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Ref.: *Submission to provide inputs for the preparation of the U.N. High Commissioner for Human Rights thematic report on the right to privacy in the digital age.*

It is with great honor that the Study and Research Group in International Law (GEPDI/CNPq), affiliated to the 'Jacy de Assis Faculty of Law' of the Federal University of Uberlândia, Uberlândia/MG – Brazil, hereby, submit information and inputs regarding the list of issues presented by the U.N. Office of the High Commissioner for Human Rights, aiming at assisting the Commissioner on her report on right to privacy in the digital age as requested by the Human Rights Council through Res. 45/15 of 26 September 2019. We will address the topics proposed separately.

1) Brazilian legislative and regulatory frameworks.

With information and communication technologies (ICT), Brazilian legislation had to adapt so as to have measures to protect personal data in the virtual space. Thus, the Brazilian legal system introduced some legislative innovations aiming at protecting the human person.

In Brazil, privacy is protected through a series of aspects: consumer law, economic, administrative, tax, financial, banking, health, civil, criminal, among others. All of them turn to the Federal Constitution of 1988 as their legal base. Article 5, items X and XII, guarantee the rights to intimacy, image, honor and the inviolability of private life¹, which also includes in present times personal data made available online.

After all, the classic concept of privacy² has gained a new field of protection in the

¹ Because it is prescribed as such in the Constitution, it is said to protect both a fundamental and a personality right, bridging the public and private law divide. *See* CANCELIER, M. O Direito à Privacidade hoje: perspectiva histórica e o cenário brasileiro. *Sequência*, Florianópolis, v. 38, n. 76, pp. 213-239, ago/2017.

² Privacy, in its classic American conception, as an aspect of the right to personality, is understood as the right to privacy

digital and data economy based on the contemporary understanding of the high strategic (economic, political and social) value of personal data, not only as an economic input, but also as an element that enables vigilance and influence on freedom, the autonomy of the will, privacy and the free development of the personality.

The introduction of specific law to the Brazilian legal system was made by Federal Law no. 12.965 of April 23rd 2014, known as the “Internet Civil Framework”. Among the principles, guarantees, duties and rights that invoked to govern the use of the internet in Brazil in articles 1, 2 and 3, it highlighted the risks of algorithm discrimination, that is, the impact of data misuse in the digital world, and specifically prescribed for the right to privacy in article 7, foreseeing it as a basic right of the internet user, ensuring greater protection for the human person. Nevertheless, as the interest over privacy in the digital world grew, the normative field of data protection in Brazil started gaining its own autonomy through a fundamental element called personal data.

Considered as the successor of such law, and much inspired by the European Union’s General Data Protection Regulation³, Federal Law no. 13.709 of August 14th 2018 (called the General Law for the Protection of Personal Data – ‘LGPD’, in the Portuguese acronym) was enacted in Brazil. It provides for the processing of personal data⁴, aiming at protecting the fundamental rights of freedom and privacy (both already prescribed by the Universal Declaration of Human Rights of 1948 and recalled by UNGA Resolution on law and privacy in a digital world of November 21st 2016⁵), and the free development of personality of individuals.

More specifically, it determines the rights that citizens have over their data, in addition to predicting several criteria for them to be used by the government and private companies, providing legal certainty for activities that depend on the use of personal data – activities that used to operate uncertainly as to which rules should governed them. In other words, in addition to privacy and informational self-determination (rights of the individual person), the ‘LGPD’ was also based upon elements of economic law, such as those expressed in its article 2, items V and VI, as “economic, technological development and innovation; free initiative, free competition and consumer protection”, guaranteeing the possibility – although limited – of using such data when offering or providing goods or services. Exclusions apply too, such as for “public security, national defense, investigative and repressive activities of criminal offenses”, as prescribed under article 4.

It also lists various guiding principles, which we must highlight (a) the principle of

and the right to be left alone. In turn, in the German conception, privacy is subdivided into three concentric spheres, from the broadest to the most restricted: *Privatsphäre*, *Intimsphäre* and *Geheimsphäre* (private, intimate and secret sphere).

³ PINHEIRO, P. *Proteção de Dados Pessoais*: Comentários à Lei n. 13.709/2018 -LGPD. São Paulo: Saraiva, 2020. 112 p.

⁴ Personal data shall be understood as all information associated with an identified or identifiable person.

⁵ Project presented by Brazil and Germany. In its 11 articles, the Resolution affirms the right to privacy, and discusses the need of States to protect, respect and ensure it, taking into consideration the principles of legality, necessity, and proportionality. Besides, it also highlights that human rights and protection must be analyzed both in in physical and virtual realities. See NAÇÕES UNIDAS. *Assembleia Geral da ONU aprova resolução de Brasil e Alemanha sobre direito à privacidade*. [S.l.], 19 dez. 2013. Available at: <https://nacoesunidas.org/assembleia-geral-da-onu-aprova-resolucao-de-brasil-e-alemanha-sobre-direito-a-privacidade/>. Access on: 25 may. 2021.

transparency on the use of personal data and the respective accountability for its improper management, and (b) the principle of purpose, whereby the data should only be used for the specific purposes it was collected for, and only if its holders were previously informed of it.

However, such new aspect of protecting privacy through the use of personal data in the digital economy in Brazil still lacks administrative and broad legal effectiveness, being it dependent on the judiciary, even though there are not many cases brought before national courts regarding it still.

Although Brazil erected the National Data Protection Authority ('ANPD', in the Portuguese acronym), an administrative body regulated by 'LGPD' as an integrating organ of the Executive Branch, it would have been better if it were transformed into an autarchy and, eventually, into a regulatory agency (an evaluation for that purpose is to be carried out in November 2022), with a greater structure and a larger technical body. After all, the 'ANPD' is responsible not only for the normative functions regarding the 'LGPD', but also for the inspection, sanctioning, planning and education of the population regarding the numerous aspects of data protection in Brazil. Its sanctioning powers will take effect in August 2021.

Hence, it is said that data protection is now projected in Brazil as an autonomous right – one in need of broad and generic protection, because it is intended to protect the individual person in face of the interests from a multiplicity of sources, whether those located in the private or public sphere. Nonetheless, it still encounters serious obstacles to its effectiveness and low level of protection due to the material difficulty of ANPD's administrative performance and the actual lack of cases ruled by national courts.

2) Other measures taken to prevent violations when using AI.

The use of Artificial Intelligence (AI)⁶, despite potentially bringing countless benefits to society, can create new forms of oppression, social monitoring, discrimination, risks and damages and, in many cases, disproportionately affect the less favored and vulnerable. And considering it is the State's "obligation under international human rights law to protect the human rights", they must be secured in "all areas of government policy and practice, including AI policy and AI applications used by governments and other entities in society".⁷

⁶ AI can be defined as the development of computer systems capable of carrying out intellectual processes characteristic of humans, such as reasoning skills, understanding of meanings, pattern recognition, simulation of logical reasoning and learning. See COPELAND, B. J. *Artificial Intelligence. Encyclopædia Britannica*. Available at: <https://www.britannica.com/technology/artificial-intelligence>. Accessed on: 27 may 2021.

OCDE. *Artificial Intelligence in Society*. OECD Publishing, Paris, 11 jun. 2020.

⁷ BRADLEY, Charles; WINGFIELD, Richard; METZGER, Megan. *National Artificial Intelligence Strategies and Human Rights: A Review. Global Partners Digital*, Apr. 2020. Available at: https://www.gp-digital.org/wp-content/uploads/2020/04/National-Artificial-Intelligence-Strategies-and-HumanRights%E2%80%9494A-Review_.pdf. Accessed on: 25 May 2021. p. 20.

Due to this, on April 6th 2021, the Brazilian Ministry of Science, Technology and Innovation published the Ordinance n. 4.617, which established the Brazilian Strategy for Artificial Intelligence ('EBIA', in the Portuguese acronym) and its thematic axes. With only three articles and an appendix, its purpose is to guide the actions of the Brazilian State for the conscious and ethical use of AI, to strengthen research and to seek development and innovations of solutions based on this technology, so that innovation can be guaranteed in the social and productive environment and to face the challenges related to the development of the country, as a way to project a better future.⁸

The strategy is divided into three "transversal axes": (a) Legislation, regulation and ethical use; (b) AI governance; and (c) International aspects; and in six "vertical axes": (a) Qualifications for a digital future; (b) Workforce and training; (c) Research, development, innovation and entrepreneurship; (d) Application in the productive sectors; (e) Application to the public authorities; (f) Public security. In total, it forecasts 74 strategic actions, although with no practical details or possible deadlines.⁹

Nevertheless, there are few considerations in 'EBIA' in regard to human rights. There are mentions, for example, that AI systems should be designed to respect the rule of law, human rights, democratic values and diversity, and that it should include appropriate safeguards, such as human intervention. As a strategic action, it only mentions the promotion of transparency, the responsible disclosure regarding the use of these systems, the promotion of human rights observance, and the possible elaboration of human rights impact reports.¹⁰ This happens because the document shows a greater concern with the sectors of the economy.

Despite this, it can be said to be part of an ambitious strategy¹¹, which also includes Bill no. 2120/2020 aiming at the formal regulation of AI in Brazil.¹² The initial text with 16 articles is still being processed by the Brazilian Congress until May 2021. It represents a step forward for the existence of regulatory law in machine learning and new technologies.

⁸ "Art. 1. *The Brazilian Strategy for Artificial Intelligence is instituted, in the form of the Annex to this Ordinance, with the purposes of: I - guide the actions of the Brazilian State in favor of strengthening the research, development and innovations of solutions in Artificial Intelligence, as well as, its conscious, ethical use for a better future; and II - ensure innovation in the productive and social environment in the area of Artificial Intelligence, capable of facing the challenges associated with the development of the Country, in terms of the provisions of Law No. 10.973, of December 2, 2004*". BRASIL. Portaria GM n. 4.617, de 06 de abril de 2021. Establishes the Brazilian Strategy for Artificial Intelligence and its thematic axes. Available at: https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/arquivosinteligenciaartificial/ia_portaria_mcti_4-617_2021.pdf. Accessed on: 25 May 2021.

⁹ Annex: "*In light of such guidelines, to organize the debate about a Brazilian AI Strategy, nine (9) axes were established, as identified below: I - thematic axes: - legislation, regulation and ethical use; - governance of Artificial Intelligence; - International aspects; II - vertical axes: - qualifications for a digital future; - workforce and training; - research, development, innovation and entrepreneurship; - application in productive sectors; - application in public authorities; and - public security*". BRASIL. Portaria GM n. 4.617, de 06 de abril de 2021. Establishes the Brazilian Strategy for Artificial Intelligence and its thematic axes. Available at: https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/arquivosinteligenciaartificial/ia_portaria_mcti_4-617_2021.pdf. Accessed on: 25 May 2021.

¹⁰ These guidelines are also present as principles in Bill no. 5051/2019 of September 16th 2019, which is being analyzed by the Brazilian Senate.

¹¹ LEMOS, Ronaldo. Brazilian AI strategy is pathetic. *Folha de S. Paulo*, 11 Apr. 2021. Available at: <https://www1.folha.uol.com.br/colunas/ronaldolemos/2021/04/estrategia-de-ia-brasileira-e-patetica.shtml>. Accessed on: 25 May 2021.

¹² BRAZIL. Congress Lower House. *Bill nº 2120/2020*. Available at: <https://www.camara.leg.br/propostas-legislativas/2236340>. Access in May 24th 2021.

The Bill is inspired by the OECD principles guidelines for artificial intelligence, which is seen as a positive way to move forward¹³.

Although Brazil is not an effective member of the OECD, it follows its guidelines on the matter, which established five principles and five orientations to ensure the safety and reliability of artificial intelligence.¹⁴ Among the principles are inclusive: (a) growth, sustainable development and well-being; (b) values centered on human beings and equity; (c) transparency and publicity; (d) robustness, security and protection; and (e) accountability. Conversely, the orientations concern domestic strategic policies that must be adopted by States, such as to (a) invest in research and development of AI, (b) promote a safe digital environment for AI, (c) endorse policy measures favorable to AI, (d) strengthen human interaction with AI innovations, and (e) encourage international cooperation for reliable AI.

Brazil, as one of the signatories of the instrument, adopts the guidelines to establish ethical principles for the responsible administration of AI in the country. Bill no.21/2020 has points of convergence and divergence with the OECD's guiding AI principles. Regarding the former, the legislator promoted the implementation of the OECD recommendations in its entirety. However, this strategy was also object of criticism as domestic legislation should be formed of assertive and well-defined norms. The openness of recommendations is seen to be detrimental with regard to the potential conflict of interests between possibly conflicting grounds, as free-initiative/competition and labor rights. Therefore, although Brazil must abide by the principle of legality, such norm can bring a wide margin of discretion.

Because of this, the Bill distances itself from the OECD guidelines, since the organization also recommended (guideline no. 3) countries to adopt domestic policies and legislation to regulate AI systems. Thus, a supervision institutional framework for monitoring and evaluating the use of AI in Brazil would be important. Nonetheless, the Bill did foresee any specific regulatory body; instead, it foresees under articles 13 and 15, reports to be conducted on the impact of AI, and a periodic assessment for its adequacy and civil responsibility for decision-making. Even so, article 8 of the Bill recognizes the justiciability of individual or collective damages caused by AI before the judiciary. It also determines the possibility of institutions and agents responsible for the AI to be demanded too.

Even though the framework is only a Bill, we highlight its relevance for the development of the intersection between the legal system and AI, especially as it may

¹³ One way to promote development in a responsible way is to observe the good regulatory practices and strategies already followed by other countries. See *EU Commission. White Paper on Artificial Intelligence – A European approach to excellence and trust*. 2020. Available at: ec.europa.eu. Accessed on: 27 may 2021. p. 10

¹⁴ OECD. *Recommendation of the Council on Artificial Intelligence*. OCDE, Paris, France, 2019. Available at: https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449?_ga=2.10185717.1321907189.1621005755-2123889323.1620120411> Access in May 24th 2021.

ensure a sustainable¹⁵ and human-centered development and use¹⁶ of AI in Brazil. After all, Brazil is only ranked 40th in the 197-country-list designed by Oxford Insights Institute¹⁷ regarding the most prepared nations to benefit from AI in the operation and offer of public services.

3) Specific impacts of the digital world on the protection of children.

The use of games, interaction applications and browsers in general has led to the provision of often sensitive data by children for their use. Furthermore, it is not rare having adults infiltrate these environments with the intention of violating children's privacy, both through incentives to some practices (shopping, providing geolocation and other sensitive data¹⁸), and through conversations that may end up exposing children to pedophilia and violation of their sexual intimacy¹⁹.

In Brazil, this scenario is aggravated by the recent changes in the Federal Government, such as the extinction of the Special Secretariat for Human Rights²⁰, the change in the composition of the National Council for the Rights of Children and Adolescents²¹ and the dissolution of the Commission to Combat Violence Sexual Childhood²², in addition to the resistance faced for the inclusion of sex education in schools, under the false understanding that, instead of teaching children to know their bodies and understand about violence and consent, they would be teaching sexual practices to the little ones²³.

The best perspective is found in the beforementioned 'LGPD', which, when dealing with the collection and treatment of data from children and adolescents, determines the

¹⁵ OVANESSOFF, A.; PLASTINO, E. *How Artificial Intelligence can drive South America's growth*. 2017. Available at: https://www.accenture.com/_acnmedia/pdf-49/accenture-how-artificial-intelligence-can-drive-south-americas-growth.pdf. Accessed on: 27 may 2021

¹⁶ For such perspective, see OECD. *Artificial Intelligence in Society*. Doc. Published on 11 Jun. 2019. Available at: <https://www.oecd-ilibrary.org/docserver/eedfee77en.pdf?expires=1622045918&id=id&accname=ocid54025470&checksum=A80DC786A1B25D7561DE0F8EE23063CE>. Accessed: 25 May 2021. p. 85.

¹⁷ MILLER, H.; STIRLING, R. *Government Artificial Intelligence Readiness Index 2019*. 2019. Available at: <https://www.oxfordinsights.com/ai-readiness2019>. Accessed on: 27 may 2021.

¹⁸ MARRAFON, M.A.; FERNANDES, E. A necessária proteção de dados das crianças e adolescentes na educação online. *ConJur*, 06 jul. 2020. Available at: <https://www.conjur.com.br/2020-jul-06/constituicao-poder-necessaria-protecao-dados-criancas-adolescentes-educacao-online>. Accessed on 27 may 2021; THE ALLIANCE FOR CHILD PROTECTION IN HUMANITARIAN ACTION. *Technical Note: Protection of Children during the Coronavirus Pandemic*, Version 1, March 2020. Available at: https://www.unicef.org/brazil/media/7516/file/nota-tecnica_protecao-da-crianca-durante-a-pandemia-do-coronavirus.pdf. Accessed on: 27 may 2021.

¹⁹ ATTANASIO, A. Coronavírus: o dramático aumento da atividade dos pedófilos virtuais com o isolamento. *BBC News*, 28 abr. 2020. Available at: <https://www.bbc.com/portuguese/geral-52450312>. Accessed on: 27 may 2021.

²⁰ BRANDÃO, E.; CABRAL, C. Direitos sexuais e reprodutivos sob ataque: o avanço do conservadorismo político e moral no Brasil. *Sexual and Reproductive Health Matters*, v. 27, n. 2, p. 76-86, 2019.

²¹ MPPR. *CONANDA - Decreto que altera a composição do Conanda foi publicado no DOU*. 13 set. 2019. Available at: <http://crianca.mppr.mp.br/2019/09/175/CONANDA-Decreto-que-altera-composicao-do-Conanda-e-publicado-no-Diario-Oficial.html>. Accessed on: 27 may 2021.

²² BOLSONARO recria comissão de enfrentamento à violência sexual infantil com funções esvaziadas. *Jornal de Brasília*, 16 set. 2020. Available at: <https://jornaldebrasil.com.br/noticias/politica-e-poder/bolsonaro-recria-comissao-de-enfrentamento-a-violencia-sexual-infantil-com-funcoes-esvaziadas/>. Accessed on: 27 may 2021.

²³ BERTHO, H. O que é a tal educação sexual. *AzMina*, 28 jan. 2020. Available at: <https://azmina.com.br/reportagens/o-que-e-a-tal-da-educacao-sexual/>. Accessed on: 27 may 2021.

observance of their best interest, in addition to consent specific to their parents or guardians.

These practices will certainly allow more adequate protection for children, by the prevention of data collection and use to direct marketing communication, and obtain sensitive data. Nevertheless, they do not have the ability to prevent children from sexual harassment. It will only happen when the State and society engage into the realization of the integral protection of children, and take their best interest into consideration at any circumstance²⁴.

In light of the inputs provided, we hope to have helped the U.N High Commissioner for Human Rights with enough information to ponder over the right to privacy in the digital age, aiming at presenting a comprehensive report over the matter to the Human Rights Council.

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²⁴ Federal Constitution, art. 227: It is the duty of the family, society and the State to ensure that children, adolescents and young people have the right to life, health, food, education, leisure, professionalization, culture, dignity, with absolute priority, respect, freedom and family and community coexistence, in addition to putting them safe from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression. (Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: 27 may 2021.)