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# Personal data protection and State surveillance: the risks of digital discrimination and the Federal Supreme Court's vision

# *Proteção de dados pessoais e vigilância estatal: os riscos de discriminação digital e a visão do Supremo Tribunal Federal*

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**Abstract**: This article proposes an examination of the changes that have taken place in the organization of society in the face of the advancement of new mechanisms of monitoring and state surveillance, with the objective of identifying the dangers arising from them and the risks that a new digital discrimination entails for fundamental rights. Based on a dialectical analysis, we move on to the study of the necessary transformations of consent, revisiting the classic civil law institute, now in the wake of the new General Law for the Protection of Personal Data (Law nº. 13.709/2018). Subsequently, we move on to the study of the impact brought about by the decision rendered by the Federal Supreme Court in the legal analysis of ADI (Direct Action of Unconstitutionality) nº. 6.389/DF, which deemed the provisions contained in Provisional Measure nº 954/2020 and recognized the existence, in our national legal system, of the fundamental right to informative self-determination that, with the approval of EC (Constitutional Amendment) 115/22, was inserted in art. 5, LXXIX as a fundamental right to personal data protection. Finally, it concludes by the necessary structuring of the National Data Protection Authority (ANPD), provided for in article 55-A of the LGPD (General Law for the Protection of Personal Data), representing its creation as an instrument that materializes the objective dimension of this fundamental right.

**Keywords**: Personal data protection. State surveillance. Informative self-determination.

**Resumo**: O presente artigo propõe um exame das transformações ocorridas na organização da sociedade frente ao avanço de novos mecanismos de monitoramento e vigilância estatal, tendo como objetivo a identificação dos perigos deles decorrentes e os riscos que uma nova discriminação digital acarreta aos direitos fundamentais. A partir de uma análise dialética, passa-se ao estudo das necessárias transformações do consentimento, revisitando o clássico instituto de direito civil, agora no bojo da nova Lei Geral de Proteção de Dados Pessoais (Lei nº 13.709/2018). Ato contínuo, passa-se ao estudo do impacto trazido pela decisão proferida pelo Supremo Tribunal Federal no julgamento da ADI nº 6.389/DF, que julgou inconstitucionais as disposições contidas na Medida Provisória nº 954/2020 e reconheceu a existência, em nosso ordenamento jurídico pátrio, do direito fundamental à autodeterminação informativa que, com a aprovação da EC nº 115/22, foi inserido no art. 5º, inciso LXXIX, como direito fundamental à proteção de dados pessoais. Por fim, conclui-se pela necessária estruturação da Autoridade Nacional de Proteção de Dados (ANPD), prevista no artigo 55-A da LGPD, representando a sua criação um instrumento concretizador da dimensão objetiva desse direito fundamental.

**Palavras-chave**: Proteção de dados pessoais. Vigilância estatal. Autodeterminação informativa.



## Introduction

A society based on measures of intense state surveillance is fundamentally linked to the maintenance of certain power relations.[1] And that is precisely why the sense of vision, widely favorite in Western tradition, emerges as a paradigm of human cognition. For Astrit Schmidt-Burkhardt,[2] her multi-dimensional semantics in the French language clearly expresses this notion: *voir* (vision), *savoir* (knowledge) and

[1] In this work, although there are no major digressions about its concept, we share the idea of power as a strategy, for Michel Foucault. Going beyond Max Weber's bureaucracy issue, Foucault places surveillance in a broader context of discipline in society as a whole, and not just within organizations. (RODOTÀ, Stefano. *A vida na sociedade de vigilância:* a privacidade hoje. Rio de Janeiro: Renovar, 2008, p. 24-25)

[2] SCHMIDT-BURKHARDT, Astrit. The All-Seer. In: LEVIN, Thomas Y.; FROHNE, Ursula; WEIBEL, Peter (org.). *Ctrl space*: rethorics of surveillance from Bentham to big brother. Karlsruhe: ZKM, 2002, p. 17-18.

*pouvoir* (power) have the same radical. The symptomatic etymological relationship reveals the structural duality of vision, connecting with reason, control and power, but also with the illumination of truth through surveillance. Thus, detaching itself from a fixed semantic structure, the vision oscillates between different fields of interaction between man and the world.

It is correct to say, therefore, that the evolution of the human species is strongly linked to the adoption of certain social and behavioral designs that, in some way, contribute both to the orderly preservation of our communities and to the maintenance of the current power structure. In the search for better conditions of security, collective health and efficiency of the public sector, the State imposes on individuals the burden of illuminating fragments of their individuality. Measures of this nature can already be felt in Brazil for a long time, such as the biometric re-registration, promoted by the Superior Electoral Court (TSE) from 2008, aiming at the implementation of a new system of voter identification;[3] or, also, the creation of the National Civil Identification (ICN), provided for in Law No. 13,444/2017 and which will use databases from the Federal Executive Branch and the National Council of Justice in an integrated manner with the biometric records stored by the Electoral Justice System.[4]

The question that deserves further reflection, however, is another one: how to deal with excessive state interventions that occur silently, without a clear delimitation of their purposes? That is to say, how to oppose what is not even *known*?

If, on the one hand, the growing technological development - allied to a gradual detachment from the protection of one's own privacy - brings countless comforts to a new avatarized individual, who wanders through social networks and intuitive software, it is also true that this scenario cohabits a growing risk of digital discrimination on the part of the State, which has long understood the need to approach particular superstructures in society. Through them, the act of governing, referring to the way in which society is ordered and regulated in its various shades, is associated with personal data processing, access control and creation or exclusion of opportunities.[5]

This is not the only reason why a new format of surveillance is said to emerge, different from those already experienced at other times. In the world of consumption,

[3] Resolution nº 22.688/2007 regulated the procedures for updating the electoral register, resulting from the implementation, on an experimental basis, of a new form of voter identification, through the incorporation of biometric data from all voters. According to the planning of the Superior Electoral Court, the conclusion of the biometric review was expected until 2022, collecting data from over 99 million voters. Available at: http://www.tse.jus.br/eleitor/biometria/informacoes-sobre-o-planejamento-da-biometria-2017-2022.

[4] CORREA, Adriana Espíndola. Lei de Proteção de dados e a identificação nacional: há antinomias? *CONJUR*, 2019. Available at: https://www.conjur.com.br/2019-fev-18/direito-civil-atual-lei-protecao-dados-identificacao-nacional-antinomias. Access in jun 2022.

[5] GANDY, Oscar. The surveillance society: information technology and bureaucratic social control. *Journal of Communication*, 1989, 39:3.

the role of tracking the population is no longer to prevent or discourage certain behaviors, in a classic view of the observer. On the contrary: the main interest is usually the maintenance of collective conduct, reaching a certain degree of predictability by data controllers. The real objective is, therefore, the classification of individuals based on their consumption profiles, political, cultural, sexual and social inclinations. Nowadays, speaking of "business strategy" means, ultimately, collecting information that describes the characteristics of the possible recipients of the product or service to be offered, discriminating families and segments of the population by crossing personal data.[6] Thus, Bruno Ricardo Bioni's statement is correct when he emphasizes that the personal data of internet users represent, today, a unique piece of complex virtual advertising gears in a new market science in terms of surveillance.[7]

In addition to trade relations, the tendency towards social sorting expands to all types of abstract data, including genetic and biometric references, computerized administrative files that, in the end, are manipulated to produce "risk categories" on a networked system. As David Lyon teaches, the individualization of risks encourages an increase in vigilance, suggesting its constant need. However, following this reasoning, there is no longer an institutional space that is not currently tainted by the categorization of the human beings: information such as whether a person owns a particular property, is married, may get marry, what their level of education is and whether they have employees at their service start to retain importance from the technological developments that we know.[8]

Ulrich Beck had already warned that, with the increase in the productivity of "goods", "evils" would also arise, some of them of a social and political nature. Bearing in mind that a large-scale technological infrastructure is prone to generating problems of equal magnitude, an inadvertent touch or swipe of the screen has made it possible to cause previously unthinkable damage. Issues involving the development and application of technology in nature, society and involving humanity itself become part of a circle of political and scientific "management" of risks, while the promise of safety is accentuated and needs to be reaffirmed in some opportunities in relation to public opinion through interventions in regarding technical-economic development.[9]

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6 RODOTÀ, Stefano. *A vida na sociedade de vigilância*: a privacidade hoje. Rio de Janeiro: Renovar, 2008, p. 114.

7 BIONI, Bruno Ricardo. *Proteção de Dados Pessoais*: a função e os limites do consentimento. Rio de Janeiro: Forense, 2019, p. 18.

8 LYON, David. Surveillance as social sorting – Computer codes and mobile bodies. In: LYON, David (org.). *Surveillance as social sorting*: privacy, risk and digital discrimination. New York: Routledge, 2003, p. 14.

9 In this sense, Ulrich Beck emphasizes the new paradigm of what he calls *risk society*, whose core is based on the solution of a completely new problem, with the advent of modernization - understood not only as the rationalization and transformation of work and organization, but also lifestyles, structures of influence and power, political forms of oppression and participation. (BECKER, Ulrich. *La sociedad del riesgo:* hacia una nueva modernidad. Buenos Aires: Paidós, 1998, p. 26).

As Carlos Helder Mendes[10] notes, the sense of fear and danger already widespread in society broadens, now addressing not only the transgression of physical borders, but also those present in "cyberspace".

Indeed, from the protection of national borders to the regulation of international transactions, at the financial level, and from security at airports to the tracking of containers in sea ports, risk assessment is one of the main characteristics of surveillance. This involves a non-stop compilation and classification of data from, for example, passengers or business transactions. At the same time, there is the potential for combining data collected in different segments of society. Medical and consumer data, evaluated together, can be strong allies to credit discrimination or in the health insurance market, which raises concerns about the smoothness in obtaining information and its accuracy at the time of storage. As a result, these records have a direct and indirect influence on people's routine and on the emergence or restriction of opportunities. Depending on how they are used, chances are removed by the investment risk assessment, its logic migrates from the organizational sector to the population itself – and according to its geographical location –, now responsible for bearing the dangers that their social relations entail.[11] [12]

Due to this new surveillance format, the problem of the protection of minorities arises, *but now with elasticized margins by the potential that data mining makes possible.* Thus, a discussion of this nature can no longer be focused solely on the formal recognition of access to networks or, even, on the right to know whether or not the data about an individual was collected, which would prove to be insufficient to guarantee a new *electronic citizenship*[13] – now exercised in an emancipatory space for the use of information and communication technologies – and the effective prior and informed protection of those whose data are collected and processed.[14]

In this article, we seek to analyze the risks that a society configured in this way represents to the free development of the personality, taking into account

[10] MENDES, Carlos Helder Carvalho Furtado. *Tecnoinvestigação Criminal*: entre a proteção de dados e a infiltração por Software. Salvador: Editora JusPodivm, 2020, p. 32.

[11] Information Commissioner: A Report on the Surveillance Society. September, 2006. Available at: http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/surveillance_society_full_report_2006.pdf. Access in jun. 2022

[12] RUARO, Regina Linden; RODRIGUEZ, Daniel Piñeiro; FINGER, Brunize. O direito à proteção de dados pessoais e a privacidade. *Revista da Faculdade de Direito (UFPR)*, v. 53, p. 58, 2012.

[13] The doctrine that deals with this subject is vast, oscillating when trying to situate recent technological developments and their inevitable future reflections on democracy and social organization. About the theme, cf. RHEINGOLD, Howard. *The virtual community*: homesteading on the electronic frontier. Cambridge -MA: The MIT Press, 2000.

[14] RODOTÀ, Stefano. *A vida na sociedade de vigilância*: a privacidade hoje. Rio de Janeiro: Renovar, 2008, p. 115.

not only the Brazilian regulatory framework on the protection of personal data (Law No. 13,709/2018), but also the role of the Federal Supreme Court in the construction of the fundamental right to informative self-determination (*Informationelle Selbstbestimmung*), which certainly hastened the approval of EC 115/22, which inserted item LXXIX into article 5 of the Federal Constitution, the fundamental right to personal data protection. In addition to criticizing the temporal misalignment between the Brazilian reality and the construction of such a legal figure by the German Constitutional Court, which, still in 1983, defined it as "*the right of individuals to decide for themselves when and within what limits your personal data may be used*",[15] it is urgent to improve the counter-response structures available to citizens to face the onslaughts of a State capable of collecting, monitoring and classifying data.

It should be noted that this article is anchored in the research line of Law, Science, Technology & Innovation and in the Research Project, called The Protection of Personal Data in the Surveillance Society: the fundamental right to privacy of the Graduate Program in Law at PUCRS (the Pontifical Catholic University of Rio Grande do Sul), as well as, within a larger, international Project, of the San Pablo University of Madrid (Spain) financed by the Spanish Ministry of Economy and Competitiveness, Reference DER2016-79819- R.

## 1 Digital discrimination

Much is said about the irregular plot that modern man is faced with today, in a discourse that often invokes a globalized, borderless and delocalized world, while new technologies – or rather, their use – can determine a deep social fragmentation.[16] This line of thinking is even more misaligned when confronted with the routine social conflicts that occur in most democratically organized societies, especially with regard to *digital discrimination*.

The concept of discrimination, which gives rise to several definitions in the scope of Sociology, History and Politics, can be outlined in the field of law as the *legal disapproval of violations of the isonomic principle with harmful results to the recipients of unequal treatment*, more seen from the perspective of substantive than formal – because, at first, only inequality that proves to be harmful seems to

[15] SCHWABE, Jürgen; MARTINS, Leonardo (Org.). *Cinqüenta anos de jurisprudência do Tribunal Constitucional Federal Alemão.* Berlim: Konrad-Adenauer-Stiftung E.V., 2005, p. 238.

[16] As for the so-called social fragmentation, it is worth checking the provocation made by Stefano Rodotà: "[...] Society decomposes. With what effects? A permanent adherence to individual needs and tastes, in a perspective that exalts consumer sovereignty? Or the obligation to comply with parameters of statistical normality, under penalty of exclusion from the market or access under particularly onerous conditions (RODOTÀ, Stefano. *A vida na sociedade de vigilância*: a privacidade hoje. Rio de Janeiro: Renovar, 2008, p. 114.)

deserve revision.[17] Considering that there are many ways to analyze the phenomenon, however, the definition that already exists at the international level and contained in the International Convention on the Elimination of All Forms of Discrimination, approved by the United Nations in 1965 and ratified by Brazil in 1968. In it, racial discrimination is defined as "any distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin, which has the purpose or result of nullifying or restricting the recognition, enjoyment or exercise at the same level (on equal terms) of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".[18]

There is also the Convention on the Elimination of All Forms of Discrimination against Women,[19] providing a similar definition, with the exception of limiting it to the conditions of the female figure and the exercise of their citizenship. Based on the two international documents, therefore, and in compliance with article 5, paragraph 2, of the Federal Constitution,[20] it is already possible to assess its relevance in the Brazilian legal system, adding to its content the prohibitive provisions of discrimination that already exist in the body of the Constitution, as can be seen, for example, from the protection of the women's labor market, in article 7, item XX.

The problem with a globalized environment, filled with an excessive thirst for technological advances, lies in the fact that, at times, some legal boundaries, such as these, are forgotten, as an example brought by Canadian scientists illustrates. In a genetic study of the Oji-Cree aboriginal tribe, located in Sandy Lake, Canada,[21] its population is defined as more prone to health problems as a whole, and also has a high tendency to develop type 2 diabetes. The research would certainly be beneficial to health care programs, enabling a more targeted and judicious "management strategy", were it not for the fact that its results give rise to the discrimination of a segment of the population by predetermined biological characteristics. Based on

[17] RIOS, Roger Raupp. *Direito antidiscriminação*: discriminação direta, indireta e ações afirmativas. Porto Alegre: Livraria do Advogado, 2008, p. 19-20.

[18] International Convention on the Elimination of All Forms of Discrimination. Available at: http://www.dhnet.org.br/direitos/sip/onu/discrimina/lex81.htm. Accces in jun. 2022.

[19] "Article 1 - For the purposes of this Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction based on sex which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by women, regardless of their marital status, on the basis of the equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

[20] As Ingo Wolfgang Sarlet teaches us, from the material opening of the fundamental rights catalog, inserted in article 5, paragraph 2, of the Federal Constitution, it is extracted that, in the image of the Lusitanian experience, materially fundamental rights can be recognized, even if not formally affirmed. (SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais:* uma teoria geral dos direitos fundamentais na perspectiva constitucional. Porto Alegre: Livraria do Advogado, 2010, p. 92-96).

[21] The study, with the title "*Absence of Association of Type 2 Diabetes With CAPN10 and PC-1 Polymorphisms in Oji-Cree"* ia available at: http://care.diabetesjournals.org/content/24/8/1498.2.full.

this argument, sociologist Jennifer Poudrier[22] is concerned about potential errors, abuses and, above all, in terms of the strengthening of *genetic discrimination*[23] – a condition by which individuals or social segments are harmed by virtue of their biological composition/inheritance.

The theme, which is constantly debated both in the field of politics and in the legal field (with greater emphasis when contextualized to the reality of health insurance), presents another element that highlights the divergence, namely, the insistence of genetic science on the use of "race" and "ethnicity" as special categories in medical and epidemiological research. In this regard, the sociologist recalls that, apart from the fact that the last two decades have confirmed, by her geneticists and biologists, the anthropological conviction that such concepts are more the result of cultural constructions than genetic predeterminations – as she declared in January 2001, the Director of the Human Genome Project[24] – carrying out scientific research does not imply forgetting values, contexts, or even a disinterested and artificially aseptic approach.[25] The use of new methods and technological advances, teaches David Flaherty,[26] must occur based on the consideration of competing values and not simply because they are available.

In the field of consumption, the evaluation of data made discrimination between people with less or greater purchasing power even more robust. Companies such as Amazon.com use sophisticated technology to trace consumer profiles, linking the information provided by their users both at the time of purchase and when searching for products on the Internet. Due to that, they direct the material to be offered based on the credit risk that people present and according to the products that are likely to interest them. However, in line with the official Surveillance Studies Network report, Amazon.com itself, on some occasions, is already able to offer the same product at

[22] POUDRIER, Jennifer. "Racial" categories and health risks epidemiological surveillance among Canadian First Nations. In: LYON, David (org.). *Surveillance as social sorting*: privacy, risk and digital discrimination. New York: Routledge, 2003, p.111.

[23] The theme, which will be addressed in this work only indirectly, is specifically interested in the collection and processing of genetic data, its official document is the UNESCO International Declaration on Human Genetic Data. For a more detailed analysis on the subject, cf. HAMMERSCHMIDT, Denise. *Intimidade genética &Direito da Personalidade.* Curitiba: Juruá, 2008.

[24] Francis Collins has stated that there is often more genetic variation between people classified as the same "race" or "ethnicity" than members of "diverse" groups and assumes that the fact that genetic research continues to explore these two fields is likely to remain a heavy burden to Science. (POUDRIER, Jennifer. "Racial" categories and health risks. epidemiological surveillance among Canadian First Nations. In: LYON, David (org.). *Surveillance as social sorting*: privacy, risk and digital discrimination. New York: Routledge, 2003, p.127)

[25] It is noted, only in order to illustrate the vagueness of the results presented, that, in addition to Aboriginal people, the American Diabetes Association identified as "high risk" groups, in 1999, of Latin American, African, Asian, and Hispanic descent peoples. (POUDRIER, Jennifer. "Racial" categories and health risks> epidemiological surveillance among Canadian First Nations. In: LYON, David (org.). *Surveillance as social sorting*: privacy, risk and digital discrimination. New York: Routledge, 2003, p.127)

[26] FLAHERTY, David. Visions of privacy: Past, present and future. In: BENNETT, Colin; GRANT, Rebecca. *Visions of privacy:* policy choices for the digital age. Toronto: University of Toronto Press, 1999, p. 24.

different prices, based on the remuneration profile of each individual.[27] Consumers, therefore, are extremely vulnerable to discrimination and, paradoxically, their right to access correct information is restricted in the digital age.

There are countless techniques for extracting, collecting and combining data capable of personalizing the offer of consumer goods to internet users. Expressions such as data warehousing, data mining and profiling[28] come to appear as instruments loaded with ambivalence: while they guide the main relationship strategies of large companies with their target audience, generating more comfort and practicality in targeting products and services, they also allow for digital exclusion and discrimination within society.

Precisely for this reason, an impulsive commitment to the latest scientific discoveries should be viewed with caution, as there is no lack of historical precedents demonstrating the dangers of an unrestricted attachment to advancing the technique. As in the field of genetics, information and communication technologies also need to be questioned, not only when it comes to their factual feasibility, but also regarding their political, ethical, legal and social feasibility.[29] And this does not imply opposition or impediment to innovation; on the contrary, what we wish is to achieve it by escaping from the classic dichotomy of "progress at any cost", on the one hand, and, on the other, a fragile resistance frightened by science. In the words of Paulo Ferreira da Cunha, perhaps the challenge is "to stop conceiving the present moment as a 'geometric point without space', compressed between the past and the future, and to expand the 'present' in space, as a time still for some compatibility between freedom and technological convenience". [30]

This is the role of electronic citizenship, which is established in the face of the effective possibility of using the Internet no longer surrounded by the traditional borders of States, in a process of expansion in global proportions, which, however, must be imbued with a social aspect, in order to design new institutions of freedom and, with that, guarantee the defense of fundamental rights in a data collection environment.[31]

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[27] Information Comissioner: *A Report on the Surveillance Society*. September, 2006, p. 8. Available at: http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/surveillance_society_full_report_2006.pdf. Access in jun. 2022.

[28] The expression data warehousing refers to the act of compiling data from different operating systems, structured according to their relevance, thus allowing a mapping of the scenario for making strategic decisions. Such practices can occur using different techniques, such as, for example, data mining, or even with the construction of profiles (profiling). (MENDES, Laura Schertel. *Privacidade, proteção de dados e defesa do consumidor*: linhas gerais de um novo direito fundamental. São Paulo: Saraiva, 2014, p. 108-111).

[29] RODOTÀ, Stefano. *A vida na sociedade de vigilância:* a privacidade hoje. Rio de Janeiro: Renovar, 2008, p. 142.

[30] CUNHA, Paulo Ferreira. *A Constituição viva:* cidadania e direitos humanos. Porto Alegre: Livraria do Advogado, 2007, p. 176.

[31] Perhaps in this sense, the recent democratic experience outlined in the elaboration of the Civil Rights Framework for the Internet in Brazil (Law No. 12,965/14) points to important values such as human rights,

Therefore, it is not only intended to provide means of defense to the collection of data or the improper use of information obtained automatically; Ultimately, it is about not allowing virtual relationships – existing in a specific environment, that is, a *meeting place situated in an alternative reality*[32] – to run free, always governed by commercial priorities in an inevitable absorption of public and private spheres for an even greater production and exchange.[33] The simple fact that we live in a different reality from models not so distant, which if we looked at four decades ago, it would have been enough to capture them. That fact, though, should not, in itself, lead to the maintenance of a system that seems to govern itself. If personal data collected by surveillance technologies flow freely through social networks and websites, this does not mean that, for each of them, there is due consent – or even *knowledge* from people. This logic must be questioned and regulated, immediately removing any contrary argument that is based on accusations of censorship or information restrictions. What we wish is, on the contrary, to promote democratic and anti-discriminatory housing in an artificial space with currents that, sometimes, prevent the accomplishment of guarantees and fundamental rights.[34]

In tune with this reality, the new General Law for the Protection of Personal Data – Law No. 13,709/2018 - inserts a true anti-discrimination provision, providing, in it, that personal data related to the regular exercise of rights cannot be used to the *detriment* of its holder.[35] It also imposed on the data controller the duty to provide clear and adequate information regarding the criteria and procedures used in automated decision-making, under penalty, if not doing so, to be subjected to an audit "*to verify discriminatory aspects in automated processing*".[36] And it could not be different, since the LGPD includes, as a guiding principle for data processing,

the exercise of citizenship in digital media, the guarantee freedom of expression, protection of the privacy of personal data, net neutrality and many others. Available at: http://culturadigital.br/marcocivil/category/consulta/1-direitos-individuais-e-coletivos-eixo-1/1-1-privacidade. Access in jun. 2022.

32 The definition of the environment as a *meeting place* can be found in the work of Carlos Alberto Molinaro, who adopts it by articulating all the constitutional provisions of the current Political Charter and infra-constitutional legislation. For the author, *the environment is a meeting place for the biotic and abiotic conditions that make existence possible*. MOLINARO, Carlos Alberto. *Direito ambiental* – proibição de retrocesso. Porto Alegre: Livraria do Advogado, 2007. Cf, also, HARTMANN, Ivar. *Ecodemocracia:* a proteção do meio ambiente no ciberespaço. Porto Alegre: Livraria do Advogado, 2010.

33 RODOTÀ, Stefano. *A vida na sociedade de vigilância:* a privacidade hoje. Rio de Janeiro: Renovar, 2008, p.157.

34 Information Comissioner: A Report on the Surveillance Society. September, 2006. Available at: http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/surveillance_society_full_report_2006.pdf. Access in May, 18 2022.

35 Art. 21. Personal data relating to the regular exercise of rights by the holder cannot be used to their detriment.

36 Paragraph 1 The controller shall provide, whenever requested, clear and adequate information regarding the criteria and procedures used for the automated decision, observing commercial and industrial secrets. Paragraph 2 In the event of failure to provide the information referred to in Paragraph 1 of this article based on the observance of commercial and industrial secrecy, the national authority may carry out an audit to verify discriminatory aspects in automated processing of personal data.

non-discrimination, described as the impossibility of carrying out the treatment for illicit or abusive discriminatory purposes.[37]

Provisions in this sense inhabit the legislative scenario of all countries that propose a serious protection of personal data. The handling of information in a globalized and cross-border economy, highlighted by José Luis Piñar Mañas,[38] added to the complexity of a heterogeneous legal composition, sometimes covering the risks to which individuals are subjected by simple digital interaction, leaving traces that, gradually and in due course, will be used by the market or State. Hence the need to implement such rules capable of implementing the principle of security, which does not find its ultimate purpose in data, protection, but in a right of the holder not to be discriminated against for information obtained in an irregular way. This is the *principle of security* – provided for in article 6 of the LGPD –, which reveals the connection between an adequate level of respectability and the effective awareness of citizens in the handling of different technologies. Even though this constitutes an arduous task for the Legislator, and in a scenario in which the risks are not visible to most of the population, the State has no other option, but to establish a regulatory framework that takes these difficulties into account. Therefore, the principle of security, in the Brazilian legal system, today requires the "use of technical and administrative measures capable of protecting personal data from unauthorized access and from accidental or unlawful situations of destruction, loss, alteration, communication or dissemination".[39]

The protection of the anti-discriminatory treatment of personal data can also be noted in the LGPD by the express mention of the *principle* of *data quality* (article 6, item V), which implies demanding accuracy and completeness of the information stored, used and transferred, keeping it up to date to the exact extent of its need.[40] For Humberto Nogueira Alcalá,[41] the central idea of the principle is summarized in the simple requirement of veracity of the information collected, whether in the temporal, qualitative or quantitative aspect.

This principle, which is also inserted in the European scenario through the General Data Protection Regulation (GDPR),[42] takes into account what José Antônio

[37] Article 6, item IX. of LGPD.

[38] MAÑAS, José Luis. Códigos de conducta y espacio digital. Especial referencia a la protección de datos. *La revista de la Agencia de Protección de Datos de la Comunidad de Madrid*, ISSN 1988-1797, nº. 44, 2010.

[39] Art. 6, item. VII, of Law nº 13,709/2018.

[40] TERWANGNE, Cécile de. Is a global protection regulatory model possible? In: GUTWIRTH, Serge; POULLET, Yves, et. al. (Org.). *Reinventing data protection?* Bruxelas: Springer, 2009, p. 175-189, p. 185.

[41] ALCALÁ, Humberto Nogueira. Autodeterminación informativa y Hábeas Data en Chile y información comparativa. In: *Anuário de Derecho Constitucional Latinoamericano*, 2005, p. 449-471, p. 452.

[42] It is an international regulation that does not require internalization by member countries and that, since 05.25.2018, in an inaugural manner, reaches borders beyond Europe, touching the shores of all continents. In its article 47, "d", it provides for the application of the general principles of data protection, among which the data quality is included.

Peres Gediel and Adriana Espíndola Corrêa[43] point out, that is, the double pressure suffered by the effective protection of personal data in a control society. On the one hand, there is pressure from the State to increase the quantity and quality of information about citizens, often in the quest to guarantee their safety and health conditions; on the other, there is the market, which perceives the economic value of accessing data on potential consumers. In compliance with all other principles, keeping certain data truthful and up-to-date is a condition to avoid situations of discrimination that impede access to all kinds of opportunities, especially in the field of consumption.

As it can be seen, the new scenario in which the surveillance society is inserted overflows the old pendulum discussion between privacy and freedom, as David Lyon points out, forming a lively and dynamic scenario, with which the different social tensions inevitably relate to. Ignoring the discriminatory potential that the new forms of data processing provide would ultimately imply, as recent events demonstrate, in not taking the protection of fundamental rights in Brazil seriously.[44] Here, the role of consent stands out and its transformations, including those occurred and yet to come, start to be analyzed.

## 2 The transformations of consent

Before analyzing consent as an institute of civil law – and its revision is necessary in view of the advances of society, relating increasingly closely to the rights of personality –, two points must be taken into account, in a generic and collective manner, namely: a) whether there is, in fact, room for effective consent in the surveillance society; b) if there is a real social insurgency to surveillance or, on the contrary, its existence is widely consented and desired, even in the face of the reduction of the private sphere. For Lothar Michael,[45] the fact that the global press makes public the private lives of countless famous people and celebrities, with the sole purpose of increasing the number of sales of their media material, which ranges from the most indiscreet investigations and photographs up to the mass reproduction of irrelevant facts in a person's routine, such as the act of driving a car or shopping in daylight. That is only understandable to the extent that this type of behavior brings readers closer to notorious figures admired by them and by society.

[43] GEDIEL, José Antônio Peres; CORRÊA, Adriana Espíndola. Proteção jurídica de dados pessoais: a intimidade sitiada entre o Estado e o mercado. *Revista da Faculdade de Direito da Universidade Federal do Paraná*, n. 47, p.141-153, 2008.

[44] LYON, David (org.). *Surveillance as social sorting*: privacy, risk and digital discrimination. New York: Routledge, 2003, p. 01).

[45] MICHAEL, Lothar. Pressfreiheit und Schutz der Privatsphäre im Spiegel nationalen und spezifisch europäischen Verfassungsrechts. *Jahrbuch des Öffentlichen Rechts der Gegenwart*. Mohr Siebeck: 2005, p. 357-375.

However, from a legal point of view, factual situations are extracted from this that accentuate complicated collisions of fundamental rights,[46] also encompassing the issue of consent.

Regarding the first point, Gary T. Marx[47] states that the act of consent presupposes a prior awareness of its possible effects, which constitutes an arduous task in terms of surveillance and data collection. Identifying what will be the use of the information provided by a cell phone service user, for example, has become factually impossible. There is no doubt that, when performing certain activities, individuals implicitly submit to the violation of their will, as in cases of medical emergencies or in the scope of civil policing. In the author's view, however, what happens today, as a rule, is a false respect for an induced consent, depending on the quality attributed to it. Just to illustrate the wording, a person can be informed that their data will be collected if there is consent or, in a different way, their data will be collected automatically, *unless* there is an expression of their disagreement.[48] The last configuration, not by chance, is the most frequently adopted in the surveillance society, taking advantage of the lack of knowledge regarding the possibility of disagreement or the possible negative effects of connivance, thus increasingly gathering information about the population.

Naturally, a concept of consent proves to be extremely problematic, given the influence of different cultures on the perception of world events, coupled with the fact that the very act of choice almost always occurs in situations that are not completely free. Nevertheless, to be legally relevant, such a choice must imply possible alternatives and its effects of the refusal do not entail exorbitant damage.[49] Gary T. Marx illustrates the point well with the example of a passenger who, when sitting in the seat of a company plane, is faced with the following warning: *Security measures are being taken to observe and inspect passengers. No one will be forced to submit to a search of this nature if they choose not to board our planes.* Rather than wasting days on a car or bus trip to another state, the customer naturally submits to the inspection.[50]

Situations like this, it must be repeated, should not be seen in terms of conspiracy or whose interests are purposely hidden due to possible illegality. In

[46] MICHAEL, Lothar. Pressfreiheit und Schutz der Privatsphäre im Spiegel nationalen und spezifisch europäischen Verfassungsrechts. *Jahrbuch des Öffentlichen Rechts der Gegenwart.* Mohr Siebeck: 2005, p. 357-375.

[47] MARX, Gary T. Ethics for the new surveillance. In: BENNETT, Colin J.; GRANT, Rebecca (org.). *Visions of privacy:* policy choices for the Digital Age. Toronto: University of Toronto Press, 1999, p. 51.

[48] MARX, Gary T. Ethics for the new surveillance. In: BENNETT, Colin J.; GRANT, Rebecca (org.). *Visions of privacy:* policy choices for the Digital Age. Toronto: University of Toronto Press, 1999, p. 51.

[49] MARX, Gary T. Ethics for the new surveillance. In: BENNETT, Colin J.; GRANT, Rebecca (org.). *Visions of privacy:* policy choices for the Digital Age. Toronto: University of Toronto Press, 1999, p. 52.

[50] MARX, Gary T. Ethics for the new surveillance. In: BENNETT, Colin J.; GRANT, Rebecca (org.). *Visions of privacy:* policy choices for the Digital Age. Toronto: University of Toronto Press, 1999, p. 52.

many circumstances, citizens are able to repel excessive intrusions and insist on the observance of a certain rule – when it exists –, questioning the system or opposing the use of their data for purposes that are insufficiently clear or of dubious legality. The individual's ability to control, however, as field research carried out by the Gallup Organization has pointed out, does not tend to approach a level of protection such that it satisfactorily limits unwanted exposure and the collection of personal data with valid consent.[51] When asked about tools capable of guaranteeing greater security for personal data on the Internet, only 54% of the population said they use them in their activities. Of those who do not use them, many said they did not know how to handle them (19%) or were unaware of their real effectiveness (19%).[52]

As for the second point to be investigated – whether or not there is a real insurgency to surveillance – many authors analyze social behavior as dubious and loaded with symbologies. Realizing that the current generation tends to submit to an increasing exposure in virtual space through social networks represents only a superficial analysis of an externalized collective behavior. Victor Burgin[53] states that, interpreting external exhibitionism, there would be a much wider space to be explored than the mere need to be seen; there would, in fact, be a search for an external look that would *subject* subjects, placing them in a place in the world. The other, in the author's words, would appear here as a "living mirror" for self-observation and self-approval, emptying the uncomfortable feeling of "being by oneself" in the world.[54]

Jacques Lacan's *mirror stage*,[55] therefore, is now reconstructed in another context, in the search for a look that gives integrity to the individual. According to Léa Silveira Sales, such a stage would be equivalent to the author's effort to specify the process of men's formation using the identification of their totalized image, which, in turn, *precipitates them despite their 'sense of themselves' pointing, oppositely, to a feeling of lack of bodily organization and fragmentation.*[56]

Perhaps here lies an undeniable tendency to accept surveillance nowadays, perceived as an integrative instrument of subjectivity, which perhaps does not completely weaken the issue of consent of those who hold the ownership of personal

[51] Information Comissioner: A Report on the Surveillance Society. September, 2006. Available at: http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/surveillance_society_full_report_2006.pdf. Access in May, 18 2010.

[52] *Data Protection in the European Union - Citizens' perceptions*: Analytical Report, 2009.

[53] BURGIN, Victor. Jenni's Room: Exhibitionism and solitude. In: LEVIN, Thomas Y.; FROHNE, Ursula; WEIBEL, Peter (org.). *Ctrl space:* rethorics of surveillance from bentham to big brother. Karlsruhe: ZKM, 2002, p. 228.

[54] SAAVEDRA, Giovani Agostini; SOBOTTKA, Emil Albert. Introdução à Teoria do Reconhecimento de Axel Honneth. *Civitas – Revista de Ciências Sociais,* v. 8, n. 1, jan/apr, 2008, p. 9-18.

[55] LACAN, Jacques. El estadío del espejo como formador de la función del yo (je) tal como se nos revela en la experiencia psicoanalítica. In: *Escritos I.* México, Siglo XXI, 1984. Available at: https://arditiesp.files.wordpress.com/2012/10/lacan_estadio_del_espejo.pdf. Accces in jun. 2022

[56] SALES, Lea Silveira. Posição do estágio do espelho na teoria lacaniana do imaginário. *Revista do Departamento de Psicologia da Universidade Federal Fluminense*, vol.17 no.1 Niterói Jan./Jun 2005, p. 113-127, p. 125.

data, but undoubtedly represents a point taken into account. consideration by the Brazilian Legislator, especially when the General Law on Personal Data Protection provided, for example, regarding the revocability of such acquiescence. According to article 5, item XII, of the LGPD, consent is defined as the "*free, informed and unequivocal expression by which holders agree to the processing of their personal data for a specific purpose*". Such authorization, however, can be revoked at any time by the individual through his express manifestation, which must be possible in a simplified and free way. Here, in the words of Danilo Doneda, there is an option for the Brazilian legislator to privilege the self-determination of the data subject, refuting a commercial or contractual bias on information relating to the individual.[57]

In any case, in tune with a new form of social interaction, in which the margins of private life are stretched for greater agility in communication and interaction, the LGPD, in its article 7, paragraph 1, waives the requirement of consent for the processing of the data made manifestly public by its holder – without neglecting, however, all other rights and principles provided for in the Law. And it could not be otherwise, under penalty of practicing a radical negationist discourse similar to that preached by the *Luddites*,[58] enraged with a process of technological evolution that did not take long to erupt. It is, therefore, necessary to have a realistic look at this new framework, which is characterized by a distribution and use of power that is different from the way in force until then. For Stefano Rodotà,[59] this is the only way to achieve the promised balance in the relationship between the protection of individual freedoms, administrative and business efficiency.

It is for this reason that Bruno Bioni highlights the need to abandon the logic of "everything" or "nothing" regarding privacy protection policies, making room for greater *granularity* of consent, which, in turn, would allow holders to agree or not with the collection of some of their personal data, delimiting in advance for which purposes there would be agreement. And this goes through the perception that technology can be an ally, not an enemy, of data protection, as allowed by Privacy Enhancing Technologies (PETs). Thus, the challenge that is imposed, in the regulatory aspect, is to enable the use of new technologies having as a basic premise the protection of the private sphere, no longer delegating to the incumbent the duty to individually repel an increasingly opaque and generalized monitoring.[60]

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[57] DONEDA, Danilo. *Da privacidade à proteção de dados pessoais:* elementos da formação da Lei Geral de Proteção de Dados. 2ª ed. São Paulo: Thomson Reuters Brasil, 2019, p. 304.

[58] The *Luddites* were a social movement of British textile artisans who, in the early 19th century, rose up against the technological developments of the Industrial Revolution, often destroying mechanized looms and other machines that entirely altered the way of life of the time. (DONEDA, Danilo. *Da privacidade à proteção dos dados pessoais.* Rio de Janeiro: Renovar, 2006).

[59] RODOTÀ, Stefano. *A vida na sociedade de vigilância*: a privacidade hoje. Rio de Janeiro: Renovar, 2008.

[60] BIONI, Bruno Ricardo. *Proteção de Dados Pessoais*: a função e os limites do consentimento. Rio De Janeiro: Forense, 2019, p. 172-174.

However, it is crucial to highlight the insufficiency of legislative provisions that exclusively delegate to individuals and to their consent the control over their personal data, an option removed by the Brazilian legislator and endorsed by the Federal Supreme Court in the ruling of the Direct Action of Unconstitutionality n. 6,387/DF, analyzed below.

## 3 The fundamental right to personal data protection in the view of the Supreme Federal Court (Direct Action of Unconstitutionality – ADIN Nº 6.389/DF)

As it can be seen, the provisions of the LGPD establish a new logic in the profile of personal data protection, now more attuned to the objective dimension of fundamental rights,[61] insofar as it imposes on the public entity - but not exclusively - the burden of proceduralizing a greater protection of the individual's information. In addition to simple statements to be applied by the Judiciary in moments of collision, it is now up to the State, as Ulysses did in Homer's Odyssey, to tie itself to the mast of a new digital vessel, avoiding the blow of the totalitarian winds that, from time to time, sometimes, also navigate the informational seas.

The importance of this debate, prior to the approval of EC 115/22, which expressly inserted the right to data protection as a fundamental right in article 5, item LXXIX, became even more evident with the edition of Provisional Measure No. 954/2020, published on April 17th, 2020 and which provided for the sharing of data by telecommunications companies with the *Fundação Instituto Brasileiro de Geografia e Estatística –IBGE* (the Brazilian Institute of Geography and Statistics), for the purpose of "supporting official statistical production" during the situation of public health emergency arising from the Coronavirus (COVID-19) Pandemic. In its provisions, MP No. 954/2020 imposed on companies the duty to make available the list of the names, telephone numbers and addresses of their consumers, whether natural or legal persons, for "official statistical production". The objective, therefore, would be to conduct interviews in a non-face-to-face manner within the scope of household surveys.

This is, of course, what we call *crisis legislation*,[62] in which subterfuges are sought for the adoption of measures potentially harmful to fundamental rights,

[61] The conception of the objective dimension of fundamental rights refers to the *Lüth* case, whose sentence was handed down by the German Constitutional Court and which recognized, in an inaugural way, the assertion that they could also be directed against the State as an objective order of values, and not only as a duty of non-violation: SCHWABE, Jürgen; MARTINS, Leonardo (Org.). *Cinqüenta anos de jurisprudência do Tribunal Constitucional Federal Alemão.* Berlim: Konrad-Adenauer-Stiftung E.V., 2005, p. 387-388.

[62] Formulas like this are known beyond Brazilian borders, as highlighted by Lydia R. Wilson e Robert McCreight. About the theme, cf. Wilson, Lydia R. JD, MA, CPP and McCreight, Robert Ph.D. (2012) "Public Emergency

theoretically justifiable by the exceptional situation that the world is going through. The arguments brought to light are the same in different countries: overly strict regulations make it impossible to collect and use data, which, in turn, slows down government responses based on demographic information, thus aggravating the Pandemic scenario. The Data Protection Law, therefore, becomes the true enemy of society.[63]

This line of argument is, however, flawed. The LGPD sets out principles and rules that in no way prohibit the activities of personal data processing, requiring only a responsible, clear and reasoned posture from the Public Power, and does so to reinforce the protection of the integrity, dignity and privacy of individuals against the risks of discrimination that a hasty and nebulous collection can generate, especially in the midst of the serious health crisis that is experienced.

In a historic decision – and comparable to the sentence of the German Census Law (Volkszahlungsurteil)[64] – the Plenary of the Federal Supreme Court endorsed the Precautionary Measures granted by Minister Rosa Weber in Direct Actions of Unconstitutionality nº 6.387, 6.388, 6.389, 6.393, 6.390, suspending the application of the aforementioned Provisional Measure. According to ADI 6.389, proposed by the Brazilian Socialist Party and with the participation of professors Danilo Doneda and Rafael Araripe Carneiro, the authors first point out the existence of formal unconstitutionality in MP (Provisional Measure) nº 954/2020, given the failure to comply with the constitutional requirements of relevance and urgency for its edition, (art. 62 of the Constitution), as well as the patent material unconstitutionality, in the face of violation of the dignity of the human person, the inviolability of intimacy, privacy, honor and image of people, data secrecy and informational self-determination (arts. 1, III, and 5, X and XII, of the Brazilian Federal Constitution).

The vote given by Minister Gilmar Ferreira Mendes deserves a detailed analysis, which highlights the need to keep the current Normative Force of the Federal Constitution in order to preserve the individual guarantees "which constitute the basis of constitutional democracy and are currently directly threatened by the mismatch between the power of surveillance and protection of privacy". And this is related to the high capacity of collecting, processing and analyzing personal data

Laws & Regulations: Understanding Constraints & Opportunities" *Journal of Homeland Security and Emergency Management*: Vol. 9: Iss. 2, Article 7. DOI: 10.1515/1547-7355.2034.

63 KUSKONMAZ, Elif Mendos; GUILD, Elspeth. Covid-19: A New Struggle over Privacy, Data Protection and Human Rights? Available at: https://europeanlawblog.eu/2020/05/04/covid-19-a-new-struggle-over-privacy-data-protection-and-human-rights/. Access in jun. 2022.

64 Specifically in German law, the Census Law Sentence is considered the Magna Carta of its dogmatic construction, insofar as it brought support to the constitutional discussion on State intervention and control in the private sphere of the individual. From then on, every limitation or restriction on the right to informational self-determination was required to have a constitutional legal basis. (BUCHNER, Benedikt. *Informationelle Selbstbestimmung im Privatrecht*. Mohr Siebeck, 2006, p. 43).

of government officials, who are now able, using algorithms and data analytics tools, to promote discriminatory classifications and stereotypes of social groups for decision-making regarding the allocation of opportunities that provide access to employment, business and social goods.

In the words of the Minister, "It is precisely this reconfiguration that enables the affirmation of the right to informational self-determination as a counterpoint to any concrete context of data collection, processing or transmission that may constitute a dangerous situation". And here it is important to clarify the irrelevance regarding the greater or lesser harmful potential of the data in isolation, since, based on technological development, no information can be considered, per se, irrelevant; its crossing in disrespect to the principles included in the LGPD can cause irreparable damage, if the purposes of its collection are distorted.

As Laura Schertel Mendes pointed out, the trial is a milestone in the Brazilian legal system, as it made personal data protection a fundamental right in an inaugural way.[65] This is because the Rapporteur Minister Rosa Weber, in her reasons, recognized the existence of a "fundamental right to informative self-determination, to give rise to judicial protection when its violation is not duly justified by a sufficient, proportional, necessary and adequate reason and with effective protection of confidentiality before third parties, with governance that includes the Judiciary, the Public Ministry, the Law and civil society entities". Submitted to the Plenary, the decision was upheld by a majority of 10 ministers.[66] Effectively, along the same lines, in a short time, the existence of a fundamental right to personal data protection was recognized by the National Congress, as previously pointed out.

Personal data protection is, in fact, costly to States that propose to protect the fundamental rights protected by the Federal Constitution and by Law 13.709/18, because it lacks an entity that is able to regulate and supervise eventual violations of the legislation or even the occurrence of unforeseeable events that jeopardize the right to personal data protection. For this purpose, the LGPD provided for the creation of the National Authority for Personal Data Protection. In the meantime, in the midst of an unprecedented global health crisis, there is no lack of voices that point to the need to channel resources from the private sector in the search for the maintenance of jobs and other interests of an economic nature, to the detriment, for example, of the effective structuring of the National Data Protection Authority (ANPD), whose legal design gives it the character of a body belonging to the Presidency of the Republic provisionally – and, consequently, the limits of its action – are still

[65] Available at: https://www.jota.info/paywall?redirect_to=//www.jota.info/opiniao-e-analise/artigos/decisao-historica-do-stf-reconhece-direito-fundamental-a-protecao-de-dados-pessoais-10052020. Access in jun. 2022.

[66] Available at: http://portal.stf.jus.br/processos/downloadPeca.asp?id=15342936101&ext=.pdf. Access in jun. 2022.

open.[67] Now, having overcome the tendency of liberal constitutionalism to perceive fundamental rights exclusively from the subjective perspective, another facet has long been unveiled, *no longer being limits for the State to become the north of its action.*[68]

As a matter of fact, by incorporating and expressing certain objective values of the community, they deserve an effectiveness from the social point of view, that is to say, a directing effectiveness with regard to state bodies.[69] [70] After all, while the world seeks counter-responses to surveillance structures that give rise to digital discrimination, we ask ourselves: what interests does an overinformed State serve?

## Final considerations

When analyzing the problems related to informational self-determination, it is difficult for a legal practitioner to not witness paradoxical and conflicting situations. Even more so when dealing with a figure that is directly linked to the right to privacy. However, it goes beyond its limits, communicating freely with meta-legal concepts and words. Initially contained within the scope of the private sphere, the protection of personal data surpasses it, encompasses and resignifies it, in a space with tensions that urgently need regulation.[71]

Such a transition, however, far from ending, outlines its first contours, clarifying the need for legal science to confront a series of elements foreign to its domain just a few decades ago. Beyond these difficulties of methodology and dogmatic organization are the torments that technology itself entails. This is because the establishment of a well-regulated personal data protection regime, with all the consequences that it inevitably entails, reaches very different centers of interest, and there must necessarily be such an effort that results in a terminological sophistication sufficient to account for all the contingencies of the advent of technologies and the debate about them that takes place. Taking this reality into account, one of several

[67] This is what is extracted from article 55-A, paragraph1, contained in Law 13,709/18, after the amendment promoted by Law No. 13,853/19: "the legal nature of the ANPD (National Data Protection Authority) is transitory and may be transformed by the Executive Power into an entity of the indirect federal public administration, subject to a special autonomous regime and linked to the Presidency of the Republic"

[68] SARMENTO, Daniel. A dimensão objetiva dos direitos fundamentais: fragmentos de uma teoria. *Arquivo de direitos humanos.* v.4, 2002, p. 63-102, p. 65.

[69] SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais:* uma teoria geral dos direitos fundamentais na perspectiva constitucional. Porto Alegre: Livraria do Advogado, 2010, p. 14

[70] For a more detailed analysis of the objective dimension of fundamental rights, Cf. ANDRADE, José Carlos Vieira de. *Os direitos fundamentais na constituição portuguesa de 1976.* 3 ed. Coimbra: Almedina, 2006; MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires. *Hermenêutica constitucional e direitos fundamentais.* Brasília: Brasília Jurídica, 2002; PEREIRA, Jane Reis Gonçalves. *Interpretação constitucional e direitos fundamentais.* Rio de Janeiro: Renovar, 2006.

[71] DONEDA, Danilo. *Da privacidade à proteção de dados pessoais.* Rio de Janeiro: Renovar, 2006, p. 403.

paradoxes remains clear, namely, the need for transparency to protect privacy and protect the misuse of personal data.[72] [73]

Ultimately, it is necessary to build an inverse Panopticon, from which, with the correct use of regulatory instruments that, without stifling the system, make it possible to face the onslaughts of bureaucratic surveillance organizations, which are present, but silent. The questioning made by Foucault, in the 70s – *who watches the watchmen?* – hangs without a satisfactory answer, and it is up to the Law and State institutions to keep the knot tied by Ulysses intact, so that the Democratic State of Law remains safe from old totalitarian currents.[74]

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[72] DONEDA, Danilo. *Da privacidade à proteção de dados pessoais*. Rio de Janeiro: Renovar, 2006, p. 404.

[73] Regarding this relationship between the need for transparency and the effective protection of personal data, Cf. GOLDMAN, Janlori. Privacy and Individual Empowerment. In: ENNETT, Colin; GRANT, Rebecca. *Visions of privacy:* policy choices for the digital age. Toronto: University of Toronto Press, 1999, p. 109.

[74] VIEIRA, Tatiana Malta. *O direito à privacidade na sociedade de informação*: efetividade desse direito fundamental diante dos avanços da tecnologia da informação. Porto Alegre: Sergio Antonio Fabris Editor, 2007, p. 194.

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