

Disabled consumers in Solidary Private Law: a dialogue between the Brazilian Consumer Protection Code and the Statute of the Disabled Person

A pessoa com deficiência no Direito Privado Solidário: um diálogo entre o Código de Defesa do Consumidor Brasileiro e o Estatuto da Pessoa com Deficiência

*Lúcia Souza d'Aquino*¹

*Guilherme Mucelin*²

Abstract: This work analyzes the evolution of private law, centered on individualism and totalizing codification, towards private law of solidarity, centered on solidarism, which valorizes the person before his particularities and his laws of protection. Thus, with the strengthening of constitutional principles and human rights, the disabled person is described, as a consumer, as hypervulnerable, worthy of specific protection, which will only be effective with the dialogue between the Consumer Protection Code and the Status of the Disabled Person. The research problem centers on how to protect the disabled person as a consumer from the plurality of standards that affect this relationship, in particular the Consumer Protection Code and the Status of Persons with Disabilities. Using a hypothetical methodology, it is assumed that the dialogue of sources method is the appropriate means to effectively protect people with disabilities in the consumer market.

Keywords: Hypervulnerability. Disabled person. Dialogue of sources. Consumer law. Statute of the Disabled Person.

Resumo: Este artigo analisa a evolução do Direito Privado, centrado no individualismo e na codificação totalizante, para o Direito Privado Solidário, centrado na solidariedade, que valoriza a pessoa com suas particularidades e leis de proteção. Então, com o fortalecimento dos princípios constitucionais e dos direitos humanos, a pessoa com deficiência é descrita, enquanto consumidora, como hipervulnerável digno de proteção específica, que somente será efetiva com o diálogo entre o Código de Defesa do Consumidor

¹ Professora Substituta da Universidade Federal da Grande Dourados – UFGD. Doutora e Mestre em Direito pela Universidade Federal do Rio Grande do Sul (UFRGS). Especialista em Direito Francês e Europeu dos Contratos pela Université de Savoie-Mont Blanc/UFRGS. Professora convidada do curso de Especialização "Direito do Consumidor e Direitos Fundamentais" da UFRGS. Membro do grupo de pesquisa "Mercosul, Direito do Consumidor e Globalização" CNPq/UFRGS. ORCID n. 0000-0002-0838-3566.

² Doutorando e mestre em Direito pela Universidade Federal do Rio Grande do Sul – UFRGS. Especialista em Direitos Fundamentais e Direito do Consumidor pela UFRGS. Especialista em Direito Francês e Europeu dos Contratos pela Université Savoie Mont Blanc/UFRGS. Membro do grupo de pesquisa "Mercosul, Direito do Consumidor e Globalização" CNPq/UFRGS. Bolsista CAPES. ORCID n. 0000-0003-3709-6539.

e o Estatuto da Pessoa com Deficiência. O problema de pesquisa é centrado em como proteger a pessoa com deficiência como consumidora diante da pluralidade de normas incidentes nessa relação, em especial o Código de Defesa do Consumidor e o Estatuto da Pessoa com Deficiência. Através de uma metodologia hipotética, parte-se da premissa de que o método do diálogo de fontes é o meio adequado para uma proteção eficiente da pessoa com deficiência no mercado de consumo.

Palavras-chave: Hipervulnerabilidade. Pessoa com deficiência. Diálogo das Fontes. Direito do Consumidor. Estatuto da Pessoa com deficiência.

1. Introduction

Classical Private Law has always considered men, *in abstracto*, as rational and free subjects, capable of self-regulating their lives, subject to the same legal system under the word "all people are equal before the law". This situation results from the ideals of freedom, equality and brotherhood born of the French Revolution, which preached the formal equality of all. During the 18th and 19th centuries, relationships were made directly between people, without the intervention of a company. Consumption was made by direct communication between the consumer and the manufacturer or service provider, without intermediaries. Thus, with production essentially by hand, this equality was possible, since the subjects had autonomy to decide the contractual conditions.

Due to several social transformations, which happened especially after the Industrial Revolution and with the massification of production and contracts, person-centered individualism suffered fragmentation, in which the individual was considered in relation to each of the different roles that he held in society, resulting in a plurality of roles, sources, regimes and laws.

Contrary to the homogeneity of the figure of the individual, the State began to recognize the diversity of the subjects that make up society, each with its particularities, making the person the center of relationships. These new subjects then began to claim their own special, subjective and protective laws, which took care of what is different and weak, that is, what is vulnerable.

This plurality significantly modified the codified and unitary civil law, which was the center of the legal system at the time. In this context, private law could not remain indifferent to the recognition of the weakness of certain groups in society, and had to develop means (special laws and microsystems) to achieve the principle of material equality, guided by appreciation of constitutional principles and through human rights (JAYME, 1995, p. 251-261)³.

Thus, such a tendency to appreciate the person, constitutional principles and human rights has given birth to a new era for Private Law, qualifying it as mutually supportive (MARQUES; MIRAGEM, 2012). Thus, the differences between individuals became identified and appreciated so that law could give special treatment to those who are considered different, ensuring legal equality and mitigating social inequality. In response, the principle of vulnerability was exalted in order to deal with the social and legal imbalances to which those who live on the margins of society are subject.

In consumer relations, the consumer is supposed to be vulnerable because of his weak position before the supplier, which justifies a special guardianship provided by Consumer Law. There are also consumers who are in a latent state of vulnerability, namely, they have hypervulnerability: a form of acute weakness which must be recognized and taken into account for the correct implementation of rights and for the reaffirmation of dignity of these consumers who have heightened vulnerability and are marginalized by the consumer and opulent society (CARVALHO; SANTOS, 2015, p. 89).

Example of these subjects are people with disabilities, who over twenty-five years ago have constitutional guarantees on minimum social rights, but only now and through specific regulations are gaining, even

³ Jayme teaches the four elements of postmodern culture that influence law: pluralism (of values, the right to be different), communication (integration into a global society without borders, dialogue of sources), storytelling (norms that do not oblige, but describe values) and the return of feelings (the preservation of cultural identity, the promotion of human rights). (JAYME, 1995, p. 251-261.)

precariously, social, working and, now, integral and integrated consumption spaces, which makes a more effective guardianship by the side of the Consumer Law, promoting the empowerment of hypervulnerable people.

Before the legislative pluralism existing concerning disabled people as consumers, having as most relevant the Consumer Protection Code and the Status of the Disabled Person, the need for a dialogue between these sources is highlighted, in order to ensure the instrumentality of solidary private law for the realization of the dignity of the human person.

2. Solidary Private Law and the Principle of Consumer's Vulnerability

Classic Solidary Private Law, with a strong French influence (PONTES DE MIRANDA, 1981, p. 93), in which the main representative is the Civil Code, the product of a codification phenomenon (MARQUES; MIRAGEM, 2012, p. 15), had as a fundamental postulate the autonomy of the will, being the contract and the right of property its greatest expressions. The freedom to manifest the will with the corresponding connection to the contractor (*pacta sunt servanda*) and the freedom to exercise property were, then, rights exercised more absolutely (MIRAGEM, 2013, p. 38).

The positivism of codification acted on the construction of modern law, debating the exacerbated formalism and the abstraction of Law, which subjected individuals to a single legal order and, thus, replaced the natural diversity of subjects and their individual rights by an order of "equal before the law". In this sense, Wieacker asserts that the idea of equal rights and duties for all people *in abstracto* had been shaped by classic private law and that all were subject to the same law (WIEACKER, 1980, p. 298), since rational, free and equal before the law, capable of self-regulating their private lives according to their pure will.

Obviously, this legal position moved Law away from social reality: it was no longer going from reality to Law, but from Law to reality (MIAILLE, 1989, p. 181). In response, the codification gave rise to the decodification (TEPEDINO, 2008, p. 11): the Social State of Law removed, through laws and guided by constitutional principles, the homogenizing and unitary magnitude of the Civil Code of central role of the private legal system and has turned to certain groups in society, in order to pursue substantial equality (PINHEIRO, 2009, p. 53) and no longer purely formal. In this point of view, man ceases to be a legal abstraction and becomes being considered according to his individual characteristics, giving rise to the democratic character of the State (PINHEIRO, 2007, p. 498).

This period was characterized by the limitation of the will of the parties, by the appreciation of the constitutional principles of social solidarity and of the dignity of the human person, changing the individualist axis of the legal systems for solidarism, to the extent that the subject has become considered according to its various roles in society (employee, tenant, consumer, etc.). It was in this context that protective microsystems appeared, which sought and seek to protect certain categories of people, given their particular characteristics, and each category must receive adequate and specific legal protection (LORENZETTI, 1998, p. 53).

On the consumer side, World War II affected this protection process decisively, as there was large-scale production of consumer goods, expansion of credit and advertising activity, which ultimately led to a mass consumer society (BAUDRILLARD, 2007, p. 86-87), helping to deconstruct the private law then in force.

Mass consumption, in conjunction with aggressive advertising techniques, has brought depersonalization, dematerialization and dispossession of the contract (MARQUES, 2004a, p. 38), both because of its normalization by general conditions and by agreements accession (NORONHA, 1996, p. 94). Allied to this, the contractual imbalance has

resulted in the attenuation of the autonomy of the will and the recognition of these subjects as the weak part in the business relationship, because the freedom to hire the weak part of the pact (the consumer) was restricted to the extent that his will was limited only to finding, or not, the adjustment, without relevance to the definition of its content (MARQUES, 2002, p. 52 ff).

This new social reality, industrialized and massified, required specific protection standards for the consumer, in order to protect the weakest (GÔNGORA, 2001, p. 15) in naturally unequal relationships (BONATO, 2003, p. 72). Miragem teaches that:

With the advent of mass consumer society and the new form of capitalist production, the recognition that, although all human beings are considerably equal, they can occupy unequal positions in social and economic relations. This consideration inspired the recovery, by law, of the old notion of equality, derived from the thought of Aristotle, known as material equality, admitting the recognition of differences, and in this sense, the possibility of unequal treatment for unequal. (MIRAGEM, 2013, p. 40.)

In this way, the recognition of the inequality between the subjects of right allowed the creation of special subjective and protective laws, like the Code of Consumer Protection, which concentrates on the fundamental idea of the protection of the consumers in the face of disobedience suppliers in mass consumption society: this is a special code for the unequal, for the different in mixed relationships between a consumer and a supplier (MARQUES; BEJNAMIN; MIRAGEM, 2006, p. 624).

From the notion of inequality and the need for a specific guardianship, it was therefore established the principle of vulnerability in consumer relationships, which is an attempt to resolve the overlapping will of the supplier - especially stronger because of its economic, informational, legal or technical power (MORAES, 1999, p. 96) – on the will of the consumer, as a means of protecting this more fragile and powerless subject. The aim, therefore, is to restore material equality in the business relationship. According to Moraes, vulnerability is "the quality or condition of this weaker

subject of the consumer relationship, given the possibility that he may be offended or injured, in physical or psychological security, as well as in the economic field, by the side of this most powerful subject of the relation". (MORAES, 1999, p. 125.)

Consolidated in article 4, paragraph I, of the Code of Consumer Protection, and in article 5, XXXII, of the Federal Constitution of 1988, the principle of vulnerability is, in short, absolute presumption (MIRAGEM, 2013, p. 114) of weakness of the consumer in the consumer market, so that justifies the existence of the Code itself (BOURGOIGNIE, 2013, p. 15). To this extent, according to Marques, vulnerability is closely linked to the principle of equality:

Equality is a macro view of man and society, a more objective and consolidated notion, whose inequality is always appreciated by comparing situations and people: to equals, we make equal treatment, to the unequal, we make unequal treatment to achieve justice. Vulnerability, then, is the daughter of this principle, but it is a flexible and unconsolidated notion, which presents features of subjectivity which characterize it: vulnerability does not always need a comparison between situations and topics. We could therefore say that vulnerability is more a state of the person, a state of inherent risk or an excessive signal of confrontation of interests identified on the market (see Rippert, *The moral rule*, p. 153), and a permanent situation or temporary, individual or collective (Fiechter Boulevard, *Rapport*, p. 328), is the technique for applying them well, is the instrumental notion that guides and clarifies the application of these protective and rebalanced standards, in search of the basis of equality and fair justice (MARQUES; BEJNAMIN; MIRAGEM, 2006, p. 144).

Private law is attentive to the fact that vulnerability highlights an objective aspect, avoiding the comparison of situations and subjects, distinguishing itself from formal equality, because "it starts from the concept of difference, to not to exclude the different, but to include it, based on the protection of the human person" (MARQUES, 2014, p. 330). Marques also systematizes the analysis of the protection of the weakest in private law in two stages: the first by combating discrimination, and the second by

promoting effective protection which respects differences and ensures access without discrimination (LAFER, 2003, p.147)⁴.

Still in the lessons of Marques:

There is therefore a new definition of equality for the weakest in private law, not only formal equality (in law or before the law), but also material or total, equality of the unequal (treating unequally and unequally also equals). A material equality which will necessarily be achieved only with the intervention of order (public order management and organization) of the State to rebalance this intrinsically unbalanced relationship, by guaranteeing rights for the weak, for example, consumers, and the imposition of fees for the strongest, such as suppliers of products and services in the consumer society or in the Brazilian market (MARQUES; BENJAMIN; BESSA, 2008, p. 30-31).

In this logic, Law recognized the existence of *de facto* inequalities in private relations, bringing about, in Brazil, during the last decades, an intense renovation with strong influxes of the Federal Constitution of 1988, of the jurisprudence and doctrine, to seek the ideal of justice. Regarding the matter, in other lines, Miragem teaches that:

This phenomenon, known as the horizontal effect of fundamental rights, has profound repercussions on Brazilian private law (...). By emphasizing the importance of the Constitution as the center of the legal system, a greater practical impact on the protection of fundamental rights in private law relationships is encouraged. The horizontal effect of fundamental rights is based on the understanding that they establish a notable influence in the relations between the private ones (...). In this sense, a legal relationship under standards of private law no longer remains attached herein, also operating the standards of public law and, in particular, fundamental rights (MIRAGEM, 2015, p. 25-26).

Thus, we visualize the solid trend of appreciation of fundamental rights, new social and economic roles and also the particularities and characteristics of each person, through the recognition and enhancement of different cultural identities, thus highlighting multiculturalism (SEMPRINI, 1999, p. 99) imminent social. According to Marques and Miragem:

It is this state of affairs that allows us to recognize in contemporary private law a clear protection of the vulnerable, as a kind of ethical

⁴ On discrimination see: LAFER, 2003, p.147

and legal command which will be achieved by protective laws, and especially by the action of the jurist committed to the realization of the principle of the dignity of the human person, through its real effectiveness also on private relations (MARQUES; MIRAGEM, 2012, p. 106).

In this scenario, we assert that private law is changing or it will soon be "joint private law" (*Solidarprivatrecht*) (MARQUES; MIRAGEM, 2012, p. 24). Therefore, based on this new conception, it is possible to equip private law to protect while it distinguishes, in order to ensure differentiated conditions on this subject from the weakest rights in relation to consumer relationships.

3. The Hypervulnerability of Disabled Consumers and the Dialogue of Sources

The contemporary legal order is sensitive to the inequality of negotiations between the parties of the consumer relationship and tirelessly seeks to balance it through the regime of protection of consumers, who are vulnerable (NEGREIROS, 2006, p. 389). Also in the sense of valuing diversity and differences, it happens that these consumers circumscribed in the protective mantle of the Code of Consumer Protection are not homogeneous (MACEDO JUNIOR, 2006, p. 491), including various sub-groups of consumers who need differentiated guardianships.

Notwithstanding the principle of vulnerability having the function of protecting the weakest in the consumer relationship, it admits its classification according to situations of aggravated or potentiated vulnerability - hypervulnerability.

Hypervulnerability means a general vulnerability of the consuming natural person aggravated by personal circumstances, apparent or known to the supplier, being inherent and special to his person (MARQUES; MIRAGEM, 2012, p. 184). In the opinion of the High Court of Justice, the

hypervulnerable are "those who, precisely because they are a minority and often victims of discrimination or ignored, suffer the most with mass consumption and" pasteurization "of the differences which characterize and enrich modern society" (BRASIL, 2009a).

In the Marques and Miragem doctrine,

Hypervulnerability is the factual and objective social situation of aggravation of the vulnerability of the consuming natural person, by apparent or known personal circumstances to the supplier, such as his reduced age (for example, the case of baby food or advertising aimed at children) or emboldened age (for example, special care for the elderly, both in the Code in dialogue with the Statute for the Elderly and credit advertising for the elderly) or a sick situation (such as Gluten and drug label information). In other words, while the "general" vulnerability of Article 4 (I) is assumed and is inherent in all consumers (in particular because of its position in contracts, the subject of this work), the hypervulnerability is inherent and "special" in the personal situation of a consumer, either permanent (extravagance, invalidity, physical or mental incapacity), or temporary (illness, pregnancy, illiteracy, age) (MARQUES; MIRAGEM, 2012, p. 188-189).

In this sense, a new trend for the future of the law is observed, by providing more tools to the "new private solidarity law", which is the qualification of aggravated vulnerability, or, in other words, the recognition of hypervulnerability as the most effective instrument for protecting and promoting material equality. Marques and Miragem highlight such positioning by teaching that:

Hypervulnerability is the exceptional (and "legally relevant") degree of general consumer vulnerability. It seems to us that here the "inconvenient" with the facilitated access to quality consumption cannot be tolerated, it is the social interest that there is no discrimination to these groups of hypervulnerable consumers (and protected by the Constitution!), (...) also even to discourage Brazil from continuing to discriminate against the elderly, sick, physically and mentally handicapped through "consumption mishaps". In short, this new equality "with calm and soul" allows us to overcome formalism and the "mechanical" vision (mechanical art) of the right to equality in private law (MARQUES; MIRAGEM, 2012, p. 193-194).

It is true that certain classes, groups or categories of people are considered hypervulnerable, and therefore need greater protection than

consumers in general (NISHIYAMA; DENSA, 2010, p. 16). The above scholars assert, in particular to people with disabilities: "Recognition of the vulnerability of people with disabilities affects law as much in public as in private law. The limits of self-determination and personal freedom are weighed in order to protect the dignity and integrity of the disabled. " (BRANDS; MIRAGEM, 2012, p. 166.)

Benjamin argues that "disability", in most cases, is a cultural, medical or scientific definition of a certain ability or incapacity, a certain physical or mental limitation, a weakness or a characteristic, because it is the roles, rights, expectations and social status that define this handicap - which is a social concept that is flexible over time and in society (BENJAMIN, 1997, p. 17).

Starting, then, from the principle of building a more united private law and the idea of material equality, "the recognition of the difference and the aggravated personal and social vulnerability of these individuals (disabled people), in different degrees of engagement of the possibilities of interaction and personal development, deserves to be seen with more attention by the Consumer Law" (MARQUES; MIRAGEM, 2012, p. 162).

In this hypothesis, the characterization of the disabled consumer as hypervulnerable, therefore enveloped by aggravated vulnerability and worthy of protection, remains established. So is the understanding of Nishiyama, which states that:

The hypervulnerability of consumers with disabilities is found precisely in the difficulty they find in having access to consumer goods. Its social integration depends very much on the facilitation of its movement to places of consumption, without needing the dependence of third parties. In this aspect, Law 10.779 / 2001 of the Estado de São Paulo, Brazil, has sought, in a way, to fulfil the constitutional order requiring shopping centres and similar establishments to provide wheelchairs to disabled visitors and people. older people who need it. We note that this normative order is directed towards the private sector and not at the Public Power. It is also up to the State to promote the facilitation of access for people with disabilities to consumer goods, because constitutional order is more a coercive norm than a simple declaration of principle.

Is the role of the State, therefore, the construction of parks and buildings of public utility and the manufacture of public transport vehicles to facilitate the mobility of people with disabilities to access consumer goods (NISHIYAMA; DENSA, 2010, p. 18).

It is remarkable that, recognized the hypervulnerability of people with disabilities, in the opinion of Schmitt (SCHMITT, 2010, p. 168), Law requires more intense protection in favor of the weak, because of the more acute vulnerability to normal situations. This understanding is even already recognized in Brazilian courts (BRAZIL, 2009a)⁵.

To effectively protect people with disabilities, the law has sought to conceptualize who these people are with a view to alleviating material inequality. The Status of the Disabled Person, considered, according to its article 2, the disabled person the one who "has a long-term insufficiency of the physical, mental, intellectual or sensory nature, which, in interaction with one or more barriers, can hinder to their full and effective participation in society on an equal basis with others".

The Status itself, with the Code of Consumer Protection, also recognizes the hypervulnerability of the disabled: in Article 5, single paragraph, it provides that, for the purposes of protection against any form of neglect, discrimination, exploitation, violence, torture, cruelty, oppression and inhuman or degrading treatment are "considered particularly vulnerable children, adolescents, women and the elderly, with disabilities" (BRAZIL, 2015)⁶, all in order to protect the dignity of the human person (SARLET *apud*

⁵ "The ethical-political, and also legal, category of vulnerable subjects includes a sub-group of hypervulnerable subjects, among whom, for obvious reasons, are people with physical, sensory or mental disabilities. (...)". (BRAZIL. Superior Court, Special Appeal No. 931.513 / RS, 1st section, rapporteur: Min. Antonio Herman Benjamin, tried on November 25, 2009.) "(...) the Social State thinks, not only of the vulnerable, but especially the hypervulnerable, because they are those who, precisely because they are a minority and often victims of discrimination or ignored, suffer the most with the massification of consumption (...). To be different or a minority, because of an illness or any other reason, is not to be less consumer or less citizen, nor to deserve second class rights or the rhetorical protection of the legislator. (...)." (BRASIL, 2009a.)

⁶ Art. 5º of the Status of the Disabled Person. (BRAZIL, 2015)

PICCIRILLO, 2008, p. 162)⁷; (NEME, 2006, p. 134.)⁸, and other constitutionally established values.

It is notable that the interaction of the Code of Consumer Protection and the Status of the Disabled Person is an example of postmodern pluralism from legislative sources (MARQUES, 2012, p. 27) which deal with related issues. One might think of traditional (apparent) conflict resolution methods or overlapping of these standards. However, for the effective protection of consumers with disabilities, these sources should not be excluded; on the contrary, they must complement each other so that this hypervulnerable is protected (FERREIRA; LIMA, 2015, p. 28). Marques calls this method ‘the dialogue of sources’:

It is joint and coordinated implementation guided by constitutional values and, today, in particular, in the light of human rights. (...) It is the coexistence of laws with different fields of application, but convergent on the same plural, fluid, mutable and complex legal system, (...) to achieve a fair result and agree with society and (with) the value system affirmed in the Constitution or received on human rights, even if the norm is present in various sources, in special law, in a microsystem or in general law. (MARQUES, 2012, p. 25.)

It is important to note that it is not compatible with the dialogue of sources method a result contrary to the consumer, i.e., the dialogue will always be clearly oriented towards the addition of rights, never its reduction. Consequently, "the result of the coordinated application of legal norms, in this case, seems to be accepted only when it enlarges the content or the extension

⁷“We have as human dignity the intrinsic and distinctive quality recognized in each human being, which makes him worthy of the same respect and consideration by the State and by the community, which implies, in this sense, a complex of fundamental rights and duties which assure the person also against any act of degrading and inhuman nature as well as guaranteeing them the minimum conditions of existence for a healthy life, as well as the promotion of their active and co-responsible participation in the destinies of their existence and life in communion with other human beings” (SARLET, 2004 apud PICCIRILLO, 2008, p. 162)

⁸"In this line of reasoning, we can see that the dignity of the human person has two structural characteristics: a negative, which means the affirmation of the physical and spiritual integrity of man as a necessary dimension of his responsible individuality , and another device, which is exhausted with the wide possibility of development and self-determination." (NEME, 2006, p. 134)

of consumer rights" (MIRAGEM, 2012, p. 101), by optimizing the fundamental rights of this hypervulnerable subject.

The institutes of autonomy of the will and freedom of the individuals, although limited in this era of solidary law, continue to be appreciated. However, the culture of postmodernity values even more the "right to difference, which is the right to material equality reconstructed by positive actions of the State in favor of the individual identified with a certain group" (MARQUES, 2012, p. 61), which is not to be confused with the idea of state paternalism (SILVA, 2012)⁹.

On Consumer Law, the dialogue of sources ensures the consumer a special and dignified guardianship. Disabled people groups, who have increased or increased vulnerability, are also active in the consumer market and are often marginalized, which justifies per se the dialogue of sources (either among special laws, microsystems or treaties), in order to suppress hypervulnerability (MARQUES, 2012, p. 45)¹⁰ and guarantee human dignity through effective guardianship.

The protection of people with disabilities as consumers is illustrated, therefore, a boiling issue in the Brazilian regulatory framework, a lot because the recognition and visibility of people with disabilities in Brazil increases annually, totalling a percentage, calculated by the IBGE (Brazilian Institute of Geography and Statistics) in the 2010 census of 24% of the Brazilian population (INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA, 2010).

⁹ Suppressing the idea of state paternalism, the Statute for Persons with Disabilities establishes in its art. 8, that it is the duty of the State, of society and of the family to ensure to the disabled person, with priority, the realization of the rights to life, health, sexuality, paternity and maternity, food, housing, education, vocational training, work, social security, adaptation and rehabilitation, transport, accessibility, culture, sport, tourism, leisure, information, communication, scientific and technological advances, dignity, respect, freedom, family, among others.

¹⁰ According to Marques, case law has consolidated the terminology "hypervulnerable" first in cases involving disabled people. (MARQUES, 2012, p.45)

So, in this idea of dialogue of sources between the Status of the Disabled Person and the Code of Consumer Protection, there is the strengthening of the rights of accessibility¹¹ owing to various technologies¹², and information¹³, including costs possible for the supplier¹⁴, which reflects directly on the own Consumer Protection Code¹⁵.

4. Final Considerations

Placing the human person at the center of legal relations has led to new parameters for the interpretation and application of standards by recognizing the differences that exist between the subjects of rights and the appreciation of human dignity, which has enabled a best guardianship of the weakest from a solidarist vision (MARQUES, 2002, p. 394).

Thus, unlike Classic Private Law, the new Private Law tends to value differences, to see man in his many facets and, guided by human rights and

¹¹Art. 53. "Accessibility is a right which ensures that people with disabilities or with reduced mobility live independently and exercise their rights of citizenship and social participation." (STATUTE OF PERSONS WITH DISABILITIES, s.d.)

¹² Art. 74. "Persons with disabilities have guaranteed access to assistive technology goods, resources, strategies, practices, processes, methods and services that maximize their independence, personal mobility and quality of life." (STATUS OF PERSONS WITH DISABILITIES, s.d.)

¹³ Art. 69. "The government must ensure the availability of correct and clear information on the various products and services offered by any media, including the virtual environment, containing the correct specification of quantity, quality, characteristics, composition and price, as well as the possible health and safety risks for consumers with disabilities, when used, by applying the arts. 30-41 of law 8.078 of September 11, 1990." (STATUTE OF PERSONS WITH DISABILITIES, s.d.)

¹⁴ Art. 69. § 1o "Virtual marketing channels and advertisements disseminated in the press, the Internet, radio, television and other means of open communication or by signature must provide, depending on the compatibility of the media, the accessibility tools which deals with art. 67 of this law, to the detriment of the supplier of the product or service, without injury to the provisions on art. 36-38 of law 8.078 of September 11, 1990." (STATUTE OF PERSONS WITH DISABILITIES, s.d.)

¹⁵ Art. 100. Law 8.078 of September 11, 1990 (the Consumer Protection Code) takes effect with the following modifications: "Art. 6, single paragraph. The information referred to in paragraph III of the caput of this article must be accessible to disabled persons, observing what is provided for by regulation." and "Art. 43. §6. All the information referred to in the caput of this article must be made available in accessible formats, including for disabled people at the request of the user."

constitutional principles, it began to recognize the weakness of the individual in their business relationships. This idea has forged the principle of vulnerability, which seeks to protect the weakest mainly in consumption relationships in the face of the natural imbalance between the supplier and the consumer.

Consumers, however, are not a homogeneous category. Certain biological and social conditions modify the imbalance in the consumption relationship in a more strident way, which makes the vulnerability of the consumer even higher, and which has been characterized by doctrine, by case law and by law as hypervulnerability, aggravated vulnerability or special vulnerability.

The disabled person is an active part of the consumer market and fits into this even more special category of vulnerability, which, due to their personal or social conditions, has access to crowded goods and services, leading them to marginalization for many sometimes. This justifies the need for more effective protection by Consumer Law and other special legislative sources, in particular the Status of the Disabled Person.

We see the concern of the legislator to ensure standards that respect and promote the protection and protection of the disabled consumer, by seeking the dignity of the human person in post-modern consumer society (BAUMAN, 2007)¹⁶. The plurality of sources, however, does not intend to withdraw the legitimacy of one or the other, but yes joint action for the protection of these subjects of law through the dialogue of sources (MARQUES, 2004a. p. 35)¹⁷. According to Marques,

The method of dialogue of sources clarifies the logic of guardianship and special protection to vulnerable subjects, the consumer of the

¹⁶ To learn more about the postmodern consumer society, see: BAUMAN, 2007.

¹⁷ "In the plurality of laws or sources, existing or co-existing on the same subject, at the same time which have fields of application, whether coincident or not, the traditional criteria for the resolution of conflicts of laws over time (Intertemporal law) find their limits. This happens because it is supposed to remove one of the laws (the previous one, the general one and the one of lower hierarchy) from the system, which explains why Erik Jayme suggests the path of 'dialogue of sources'." (MARQUES, 2004a, p.35)

CDC or the hypervulnerable (elderly, children, the disabled, the sick), and the possibility of a unitary and coherent vision. of Private Law, according to the Constitution. (MARQUES, 2012, p. 66.)

In this way, the combination of different, but complementary laws in the pursuit of material equality and the appreciation of the fundamental rights of consumers with disabilities is the way to achieving their human condition as a market participant, by providing tools for promoting accessibility and information rights (PIERRI, 2014, p. 256) whenever the needs of the individual are taken into account (JAYME, 2003, p. 92). Only in this way will the new Private Law achieve its goal of building a more just, free and united society.

References

- BAUDRILLARD, Jean. **A Sociedade de Consumo**. Trad. Artur Morão. Lisboa: Edições 70, 2007.
- BAUMAN, Zygmunt. **Vida para Consumo: a transformação das pessoas em mercadoria**. Rio de Janeiro: Zahar, 2007.
- BENJAMIN, Antonio Herman de Vasconcelos. A tutela das pessoas portadoras de deficiência pelo Ministério Público. **Advocacia Pública & Sociedade: direitos da pessoa portadora de deficiência**. São Paulo, n. 1, p. 13-38, jan.1997.
- BONATO, Cláudio. **Código de defesa do consumidor: cláusulas abusivas**. Porto Alegre: Livraria do Advogado, 2003.
- BOURGOIGNIE, Thierry. Colloque Brésil Québec sur le droit de la consommation. In: BOURGOIGNIE, Thierry; RAMOS, Fabiana D'Andrea; FONSECA, Patrícia Galindo da. **La Protection du consommateurs au Québec et au Brésil: Échanges de droit comparé**. Niterói: UFF, 2013. p. 13-28.
- BRASIL. Superior Tribunal de Justiça. **Recurso Especial n. 586.316/MG**. Recorrente: Ministério Público do Estado de Minas Gerais. Recorrido: ABIA – Associação Brasileira das Indústrias de Alimentação. Relator: Min. Antonio Herman Benjamin. Julgado em: 19 mar. 2009.
- BRASIL. Superior Tribunal de Justiça. **Recurso Especial n. 931.513/RS**. Recorrente: Estado do Rio Grande do Sul. Recorrido: Ministério Público do Estado do Rio Grande do Sul. Relator: Min. Carlos Fernando Mathias. Julgado em: 25 nov. 2009.
- CARVALHO, Diógenes Faria de; SANTOS, Nivaldo dos. A vulnerabilidade psíquica e o superendividamento do consumidor. In: FERREIRA, Vitor Hugo do Amaral; CARVALHO, Diógenes Faria de; SANTOS, Nivaldo dos (orgs.). **Sociedade de Consumo: Pesquisas em Direito do Consumidor**. Goiânia: Espaço Acadêmico, 2015. p. 89-112.
- DUGUIT, Léon. **Fundamentos do direito**. Trad. Ricardo Rodrigues Gama. Campinas: LZN, 2003.
- FERREIRA, Vitor Hugo do Amaral; LIMA, Bruno Giacomini. **Homo Economicus: os (des)encontros da sociedade de consumo superendividada**. In: FERREIRA, Vitor Hugo do

- Amaral; CARVALHO, Diógenes Faria de; SANTOS, Nivaldo dos (orgs.). **Sociedade de Consumo**: Pesquisas em Direito do Consumidor. Goiânia: Espaço Acadêmico, 2015. p. 17-38.
- GÔNGORA, Cláudia. **O direito do consumidor e o Mercosul**: relações de consumo no direito brasileiro. São Paulo: Método, 2001.
- INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA (IBGE). **Censo Demográfico de 2010**. Disponível sur: <<http://www.ibge.gov.br/home/presidencia/noticias/imprensa/ppts/00000008473104122012315727483985.pdf>>. Accédé le 20 set. 2015.
- JAYME, Erik. Identité culturelle et intégration : le droit international privé postmoderne. **Recueil des Cours**, The Hague/BRILL, v. 251(1995).
- JAYME, Erik. O direito internacional privado no novo milênio: A proteção da pessoa humana face à globalização. **Cadernos do Programa de Pós-Graduação em Direito (UFRGS)**, Porto Alegre, v. 1, 2003.p.85-97.
- LAFER, Celso. **A reconstrução dos direitos humanos**: dialogando com o pensamento de Hannah Arendt. São Paulo: Cia das Letras, 2003.
- LORENZETTI, Ricardo Luis. **Fundamentos do direito privado**. São Paulo: Revista dos Tribunais, 1998.
- MARMELSTEIN, George. **Curso de Direitos Fundamentais**. São Paulo: Atlas, 2008.
- MARQUES, Claudia Lima. Algumas observações sobre a pessoa no mercado e a proteção dos vulneráveis no direito privado brasileiro. In: GRUNDMANN, Stefan et. al. (org.). **Direito privado, Constituição e fronteiras**: encontros da Associação Luso-Alemã de Juristas no Brasil. São Paulo: Revista dos Tribunais, 2014.p.287-331.
- _____. **Confiança no Comércio Eletrônico e a Proteção do Consumidor**: um estudo dos negócios jurídicos de consumo no comércio eletrônico. São Paulo: Revista dos Tribunais, 2004.
- _____. **Contratos no Código de Defesa do Consumidor**: o novo regime das relações contratuais. 4.ed. São Paulo: Revista dos Tribunais, 2002.
- _____. O “diálogo das fontes” como método da nova teoria geral do direito: um tributo à Erik Jayme. In: MARQUES, Claudia Lima (coord.). **Diálogo das Fontes**: do conflito à coordenação de normas do direito brasileiro. São Paulo: Revista dos Tribunais, 2012.p.17-66.
- _____. Superação das antinomias pelo diálogo das fontes: o modelo brasileiro de coexistência entre o Código de Defesa do Consumidor e o Código Civil de 2002. **Revista de Direito do Consumidor**, São Paulo,v. 51, 2004. p.34-67.
- _____; BEJNAMIN, Antônio Herman V.; MIRAGEM, Bruno. **Comentários ao Código de Defesa do Consumidor**. São Paulo: Revista dos Tribunais, 2006.
- _____; BENJAMIN, Antonio Herman V.; BESSA, Leonardo Roscoe. **Manual de Direito do Consumidor**. São Paulo: Revista dos Tribunais, 2008.
- _____; MIRAGEM, Bruno. **O novo direito privado e a proteção dos vulneráveis**. São Paulo: Revista dos Tribunais. 2012.
- MIAILLE, Michel. **Introdução crítica ao direito**. 2. ed. Lisboa: Estampa, 1989.
- MIRAGEM, Bruno. **Curso de Direito do Consumidor**. São Paulo: Revista dos Tribunais, 2013.
- _____. **Direito Civil**: Responsabilidade Civil. São Paulo: Saraiva, 2015.
- _____. **Eppur si muove**: diálogo das fontes como método de interpretação sistemática no direito brasileiro. In: MARQUES, Claudia Lima (coord.). **Diálogo das Fontes**: do conflito à coordenação de normas do direito brasileiro. São Paulo: Revista dos Tribunais, 2012. p. 67-110.

MORAES, Paulo Valério dal Pai. **Código de defesa do consumidor – o princípio da vulnerabilidade**: no contrato, na publicidade, nas demais práticas comerciais. Porto Alegre: Síntese, 1999.

NEGREIROS, Teresa. **Teoria do contrato**: novos paradigmas. 2. ed. Rio de Janeiro: Renovar, 2006.

NEME, Eliana Franco. Dignidade, igualdade e vagas reservadas. In: ARAUJO, Luis Alberto David (coords.). **Defesa dos direitos das pessoas portadoras de deficiência**. São Paulo: Revista dos Tribunais, 2006. p. 133-151.

NISHIYAMA, Adolfo Mamoru; DENSA, Roberta. A Proteção dos consumidores hipervulneráveis: os portadores de deficiência, os idosos, as crianças e os adolescentes. **Revista de Direito do Consumidor**, São Paulo, v. 76, p. 13-45, 2010.

NORONHA, Fernando. Contratos de consumo, padronizados e de adesão. **Revista de Direito do Consumidor**, São Paulo, v. 20, p.24-36, 1996.

PICCIRILLO, Miguel Belinati. A dignidade da pessoa humana e a inclusão da pessoa com deficiência. In: FACHIN, Zulmar (coord.). **Direitos fundamentais e cidadania**. São Paulo: Método, 2008.

PIERRI, Débora. Políticas públicas e privadas em prol dos consumidores Hipervulneráveis – idosos e deficientes. **Revista de Direito do Consumidor**, São Paulo, v. 92, p. 221-299, 2014.

PINHEIRO, Rosalice Fidalgo. Autonomia privada e estado democrático de direito. In: SARLET, Ingo Wolfgang; PAGLIARINI, Alexandre Couto (coord.). **Direitos humanos e democracia**. Rio de Janeiro: Forense, 2007. p.491-508.

_____. **Contrato e direitos fundamentais**. Curitiba: Juruá, 2009.

PONTES DE MIRANDA, Francisco Cavalcanti. **Fontes e Evolução do Direito Civil Brasileiro**. Rio de Janeiro: Forense, 1981.

SCHMITT, Cristiano Heineck. A “hipervulnerabilidade” do consumidor idoso. **Revista de Direito do Consumidor**, São Paulo, v. 70, 2010. p.139-171.

SEMPRINI, Andrea. **Multiculturalismo**. Bauru, SP: EDUSC, 1999.

SILVA, Clóvis V. do. Couto e. **A Obrigação como Processo**. Rio de Janeiro: FGV, 2006.

SILVA, Virgílio Afonso da. **A constitucionalidade da restrição da publicidade de alimentos e bebidas não alcoólicas voltada ao público infantil** (Parecer). São Paulo: Instituto Alana, 2012. Disponível em: <http://cirancaeconsumo.org.br/wp-content/uploads/2014/02/PArecer_Virgilio_Afonso_6_7_12.pdf>. Acesso em: 19 jun. 2015.

TEPEDINO, Gustavo. Premissas metodológicas para a constitucionalização do direito civil. **Temas de Direito Civil**, Rio de Janeiro: Renovar, 2008.

WIEACKER, Franz. **História do Direito Privado Moderno**. Trad. A. M. Botelho Hespanha. 2. ed. Lisboa: Calouste Gulbenkian, 1980.

Artigo recebido em: 20/05/2019.

Aceito para publicação em: 30/04/2020.