The electronic administrative process and its discipline in Brazilian administrative law: new challenges and old problems*

O processo administrativo eletrônico e sua disciplina no direito administrativo brasileiro: entre novos desafios e velhos problemas

*Patrícia Ferreira Baptista***
*Leonardo Silveira Antoun Netto****

ABSTRACT

This paper aims to point out the challenges and problems to the electronic administrative process discipline in Brazilian administrative law. The text begins with a brief history of the development and implementation of electronic process tools in Brazilian public administrations, with particular emphasis on its most widespread model, known as Sistema Eletrônico de Informações (SEI). Next, it discusses the main new challenges for deepening digitalization with respect to the guarantees of the democratic rule of law

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** Associate Professor of Administrative Law at the Faculty of Law, Universidade do Estado do Rio de Janeiro (Uerj). PHd in State Law at Universidade de São Paulo (USP). Master's in Public Law at Uerj. State Attorney, Rio de Janeiro. E-mail: patriciafbaptista@gmail.com.
*** Master's in Public Law at Uerj. State Attorney, Rio de Janeiro. E-mail: leonardo.netto@yahoo.com.br.

and citizens rights. It also highlights that the digitalization of processes, contrary to expectations, did not mean overcoming previously existing problems. Finally, it concludes with a reflection on the effective transforming capacity of electronic administrative processes or if, on the contrary, they are limited to a bureaucratic transposition tool.

KEYWORDS

administrative law — public administration — administrative process — electronic administrative process — SEI

RESUMO

O presente estudo tem por objeto apontar os desafios e os problemas da disciplina, no direito administrativo brasileiro, do processo administrativo eletrônico. Para situar o leitor, o texto inicia com breve histórico do desenvolvimento e da implantação de ferramentas de processo eletrônico nas administrações públicas brasileiras, com particular destaque para o modelo mais difundido, que é o Sistema Eletrônico de Informações (SEI). Na sequência, discorre sobre os principais novos desafios para o aprofundamento da digitalização com respeito às garantias do estado democrático de direito e aos direitos dos cidadãos. Destaca, ainda, que a digitalização dos processos, ao contrário do esperado, não significou a superação de problemas antes existentes. Conclui, por fim, com uma reflexão acerca da efetiva capacidade transformadora dos processos administrativos eletrônicos ou se, ao contrário, limitam-se à ferramenta de transposição burocrática.

PALAVRAS-CHAVE

direito administrativo — administração pública — processo administrativo — processo administrativo eletrônico — SEI

Introduction

The growing importance of the administrative process as a central element of administrative legal theory relates more directly to its substantive aspects. Administrative procedure considers process to be the most suitable means and environment for the development and making of public decisions. The

architecture of the process, considered as a decision-making locus, must favor the participation of interested parties, the concern and composition of these interests, and collection of all the elements necessary so that the decision can be made in the most informed, effective way possible.[1]

In this context, therefore, there is no meaning for public administration outside the administrative process. The entire course of public actions necessarily occurs in this environment. Hence, the unequivocal relevance of process as a theoretical element, with a more substantive than formal appeal (more than simply procedural).

For this reason, legislation governing administration has given, over the last two and a half decades, considerable attention to the substance and principles of administrative processes rather than constructing decision-making models. Apart from, as a rule, the reduction of actions to texts, the form of administrative processes was not at the center of legal concerns as regards administrative procedures over the last 20 years.

Over the last decade, however, the implementation of digitalization public administration policies has brought with it electronic administrative process systems,[2] strongly driven from 2020 onwards, by the social isolation caused by the Covid-19 pandemic. There has been then, for the first time, a substantial change in the means and form in which administrative processes are conducted.

The digitalization of administrative processes has presented, to administrative law, new questions. Among them, is the need to ensure the adequacy and compatibility of digital technologies vis-a-vis procedural constitutional guarantees and other legal-constitutional parameters to which public administration is bound. There have been, also, new contours with regards to problems that arose in the analogue world: how to guarantee the access to and transparency of digital processes, the security of these processes and the data involved and the speed of decisions. Important also, is the need to avoid the risk of superficial digitalization, of the electronic process representing only the transposition of a bureaucratic transition from the physical process to the digital environment, so that the implementation of the new tool effectively means a transformation of the decision-making process.[3]

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1 MEDAUAR, Odete. *O direito administrativo em evolução*. 3. ed. Brasília: Gazeta Jurídica, 2017. p. 293.

2 The expression electronic administrative process will be used in this study as it is currently the most widespread and most used in the country, in normative acts and in literature, to refer to the digitalization of administrative procedures. However, the expressions *digital administrative process* and *e-procedure* are sometimes referred to in documents and studies on the topic.

3 In this sense, BORGES DE CARVALHO, Lucas. Governo digital e direito administrativo: entre

After a brief recap of the development of public policy and the regulations on the matter thus far, with emphasis on PLS no. 2,481/2022,[4] in proceedings in the Senate (items 2 and 3), we will discuss, in the following (items 4 and 5), some of the new challenges and old problems that the digitalization of administrative processes brings to administrative law and possible ways to deal with them. We conclude with a question about the potential of electronic administrative processes.

1. Development and implementation of electronic administrative processes in Brazilian public administration

The implementation of the electronic administrative processes is part of the comprehensive digital development of government in Brazil.[5] In summary, digital governance, regulated by Federal Law No. 14,129/2021, involves, according to the Organization for Economic Co-operation and Development (OECD), the use of technologies, vis-a-vis modernization strategies, to enhance public utility, supporting the production and access to data, services and content, towards integrated action in an ecosystem of government entities, non-governmental organizations, business associations and citizens.[6]

Thus, to implement this policy, the federal administration presents strategic objectives, goals, indicators and initiatives for Digital Governance policy in a document, with the same period of validity as the *Plano Plurianual*, called "*Estratégia*

a burocracia, a confiança e a inovação. *Revista de Direito Administrativo*, v. 279, n. 3, p. 144, 2020. Available at: https://doi.org/10.12660/rda.v279.2020.82959. Accessed on: 22 May 2022; CUNHA, Carlos Roberto Lacerda. A transformação digital do governo federal brasileiro analisando as recomendações dos organismos internacionais. Monografia — Universidade Federal de Minas Gerais, Belo Horizonte, 2019. p. 15.

4 Resulting from the Draft presented by the Committee of Jurists integrated by the first author, see item 3, below.

5 The authors have already reflected in more depth on digital government and its legal perspectives in another work, to which we refer: BAPTISTA, Patrícia F.; ANTOUN NETTO, Leonardo S. Governo digital: política pública, normas e arranjos institucionais no regime federativo brasileiro. A edição da Lei federal nº 14.129/2021 e o desenvolvimento da política nacional de governo digital. *Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro*, v. 41, p. 34-34, 2022.

6 "Digital Government refers to the use of digital technologies, as an integrated part of government modernization strategies, to create public value. It relies on a digital government ecosystem comprised of government actors, non-governmental organizations, businesses, citizens' associations and individuals which supports the production of and access to data, services and content through interactions with the government". OECD. Recommendation of the Council on Digital Government Strategies. Paris: OECD Publishing, 2014. Available at: https://www.oecd.org/gov/digital-government/recommendation-on-digital-government-strategies.html. Accessed on: 5 Jun. 2022.

de Governança Digital — EGD" (Federal Decree no. 8,638/2016, article 5). In its current Digital Governance Strategy for the period 2016 to 2019, the federal government highlighted the *Sistema Eletrônico de Informações* (SEI), a tool for managing processes and electronic administrative documents, a significant achievement of the 2000s.

Strictly speaking, the tool was developed by the Federal Regional Court of the 4th Region in 2009, notable also for the establishment of the "E-Proc" system, Brazil's first electronic petitioning system, in 2002, under the then presidency of former minister of the Federal Supreme Court (STF) Teori Zavascki.[7] This is an interesting feature the Brazilian reality: the implementation of a judicial electronic process was prior to the federal administrative electronic process, and, perhaps for this reason, had a great influence on it.

In fact, when the *Ministério do Planejamento* had its first formal contact with the SEI, through Public Consultation no. 1, of January 8, 2013, the tool had already been provided free of charge to 17 other federal, state and municipal bodies, most of which are part of the justice system.[8] Then, in June 2013, *Acordo de Cooperação Técnica* no. 02/2013 was signed, between the Ministério do Planejamento, Orçamento e Gestão, Empresa de Pesquisa Agropecuária (Embrapa), Comissão de Valores Mobiliários (CVM) and the Federal District Government, for the construction of the Processo Eletrônico Nacional (PEN). In December 2014, Joint Ordinance no. 03/2014 was issued, which formally established the SEI governance model within the scope of the Processo Eletrônico Nacional (PEN).

Thus, the federal government opted to use a tool that had been developed by the Brazilian State itself and offered free of charge by the Federal Regional Court of the 4th Region. The specialized literature points out several practical difficulties of this solution confirmed at the time, such as pressure from private and public companies to adopt competing tools available for purchase on the market, as well as the unfeasibility of, at that moment, offering all other federative entities this functionality.[9] Since 2014, a learning curve has resulted in incremental adaptations of the SEI to the reality of public administration,

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7 RAMOS, Miguel Antônio Silveira. *O processo eletrônico como uma política pública de combate à crise do Judiciário e os obstáculos ao acesso à Justiça*. Dissertação (mestrado) — Programa de Pós-Graduação em Direito, Faculdade de Direito, Universidade Federal do Rio Grande, Rio Grande, 2016. p. 69.

8 SARAIVA, André. SEI! A implementação do SEI — Sistema Eletrônico de Informações. ENAP — Casoteca de Gestão Pública, 2018. Available at: https://repositorio.enap.gov.br/handle/1/123, p. 4. Accessed on 15 May 2023.

9 André Saraiva, *Sei!*, op. cit., p. 6.

distinct from that existing in the Brazilian Judiciary, in a process led notably by *Agência Nacional de Telecomunicações (Anatel)*.[10]

In this context, two phases of SEI implementation occurred in the federal administration. The first, quantitative in nature, sought to internally expand the use of the tool, with the establishment of deadlines and schedules for the adoption of the electronic administrative process by October 2017, and with the specific obligation to use SEI, established in February 2018 by Ordinance no. 17/2018, of the Planning Ministry. At a second instance, the qualitative stage was verified, and is ongoing, as constant improvement of the software, with the incorporation of innovative solutions.

In addition to the evolution of the electronic administrative process in the federal public administration, the PEN project has a national relevance, as the SEI should expand to other federative entities. This phenomenon, as will be seen, has specific benefits, such as its interoperability, but also risks, like the decrease in autonomy of states, the Federal District and municipalities. In any case, the adoption of the SEI by other federate entities is already underway in states such as Rio de Janeiro and São Paulo, making the academic effort more relevant in term of the parameterization of legal guidelines.

In this sense, in 2021, the federal government launched a new electronic process, developed on the basis of the SEI, the *Sistema Único de Processo Eletrônico em Rede* (Super.GOV.BR). According to its website, the software aims to go beyond the production, editing, signing and processing of documents and administrative processes among various units, bodies and institutions of the federal government. Super.GOV.BR aims at being a modern platform, with the incorporation of tools to optimize processes and improve the efficiency of public services.[11]

The development and implementation of the electronic administrative process in federal public administration resulted in the need to create a regulatory framework that not only ensured its legal validity, but regulated relevant practical issues, due to the evident differences in processing in relation to the physical procedures. At this point, we should highlight that the same phenomenon occurred, years earlier, in the Judiciary, which, with the expansion of the electronic

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[10] Ibid., p. 7.

[11] Available at: https://www.gov.br/economia/pt-br/assuntos/processo-eletronico-nacional/conteudo/super.br/super-gov.br/?_authenticator=9045fec7f2dd4ef5c53754b238744cf801a4f30f. According to the information appearing on the aforementioned website, at the time this text is written (May 2023), use Super.Gov.br: a Comissão de Valores Mobiliários, a Controladoria-Geral da União (CGU), o Ministério das Comunicações, o Ministério dos Transportes, o Ministério da Defesa e a Presidência da República. Accessed on: May 15, 2023.

judicial process, found itself in with the contingency of approving Federal Law no. 11,419/2006. This, then — the standardization of the process electronic administrative, at the legal level — is the focus of the following discussion.

2. Standardization of the electronic administrative process

The Federal Constitution of 1988 presented, in an unprecedented way, the express guarantee of due administrative legal process, in its article 5, item LIV.[12] Thereafter, especially since the end of the 1990s, there have been infra-constitutional norms, in diverse federate entities, which sought to establish general laws of administrative process, aimed at implementing the constitutional precept. The Brazilian option, highlighted by the specialized doctrine, follows a "relatively minimalist normative model",[13] with ample space for conformation by public administrations and control bodies.

In this context, it was justifiable that, at that time, the legislator did not focus in detail on the regulation of the electronic administrative process, technology that was embryonic at the end of the 1990s. In fact, it already existed, since the establishment of Federal Law no. 7,232/1984, the *Política Nacional de Informática* aimed, among others objectives, at the "continuous adjustment of the computerization process to the peculiarities of Brazilian society" (article 2, item V). However, public policy was still in its infancy. For this reason, most of the laws at that time did not mention this modality,[14] found with more frequency, if tentatively, from the 2000s.

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[12] Professor Sergio Ferraz highlights his decisive participation in the final drafting of the constitutional provision: "I suggested adding 'in the judicial and administrative process'. The reference to the application of these guarantees to the administrative process is absolutely unprecedented, and of little recordability in modern constitutions". CARVALHO, Luiz Maklouf. 1988: *segredos da constituinte* — os vinte meses que agitaram e mudaram o Brasil. Rio de Janeiro: Record, 2017. p. 315.

[13] "Furthermore, Brazilian general administrative procedure laws opted for a normative, relatively minimalist, model, not making an effort to catalog and distinguish the types of procedural rules, thus leaving space for more concrete rules to be constructed by legislation or specific regulations, or even by constitutional jurisprudence […] is an attempt to operate, in the same machine, gears analysts may see as difficult to coordinate: general laws of administrative procedure with unifying intentions that leave ample room for sectoral procedural laws, all of this coexisting with a growing jurisprudential production on administrative process, with constitutional status." SUNDFELD, Carlos Ari. *Direito administrativo para céticos*. 2. ed. São Paulo: Malheiros, 2014. p. 294.

[14] Federal Law no. 9,794/1999 and Law no. 10,177/1998, of the state of São Paulo, legislative milestones of this period, in fact did not expressly mention the possibility of electronic processing.

Law no. 5,427/2009, of the state of Rio de Janeiro, for example, in article 19, § 5, delegated the discipline of the matter to the regulations.[15] Law no. 13,457/2009, of the state of São Paulo, dedicated an entire section, with around 10 articles, to promoting the "computerization of Tax Administrative Process". At the federal level, occasionally, administrative processes allowed electronic modality, as in Federal Law no. 10,520/2002, which in article 2, § 1, expressly admitted administrative processes of contracting in the auction mode, "through the use of technological resources for the information, in accordance with specific regulations". Federal Law no. 12,682/2012, in turn, over five articles, began to define criteria for the elaboration and archiving of documents on electromagnetic media, although this has been largely vetoed.[16]

Thus, given the persistence of minimalist legislative frameworks, in Brazil it was up to public administrations, through infra-legal acts, to regulate their electronic processes. At the federal level, in addition to specific sectoral initiatives, this occurred only in 2015, through Decree no. 8,539/2015, which regulated the aforementioned Federal Law no. 12,682/2012. In this instance, the use of electronic media was more widely regulated within the scope of bodies and direct, autonomous and foundational federal entities. The aforementioned act treated issues in a terminological way, established its principles and objectives — among others, efficiency, effectiveness, safety, transparency, economy and environmental sustainability — and established rules that allowed the practical applicability of the tool.

Identical phenomenon, of progressive regulatory expansion of electronic administrative processes, are seen, to a greater or lesser extent, especially after the limitations imposed due to Covid-19, in other federative entities. In the state of São Paulo, incrementally, successive regulations were introduced,

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[15] State Law no. 5,427/2009, article 19, § 5: "The Public Administration may discipline, by decree, the practice and official communication of procedural acts by electronic means, meeting the technical requirements required in specific legislation, especially those of authenticity, integrity and legal validity".

[16] The veto message from the Ministry of Justice, maintained in the National Congress, gave the following reasons: "By regulating the production of legal effects of documents resulting from the digitalization process in a distinct form, the provisions would give rise to legal uncertainty. Furthermore, authorizations for the destruction of original documents immediately after scanning and for the elimination of documents stored electronically, optically, or equivalent, do not comply with the procedure set out in archival legislation. The proposal also uses the concepts of digital document, digitized document and original document in an unsystematic way. Finally, procedures for reproducing the resulting documents are not established in the digitalization process, so that the extension of legal effects for all legal purposes would not have a technological or procedural counterpoint guarantee that would justify it".

with emphasis on Decrees no. 63,936/2018, 64,355/2019 and 66,509/2022, all recently revoked by Decree no. 67,641, April 10, 2023, which regulates the use of electronic means for the formalization of administrative process within the scope of state public administration and establishes the *Sistema Eletrônico de Informações* for the state of São Paulo (SEI/SP). In the state of Rio de Janeiro, there has also been a profusion of regulatory decrees, unified, on September 19, 2022, by Decree no. 48,209, which regulates the *System Electronic Information System* (Seirj) as the official system for assessment, production, processing and consultation of documents and administrative processes.

In this context of evolution and normative consolidation — infra-legal — of the electronic administrative process, a draft law was presented to the Federal Senate, in 2022, by the commission of jurists chaired by Superior Court (STJ) minister Regina Helena Costa, under rapporteur professor Valter Shuenquener de Araújo, to promote changes in Federal Law no. 9,784/1999.[17] At the time of this present article, the first half of 2023, the draft has become Senate Bill (PLS) no. 2,481/2022, initiated by senator Rodrigo Pacheco, processed by the *Committee of Constitution, Justice and Citizenship of the Upper Chamber*.

Specifically with regard to the electronic process, PLS no. 2,481/2022, inspired by the Portuguese administrative code,[18] in Federal Decree no. 8,539/2015 and in bills under consideration in the Chamber of Deputies,[19]

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[17] The *Subcomissão para a Reforma da Lei do Processo Administrativo*, under rapporteur Professor Valter Schuenquener, included professors Gustavo Binenbojm, Flávio Amaral Garcia, Alexandre Aroeira Salles, Mauricio Zockun, Andre Jacques Luciano Uchoa Costa and the first author of this article.

[18] Código do Procedimento Administrativo (CPA) português, Decreto-Lei nº 04/2015, *Diário da República*, n. 4, 2015, Série I de 2015-01-07. Available at: https://dre.pt/dre/legislacao-consolidada/decreto-lei/2015-105602322: "Article 61. Use of electronic means 1 — Unless otherwise provided by law, the instruction of procedures should preferably use electronic means, with a view to: a) Facilitating the exercise of rights and fulfillment of duties through systems that, safely, easily, quickly and comprehensibly, are accessible to all interested parties; b) Allow access to interested parties re. procedure and information; c) Simplify and reduce the duration of procedures, promoting the speed of decisions, with the necessary legal guarantees. 2 — When instructions for the procedure use electronic means, applications and computer systems must indicate the person responsible for directing the procedure and the body responsible for the decision, as well as ensuring control of deadlines, the orderly processing and the simplification and transparency of the procedure. 3 — For the purposes of the provisions of the previous paragraph, the interested parties have the right: a) To know by electronic means the status of the procedures that concern them directly; b) Obtain the necessary instruments for electronic communication with administration services, namely username and password for access to platforms, simple electronic signatures and, when legally provided, an electronic mail account and certified digital signature". Accessed on: May 15, 2023.

[19] PL nº 1,732/2020, authored by deputies João Bosco and Hugo Leal. Available at: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1878894&filename=PL+1732/2020. Accessed on: May 15, 2023.

follow the minimalist tradition of administrative processes, with open and varied links to public administration and governing bodies spread across the country.[20]

Thus, the Commission that created the draft which became PLS no. 2,481/2022 was oriented towards inclusion, in the general law, of only a few norms containing general guidelines to be observed in the implementation and discipline of processing of electronic documents by the different levels of public administration in the country. Indeed, regarding the nomenclature, the expression electronic administrative process was preferred to digital process, as the first is already established in use.

Concerning the topic of electronic administrative processes, it should be included in the general law of administrative proceedings, Chapter X-A, with articles 47-A to 47-E disciplining general rules on the matter. Article 47-A would establish the preferential nature of the electronic processing, which could only be exempted, exceptionally, "when the electronic medium is unavailable, unfeasible or when facing a risk of significant damage to the speed of the process". Article 47-B, in turn, ensured important conditions for the proper functioning of electronic systems, such as the use of open codes, guarantee of interoperability, establishment of mechanisms for verifying the authenticity and integrity of signatures and of documents, and the standardization and simplification of requirements. Articles 47-C and 47-D are aimed at the effectiveness of (digital) participation of interested individuals and legal entities, while article 47-E introduced an innovative standard aimed at the use of artificial intelligence in public administration.[21]

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[20] Note, the competing competence of the federative entities to institute and discipline their administrative processes, as a result of their autonomy in relation to Federal Union. However, it is essential to recognize the guiding role attributed to federal legislation, either by the state and municipal public administrations themselves, or by the jurisprudence of the superior courts. In this sense, the statement of Summary No. 633 of the STJ is highlighted, as it evokes the supplementary and subsidiary character of the federal standard, in verbis: "Law no. 9,784/1999, especially with regard to the deadline for the review of administrative acts within the scope of the federal Public Administration, may be applied, in a subsidiary manner, to states and municipalities, if there is no local and specific standard that regulates the matter".

[21] The proposal for article 47-E was presented with the following wording: "The use of artificial intelligence models within the scope of the electronic administrative process must be transparent, predictable, auditable, previously informed to interested parties and allow the review of their data and results. Sole paragraph. A.I. models should preferably use open codes, facilitating integration with the systems used in other bodies and public entities and enable their development in a collaborative environment". The introduction of the instrument in Federal Law No. 9,784/1999 is in line with the evolution of this topic in academia. In this sense, the new instrument meets the provisions of Statement No. 12 of the Jornada de Direito Administrativo, in verbis: "The robotic administrative decision must be sufficiently motivated,

As can be seen from the brief overview of the proposed legal provisions, in light of new challenges and old problems, PLS no. 2,481/2022 contributes to a maturing public debate on the electronic administrative process. It proposes consolidation of basic parameters, about which there is relative consensus, which will serve as guidance for public officials and managers.

In the following section we discuss the obstacles — new and old — which need to be overcome to effectively implement the tool in Brazilian public administration, to achieve a more efficient, digitalized governance.

3. New challenges

The digitalization of administrative processes involves technological aspects which the law, for various reasons, must take on board. Faced with the challenges arising from digitalization and the rapid innovations of this industry, it is necessary and desirable to establish normative standards that ensure respect for values inherent in the democratic state, in law. The challenge is to legally assimilate the technology of electronic processes, taking care not to undermine the capacity for innovation.

3.1 Open-source code

The development of electronic process tools presupposes the use of one or more source codes,[22] a programming language. There are closed-source codes, distributed under license, protected by patent and intellectual property rules, which may not be modified by anyone other than the license holder. There are, however, so-called open-source codes which, despite having open source licenses, can be studied, modified and distributed by anyone. Their development is usually collaborative and public.

Even though, in principle, some Brazilian public administrations have hired large multinational technology companies to develop the electronic process, the different levels of government are realizing the need to ensure independent digital technologies, sensitive to the area of digital sovereignty.

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its opacity being grounds for invalidation".

[22] According to Wikipedia, "source code is the set of words or symbols written in an orderly manner, containing instructions in one of the existing programming languages, in a logical way." Available at: https://pt.wikipedia.org/wiki/C%C3%B3digo-fonte. Accessed on: May 15, 2023.

Therefore — and this is one of SEI's main appeals, responsible for its success and diffusion —, the use of open source codes has been highlighted as a requirement for development and implementation of electronic process tools, as with other digital technologies. In this sense, article 47-B of PLS no. 2,481/2022 which points to the preferential use of open codes, grants that, for a certain functionality, there may be no open source available, making it necessary for the public administration to resort, exceptionally, to a proprietary code.

The objective of privileging the use of open codes, as stated, is not just to avoid dependence on one or another company. Technology ensures the freedom to develop and more advanced collaboration by way of these tools. The aim is also to preserve freedom of tender and contracting for the development of technological tools that best adapt to public needs. With open source, different levels of administration and government will be able to collaborate among themselves and exchange experiences, in electronic networks, as has already been happening, benefiting simultaneously from the experiences of 5,600 Brazilian public administrative bodies.

3.2 Interoperability

According to the definition in the reference document that establishes the *Padrões de Interoperabilidade de Governo Eletrônico* (ePING) (Standards for Electronic Government Interoperability (ePING), published by the federal government, "interoperability can be understood as that referring to the ability of diverse systems and organizations to work together (interoperate) to ensure that people, organizations and computer systems interact to exchange information in an effective and efficient manner".[23]

Concern with the interoperability of electronic government systems and, among other things, the interoperability of electronic process systems was present, as reported, from the initial moment of development of these public policies by the federal public administration. The Processo Eletrônico Nacional (PEN) initiative, from the beginning, involved integrating the various electronic processing then under development.

The adoption by the various bodies and entities of standards that, as well as open, are interoperable systems, is, in reality, a practical necessity

[23] Documento de Referência da ePING — Versão 2018, Ministério do Planejamento, Desenvolvimento e Gestão Secretaria de Tecnologia da Informação e Comunicação, Departamento de Governo Digital. Available at: https://www.gov.br/governodigital/pt-br/governanca-de-dados/ePING_v2018_20171205.pdf. Accessed on: May 2023.

given the reality of a federated State, with almost 5,600 autonomous public administrations, not counting the independent powers, entities with constitutional autonomy, and indirect entities, enjoying, to some extent, administrative autonomy and the competence to, in theory, establish rules and systems for electronic processing.

So that all these parties can interact, making lives of citizens who depends on interoperability — a concept that is much more technological than legal — there must be a minimum standard for the functioning of all electronic processing systems that are or will be adopted at any level of public administration in the country.

Thus, item II of article 47-B of PLS no. 2,481/2022 establishes that electronic processing systems need to observe the guarantee of interoperability, as with any intelligence instrument. adopted, as will be seen below.

The interoperability policy has always been clear, and, thus far, is apparently successful. Furthermore, in this sense, the concerns of system developers are clearly recognized, particularly the SEI system. The development of the SEI system, most used in the country, at all levels of government, owes a lot to the Federation module, launched in 2021, which allows for the sharing of processes between institutions. Actions may be carried out simultaneously in institutions; updating data, in the *Process Tree*, occurs periodically, over a short period of time.

Mention should also be made of the enactment, in October 2022, of Ordinance Seges/ME no. 9,412, which established Tramita.GOV.BR, a communication platform for electronic systems for the processing of information and documents among the various existing systems within the federal administration.

Given the various interoperability initiatives in effect, it is clear that standardization in the general law functions, therefore, more as a reinforcement — to make it clear that it is not just about implementing a policy, but fulfilling a legal duty.

Additionally, however, it is necessary to recognize that this is a matter whose parameters are in the field of technology, where it has already merited appropriate treatment, as seen in the ePING reference document mentioned.

3.3 Use of artificial intelligence

As controversial as it is inevitable, public administration will make use, at some point, of artificial intelligence (AI) for electronic administrative decision-making processes — to automate laborious, standardizable cognitive tasks.[24]

Within the scope of the Judiciary, not only are there already artificial intelligence tools in use by the Superior Courts — the STF has been using two robots, Victor, since 2017, for screening resources, and Rafa, for classifying processes, according to the UN agenda[25] — but the area is now standardized. The Conselho Nacional de Justiça (CNJ) regulated the use of AI through Resolution No. 332, of August 21, 2020, which provides for ethics, transparency and governance in the production and use of AI in the Judiciary and takes other measures.[26] The biggest concern of the standards is to ensure the compatibility of tools with respect for users' fundamental rights and indicate the possibilities for controlling its use.

In order to provide a minimum of discipline and parameters capable of guiding managers in the decision to implement any AI model in public administration, PL no. 2,481/2022 opted, in art. 47-E,[27] to limit itself to showing the need for transparency, predictability and auditability of its use. The draft standard, evidently, does not make any technical inroads regarding the type of AI model capable to be employed. However, it establishes as non-negotiable that (i) citizens and society in general are clearly and previously informed regarding the use of an automated model and (ii) that it is possible to review the data and results produced by AI. These two guarantees, it is believed, greatly reduce the risks of robot errors which, where identified, can be corrected.

Furthermore, the project reinforces the same requirements for AI as for other digital platforms and tools in use by public authorities: open codes,

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[24] VIEZZER, Matheus. O uso da inteligência artificial pelo sistema jurídico brasileiro, classificação da inteligência artificial e análise de seu uso. *Revista Ibero-Americana de Humanidades, Ciências e Educação*, São Paulo, v. 8 n. 1, jan. 2022. Available at: https://periodicorease.pro.br/rease/article/view/3950. Accessed on: 15 May 2023.

[25] See: https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=499690&ori=. Accessed on: 15 May 2023.

[26] See: https://atos.cnj.jus.br/files/original191707202008255f4563b35f8e8.pdf. Accessed on: 15 May 2023.

[27] "Art. 47-E. The use of artificial intelligence models within the electronic administrative process must be transparent, predictable, auditable, informed in advance to interested parties and allow the review of its data and results. Sole paragraph. Artificial intelligence models should preferably use open codes, facilitate their integration with systems used in other bodies and public entities and enable its development in a collaborative environment."

interoperability and collaborative development, in to ensure independence, economy and sovereignty of administration in relation to the systems in use.

4. Old problems

Alongside the new challenges, the digitalization of administrative processes has not fully overcome some of the old issues. Defects and obstacles often resulted in the frustration of administrative legal processes and the violation of other procedural rights vis-a-vis public administration. In its digital version, some of these old problems, now under a new guise and with new nuances, persist. New remedies may be necessary.

4.1 Access to the electronic process and the phenomenon of digital exclusion

In the age of "paperclips administration"[28], the difficulty of accessing administrative processes resulted from numerous obstacles: the need to go to the source of distribution, the location of the process, knowing what the document was and the information needed. Everything was difficult, costly and multiplied countless times due to the distances in a country of continental dimensions such as Brazil.

With the transition to a digital process, the access barrier becomes the technology itself. On the one hand, the population often lacks the wherewithal to access electronic processing systems. And, on the other hand, even where tools are available, there are cognitive difficulties resulting from poor education and social conditions, age and income, making access to new digital technologies challenging and which, in practice, can mean the population are cut off from

[28] "*Administrative law of paper clips* (DAC) is that of a Stationery Administration, which acts through records and acts, deals with rights and duties on paper, is statist, distrustful of private individuals, disregards relationship between time, costs and results, does not prioritize." SUNDFELD, Carlos Ari. O direito administrativo entre os clips e os negócios. In: ARAGÃO, Alexandre Santos de; MARQUES NETO, Floriano de Azevedo (Coord.). *Direito administrativo e seus novos paradigmas*. Belo Horizonte: Fórum, 2008. p. 89.

public services provided. This is a phenomenon known as digital inequality[29] or digital exclusion.[30]

In this scenario, it is necessary for public administration, in the implementation and development of the electronic process, to provide means of access to relevant platforms. It must, if not eliminate, at least reduce the risks of exclusion, proactively offering equipment (tablets, terminals, etc.) in easily accessible locations, and access to network signals for integration with digital platforms. At the same time, it must seek to develop digital tools and solutions whose operation is simple and easily understood by the population — making applications available to cell phones, broadband access —, disseminating usage tutorials and offering training.

Thus, PLS no 2,481/2022, to guarantee broad, simple and rapid access to electronic processes (article 47-A, item II), imposed on the public administration an obligation expressly to provide the means of access, endowing it, at least in part, with the burden of combating digital exclusion (article 47-C): "Art. 47-C. The Public Administration must ensure that interested parties have the means to access and consult the electronic administrative processing systems, and practically master processes of interest to them."[31]

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[29] SCHIEFLER, Eduardo André Carvalho; CRISTÓVAM, José Sérgio da Silva; SOUSA, Thanderson Pereira de. Administração pública digital e a problemática da desigualdade no acesso à tecnologia. *International Journal of Digital Law*, Belo Horizonte, ano 1, n. 2, p. 10, maio/ago. 2020: "Digital inequality can have several origins, which are normally 'related to the individual's physical conditions, cognitive or motivational, sociodemographic characteristics, such as education level, income, professional status, language, ethnicity, age, gender and geographic location'. Therefore, the difficulty of adapting to technologies faced by certain people should not be ignored under the pretext that Digital technology provides several benefits to citizenship, as discrimination may occur vis-a-vis users and the attribution of activities to a restricted group of willing employees', resulting in a tendency to concentrate power in the hands of a few."

[30] Reyna, Gabardo and Santos draw attention to digital exclusion in the country, especially among the elderly, those with little or no education, and the unemployed, particularly vulnerable when it comes to digitalization of public services. REYNA, Justo; GABARDO, Emerson; SANTOS, Fábio de Sousa. Electronic government, digital invisibility and fundamental social rights. *Seqüência: Estudos jurídicos e políticos*, v. 41, p. 38, 2020. Available at: https://periodicos.ufsc.br/index.php/sequencia/article/view/75278. Accessed on: 15 May 2023.

[31] Concern about citizen access to digital processing is also present in art. 14 of the Portuguese Code of Administrative Procedure: "Article 14. Principles applicable to electronic administration. 1 — Public Administration bodies and services must use electronic means when performing activities, in order to promote administrative efficiency and transparency and proximity to interested parties. 2 — The electronic means used must guarantee availability, access, integrity, authenticity, confidentiality, preservation and security of information. 3 — The use of electronic means, within the limits established in the Constitution and the law, is subject to the guarantees provided for in this Code and the general principles of administrative activity. 4 — Administrative services must make electronic means available and disseminate them appropriately, so that interested parties can use them in the exercise of their legally protected

4.2 Transparency and the risk of opacity

The crises in administrative practice and consequent increase in processes are interconnected phenomena that have, whose main causes include the need for greater legitimization of public administration decisions in a democratic state of law.[32] For this reason, Federal Law no. 9,784/1999 identifies as one of the criteria that must define the federal administrative process "official disclosure of administrative acts, except for cases of secrecy provided for in the Constitution" (article 2, sole paragraph, item V). Likewise, Law no. 10.177/1998, of the state of São Paulo, expressly states that dissemination is one of the guiding principles of the administrative process (article 4). Law no. 5,427/2009, of the state of Rio de Janeiro, goes further, explicitly including the principle of transparency (article 2).

In this sense, the tenet of administrative law is to reduce the opacity of the unilateral decision-making in the closed rooms of the state bureaucracy. Notwithstanding the recent legislative effort, the fact is that great difficulty persists in obtaining the desired transparency. As stated elsewhere, "the process, in itself, does not generate legitimacy. Legitimization, in fact, is the result of greater involvement of parties in decision making".[33] In other words, the means in themselves are insufficient to promote democratic value; actors must be focused on this purpose. In the context of this historic problem, which plagues Brazilian public administrations, the electronic administrative process must be clearly understood.

On the one hand, there is no doubt that its implementation can contribute towards increasing the transparency of public administration. We should

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rights and interests, namely to formulate desires, obtain and provide information, undertake consultations, present allegations, make payments and challenge administrative acts. 5 — Interested parties have the right to equal access to Administration services, and under no circumstances may use of electronic devices for unforeseen restrictions or discrimination against those who interact by non-electronic means. 6 — The provisions of the previous paragraph do not prejudice the adoption of positive differentiation for the use, by interested parties, of electronic means in interactions with the Public Administration".

32 "The secret, invisible, power in the Administration, proves contrary to the democratic character of the State. Broad transparency contributes to guaranteeing the rights of those administered; at a more general level, it ensures conditions for objective legality because it gives the population the right to know how the Administration acts and takes decisions; it 'tears down the secret wall of the administrative citadel', enabling permanent control over its activities […], with dissemination as a rule, there is 'dialogue rather than muteness, transparency instead of opacity', and the trust of the administered in the Administration is elevated." Odete Medauar, *O direito administrativo em evolução*, op. cit., p. 235.

33 BAPTISTA, Patrícia. *Transformações do direito administrativo*. 2. ed. Rio de Janeiro: Lumen Juris, 2018. p. 169-170.

note, in fact, that the enactment of the *Lei de Acesso à Informação* (Federal Law no. 12,527/2011) was one of the catalysts for the development of the electronic administrative process at federal level.[34] The pressing need to increase the quantity and quality of information provided to interested citizens, including sanctions against inactive civil servants, intensified the move toward digitalization. Federal Law no. 12,527/2011, thus, was a driving force of transparency.

At the same time, the usefulness of the tool depends on effectively overcoming a culture of secrecy, unfortunately, still rooted in public administration. In this light, a recent circumstance threatens potential advances — in transparency —, based on an extreme interpretation of *Lei Geral de Proteção de Dados* (Federal Law no. 13,709/2018). It should be noted, there is no objection here to the legitimacy of the new legislation, nor to the express promotion, resulting from Constitutional Amendment no. 115/2022, of data protection in digital media as a fundamental right, in accordance with article 5, LXXIX, of the 1988 Federal Constitution.

In reality, the diagnosis is diverse and has an interpretative bias. Under the pretext of applying Federal Law no. 13,709/2018, vis-a-vis an excessively broad interpretation granted by many Brazilian public administrations, considerable data and information is subjected to the most varied hypotheses of secrecy. The potential "*administrative short circuits*"[35] arising from the relationship between the *Lei de Acesso à Informação* and *Lei Geral de Proteção de Dados* are, to some extent, inevitable: most of the acts practiced by Brazilian public administration involves data — sensitive or otherwise — of interested individuals or third parties, who require due protection by public authorities. The risk, however, is not in the law itself, but rather the scope that can be given to data protection, to the detriment of access to information.

At this point, then, it seems necessary to exercise greater caution in interpretation. In light of the principle of proportionality, solutions must be pursued that do not imply the total loss of transparency to the detriment of data protection. The argumentative burden for restricting access to administrative procedures based on the General Data Protection Law must be more rigorous and not require specific, contextual motivation in each case, in pursuit of generic solutions and labels, at the possible cost of transparency.

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[34] André Saraiva, *Sei!*, op. cit., p. 3.

[35] ARRUDA, Rafael. LAI e LGPD no mundo dos dados: uma relação de curtos-circuitos administrativos. *Portal Jota*, 7 May 2023. Available at: https://www.jota.info/opiniao-e-analise/artigos/lai-e-lgpd-no-mundo-dos-dados-07052023. Accessed on: 10 May2023.

Furthermore, where possible, prior judgment should be made regarding which information in the administrative process is worth protecting, opting for techniques that limit confidentiality to specific data or documents and not their entirety. Without this interpretative caution, it is quite possible that the electronic administrative system is incapable of solving the old problem of opacity in management of public affairs and, unfortunately, may even deepen it.

4.3 Decision time

Section LXXVIII of article 5 of the 1988 Federal Constitution, through Constitutional Amendment no. 45/2004, guarantees "to everyone, in the judicial and administrative sphere, […] a reasonable timeframe for the process and a guarantee of promptness". This, in deed, is a chronic problem in Brazil: the slowness in resolving conflicts generates legal uncertainty and often generates social unease. In this sense, the physical processes of the aforementioned "administration of paperclips", in addition to difficulties of access, was marked by a great delay in the definitive resolution of claims against the State.

Digitalization of administrative processes, meanwhile, raised expectations of a significant reduction of bureaucratic procedures with a direct impact on efficiency. This indeed was the hope of the Judiciary's when it adopted the electronic process as a public policy to combat the failures of judicial practice.[36] But, although the topic needs further in-depth research and empirical study, the perception is that even the electronic system faces challenges which compromise agility. As Miguel Ramos points out, from the perspective of electronic judicial proceedings, basic infrastructure obstacles — technological, normative, cultural and human — remain, which limit the advantages of this new tool.

PLS no. 2,481/2022, in line with the provisions of the Federal Constitution of 1988, was also sensitive to this concern, expressly regulating the issue, emphasizing that one of the objectives of the electronic administrative process is to "simplify and reduce the length of procedures, promoting speedy decisions, without prejudice to constitutional and legal guarantees" (article 47-A, item III).

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[36] "Thus, for example, activities such as punching holes in paper, stapling documents, certifying dates, deadlines, etc., no longer exist as the activity of an employee, and are now executed directly through the electronic protocol for attaching a document, or through the system of automatic certification. It is estimated that there is the possibility of reducing around 60 to 70% of processing time, under ideal usability conditions (CNJ, 2014a)." Miguel Antônio Silveira Ramos, *O processo eletrônico como uma política pública de combateà crise do Judiciário e os obstáculos ao acesso à justiça*, op. cit., p. 90.

The inclusion of this instrument in Federal Law no. 9,784/1999 — reflected in the constitutional text itself in Constitutional Amendment no. 45/2004 — has an important symbolic role, but the effective solution to this historic problem necessarily requires greater discussion of the functionalities of the electronic administrative process.

4.4 Data security

If previously, in the world of paper, administrative processes were at risk of loss, destruction, whether accidental or not, or undue access, where they included information classified as confidential; in the digital world data security issues have multiplied. Cyber risks, notably leakage of relevant information, have amplified the public debate around security of sensitive data of individuals and data relevant to State sovereignty. In fact, from the perspective of data security, the problems vis-a-vis electronic processes, can be of two different orders.

The first is the issue, already mentioned, of the security of personal data, protected by the public administration — and which, in our opinion, in a somewhat rushed and excessive manner, has compromised the transparency of public affairs. Thus, the problem of guardianship of private data by the State is intensely debated, in light of *Lei Geral de Proteção de Dados*, in academic works dedicated to the topic[37] and STF jurisprudence.[38] In this sense, in 2020, under

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[37] ZULLO, Bruno Almeida. *A Disciplina Jurídica da Proteção de Dados Pessoais no Estado*: desafios na era do governo digital. Dissertação (mestrado em direito público) — Universidade do Estado do Rio de Janeiro, Rio de Janeiro, 2020.

[38] STF, ADI 6649, julg. 15/09/2022, rel. min. Gilmar Mendes: "The Court rejected the preliminaries; unanimously, for ADI 6,649; regarding ADPF 695, the Ministers were defeated by a majority. André Mendonça and Nunes Marques, were not aware of the argument. On merit, by majority, they judged the requests are partially valid, providing an interpretation in accordance with Decree 10,046/2019, translated in the following terms: 1. The sharing of personal data between Public Administration bodies and entities presupposes: a) choice of legitimate, specific and explicit purposes for data processing (art. 6, item I, of Law 13,709/2018); b) compatibility of the processing with the stated purposes (art. 6, item II); limitation of sharing to the minimum necessary to meet the stated purpose (art. 6, item III); as well as full compliance with the requirements, guarantees and procedures established in the General Law of Data Protection, as compatible with the public sector. 2. Sharing of personal data between public bodies presupposes strict compliance with art. 23, item I, of Law 13,709/2018, which determines that due transparency of the hypotheses, in which each government entity shares or has access to bank data, [...] 3. Access by government bodies and entities to the Citizen Base Registry is conditioned on full compliance with the guidelines listed above, [...] 4. Sharing personnel information in a registry of intelligence activities will observe the provisions of specific legislation and the parameters set in the judgment of ADI 6,529, Rel. Min. Cármen Lúcia […] 5. The processing of personal data by public bodies, contrary to legal and constitutional parameters, will impose civil liability on the part of the State for damages

rapporteur minister Rosa Weber, the Supreme Court suspended Provisional Measure no. 954/2020, aimed at allowing the sharing of personal data by telephone companies with the *Instituto Brasileiro de Geografia e Estatística* (IBGE), among other reasons, due to the lack of guarantee regarding data security.[39] Further, in this context, in compliance with the STF decision in ADI no. 6,649/2020, the federal government enacted, on November 28, 2022, Federal Decree no. 11,266/2022, which adapted the terms of the previous decree (no. 10,046/2019) to the decision of the Court, in order to ensure adequate protection of sensitive data held by the federal government for public purposes.

On the other hand, a diverse but extremely sensitive issue — neglected, to a certain extent, by legislation, doctrine and jurisprudence — is the protection of data and metadata relevant to the sovereignty of the states themselves. In others words, there is little and incipient debate, in the legal environment, around the challenge of guaranteeing security to the existence of the process itself and the electronic management system that supports it. Greater maturity is needed on relevant issues regarding who should guard this public and private data. Where can it be stored safely and securely? Who would, in the end, bear the financial burden? The delegation of this task, or part of it, to private

incurred by individuals, in accordance with arts. 42 et seq. of Law 13,709/2018, associated with the right of recourse against civil servants and political agents responsible for the illicit act, in the event of guilt or intent. 6. Willful breach of the duty of transparency established in art. 23, item I, of the LGPD, outside of the constitutional hypotheses of secrecy, the state agent will be held responsible for acts of improbity, in accordance with art. 11, item IV, of Law 8,429/92, without prejudice to the application of sanctions or disciplinary measures provided for in the statutes of federal, municipal and state civil servants. Finally, the Court declared, with effect for the future, the unconstitutionality of art. 22 of Decree 10,046/19, preserving the current structure of the Central Data Governance Committee for a period of 60 days, from the date of publication of the minutes of the judgment [...] All in accordance with the vote of Minister Gilmar Mendes (Rapporteur), partially defeated and in the terms of their respective votes, Ministers André Mendonça, Nunes Marques and Edson Fachin. Under the Presidency of Minister Rosa Weber". Plenary, 15.9.2022.

39 In her paradigmatic vote, minister Rosa Weber clearly identified the core of the issue: "Another point which what I draw your attention to is that, despite the exclusivity of the use of data collected by IBGE, the Provisional Measure 954 does not (contain) any guarantee that ensures implementation is safe. There is no provision for external auditing and no liability for possible improper access or misuse of collected data. […] What I make clear, in this perfunctory judgment, is that it cannot be done in a way that does not guarantee protection mechanisms compatible with constitutional clauses that ensure individual freedom (art. 5, head paragraph), privacy and free development of personality (art. 5, X and XII). Requiring cars to be equipped with brakes, airbags and rear-view mirrors does not mean creating obstacles for the automobile industry, requiring that standards involving fundamental rights and personality comply with minimum requirements of constitutional suitability, nor can it be read as an embarrassment to state activity." (Ação Direta de Inconstitucionalidade nº 6.387, ministra relatora Rosa Weber, j. 07.05.2020, *DJe* 12.11.2020).

organizations generates concerns in relation to the sovereignty of individual states; while the full assumption of this activity by public entities confronts the recognized lack of expertise in public administration of human resources. The issue may belong to public administration, but, due to its general relevance, needs to be standardized.

In this regard, the reference to the guarantee of data protection in article 47-A, item V of PLS no. 2,481/2022 embodies this concern. However, approval of the bill would only be a starting point for public debate — which deserves greater reflection — around the larger problem of protecting data, which will likely be intensified with the expansion of digital government.

5. Electronic process: decision-making transformation or bureaucratic transposition?

By way of conclusion, the following question is proposed: to what extent does the digitalization of administrative processes in Brazil present an opportunity to truly transform the public administration decision-making process? Or, on the contrary, is what is happening a mere transposition of bureaucratic logic from the paper to the digital world? In the latter scenario, electronic processes are mere emulations of their paper counterparts, without substantial change or gain in the quality of administrative decisions.

Although there are reasons for scepticism, it must also be recognized that the window of opportunity for a more effective change has not yet closed. The digitalization of administrative processes is recent in Brazil, accelerated by the pandemic. Its challenges and issues continue to be mapped. It is possible that time and digital evolution contribute to increasing the decision-making quality of public administration, with real gains in speed, efficiency, transparency and legitimacy.

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