General Data Protection Law (LGPD) and the access to Public Information Law (LAI): a dialogue (im)possible? The influences of European law*

Lei Geral de Proteção de Dados (LGPD) e a Lei de Acesso à Informação Pública (LAI): um diálogo (im)possível? As influências do direito europeu

Têmis Limberger**

ABSTRACT

This article aims to study the General Law of Data Protection in relation to the Law of Access to Public Information and seek an interpretation that serves the public interest and the protection of two personal data, analysing or article 23, caption, of the LGPD, which addresses or treats of dice for public power. To do this, use direct European contributions, in which some countries are veterans with access to public information, and whose rules

* Article received on October 4, 2021 and approved on February 14, 2022. DOI: 10.12660/rda.v281.2022.85654.

** Universidade Pompeu Fabra, Barcelona, Espanha. E-mail: temisl@unisinos.br. Ph.D. in Public Law at Universidade Pompeu Fabra (Barcelona). Post-doctorate internship from the University of Seville. Master and graduated from UFRGS. Attorney. Professor on the PPGD at Unisinos. Prosecutor (retired). Author of books and articles in public law.

are consolidated not Regulation CE 1049/2001 and, on the other hand, the General Regulation of Data Protection EU 2016/679. For apparent conflict resolution: protect personal data or promote transparency, suggest criteria. At the end, it is concluded that despite the lack of a culture of personal data protection in the country, dialogue is possible, as there are no absolute rights in the legal system.

KEYWORDS

protection of heavy dice — access to public information — treatment of public power dice — general regulation for the protection of European data — legislative dialogue

RESUMO

Este artigo visa estudar a Lei Geral de Proteção de Dados com relação à Lei de Acesso à Informação Pública e buscar uma interpretação que atenda ao interesse público e à proteção dos dados pessoais, analisando o artigo 23, caput, da LGPD, que aborda o tratamento de dados pelo poder público. Para tanto, utilizar-se-ão aportes do direito europeu, no qual alguns países são veteranos em acesso à informação pública, e cujas regras são consolidadas no Regulamento CE 1049/2001, e, por outro lado, o Regulamento Geral de Proteção de Dados UE 2016/679. Para resolução do conflito aparente: proteger os dados pessoais ou propiciar a transparência, sugerem-se critérios. Ao final, conclui-se que, apesar de ainda não haver no país a cultura da proteção dos dados pessoais, é possível o diálogo, visto que não existem direitos absolutos no ordenamento jurídico.

PALAVRAS-CHAVE

proteção de dados pessoais — acesso à informação pública — tratamento de dados pelo poder público — regulamento geral de proteção de dados europeu — diálogo legislativo

1. Introduction

It may seem contradictory: protection of personal data together with free access to public information. But is there a possible dialogue between the two?

The issue has been formulated as follows:[1] how may transparency and privacy be reconciled? Should access to documents be sacrificed on the altar of privacy? Or, must privacy evaporate to enable scrutiny and the illumination of government actions? The clash between the public and private spheres is updated in the LGPD, whose legislation refers to the treatment of public data and makes reference to the LAI. This, in turn, refers to the protection of personal data.

Thus, the hypotheses are formulated: is dialogue between LGPD and LAI possible? The LGPD regulates the protection of personal data, recently raised to the status of fundamental right, in article 5, XII-A, CF, while the LAI stems mainly from the right to information, in article 5, XXXIII, of the CF. In turn, the European Charter[2] of fundamental rights provides, in article 8, for the protection of personal data and, in article 42, for citizens' access to public documents.

The method employed in this article is hypothetical-deductive, using a comparative approach and doctrinal research. The relative importance of North American law is recognized, but the article focuses on comparative research on the contributions of European law.

The introduction of art. 23 of the LGPD aims to establish rules regarding the processing of personal data by public authorities and refers to the LAI. Experience in comparative law is sought, mainly the European General Data Protection Regulation (RGPD) 2016/679, which inspired Brazilian legislation, and Regulation (EC) no. 1049/2001[3] of the European Parliament and Council, relating to public access to documents of the EU institutions, without ignoring the specificities of Brazil.

As a result of the Regulation, countries legislated internally; thus, there is French legislation,[4] which inspired the Portuguese,[5] informally known as

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1 SOLOVE, Daniel J. *The digital person*. Technology and privacy in the information age. Nova York: New York University Press, 2004. p. 150.

2 CARTA dos direitos fundamentais da União Europeia, 2016/C, 364/01. *Jornal Oficial das Comunidades Europeias*. Available at: http://www.europarl.europa.eu/charter/pdf/text_pt.pdf. Accessed on: 11 Jan. 2022.

3 REGULAMENTO (CE) nº 1049 de 30 de maio de 2001. Relativo ao acesso do público aos documentos do Parlamento Europeu, do Conselho e da Comissão. Available at: https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32001R1049&from=en. Accessed on: 11 Jan. 2022.

4 French. Law no. 78/753,17 July1978, with amendments on 9/10/2016, provides for the various measures to improve relations between the administration and the public and various administrative, social and fiscal provisions. Available in: http://www.legifrance.gouv.fr/loda/id/LEGITEXT000006068643/. Accessed on: 11 Jan. 2022.

5 Portuguese Law no. 26/2016, of August 22, 2016. Regulates access to administrative and environmental information. Available at: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2591&tabshe=laws&ficha=1. Accessed on: 11 Jan. 2022.

Lada. The UK also has its specific text in The Freedom of Information Act 2000 (Foia).[6]

However, greater emphasis must be given to the pioneering spirit of the Scandinavian countries, where Sweden played a leading role, in 1766 creating a committee to regulate the role of the press in writing and issuing opinions on documents without censorship, known as the first rule of access to public information. It should be noted that even before the French Revolution, which in 1789 enshrined, in article 15 of the Declaration of the Rights of Man and Citizens, the right to hold public officials responsible. The second law on access to public information appeared in 1951 in Finland, and later Denmark and Norway (both 1970) instituted legal frameworks of transparency.

European legislation protecting personal data results from an evolution beginning in the 1970s, with a specific law in the Land of Hesse, Germany, highlighting French legislation that provided for a Commission for Data Protection (1978), and becomes more comprehensive in Convention 108, dealing with general principles of personal data protection, incorporated into the new legislation. In 2018, Convention 108+ updated the provisions of previous years and allowed the accession of other non-EU countries.[7]

The European General Data Protection Regulation (GDPR EU 2016/679) expressly revoked DC 95/46 EC, providing for the treatment of personal data without distinguishing records of ownership public or private. It referred generally, only, to public interest, as in art. 6.1.[8] "e" and 6.3. "b",[9] for example.

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[6] UK Law: The Freedom of Information Act 2000 (FOIA). Available at: https://ico.org.uk. Accessed on: 7 Jan. 2022.

[7] Currently, Uruguay is one of the signatory countries. Available at: https://blog.cuatrocasas.com/intellectual-property/convenio-108-datas/. Accessed on: 29 May 2021.

[8] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016. General Data Protection Regulation (GDPR). Art. 6.1 — Processing is only lawful if and in the insofar as at least one of the following situations occurs: […] e) Processing is necessary for the exercise of public interest functions or the exercise of public authority in which the person responsible is invested. Available at: https://eurlex.europa.eu/legalcontent/PT/TXT/PDF/?uri=CELEX:32016R0679&qid=1641507736183&from=EN. Accessed on: 6 Jan. 2022.

[9] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016. GDPR, Art. 6.3 — The legal basis for the treatment referred to in paragraph 1, subparagraphs c) and e), is defined: […] b) By the law of the Member State to which the controller is subject. The purpose is determined on this legal basis or, as far as with regard to the treatment referred to in paragraph 1(e) shall be necessary for the exercise of public interest functions or the exercise of public authority vested in the person responsible. […] Union or Member State law must respond to an objective of public interest and be proportionate to the legitimate objective pursued. Available at: https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32016R0679&qid=1641507736183&from=EN. Accessed on: 6 Jan. 2022.

Concerning this, currently, there is no specific provision in the GDPR for data processing carried out by the government. This regulation is comprehensive in terms of the protection of personal data without specifying the public or private character. There are only a few expressions, which reference public authorities, such as public interest records, for example.

On the other hand, Regulation no. 1049/2001 establishes the right of access to documents from EU institutions, bodies, offices and agencies, but points out restrictions, especially in terms of jeopardising protection of the public interest or interfering in the private lives of citizens.

Thus, there is a need to ascertain possible dialogue between protection of personal data and access to public information and, if applicable, identify the criteria to guide this interpretation.

2. LGPD and LAI: an (im)possible dialogue? Construction of criteria.

This dialogue[10] between the right to protection of personal data[11] and accessing public information is a well-known binomial in comparative law, incorporated into Brazilian law, especially in the introduction of art. 23, of the LGPD,[12] which regulates the right of users to data processed by the government.

It is worth recalling the postulate that fundamental rights may be subject to restrictions. The right to protection of personal data does not constitute an absolute prerogative, as it must be considered in relation to its function in society, as prescribed by the TJUE[13] and established in Report No. 4.[14] of the GDPR.

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[10] JAYME, Erik. Identité culturelle et intégration: le droit internationale privé postmoderne. *Recueil des Cours de l'Académie de Droit International de la Haye*, Haye, Nijhoff, v. II, p. 295, 1995.

[11] SARLET, Ingo. Fundamentos constitucionais: o direito fundamental à proteção de dados. In: MENDES, Laura et al. (Org.). *Tratado de proteção de dados pessoais*. Rio de Janeiro: Forense, 2021. See also DONEDA, Danilo. *Da privacidade à proteção de dados pessoais*: fundamentos da LGPD. 2. ed. São Paulo: Thomson Reuters RT, 2020. p. 172.

[12] Brazil. Law no. 13.709, 14 Aug 2018. Lei Geral de Proteção de Dados (LGPD). Art. 23. The processing of personal data by legal entities governed by public law referred to in single paragraph of art. 1 of Law No. 12.527/2011 (Lei Geral de Proteção de Dados), must serve the public purpose, with the objective of executing the legal competences of the public service, provided that: […]. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm. Accessed on: 29 May 2021.

[13] Case *Volker und Markus Schecke y Eifert*, TJUE, on 9/11/2010. (PIÑAR MAÑAS, José Luis et al. *El derecho a protección de datos en la jurisprudencia del Tribunal de Justicia de la Unión Europeia.* Madri: Ed. la Ley, 2018. p. 29.)

[14] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016. GDPR, Consideration 4. The processing of personal data should be designed to serve the people. The right to the protection of personal data is not absolute; it should be considered in relation

In the Brazilian legal context, "apparent paradoxes"[15] are revealed, from a structured legal framework based on a principle of privacy, where the promotion of transparency has been gaining increasing prominence.

At first glance it may seem contradictory, but it is possible to identify the prevailing law, considering specific scenarios. It is important to look for lessons from comparative law which have already weighed the dichotomy.

The GDPR is innovative in establishing transparency in art. 5.1, promoting lawfulness, loyalty and transparency in the handling of relationships that must be established with the subject of the data. Consideration no. 39.[16], in addition, adds the principle of equity.

Returning to the question:[17] how may transparency and privacy be reconciled?

To unravel the issue, it is vital to accommodate the right to protection of personal data of citizens with the right to access public information.

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to its role in society and be balanced with other fundamental rights, in accordance with the principle of proportionality. This regulation respects all fundamental rights and observes the freedoms and principles recognized in the Charter, enshrined in the Treaties, in particular respect for private and family life, domicile and communications, the protection of personal data, freedom of thought, of conscience and religion, freedom of expression and information, freedom of enterprise, the right to criminal action and an impartial court, and cultural, religious and linguistic diversity. Available at: https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32016R0679&qid=1641507736183&from=EN. Accessed on: 6 Jan. 2022.

15 Danilo Doneda, Da privacidade à proteção de dados pessoais, op. cit., p. 325.

16 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016. GDPR, Consideration No. 39. The processing of personal data must be carried out in a lawful and equitable manner. It should be transparent to citizens how the personal data concerning them is collected, used, consulted or subject to any type of processing and if the personal data is or will be processed. The principal of transparency requires that information or communications related to the processing of personal data are easily accessible and understandable, and formulated in a language which is clear and simple. This concerns, in particular, the information provided to data subjects about the identity of the person responsible for the activity and the purposes for which processing is intended, as well as the information intended to ensure that it is carried out with fairness and transparency towards the individuals concerned, as well as safeguarding of the right to obtain confirmation and communication of relevant personal data. The citizen should be alerted to the risks, rules, guarantees and rights associated with the treatment of personal data and the means available to them to exercise their rights. In particular, the specific purposes of the processing of personal data must be explicit and legitimate and must be determined when collecting the personal data. Personal data must be adequate, relevant and limited to what is necessary for the purposes. For this, it is necessary to ensure that the retention of data is limited to a minimum. Personal data should only be processed if the purpose cannot reasonably be achieved by others means. In order to ensure that personal data is kept only for the duration of the period considered necessary, the controller must set the deadlines for erasure or periodic review. All reasonable steps must be taken so that inaccurate personal data be rectified or deleted. Personal data must be treated in a way that ensures due security and confidentiality, including preventing access to personal data and equipment used to process it, or the use thereof by unauthorized persons. Available at: https://eurlex.europa.eu/legalcontent/PT/TXT/PDF/?uri=CELEX:32016R0679&qid=1641507736183&from=EN. Accessed on: 6 Jan. 2022.

17 Daniel J. Solove, *The digital person*, op. cit., p. 150.

To resolve the dilemma, some criteria are necessary:[18] a) evaluation on a case-by-case basis whether personal data may be disclosed, and, if so, under what conditions and how (digitalized, dissemination on the Internet, etc.); b) principles of purpose and legitimacy; c) what information exactly, about the person in question; d) and its correlative right of opposition, use of new technologies for the protection of personal data.

For this reason, Piñar Mañas, in a suggested synthesis, advocates: access to information and data protection, the keys[19] to establishing parameters. Thus, the public character of data of a personal nature, which results from a regulation or from the will of the person concerned, does not ipso facto and forever deprive the said person of the protection afforded by law, by virtue of the fundamental principles of defence of human identity.[20]

Emilio Guichot,[21] analysing the clash between disclosure and data protection, asserts that the key to unravelling this complex system is establishment of limitations: prohibiting access to certain data, restricting certain uses, allowing access for a small group of people, imposing conditions (for example, the need to justify a petition) or only allowing non-computerized access (e.g., copy of a document).

The general rule is the need for consent to proceed with the assignment of data affected by a request for access to records and documents. Today the situation is the opposite: the starting point is what is assigned by law.[22]

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18 AGENCIA VASCA DE PROTECCIÓN DE DATOS. IV Encuentro de Agencias Autonómicas de Protección de Datos, Vitoria, 23 y 24 de octubre de 2007. Available at: http://www.avpd.euskadi.eus/s04-75/es/contenidos/evento/4_encuentro_apds/es_intro/programa.html. Accessed on: 20 Aug. 2021.

19 PIÑAR MAÑAS, José Luis. Transparencia y protección de datos. Una referencia de la Ley Española 19/2013 de transparencia, acceso a la información y buen gobierno. In: SARLET, Ingo Wolfang et al. (Coord.). *Acesso à informação como direito fundamental e dever estatal*. Porto Alegre: Livraria do Advogado, 2016. p. 77.

20 Grupo de Trabajo del Artículo 29, em su Dicctamen 3/99, relativo a Información del Sector Público y protección de datos personales, aprobado el 3/5/2003.

21 GUICHOT, Emilio. *Datos personales y administración pública*. Navarra: Thomson & Civitas, 2005. p. 321. In the same sense, see also GUICHOT, Emilio. El nuevo Derecho europeo de acceso a la información pública. *Revista de Administración Pública*, n. 173, p. 407-445, maio/ago. 2007, which establishes guidelines on how to interpret the relationship between the right of access and the right to data protection, consolidated in European law, p. 438. The Law (Ley 19/2013) is an enabling instrument to facilitate, without the consent of the affected, the transfer of personal data to third parties (access requesters). See art. 11 of the LOPD, which provides for the transfer of data and asserts that it is not possible without the consent of those affected, unless a law authorizes it (Lei de Transparência).

22 José Luis Piñar Mañas, Transparencia y protección de datos, op. cit., p. 86, vis-a-vis Law 19/2013, in its art. 12, which provides for the right of access to public information, under the terms of article 105 "b", of the EC and, later, art. 15, of Law 19/2013, which disciplines (in its items), the protection of personal data, whether it applies or not.

Thus, our main concern, the clash between protection of data and free access to public information, is resolved by specific techniques designed to overcome this conflict. Art. 23 demands systematic interpretation,[23] respecting the principle of equality and legal certainty in the application of law, to ensure the integrity of the legal order. Hence, a systematic interpretation of LGPD and LAI should be advanced. But how to combine them, given one law determines the protection of personal data and another full disclosure of public information? The matter is contradictory, but this is only apparent. The legal system must be interpreted in a sophisticated way, seeking harmonious dialogue.

LAI's objective is to guarantee public information, provided for in art. 5, XXXIII, of the FC (access to public information), and in art. 37, § 3, II, of the CF, which provides for user participation in public administration and user access to records and information about government acts,[24] observed in art. 5, X, of the CF and the hypotheses of secrecy.

Arts. 5, XXXIII, and 37, § 3, II, of the CF, embody the principle of administrative disclosure, provided for in art. 37, header of the CF, by which LAI aims to ensure transparency. Government must publicise its workings. Disclosure is the rule and secrecy the exception. In this context, transparency

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[23] CANARIS, Wilhelm Claus. *Pensamento sistemático e conceito de sistema na ciência do direito.* Lisboa: Fundação Calouste Gulbekian, 1989. p. 22-23. The idea of the legal system is justified by one of the highest values of law, notably the principle of justice and its realizations in the ideas of equality and legal certainty in its manifestations respecting the determination and predictability of law, such as stability and continuity of legislation and jurisprudence or simply as the application of law. The role of the concept is that of translating and realizing the evaluative adequacy and the inner unity of the legal order. So, the system is rooted in the idea of law as the set of highest values. Although adequacy and unity can often be achieved in a fragmented way, this does not deny a systematic approach, it only makes it clear that there are certain limits.

[24] Carvalho criticizes the expression *act of government*, which is sheltered within the notion of administrative act. Administration acts convey a broad sense and indicate any and all acts that originate from the numerous bodies that make up the administrative system in any of the powers. The identification criterion resides in the "origin" of the manifestation of the will from the public administration (CARVALHO FILHO, José dos Santos. *Manual de direito administrativo*. 32. ed. São Paulo: Gen/Atlas, 2018. p. 103). Some authors allude to political and governmental acts. There are also those opposed to this position, because the acts are based on the Law and the Constitution. Thus, the expression "acts of government or politicians" is liable to criticism (BANDEIRA DE MELLO, Celso Antônio. *Curso de direito administrativo*. 17. ed. São Paulo: Malheiros, 2004. p. 172-173). Di Pietro remains faithful to the doctrinal division and establishes that the political function belongs predominantly to the head of the Executive Branch, although it is not his exclusive prerogative. This arises from the distinction between public administration and government (a more political sense). (DI PIETRO, Maria Sylvia Zanella. *Direito administrativo.* 31. ed. São Paulo: Gen Forense, 2018. p. 79 and 84). Examples of the latter would be: the extraordinary convening of the National Congress, the appointment of Parliamentary Inquiry Commissions, meetings with representatives from foreign States, the declaration of war and the conclusion of peace, the declaration of state emergency and intervention.

not made explicit in the CF may be extracted from the principle of disclosure (art. 37, header, CF), according to the principle of democracy inscribed in art. 1 of the CF and the right to information (art. 5, XXXIII, CF).[25] Thereby, it may be concluded that disclosure is the *generic* constitutional principle, of which transparency is the *species* (provided for in infra constitutional laws).

In order to regulate these precepts, Law no. 12.527/2011 was enacted,[26] the *Lei de acesso às informações públicas* (LAI), leading to Decree no. 7.724/2012, which established the term active transparency (articles 7 and 8 of the decree), where the ex officio transfers information and passive transparency (articles 9 and 10 of the decree), when the information is requested by the interested party.

Disclosure confronts a precept established by art. 5, X, CF (the right to intimacy, private life, personal dignity, in the face of moral or material damages), and, recently, article 5, XII-A, elevated protection of personal data to the constitutional level,[27] corroborating the idea that rights are self-limiting, legally speaking.

Thus, the Federal Constitution addresses both privacy and intimacy, a distinction not always covered by doctrine.[28] LGPD did not make the distinction, in its art. 2, I, referring only to privacy.

Art. 23 of the LGPD identifies the binomial aspect: data protection and disclosure of data by the public authority, seeking a systematic interpretation within the context of the Brazilian legal system. An example which illustrates the dilemma is establishing mandatory disclosure of public expenditures. Thus, the public authority should make available the costs of civil servants,[29] which may sometimes include information of a personal nature, such as alimony discount, or fees for medical or real estate services.

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[25] LIMBERGER, Têmis. *Cibertransparência*: informação pública em rede — a virtualidade e suas repercussões na realidade. Porto Alegre: Livraria do Advogado, 2016. Regarding transparency, see p. 44-45.

[26] LAI revoked some provisions of Law no. 8.159/1991, which regulates public archives, and Law no. 11.111/2005, which regulated the final part of art. 5th, XXXIII, CF.

[27] BRASIL. *Constituição da República Federativa do Brasil de 1988*, de 5 de outubro de 1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: 11 Jan. 2022. BRASIL. *Proposta de emenda à Constituição nº 17 de 2019*. At: http://www25.senado.leg.br/web/atividade/materias/-/materia/135594. Accessed on: 11 Jan. 2022.

[28] DONEDA, Danilo. Da privacidade à proteção de dados pessoais: fundamentos da LGPD. In: MENDES, Laura et al. (Org.). *Tratado de proteção de dados pessoais*. Rio de Janeiro: Forense, 2021. p. 325.

[29] BRASIL. Supremo Tribunal Federal (STF). ARE 652777, TP, Relator Teori Zavascki, j. 23/4/2015, DJ 107/2015. See Guichot, who states that the salary income of a person integrates the concept of private life contained in art. 8 of the European Charter, referring to the judgment *Amann* c. Switzerland of 2/16/2000, *Recueil des arrêtes et décisions* 2000-II, § 65, and *Rotaru* c. Rumania de 4/5/2000, *Recueil des arrêtes et décisions* 2000-V, § 43 (Emilio Guichot, *Datos personales y administracción pública,* op. cit., p. 308).

The LGPD already sets out the principles of free access and transparency in art. 6, IV and VI. In this way, a compatible reading points to the idea that disclosure intended by the law on access to public information finds its limit in the legal statute, which determines personal data protection.

The right to information has a dual character, as it consists of the right to inform and be informed, both of which must be permeated by the democratic agenda[30] inscribed in the CF. Thus, the citizen produces information as well as receives it. And this dissemination of information is increasingly intensive with internet communication. In past times the production of information was more centralised, communicated by traditional media: newspaper, radio, television. But, nowadays we are all potential agents, through online media and social networking. According to Castells,[31] each citizen becomes a diffuser and propagator of information. This is democratic, on the one hand, since the internet has no centrality or hierarchy, in principle, but, on the other, there is a need for accountability and a limit in the information generation. Thus, while it is possible to consider news disseminated by traditional press, on the other hand, it is essential that there is responsibility in the placement, since communication launched on the it spreads quickly and can have serious consequences for other people. Judgment occurs quickly by users of social networks, at odds with the valuable constitutional principle of contradictory and ample defence.

The right to information is bound up with civic awareness, with a commitment to democracy. In this way, fake news subverts democracy. It cannot be trusted as informative, as it is a contradiction in its own terms.

Access to public information[32] is bound up with management action, taking a stand in a concrete manifestation of the right to access to administrative documents.[33]

One of the consequences of LAI is the sense of public administration respecting social control (carried out by the citizen or society) and judicial

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30 VILLAVERDE MENÉZES, Ignácio. *Estado democrático e información: el derecho a ser informado y La Constitución Española de 1978*. Oviedo: Junta General del Principado de Asturias, 1994. p. 27.

31 CASTELLS, Manuel. *Comunicación y poder*. Madri: Alianza Editorial, 2009. p. 25.

32 FERNÁNDEZ RAMOS, Severiano. *El derecho de acceso a los documentos administrativos*. Madri: Marcial Pons, 1997. p. 357.

33 Ibid., p. 350.

authority, in terms of the reciprocal relationship between authorities, institutions and citizenship, reaffirming the Principle of the Separation of Powers.

These mechanisms were consolidated through the law establishing open data,[34] enabling intensified inspection, as each citizen is able to create their own platform. At the moment, more than 100 countries[35] benefit from public information laws.

Thus, the technological revolution allows for and demands a more efficient administration[36], closer to the citizen, faster and up to date, affording citizens a much-improved service. However, at the same time, it needs to be more transparent, democratic, controlled, accessible and respectful of privacy,[37] including protection of personal data.

In this light, we return to the initial question — whether a dialogue between the LGPD and the LAI is possible. The Supreme Federal Court made important judgments in favour of data protection and transparency (ADI no. 6.387[38] and ADPF no. 690/DF[39]). Although there would seem to be a contradiction, as the latter claims to protect data and the former information, both deal with, through coordinated action, constitutional values (the principle of disclosure, right to information and protection of personal data). The preponderant value must be sought in each case, building interpretive criteria for interpreters and legal professionals.

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34 BRASIL. *Lei nº 12.527, de 18 de novembro de 2011*. Lei de Acesso à Informação. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12527.htm. Accessed on: 13 Jul. 2020.

35 CGU Laboratório de Tecnologia da Informação e Mídias Educacionais. *Acesso a informação*: um direito de todos. Available at: http://www.labtime.ufg.br/site/#/. Accessed on: 8 Jan. 2022.

36 BRASIL. *Lei nº 14.129, de 29 de março de 2021*. Lei do Governo Digital. Available at: http:/www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/l14129.htm. Accessed on: 13 Jul. 2021.

37 PIÑAR MAÑAS, José Luis. *Administración electrónica y ciudadanos*. Pamplona: Civitas, 2011. p. 30. See also HERNÁNDEZ CORCHETE, Juan Antonio. Transparencia en la información al interessado del tratamento de sus datos personales y en el ejercicio de sus derechos. In: PINÃR MAÑAS, José Luis. *Reglamento general de protección de datos: hacia un nuevo modelo europeo de privacidade*. Madri: Reus, 2016. p. 225-226. And: RAMS RAMOS, Leonor. Tratamiento y el acceso del público a los documentos oficiales. In: José Luis Pinãr Mañas, *Reglamento general de protección de datos*, op. cit., p. 615.

38 BRASIL. Supremo Tribunal Federal (STF). *Ação Direta de Inconstitucionalidade* 6.387. Available at: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=754357629. Accessed on: 20 Aug. 2021.

39 KARPOV, Kleber. *Política distrital.* STF: Partidos contestam atos que restringem publicidade dos dados relativos à Covid-19. 8/6/2020. Available at: http://www.politicadistrital.com.br/2020/06/08/stf-partidos-contestam-atos-que-restringiram-publicidade-dos-dados-relativos-a-covid-19/. Accessed on: 25 Aug. 2021.

Thus, regulatory provisions protecting data or access to public information coexist in the legal system and the prevailing value must be sought and protected, as the case may be, based on criteria built by administrative and judicial decisions, to establish legal certainty for the benefit of society and prevent subjective or biased decision-making.

Accordingly, it is possible to develop a dialogue between the right to protection of personal data with access to public information. The treatment of data, in general, should serve people, and in relation to public authority, this should be observed in a more forceful way, as its objective is to serve citizens in the community. The right to data protection, like other rights, is not absolute and must be balanced with other fundamental rights, in specific cases, observing, also, the principles that guide the legal system.

3. Legal entities governed by public law covered by LGPD

The legal provision of the header of art. 23 of the LGPD refers to the compliance of legal entities governed by public law referred to in the sole paragraph of art. 1 of LAI. There, the Data Protection Legislation establishes limits on the legal entity governed by public law, which is not included in the LAI. Item I of art. 23 of the LGPD refers to bodies of direct administration, wherein LAI in item II deals with public and private legal entities. According to a literal interpretation, legal entities governed by private law are excluded, compromising the notion of data processing carried out by the public power, which is evidently unreasonable.

Although the approach is not the same, in terms of legal entities governed by private law, art. 3 of the LGPD deals with the applicability to legal entities governed by both public or private law.

Thus, to ensure the remit of public administration, which must act in pursuit of civic objectives, it is important to establish guidelines for public administration with all its specificities, but not create a regime which suggests a mosaic of possible interpretations, regarding the purpose of actions, which may compromise law enforcement.

The GDPR supported the processing of personal data in an univocal way, without distinguishing publicly or privately owned records, as seen

in arts 6.1., "e"[40] and 6.3., "b".[41] Also, the considerations 50,[42] 97,[43] 156[44] and 163[45] deal with the purpose, public interest, authority and confidentiality of national authorities.

The LAI, meanwhile, establishes the principle of transparency for entities of direct and indirect administration, without distinguishing between legal entities in public or private law. Thus, this distinction is not appropriate, as transparency and protection of personal data should be a guideline for public administration in any sphere, as well as the pursuit of civic well-being, inherent to public organs.[46]

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[40] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016. GDPR, Art. 6.1 — Processing is only lawful if and to the extent that at least one of the following situations applies: […] e) The processing is necessary for functions of public interest or the exercise of public authority vested in the person responsible. Available at: https://eurlex.europa.eu/legalcontent/PT/TXT/PDF/?uri=CELEX:32016R0679&qid=1641507736183&from=EN. Accessed on: 6 Jan. 2022.

[41] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016. GDPR, Art. 6.3 — The legal basis for the treatment referred to in paragraph 1, subparagraphs c) and e), is defined: […] b) By the law of the Member State to which the controller is subject. The purpose of the processing is determined on this legal basis or, with regard to the treatment referred to in paragraph 1(e) shall be necessary for the exercise of public interest functions or the exercise of public authority vested in the responsible agent. […] Available at: https://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32016R0679&qid=1641507736183&from=EN. Accessed on: 6 Jan. 2022.

[42] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016. GDPR, Consideration 50: The processing of personal data for purposes other than those for the which personal data was initially collected should only be authorized if compatible with the original purposes. […] Available at: https://eurlex.europa.eu/legalcontent/PT/TXT/PDF/?uri=CELEX:32016R0679&qid=1641507736183&from=EN. Accessed on: 6 Jan. 2022.

[43] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016. GDPR, Consideration No. 97: Whenever the processing of data is carried out by a public authority, […]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679. Accessed on: 29 jun. 2021.

[44] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016. GDPR, Consideration No. 156: The processing of personal data for archiving purposes of public interest, […]. Available at: https://eurlex.europa.eu/legalcontent/PT/TXT/PDF/?uri=CELEX:32016R0679&qid=1641507736183&from=EN. Accessed on: 6 Jan. 2022.

[45] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016. GDPR, Consideration 163: Confidential information that the Union and the national statistical authorities collect for the production of official European and national statistics. […]. Available at: https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32016R0679&qid=1641507736183&from=EN. Accessed on: 6 Jan. 2022.

[46] Regarding the disclosure of the salaries of named public servants, see the judgment of Appeal no. 652-777, item no. 483, of General Repercussion, by the STF, where it is argued that enrolment linked to salaries would be enough. In case of disparity, specific information may be requested. In any case, despite the aforementioned judgment, it is important to protect private information such as alimony discount, medical, real estate, etc. (Têmis Limberger, *Cybertransparency*, op. cit., p. 54-58).

It is important to remember the federative entities provided for in arts. 1 and 18, FC: the union, member states, DF and municipalities, endowed with autonomy. The matter is also dealt with in art. 41 of the Civil Code of 2002, which mentions legal entities governed by internal public law, including autonomous bodies and other public entities created by law. The legal device is not exhaustive, leaving to the public authority the option to institute other modalities with their own legal personality.

Direct administration covers services integrated in the administrative structure of the Presidency of the Republic and the Ministries (art. 4, I, DL 200/67).

The public bodies of the LAI are subject to the LAI regime, under the direct administration of the Executive and Legislative Powers, the Audit Courts, Judiciary and the Public Prosecutor's Office. It is important to add other offices in which the essential functions of justice reside (Public Defender's Office,[47] Federal Attorney's Office and Public Prosecutors).

LAI, in art. 1, sole paragraph, II, at the beginning of the legal provision, refers to legal entities: autonomous bodies, public foundations, public companies and semi-public corporations, already mentioned in art. 4, II, DL 200/67. The concept of indirect administration[48] was established in Brazilian law by DL 200/67, based on the notion of decentralization[49] (art. 4, II, DL 200/67), outlining distinct legal personalities: for municipalities, public companies, semi-public companies and public foundations.

Autonomous bodies have a legal personality governed by public law, and, accordingly (art. 37, XIX, of the FC), possess their own assets and revenues (art. 5, I, DL 200/67).

In the current constitutional model, public universities enjoy didactic-scientific, administrative, financial and property management autonomy, in art. 207, of the FC, often constituted in the form of an autonomous body. Other cases, such as Regulatory Agencies, art. 174, of the FC, are constituted in the form of autonomous entities under a special regime.

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[47] Regarding lack of legislative technique, as there is no legislative reference to the Public Defender's Office (TASSO, Fernando Antonio. Do tratamento de dados pessoais pelo Poder Público. In: MALDONADO, Viviane Nóbrega; BLUM, Renato Ópice (Org.). *LGPD comentada*. 3. ed. São Paulo: Thomson Reuters Brazil, 2021. p. 264).

[48] The entities included in the indirect administration are linked to the ministry in whose area of competence its main activity is framed (article 4, sole paragraph, of the DL 200/67 with the wording of Law No. 7.596/87).

[49] The indirect administration of the State is the set of administrative persons who, linked to the respective direct administration, are intended to perform administrative activities in a decentralized way.

Public companies (art. 5, II, DL 200/67), semi-autonomous corporations (art. 5, III, DL 200/67), are constituted in the form of private law legal entities.

Public foundations (art. 5, IV, DL 200/67) have an ambiguous legal nature. Conventional opinion[50] argues that there are two types of foundations under public law and under private law. In this understanding, public law foundations are characterised as truly autonomous, which is why they are sometimes called autonomous foundational, in their own category.

Public consortia are not mentioned in the aforementioned decentralisation, but were later provided for by art. 241, FC, and regulated in Law no. 11.107/2005. They may be constituted in the form of a public or private entity. Where public in character, they fall under the indirect administration of all consortium entities of the Federation (article 6, § 1, Law nº 11.107/2005). Thus, Di Pietro,[51] is correct when he asserts that Law no. 11.107/2005 created a type of entity that will provide public service through decentralisation; public consortia, to be created by federative entities for the associated management of public services.

They are constituted as entities with the legal personality of private law: public companies, semi-public companies. Note that art. 24 of the LGPD takes into account the nature of the administrative function practised, distinguishing those competitive or otherwise.

Furthermore, public foundations and consortia can take the form of legal entities governed by public or private law, according to their constitution.

The most consistent systematic interpretation accords with a basic approach to the protection of personal data that must be observed with respect to principles of the law, whether subject to public or private law, as can be seen in article 7, III and § 3, of the LGPD.

The processing of data of legal entities governed by public or private law is not identical, but basic protection is guaranteed by art. 3rd, of the LGPD.

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[50] Reference: Celso Antonio Bandeira de Mello, Maria Silvia Zanella Di Pietro, Diógenes Gasparini, Miguel Reale, Cretella Jr. and Oswaldo Bandeira de Mello (José dos Santos Carvalho Filho, *Manual de direito administrativo*, op. cit., p. 563). The STF opted for this understanding, when it asserted that "not every foundation instituted by the public authority is a foundation of private law. The foundations instituted by the public authority, which assume the management of state service and submission to the administrative regime provided, in the Member States, by state laws, are foundations governed by public law, and therefore legal entities governed by public law. Such foundations are species of the autarquia genus, with the prohibition referred to in § 2 of article 99 of the CF". (STF, RE 101.126/RJ, TP, rel. min. Moreira Alves, j. 10.24.1984, DJ 3.1.1985, and also: STF, RE 219.900 AgR, T1, rel. min. Ellen Gracie, J. 6.4.2004, DJ 8.16.2002).

[51] Maria Sylvia Zanella Di Pietro, *Direito administrativo*, op. cit., p. 515.

Clearly, some institutes, for example, vis-a-vis data collection or cancellation requests, require mitigation with respect to the public law entity.

LGPD and LAI must be interpreted in a systematic way, in view of the unity and coherence of the legal system. There will be situations where data protection is prevalent and others where access to public information is predominant, according to the main interest in each case. Interpretive criteria will be based on the cases examined by the administrative or judicial authority.

4. Government purposes in the treatment of personal data

With respect to comparative law, art. 6.1 of GDPR mentions the prevailing legal interest and the processing of data by public administrators.[52] According to this precept, European Union legislators apparently considered that public administrations will only be able to process data respecting a legal obligation or as a result of competition, either because processing is necessary for that purpose, or since it is linked to powers granted to public administrations by law.

It is important to heed the principle of limitation of purpose, foreseen in art. 5.1, "b", of the RGPD, which recommends the data must be collected for specific, explicit and legitimate objectives. Moreover, data cannot be applied for reasons incompatible with the purpose for which it was gathered and subsequent treatment must be justified.[53]

Public administration bodies may only assign or communicate data according to the purpose for which they were collected, respecting the civic objectives, or the pursuit of public interest, in order to execute legal competences or fulfil public service duties, provided for in art. 23, head paragraph, of the LGPD. Thus, this provision establishes a complementary hypothesis for the processing of data by public authorities, adding hypotheses, in addition to that provided for in articles 7 to 11, of the LGPD.[54] Covid-19 presented situations in which (sensitive) health data are collected at the municipal and state level.

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[52] PUENT ESCOBAR, Augustín. Principios y licitude del tratamento. In: RALLO LOMBARTE, Artemi. *Tratado de protección de datos*. Valência: Tirant to Blanc, 2019. p. 149-150.

[53] Ibid. P. 151. Consideration 50 of the GDPR sets out in detail the processing for different purposes, but always with compatibility with the initial purpose.

[54] WIMMER, Miriam. O regime jurídico do tratamento de dados pessoais pelo poder público. In: MENDES, Laura et al. (Org.). *Tratado de proteção de dados pessoais*. Rio de Janeiro: Forense, 2021. p. 271-288.

Subsequently, it was anonymized and made available on the Ministry of Health website, in order to formulate public policies to combat the pandemic, in addition to promoting transparency. This is an example of enforcement of legal competence.[55]

Legitimate interest applies when the public administration must carry out the communication of the data based on fulfilment of a legal obligation, which imposes such an assignment, in the event of the requirements laid down for this; independent data access of the interested party (LAI).[56]

Thus, the processing of personal data for purposes other than for which they were initially collected should only be allowed when compatible with the purpose of initial collection. In this sense, the reasonable expectations of the data subject may be included.[57]

The concept of serving a public purpose[58] can be found in Law no. 4.717/1965, known as *Lei da Ação Popular*. One of the first considerations of public purpose comes to Brazilian law through popular action, concerning deviation of purpose (art. 2, "e"). Similarly, French law dealt with the misuse of powers in the context of civil obligations. This is justified since private law is much older than modern public law, whose beginnings are identified with the French Revolution. However, in Roman law it was already possible to extract this notion, present in the *actio popularis*.

Later legislation dealt with the public purpose in a more developed, contemporary way, with the identification of administrative probity, for

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[55] REDE INTERAGENCIAL DE INFORMAÇÕES PARA SAÚDE (RIPSA). Available at: http://www.ripsa.org.br. Accessed on: 8 Jan. 2022.

[56] Complemented by article 86 of the GDPR. Still, Bioni refers to the need to stabilize the legitimate interest because it is an undetermined legal concept: "it is a common denominator among data subjects in view of the need to ensure predictability to the application of the legal basis of legitimate interest". (BIONI, Bruno. *Proteção de dados pessoais*: a função e os limites do consentimento. 2. ed. Rio de Janeiro: Forense, 2020. p. 234).

[57] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016. GDPR, Consideration 50: The processing of personal data for purposes other than which it was initially collected should only be authorized if compatible with the original purposes. […] the context in which the personal data was collected, in particular the reasonable expectations of the data subject regarding its further use, based on their relationship with the controller; […]. Available at: https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32016R0679&qid=1641507736183&from=EN. Accessed on: 6 Jan. 2022

[58] On the misrepresentation of the public authority due to the pursuit of satisfaction of private interest, see the explanation in Brazilian sociology mainly in the works of Raimundo Faoro (FAORO, Raimundo. *Os donos do poder*: formação do patronato brasileiro. 15. ed. São Paulo: Globo, 2000. v. II, Capítulo final: A viagem redonda: do patrimonialismo ao estamento. p. 731747) and Sérgio Buarque de Holanda (HOLANDA, Sérgio Buarque de. *Raízes do Brasil*. São Paulo: Companhia das Letras, 2006. cap. V: O homem cordial. p. 152-222).

example, in art. 37, § 4, of the FC, provided for in Law no. 8.429/1992 (*Lei de Improbidade Administrativa*) and subsequent amendments, and also Law no. 12.846/2013, *Lei Anticorrupção*, which aims to discipline the liability of legal entities for the practice of harmful acts against the public administration.

The aim of administrative actions must always serve the public purpose, understood as the performance of the typical attributions aimed at the fulfilment of the fundamental rights foreseen in the FC. The interest of the community must be paramount, not the satisfaction of the private interests of public officials or their relatives, circle of friends or network of contacts, serving themselves. Where the purpose is not met, the soundness of the administrative act is compromised.

The principle of data collection has been clear, within the scope of international protection of personal data, since Agreement 108/81. In this study, the public purpose is added.

To understand the pursuit of the public interest, the concept which reaches Brazilian law can be understood through the Italian doctrine of Renato Alessi.[59] The author distinguishes primary public interest (the interest of the collective) and secondary (the way in which the administration views the public interest). Most of the time, primary and secondary are coincident, but they may be separate, as in tax collection by the public administration. Sometimes the taxpayers oppose the collection of a new tax, claiming improper collection, and the administration claims that it is appropriate.

An interpretive parameter may be sought, fundamentally, with the supremacy of public interest over private interest; a principle implicit in the FC, which aims to guide legal operators and the society. It is conceptualised as a:

> […] general principle of law inherent to any society, the condition of its existence. It is not rooted in a specific device of the Constitution, but may be allude to or implied in concrete manifestations of it, such as, for example, the social function of property, consumer or environmental environment [...].[60]

Thus, the supremacy of the public interest appears a logical presupposition of society. If there was no collective agenda, following

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[59] ALESSI, Renato. *Sistema instituzzionali del diritto italiano*. Milão: Giuffrè, 1960. p. 197-198.
[60] Celso Antônio Bandeira de Mello, *Curso de direito administrativo*, op. cit., p. 85.

certain presuppositions oriented to the regulation of community, built through consolidated legal rules, with vectors that point to ethical foundations, the social fabric would disintegrate.

Note, concerning the public and private, the modern tendency to overcome the classic dichotomy of the Liberal State, in which the private is made public and the public privatized.[61]

Fernando Garrido Falla[62] addressed the administrative activity of private law, in relation to the crisis arising when public service is no longer only that provided by the state, but is also carried out by private companies. The notion that public services are performed exclusively by the government no longer holds.

German doctrine coined the notion "the flight from administrative law" towards private law,[63] which emerged after the Second World War in Europe, due to the fiscal crisis that forced the State to act more efficiently, submitting to the precepts of private law.

Consideration 156 deals with the processing of personal data for the purposes of public interest according to the principle of minimization.[64] Hence, it may be argued that Brazilian public authorities collect the bare minimum data to pursue the public interest in the activity.

The objective of exercising legal power stems from the provisions contained in the organs provided for in legislation in a broad sense, here also understood the Constitution. Competence is understood as the ambit established by law within which agents can legitimately exercise their activity, based on the need for division of labour, i.e., the utility of distributing the volume of tasks arising

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61 CANOTILHO, José Joaquim Gomes. Civilização do direito constitucional ou constitucionalização do direito civil? A eficácia dos direitos fundamentais na ordem jurídico-civil. In: GRAU, Eros Roberto; GUERRA FILHO, Willis Santiago (Org.). *Direito constitucional: estudos em homenagem a Paulo Bonavides*. São Paulo: Malheiros, 2001. p. 108-115.

62 GARRIDO FALLA, Fernando. *Tratado de derecho administrativo*. 12. ed. Madri: Tecnos, 1994. v. I, p. 124.

63 FLEINER FRITZ. *Institutionem des Verwaltungsrechts*. 8. ed. 1928. p. 326. Apud: MIR PUIGPELAT, Oriol. *Globalización, Estado y Derecho*. Las transformaciones recientes del derecho administrativo. Madri: Thomson Civitas, 2004. p. 158.

64 Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016. GDPR, Consideration No. 156: The processing of personal data for archiving purposes of public interest, or for scientific or historical research purposes or for statistical purposes, should be subject to the adequate guarantee of the rights and freedoms of the data subject under the terms of this Regulation. These guarantees must ensure the existence of techniques and organizations that ensure, in particular, the principle of data minimization. […]. Available at: https://eurlex.europa.eu/legalcontent/PT/TXT/PDF/?uri=CELEX:32016R0679&qid=1641507736183&from=EN. Accessed on: 6 Jan. 2022.

from each of the basic functions (legislative, administrative or jurisdictional) among the various agents of the State.[65]

Fulfilling the legal attributions of public service provision[66] can be understood as the tasks necessary for the realization of benefit and rights constitutionally foreseen (here understood in a wider context). Thus, the difficulty in legally conceptualizing public services,[67] as this accompanies the development of the State.[68] It may be concluded that the principle of respecting public purpose must be observed by the public administration, whether a public or private legal entity, as part of the civil framework. Yet, there may need to be more forceful compliance measures with respect to public interest and legal competences when dealing with legal entities of public law.

5. Disclosure of personal data by the public authorities on websites

As regards the processing of data, the public administration, in the exercise of its powers must provide clear information, preferably online, ensuring the transparency provided for in art. 6, VI, of the LGPD.

Thus, citizens with data collected by public authorities have the right to know about its processing and flow in a clear and accessible way, preferably

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[65] José dos Santos Carvalho Filho, *Manual de direito administrativo*, op. cit., p. 76-177.

[66] Currently, the difficulty of legally conceptualizing public service is well known, as this notion accompanies the development of the state. Thus, the emergence of the French notion of public service as that performed directly by the public authority. In the state (welfare state) there is an increase in benefits administered by the public authority. In the current context, we are witnessing the so-called economic state, with the tendency towards neoliberal policy, with many services provided by public authorities now performed by the private sector, expanding the notion of public service. In this sense, see the evolution of the notion of extra-contractual civil liability of the State, which mentions a legal entity governed by private law that provides public service (art. 37, § 6, CF) and the emergence of regulatory agencies in Brazilian law (art. 241, CF). Thus, Moreira Neto states that: "[…] it is possible to determine a disciplinary niche within which the complex State-society, in industrial societies, which seeks to impose a corrective (intervention) or impulsive (fostering) order to economic activities, both through the performance of the State, as well as the associated action of the bodies of society in establishing the fundamental economics of regulation" (MOREIRA NETO, Diogo de Figueiredo. *Direito regulatório.* Rio de Janeiro: Renovar, 2003. p. 71). See GUERRA, Sérgio. *Discricionariedade, regulação e reflexividade*: uma nova teoria sobre as escolhas administrativas. 6. ed. rev. e atual. Belo Horizonte: Fórum, 2021. p. 234.

[67] CONRADO, Regis da Silva. *Serviços públicos à brasileira*: fundamentos jurídicos, definição e aplicação. São Paulo: Saraiva, 2013. p. 284.

[68] COUTO E SILVA, Almiro. Privatização no Brasil e o novo exercício de funções públicas por particulares. Serviço público 'à brasileira'. *Revista de Direito Administrativo*, Rio de Janeiro, v. 230, p. 45-74, out./dez. 2002.

on the relevant official website. This generates a duty on the part of the public administration, to make this available.

Transparency[69] (art. 12, GDPR) refers to the fact that all information addressed must be concise, easily accessible and use clear and simple language. The directive lays down an obligation for those responsible to ensure this happens on behalf of the interested parties.

For the processing of data, the public administration must indicate appropriate supervision.[70] The supervisor, an individual or legal entity, is the channel of communication between the controller, the data subjects and the ANPD, pursuant to art. 41 of the LGPD. Both public and private legal entities play a role in managing data processing.

Still, the main responsibility lies with the controller; in the case of direct administration at the federal level,[71] the Union will assume control and. Sometimes *de-concentration* occurs, as in the case of ministries, and their liability.[72] In the event of administrative or judicial action, the motion will be against the Union, but whoever is at the head of the Ministry or responsible for data treatment may answer, too. Articles 42 to 45 of the LGPD, which deal with responsibility, do not specify whether it will be objective or subjective. Thus, in the case of public power, one must seek constitutional guidelines on the matter. The responsibility of a legal entity governed by public law is objective, and that of public servants subjective, considering the responsibility for administrative risk, foreseen in article 37, § 6, of the FC.

In indirect public administration, the legal entities of public or private law will be the controlling agent and as such have the responsibility. The person in charge and the operator will only respond if actions are contrary to the controller's orders or contrary to art. 43, I and II, of the LGPD.

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[69] PUYOL MONTERO, Javier. Transparencia de la información y derecho de acceso de los interessados en la nueva normativa de protección de datos. In: Artemi Rallo Lombarte, *Tratado de protección de datos*, op. cit., p. 275-312.

[70] About art. 41 of the LGPD: "The imputation of the need for a person in charge on behalf of controller of activities and actions related to data processing is to ensure that the information is centralized and that the controller makes sure application of the standards will receive effective validation. This person in charge may be hired from the team or outsourced" (PINHEIRO, Patrícia Peck. *Proteção de dados pessoais*: comentários à Lei nº 13.709/2018 (LGPD). São Paulo: Saraiva Educação, 2018).

[71] The same reasoning applies to each of the other federated entities: member states, federal district and municipalities.

[72] GUIA orientativo para definições dos agentes de tratamento de dados pessoais e do encarregado. Brasília/ DF, 2021. Available at: http://www.gov.br/anpd/pt-br/documentos-e-publicacoes/2021.05.27GuiaAgentesdeTratamento_Final.pdf. Accessed on: 8 Jan. 2022.

The ANPD shall establish the means of promulgation, pursuant to art. 55, J, X, LGPD, regulated by art. 4, III, "b", Annex I, and by Decree 10.474/2020, which states that the Board of Directors is responsible for dissemination of information undertaken by public legal entities, except with regard to industrial and commercial secrecy. The claim of secrecy, notwithstanding, may not harm the constitutional principle of openness and transparency,[73] as in the case of tax waiver in relation to private companies, where the case would need to be demonstrated, by way of example.

The creation of the figures provided for by the LGPD (controller, operator and responsible) does not exempt the mentioned legal entities (direct and indirect administration) to institute the authorities dealt with in arts. 35 and 37, of the LAI: *Comissão Mista de Reavaliação de Informações* and *Gabinete de Segurança Institucional da Presidência da República e o Núcleo de Segurança e Credenciamento*.

Once again, systematic interpretation is evoked, when observing the deadlines and procedures in specific Habeas Data legislation, provided for in art. 5, LXXII, of the Federal Constitution, and regulated by Law no. 9.507/1997, whose tendency is to greater use of the procedural guarantee, vis-a-vis exhaustion of the administrative procedure, before entering the judicial process. It also mentions *Lei do Processo Administrativo* (Law No. 9,784/1999) based on the constitutional principle of contradictory and full defence (art. 5, LV, CF). To establish guidelines, Resolution CD/ANPD No. 1.[74] was established, which prescribes the *Processo de Fiscalização* and the *Procedimento Administrativo Sancionador*, within the scope of the ANPD, in addition to the aforementioned connection between LAI and the LGPD.

In this way, harmonious dialogue, with reference to constitutional principles, must be observed in the interpretation and application of the LGPD, to ensure the growth of a data protection culture in Brazil.

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[73] LIMBERGER, Têmis; TRONQUINI, Luiz Felipe Menezes. A transparência na concessão de incentivos tributários e a demonstração da renúncia de receita tributária: realidade, perspectivas e possibilidades. *Revista de Interesse Público*, v. 120, p. 2-20, 2020.

[74] DOU, 29/10/2021. Available at: http://www.in.gov.br/en/web/dou/-/resolucaocd/anpd-n-1-de-28-de-outubro-de-2021-355817513. Accessed on: 11 Jan. 2022.

6. Final considerations

The Scandinavian countries of Europe have a long-standing tradition of access to public information. Currently, the EC Regulation 1049/2001 brings together guidelines on the matter. More than one hundred countries have legislation on this subject. In this globalized context, Brazil is celebrating the first decade of LAI.

Meanwhile, the GDPR is the result of a five-decade evolution, inspired by the LGPD. The European regulation establishes the processing of data univocally, without distinguishing publicly or privately owned records. It evokes concepts such as: public purpose and interest, authority public and confidentiality of national authorities. Brazil faces the challenge of implementing a culture of data protection, in a context different from the European.

The tension between public and private is addressed through the institution of a protective data law in relation to public information access, especially in art. 23, header, of the LGPD, which refers to the sole paragraph art. 1 of the LAI. At first reading, it seems contradictory to protect personal data and determine access to public information, and also to exclude legal entities governed by private law, from the said protection.

Basic treatment of personal data protection must be observed concerning the principles contained in the law, regardless of whether the legal entity is governed by public or private law, pursuant to art. 3 of the LGPD. Legal entities governed by private law will have peculiarities, developed, as they are, in a competitive regime, considering art. 24, from

LGPD, and art. 173, § 1, of the Federal Constitution.

The right to protection of personal data does not constitute an absolute prerogative, however, as we see in relation to public information online. Some criteria are: case-by-case assessment of the possibility of publication, taking into account principles of purpose and legitimacy, the effective possibility of the holder to exercise the right of opposition and the use of new technologies in favour of protection of fundamental rights.

Only the processing of data by the administration should be made public, for a purpose other than that agreed at the time of collection, where compatible with the initial one, respecting the reasonable expectations of the data subject vis-a-vis the concept of serving the public interest. Accordingly, it is necessary to collect the minimum data. Regarding the execution of legal powers, they are understood as those provided for in the legislation in a broad sense, understood in the FC.

Art. 23 of the LGPD must be interpreted systematically, seeking a harmonious dialogue, as recommended by art. 6, items IV and VI, of the LGPD. In this sense, important judgments have been made by the STF, in favour of transparency and data protection (ADPF nº 690/DF and ADI nº 6.387), demonstrating the possibility of granting constitutional protection to both, without compromising either.

Regarding the processing of data, the public administration must provide clear information, preferably online, to safeguard transparency. Citizens have the right to know about the flow of data. Thus, a controller and manager, at minimum, must ensure communication between the user and the public entity. The constitutional guarantee of Habeas Data must be reinvigorated, with information registered on the public databases.

The technological revolution allows and demands a more transparent and respectful guarantee of fundamental rights, in particular, the protection of personal data.

References

AGENCIA VASCA DE PROTECCIÓN DE DATOS. IV Encuentro de Agencias Autonómicas de Protección de Datos, Vitoria, 23 y 24 de octubre de 2007. Available at: http://www.avpd.euskadi.eus/s0420375/es/contenidos/evento/4_encuentro_apds/es_intro/presentacion.html. Accessed on: 20 Aug. 2021.

ALESSI, Renato. *Sistema instituzzionali del diritto italiano*. Milão: A. Giuffrè, 1960.

BANDEIRA DE MELLO, Celso Antônio. *Curso de direito administrativo*. 20. ed. São Paulo: Malheiros, 2005.

BIONI, Bruno. *Proteção de dados pessoais*: a função e os limites do consentimento. 2. ed. Rio de Janeiro: Forense, 2020.

BLOG DE PROPIEDAD INTELECTUAL Y TECNOLOGÍAS. Available at: http://www.cuatrecasas.com/es/spain/insights/propiedad-intelectual.

BRASIL. *Constituição da República Federativa do Brasil*, de 05 de outubro de 1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: 11 Jan. 2022.

BRASIL. *Lei no 12.527, 18 Nov. 2011*. Lei de Acesso à Informação. Regulates access to information provided for in item XXXIII of art. 5th, in item II of § 3 of art. 37 and in § 2 of art. 216 of Constituição Federal; changes law no. 8.112, December 11, 1990; repeals Law No. 11.111, May 5, 2005, and the provisions of Law no. 8,159, of January 8, 1991; among other measures. Published in the DOU of 11.18.2011 — Edição extra. http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12527.htm. Accessed on: 13 Jul. 2020, 29 May 2021.

BRASIL. *Lei no 13.709, 14 Aug 2018*. Lei Geral de Proteção de Dados (LGPD). Published in DOU on 15.8.2018. Available at: http://www.planalto.gov.br/ccivil_03/_ato2015-. Accessed on: 29 May 2021.

BRASIL. *Lei no 14.129, 29 March 2021*. Provides principles, rules and instruments for Digital Government and for increasing public efficiency and amends Law No. 7.116, of August 29, 1983, Law No. 12.527, of November 18 of 2011 (Lei de Acesso à Informação), Law no. 12.682, July 9, 2012, and Law No. 13.460, June 26, 2017. Published in the DOU of 6.11.2021. Available at: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/L14129.htm. Accessed on: 13 Jul. 2021.

BRASIL. Proposta de emenda à Constituição no 17, 2019. Available at: http://www25.senado.leg.br/web/atividade/materias/-/materia/135594. Accessed on: 11 Jan. 2022.

BRASIL. Supremo Tribunal Federal (STF). *Ação Direta de Inconstitucionalidade* 6.387. Available: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=754357629. Accessed on: 20 Aug. 2021.

BRASIL. Supremo Tribunal Federal (STF). ARE 652777, TP, rel. Teori Zavascki, j. 23/04/2015, DJe 1/7/2015.

BRASIL. Supremo Tribunal Federal (STF). RE 101.126/RJ, TP, Rel. Min. Moreira Alves, j. 24.10.1984, DJe 1/3/1985.

BRASIL. Supremo Tribunal Federal (STF). RE 219.900 AgR, T1, rel. min. Ellen Gracie, j. 4.6.2004, DJ 16/8/2002.

CANARIS, Wilhelm Claus. *Pensamento sistemático e conceito de sistema na ciência do direito*. Lisboa: Fundação Calouste Gulbekian, 1989.

CANOTILHO, José Joaquim Gomes. Civilização do direito constitucional ou constitucionalização do direito civil? A eficácia dos direitos fundamentais na ordem jurídico-civil. In: GRAU, Eros Roberto; GUERRA FILHO, Willis Santiago (Org.). *Direito constitucional*: estudos em homenagem a Paulo Bonavides. São Paulo: Malheiros, 2001. p. 108-115.

CARTA dos direitos fundamentais da União Europeia, 2016/C, 364/01. *Jornal Oficial das Comunidades Europeias*. Available at: http://www.europarl.europa.eu/charter/pdf/text_pt.pdf. Accessed on: 11 Jan. 2022.

CARVALHO FILHO, José dos Santos. *Manual de direito administrativo*. 32. ed. São Paulo: Atlas, 2018.

CASO *Volker und Markus Schecke y Eifert*, TJUE, sentença de 9/11/2010. In: PIÑAR MAÑAS, José Luis et al. *El derecho a protección de datos en la jurisprudência del Tribunal de Justicia de la Unión Europeia*. Madri: Ed la Ley, 2018.

CASTELLS, Manuel. *Comunicación y poder*. Madri: Alianza Editorial, 2009.

CONRADO, Regis da Silva. *Serviços públicos à brasileira: fundamentos jurídicos, definição e aplicação*. São Paulo: Saraiva, 2013.

COUTO E SILVA, Almiro. Privatização no Brasil e o novo exercício de funções públicas por particulares. Serviço público 'à brasileira'. *Revista de Direito Administrativo*, Rio de Janeiro, v. 230, p. 45-74, out./dez. 2002.

CGU. Laboratório de Tecnologia da Informação e Mídias Educacionais. *Acesso a informação pública um direito de todos*. Available at: http://www.labtime.ufg.br/site/#/. Accessed on: 8 Jan. 2022.

DI PIETRO, Maria Sylvia Zanella. *Direito administrativo*. 31. ed. São Paulo: Forense, 2018.

DONEDA, Danilo. *Da privacidade à proteção de dados pessoais*: fundamentos da LGPD. 2. ed. São Paulo: Thomson Reuters RT, 2020.

DONEDA, Danilo. *Da privacidade à proteção de dados pessoais*: fundamentos da LGPD. In: MENDES, Laura et al. (Org.). *Tratado de proteção de dados pessoais*. Rio de Janeiro: Forense, 2021.

FAORO, Raimundo. *Os donos do poder: formação do patronato brasileiro*. 15. ed. São Paulo: Globo, 2000. v. II.

FERNÁNDEZ RAMOS, Severiano. *El derecho de acceso a los documentos administrativos*. Madri: Marcial Pons, 1997.

FLEINER FRITZ, *Institutionem des Verwaltungsrechts*. 8. ed. 1928. Apud: MIR PUIGPELAT, Oriol. *Globalización, Estado y derecho. Las transformaciones recientes del derecho administrativo*. Madri: Thomson Civitas, 2004. p. 326.

FRANCE. Law no. 78/753 17 July 1978 with alterations on 9/10/2016. It provides for the various measures to improve relations between the administration and the public and various administrative, social and fiscal provisions. Available at: http://www.legifrance.gouv.fr/loda/id/LEGITEXT000006068643/. Accessed on: 11 Jan. 2022.

GARRIDO FALLA, Fernando. Tratado de derecho administrativo. 12. ed. Madri: Tecnos, 1994. v. I.

GRUPO DE TRABAJO DEL ARTÍCULO 29. *Dicctamen 3/99, relativo a Información del Sector Público y protección de datos personales, aprobado el 3/5/2003*.

GUERRA, Sérgio. *Discricionariedade, regulação e reflexividade:* uma nova teoria sobre as escolhas administrativas. 6. ed. rev. e atual. Belo Horizonte: Fórum, 2021.

GUIA orientativo para definições dos agentes de tratamento de dados pessoais e do encarregado. Brasília/DF, 2021. Available at: http://www.gov.br/anpd/pt-br/documentos-e-publicacoes/2021.05.27GuiaAgentesdeTratamento_Final.pdf. Accessed on: 8 Jan. 2022.

GUICHOT, Emilio. *Datos personales y administración pública*. Navarra: Thomson & Civitas, 2005.

GUICHOT, Emilio. El nuevo derecho europeo de acceso a la información pública. Revista de Administración Pública, n. 173, p. 407-445, maio/ago. 2007.

HABERMAS, Jürgen. *Mudança estrutural da esfera pública*. São Paulo: Unesp, 2014.

HERNÁNDEZ CORCHETE, Juan Antonio. Transparencia en la información al interessado del tratamento de sus datos personales y en el ejercicio de sus derechos. In: PINÃR MAÑAS, José Luis. *Reglamento general de protección de datos: hacia un nuevo modelo europeo de privacidade*. Madri: Reus, 2016. p. 205-226.

HOLANDA, Sérgio Buarque de. *Raízes do Brasil*. São Paulo: Companhia das Letras, 2006.

JAYME, Erik. Identité culturelle et intégration: le droit internationale privé postmoderne. *Recueil des Cours de l'Académie de Droit International de la Haye*, Haye, Nijhoff, v. II, p. 60-251, 1995.

KARPOV, Kleber. *Política distrital*. STF: partidos contestam atos que restringem publicidade dos dados relativos à Covid-19. 8/6/2020. Available at: http://www.politicadistrital.com.br/2020/06/08/stf-partidos-contestam-atos-que-restringirampublicidade-dos-dados-relativos-a-covid-19/. Accessed on: 25 Aug. 2021.

LEI portuguesa no 26/2016 de 22 de agosto de 2016. Regula o acesso à informação administrativa e ambiental. Available at: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2591&tabela=leis&ficha=1. Accessed on: 11 Jan. 2022.

LEI do Reino Unido: The Freedom of Informaction Act 2000 (Foia). Available at: Https://ico.org.uk. Accessed on: 7 Jan. 2022.

LIMBERGER, Têmis. *Cibertransparência*: informação pública em rede — a virtualidade e suas repercussões na realidade. Porto Alegre: Livraria do Advogado, 2016.

LIMBERGER, Têmis; TRONQUINI, Luiz Felipe Menezes. A transparência na concessão de incentivos tributários e a demonstração da renúncia de receita tributária: realidade, perspectivas e possibilidades. *Revista de Interesse Público*, v. 120, p. 2-20, 2020.

LUHMANN, Niklas. *Sistemi sociale*. Fundamenti di una teoria generali. Bologna: Il Mulino, 1990.

MELLO, Celso Antônio Bandeira de. *Direito administrativo*. 17. ed. São Paulo: Malheiros, 2004.

MOREIRA NETO, Diogo de Figueiredo. *Direito regulatório*. Rio de Janeiro: Renovar, 2003.

PIÑAR MAÑAS, José Luis. *Administración electrónica y ciudadanos*. Pamplona: Civitas, 2011.

PIÑAR MAÑAS, José Luis et al. *El derecho a protección de datos en la jurisprudência del Tribunal de Justicia de la Unión Europeia*. Madri: Ed la Ley, 2018.

PIÑAR MAÑAS, José Luis. Transparencia y protección de datos. Una referencia de la Ley Española 19/2013 de transparência, acceso a la información y buen gobierno. In: SARLET, Ingo Wolfang et al. (Coord.). *Acesso à informação como direito fundamental e dever estatal*. Porto Alegre, Livraria do Advogado, 2016.

PINHEIRO, Patrícia Peck. *Proteção de dados pessoais*: comentários à Lei no 13.709/2018 (LGPD). São Paulo: Saraiva Educação, 2018.

PUENT ESCOBAR, Augustín. Principios y licitude del tratamento. In: RALLO LOMBARTE, Artemi. *Tratado de protección de datos*. Valência: Tirant to Blanc, 2019. p. 115-168.

PUYOL MONTERO, Javier. Transparencia de la información y derecho de acceso de los interessados en la nueva normativa de protección de datos. In: RALLO LOMBARTE, Artemi. *Tratado de protección de datos*. Valência: Tirant to Blanc, 2019. p. 275-312.

RAMS RAMOS, Leonor. Tratamiento y el acceso del público a los documentos oficiales. In: PINÃR MAÑAS, José Luis. *Reglamento General de protección de datos: hacia un nuevo modelo europeo de privacidade*. Madri: Reus, 2016. p. 601-620.

REDE INTERAGENCIAL DE INFORMAÇÕES PARA SAÚDE (RIPSA). Available at: http://www.ripsa.org.br. Accessed on: 8 Jan. 2022.

REGULAMENTO (CE) no 1049 de 30 de maio de 2001. Relativo ao acesso do público aos documentos do Parlamento Europeu, do Conselho e da Comissão. Available at: https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:32001R1049&from=en. Accessed on: 11 Jan. 2022.

REGULAMENTO 2016/679 do Parlamento Europeu e do Conselho, de 27 de abril de 2016. Regulamento Geral de Proteção de Dados (RGPD). Available at: https://eurlex.europa.eu/legalcontent/PT/TXT/PDF/?uri=CELEX:32016R0679&qid=1641507736183&from=EN. Accessed on: 6 Jan. 2022.

RESOLUÇÃO CD/ANPD no 1. Disciplina o Processo de Fiscalização e do Procedimento Administrativo Sancionador, no âmbito da ANPD. Available at: http://www.in.gov.br/en/web/dou/-/resolucao-cd/anpd-n-1-de-28-de-outubro-de-2021-355817513. Accessed on: 11 Jan. 2022.

SARLET, Ingo. Fundamentos constitucionais: o direito fundamental à proteção de dado. In: MENDES, Laura et al. (Org.). *Tratado de proteção de dados pessoais*. Rio de Janeiro: Forense, 2021. p. 21-60.

SOLOVE, Daniel J. *The digital person*. Technology and privacy in the information age. Nova York: New York University Press, 2004.

TASSO, Fernando Antonio. Do tratamento de dados pessoais pelo poder público. In: MALDONADO, Viviane Nóbrega; BLUM, Renato Ópice (Org.). LGPD *comentada*. 3. ed. São Paulo: Thomson Reuters Brasil, 2021. p. 261-303.

VILLAVERDE MENÉZES, Ignácio. *Estado democrático e información:* el derecho a ser informado y la Constitución Española de 1978. Oviedo: Junta General del Principado de Asturias, 1994.

WIMMER, Miriam. O regime jurídico do tratamento de dados pessoais pelo poder público. In: MENDES, Laura et al. (Org.). *Tratado de proteção de dados pessoais*. Rio de Janeiro: Forense, 2021. p. 271-288.