A STRONGER RIGHT TO DATA PROTECTION DURING PANDEMICS? LEVERAGING THE AMERICAN CONVENTION OF HUMAN RIGHTS AGAINST GOVERNMENTAL INACTION: A BRAZILIAN CASE-STUDY

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Summary: This article presents a case-study to illustrate the crucial importance of an effective data protection law in the fight against pandemics, and critically assess the extent to which the absence of such framework may amount to a violation of the American Convention of Human Rights. The analysis focuses on Brazil as an emblematic example, as the country has been facing the pandemic without being able to rely on a comprehensive and properly supervised data protection law, while also failing to adopt data-driven responses which could have helped to raise awareness and prevent the spread of the virus. Although the relationship between the adopted policies and the unwavering rise of contagions and deaths is one of correlation, and not necessarily causation, it is argued that an examination of the facts through the lenses of the Convention and its case-law could give sufficient grounding to a claim of responsibility for failure to ensure sufficient protection to the rights to privacy, life and both physical and psychological integrity.

Keywords: Covid-19. Data protection. Data utilization. Positive obligations. Supervisory authority. Effective protection.

Introduction

This article presents a case-study to illustrate the crucial importance of an effective data protection law in the fight against pandemics, and critically assess the extent to which the absence of such framework may amount to a violation of the American Convention of Human Rights. The analysis focuses on Brazil as an emblematic example, as the country has been facing the pandemic without

being able to rely on a comprehensive and properly supervised data protection law, while also failing to adopt data-driven responses which could have helped to raise awareness and prevent the spread of the virus. Although the relationship between the adopted policies and the unwavering rise of contagions and deaths is one of correlation, and not necessarily causation, it is argued that an examination of the facts through the lenses of the Convention and its case-law could give sufficient grounding to a claim of responsibility for failure to ensure sufficient protection to the right to privacy, life and physical and psychological integrity. To substantiate such claim, the article begins by describing the Brazilian government's approach towards the health risks raised by the pandemic (Section 1), and highlighting the privacy and data protection questions raised by technological solutions that are dependent on the collection and use of personal data (Section 2). It follows with an overview of the troubled process of entry into force of a general data protection law in the country, and of a Supreme Court ruling that invalidated the government's attempt to use data of its citizens to fight the pandemic, in particular to gather evidence for the adoption of economic measures (Section 3). Finally, having explained the nature of the positive obligations assumed by States that are parties to the Convention, the article examines whether the Brazilian data protection framework has proven fit for purpose during the pandemic (Section 4), and concludes with lessons learned from this case-study.

1 Covid-19 in Brazil: politics *vs.* scientific evidence?

Brazil is the second hardest hit country in the entire world in terms of COVID-19 deaths (having now reached 130.000). However, when this new Corona virus made their way to the continent, with the first case being registered on February 25th amidst reports of thousands of deaths in other countries such as China and Italy, it did not immediately ring an alarm bell. This was mainly because, at the time, there was a widely shared belief that the warm temperatures in the country would prevent the spread of the virus. It is possible that this bolstered the confidence of Brazil's President Jair Bolsonaro in minimizing the importance of the virus in its public utterances on the matter: for instance, when he criticized the "oversized" concern for the destructive power of the Coronavirus, including for alleged economic reasons, and reassured the Brazilian population that this was not a problem as far as Brazil was concerned;[1] when, despite the steady increase

[1] "Tem a questão do coronavírus também que, no meu entender, está superdimensionado, o poder destruidor desse vírus. Então talvez esteja sendo potencializado até por questão econômica, mas acredito

in contagions recorded in Brazil and the health authorities' instructions to maintain social isolation, he appeared in a political rally organized by his supporters on 15 March in Brasilia, where he was photographed shaking hands and taking "selfies" with participants;[2] or when he continued to criticize the "hysteria" around the spread of the virus, even as his health minister Luiz Henrique Mandetta announced on 20 March that the virus posed an existential threat to Brazil's fragile healthcare system from the end of April.[3]

On March 24th, President Bolsonaro gave a national address on television,[4] where he made evident the key tenets of his strategy in fighting the virus: first, a strong preoccupation for the economic consequences, demonstrated by his admonition that "life goes on, and jobs must be maintained". Second, he requested state and municipal authorities to stop general social isolation measures and focus on "vertical" isolation, i.e. an isolation of those segments of the population with higher risk of death or of developing serious conditions with Covid-19, since the virus would be no more than a "small flue (*gripezinha*) for most people.[5] Third

que o Brasil, não é que vai dar certo, já deu certo." [trad.: " There's also the issue of coronavirus which, in my understanding, is oversized, the destructive power of this virus. So maybe this is being boosted even for economic reasons. But I believe that in Brazil not only things will go alright, they are already alright] TARJA, Alex. Todos nós vamos morrer um dia: veja falas de Bolsonaro sobre o coronavírus. *UOL*, São Paulo, 01 mai. 2020. Disponível em: https://noticias.uol.com.br/saude/ultimas-noticias/redacao/2020/05/01/todos-nos-vamos-morrer-um-dia-as-frases-de-bolsonaro-durante-a-pandemia.htm. Acesso em: 07 ago. 2020.

2 Even more concerning of this appearance was that the President had just returned from an institutional visit in the United States, after which 11 members of his crew had already been diagnosed with Covid-19 (the number was updated to 23 after the full results of the tests came out, a week after the rally. G1; GLOBO. Sobe para 23 o total de pessoas que estiveram com Bolsonaro nos EUA e têm coronavírus. *G1*, Rio de Janeiro, 23 mar. 2020. Disponível em: https://g1.globo.com/politica/noticia/2020/03/23/sobe-para-23-o-total-de-pessoas-que-estiveram-com-bolsonaro-nos-eua-e-tem-coronavirus.ghtml. Acesso em: 07 ago. 2020). Bolsonaro justified his actions claiming that he had not organized the rally himself and that it was his right to shake people's hands, especially as it is "in the people" that he has his roots: "Se eu resolvi apertar a mão do povo, desculpe aqui, eu não convoquei o povo para ir às ruas, isso é um direito meu. Afinal de contas, eu vim do povo. Eu venho do povo brasileiro." URIBE, Gustavo, BRANT, Denielle, CARVALHO, Daniel. Bolsonaro diz que não pode ser ameaçado e que seria um golpe isolar o presidente. *UOL*, São Paulo, 16 mar. 2020. Disponível em: https://www1.folha.uol.com.br/poder/2020/03/bolsonaro-diz-que-nao-pode-ser-ameacado-e-seria-um-golpe-isolar-o-presidente.shtml Acesso em: 07 ago. 2020.

3 PARAGUASSU, Lisanda, EISENHAMMER, Stephen. Brazil cuts growth, sees coronavirus quickly ravaging health system. REUTERS, São Paulo/Brasilia, 20 mar. 2020. Disponível em: https://www.reuters.com/article/us-health-coronavirus-brazil/brazil-cuts-growth-sees-coronavirus-quickly-ravaging-health-system-idUSKBN2171T4 Acesso em: 07 ago. 2020.

4 UOL. 'Gripezinha': leia a íntegra do pronunciamento de Bolsonaro sobre covid-19. *UOL*, São Paulo, 24 mar. 2020. Disponível em: https://noticias.uol.com.br/politica/ultimas-noticias/2020/03/24/leia-o-pronunciamento-do-presidente-jair-bolsonaro-na-integra.htm. Acesso em: 07 ago. 2020.

5 GOMES, P. H. Brasileiro pula em esgoto e não acontece nada, diz Bolsonaro em alusão a infecção pelo coronavírus. *G1*, Brasília, 26 mar. 2020. Disponível em: https://g1.globo.com/politica/noticia/2020/03/26/brasileiro-pula-em-esgoto-e-nao-acontece-nada-diz-bolsonaro-em-alusao-a-infeccao-pelo-coronavirus.ghtml. Acesso em: 07 ago. 2020.

and last, he announced that efforts were being put into demonstrating the efficacy against coronavirus of chloroquine, a medicine produced in Brazil and widely used to fight malaria, *lúpus* (SLE) and arthritis, and which is known to have serious (and potentially lethal) side-effects.

This pronouncement effectively marked the beginning of deep tensions between the President and other authorities, especially with the scientific community. The first big sign of that was the dismissal on 16 April of Health Minister Mandetta, due to a divergence of views over the necessity of social isolation measures.[6] This was followed not even a month later by the resignation of his replacement, Nelson Teich, appointed by Bolsonaro in the hope to find a better ally than Mandetta on the economy-focused strategy. Although Teich did not provide any reasons for the resignation, it is worth noting that it came the day after he learned in a press conference that the President had issued a decree classifying gyms, beauty salons and barbers as "essential services" that cannot be interrupted by state and municipal authorities.[7] In later declarations, Teich explained that the government's request to the Federal Council of Medicine to allow the prescription of chloroquine for mild cases of Covid-19 had a weight in its resignation, stressing that the country's health care budget is too small to be used for things that don't work.[8] The epilogue of this saga was the publication of official government guidelines for wider use of chloroquine in mild cases,[9] published when the health ministry came under the control (on an *interim* basis)[10] of Eduardo Pazuello, an active-duty army general.

The message sent by Bolsonaro's government, especially to its followers, was one of resignation to the inevitability of contagions and deaths,[11] accompanied

6 PARAGUASSU, L.; BRITO, R. Bolsonaro expected to fire defiant Brazilian health minister. *REUTERS*, United States, 15 abr. 2020. Disponível em: https://www.reuters.com/article/us-health-coronavirus-brazil/bolsonaro-expected-to-fire-defiant-brazilian-health-minister-idUSKCN21X1QM. Acesso em: 07 ago. 2020.

7 PHILLIPS, D. Brazil loses second health minister in less than a month as Covid-19 deaths rise. *The Guardian*, Londres, 15 mai. 2020. Disponível em: https://www.theguardian.com/world/2020/may/15/brazil-health-minister-nelson-teich-resigns. Acesso em: 07 ago. 2020.

8 AGÊNCIA ESTADO. Teich: decisão de Bolsonaro em antecipar uso da cloroquina teve peso em sua saída. *A Gazeta*, Espírito Santo, 24 mai. 2020. Disponível em: https://www.agazeta.com.br/brasil/teich-decisao-de-bolsonaro-em-antecipar-uso-da-cloroquina-teve-peso-em-sua-saida-0520. Acesso em: 07 ago. 2020.

9 MINISTÉRIO DA SAÚDE. ORIENTAÇÕES DO MINISTÉRIO DA SAÚDE PARA MANUSEIO MEDICAMENTOSO PRECOCE DE PACIENTES COM DIAGNÓSTICO DA COVID-19. Brasília, DF: Ministério da Saúde, 2020. Disponível em: https://saude.gov.br/images/pdf/2020/May/20/ORIENTA—ES-D-PARA-MANUSEIO-MEDICAMENTOSO-PRECOCE-DE-PACIENTES-COM-DIAGN–STICO-DA-COVID-19.pdf. Acesso em: 07 ago. 2020.

10 It should be noted that, at the time of writing, this temporary arrangement has been in place for almost 3 months.

11 To that effect, it is worth reminding the interview given on 28 April, by Bolsonaro who, having been informed by a reporter that Brazil surpassed China in the number of deaths, gutted: "And so what? What do you want me to do about it? Despite being Messias [Jair Bolsonaro's second name] I cannot do miracles".

by a strong preoccupation for the economic consequences of this health crisis. Bolsonaro manifested this concern on several occasions on social media and interviews, and even more explicitly in a speech on national television on 8 April, where he reminded that "unemployment leads to poverty, hunger, misery, and ultimately death", and that the "consequences of a treatment cannot be worse than the disease".[12] Perhaps the example that best embodies this mentality is "*O Brasil n*ão *pode parar*", a mediatic campaign encouraging autonomous workers to continue working despite the imposition of social isolation measures. The video of the campaign was published on the official Instagram page of the Special Secretariat of Communication of the Presidency and shared by several persons close to the President (including his son, Rio de Janeiro's senator Flavio Bolsonaro), but its dissemination was immediately enjoined by a court order. The judicial order, issued in response to a complaint lodged by the Federal Public Minister, prohibited the dissemination from official government accounts of any information against social isolation, including this campaign, except where strictly grounded on scientific evidence. Interestingly, when these facts were brought to light by the Press, the Secretariat denied the existence of the campaign, despite its wide circulation and the public availability of screenshots of its publication by the Secretariat just three days prior.[13]

This brief overview has provided examples of the Presidency's attitude towards the health risks posed by virus, which has been one of damage mitigation (rather than prevention) and of contestation of pro-isolationist narratives, even at the cost of ignoring documented facts.[14] It stands to reason that this attitude,

GARCIA, G.; GOMES, P. H.; VIANA, H. 'E daí? Lamento. Quer que eu faça o quê?', diz Bolsonaro sobre mortes por coronavírus; 'Sou Messias, mas não faço milagre'. *G1*, Brasília, 28 abr. 2020. Disponível em: https://g1.globo.com/politica/noticia/2020/04/28/e-dai-lamento-quer-que-eu-faca-o-que-diz-bolsonaro-sobre-mortes-por-coronavirus-no-brasil.ghtml. Acesso em: 07 ago. 2020.

[12] MIGALHAS. Tratamento não pode ser mais danoso que a doença, diz Bolsonaro em novo pronunciamento. *MIGALHAS*, São Paulo, 8 abr. 2020. Disponível em: https://www.migalhas.com.br/quentes/324203/tratamento-nao-pode-ser-mais-danoso-que-a-doenca-diz-bolsonaro-em-novo-pronunciamento. Acesso em: 07 ago. 2020.

[13] ANDRADE, H. de. Após divulgar campanha nas redes, Planalto nega campanha vetada por liminar. UOL, Brasília, 28 mar. 2020. Disponível em: https://noticias.uol.com.br/politica/ultimas-noticias/2020/03/28/apos-divulgar-campanha-nas-redes-planalto-nega-campanha-vetada-por-liminar.htm. Acesso em: 07 ago. 2020.

[14] I have documented more manifestations of this position in a recent blogpost, focused on the role of open data and evidence-based policy-making in facing COVID 19: ZINGALES, Nicolo. A Brazilian cautionary tale on pandemic negationism: open data is an essential safeguard for evidence-based policy-making. *Datactive*, Amsterdam, 09 set. 2020. Disponível em: https://data-activism.net/2020/09/bigdatasur-covid-a-brazilian-cautionary-tale-on-pandemic-negationism-open-data-is-an-essential-safeguard-for-evidence-based-policy-making/. Acesso em 09 set. 2020.

compounded by the wide range of "fake news" circulating about the Corona virus[15] and the numerous photos and videos of the President and some of his ministers failing to abide by the rules set by health authorities on the use of masks and the avoidance of agglomerations,[16] has materially distorted the population's perception of the seriousness of the virus. Against this background, let us pause and reflect upon the significance of this approach: how could the government have made, or at least enabled, better use of scientific evidence to face off with the virus and its adverse consequences? While it is extremely complex to second-guess the optimal trade-off between maintaining a functioning economy and measures of containment and prevention of the virus, there are also more straightforward lines that can be drawn to single out conduct that clearly falls outside the gray zone. In this regard, a core criticism that can be moved against the administration of the pandemic concerns the insufficiency of information provided to its citizens to understand their immediate danger and prevent spread of the virus. While some general statistics about the virus were released daily by the Ministry of Health,[17] the government showed lack of vision in failing to tap on an extremely valuable resource in the fight against the pandemic: citizens' data. It is argued that the existence of an adequate data protection framework would have facilitated the more strategic use of the wealth of data that is or *can be* produced every day by millions of individuals. To appreciate this, the following section will explain how insights from citizen data have been used (not without criticism) by governments and organizations around the world to provide services that help communities dealing with the risks posed by the pandemic.

[15] CARAM, T. Coronavírus: fake new atinge 110 milhões de brasileiros. *Estado de Minas*, Belo Horizonte, 21 maio 2020. Disponível em: https://www.em.com.br/app/noticia/bem-viver/2020/05/21/interna_bem_viver,1149424/coronavirus-fake-news-atinge-110-milhoes-de-brasileiros.shtml. Acesso em 09 set. 2020.

[16] BRAGON, R.; CARVALHO, D. Nos últimos 14 dias, Bolsonaro se aglomerou e interagiu, sem máscara, com centenas de pessoas. *Folha de S. Paulo*, Brasília, 7 jul. 2020. Disponível em: https://www1.folha.uol.com.br/poder/2020/07/nos-ultimos-14-dias-bolsonaro-se-aglomerou-e-interagiu-sem-mascara-com-centenas-de-pessoas.shtml. Acesso em: 07 ago. 2020. G1. Ministro da Educação Abraham Weintraub participa de protesto sem máscara e causa aglomeração no DF. *G1*, Brasília, 14 jun. 2020. Disponível em: https://g1.globo.com/politica/noticia/2020/06/14/ministro-da-educacao-abraham-weintraub-participa-de-protesto-sem-mascara-e-causa-aglomeracao-no-df.ghtml. Acesso em: 07 ago. 2020.

[17] It is worth mentioning that some controversy arose from the decision by the Ministry of Health on June 5th to fundamentally change the portal for the divulgation of official statistics, which resulted in a significant curtailment of their granularity and utility. For more details, see ZINGALES, Nicolo. A Brazilian cautionary tale on pandemic negationism: open data is an essential safeguard for evidence-based policy-making. *Datactive*, Amsterdam, 9 set. 2020. Disponível em: https://data-activism.net/2020/09/bigdatasur-covid-a-brazilian-cautionary-tale-on-pandemic-negationism-open-data-is-an-essential-safeguard-for-evidence-based-policy-making/. Acesso em 9 set. 2020.

2 Data-driven solutions for the common good: governmental approaches and bottom-up initiatives

With the current pandemic, the world is facing unprecedented challenges. One of those is to define the most appropriate response to the crisis. While the pressure on our health care system is arguably the most immediate and well-known implication of COVID-19, there are a number of concerns with existing strategies of population management in the fight against COVID-19. In this context, discussions over various types of "Coronavirus apps" to fight the pandemic have taken center stage. A range of technological solutions are available, with one common characteristic: they rely on the disclosure of personal data of individuals, the insights of which are then used to inform those individuals *and* broader segments of the population. In this light, each government is called to define a framework that allows it, and more broadly the communities it governs, to leverage data-driven insights for the common good.

However, an important challenge in this regard affects several countries in the Latin American region, including Brazil: while the potential benefit from data usage may be relatively clear from the outset, the applicable legal framework does not provide sufficient guidance on how the introduction of these initiatives should be evaluated, from the point of view of the impact generated on individual rights and freedoms.[18] Note that this impact is not limited to privacy, as the right to data protection is an autonomous concept that is instrumental to the protection of a range of other fundamental rights.[19] Hereinafter in this section, we introduce some of the relevant technologies and sketch the privacy and data protection issues that arise in connection with their use.

2.1 Contact tracing

Without doubt, a major challenge of the current pandemic is the ease and speed at which contagion happens. Early studies by the WHO demonstrated that

[18] For a comprehensive overview of this impact from the perspective of the European Convention of Human Rights, see AMOS, Merris. Human Rights Law and the COVID-19 Pandemic in the United Kingdom Part 1. *SSRN*. S/L, 15 abr. 2020. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576496. Acesso em 07 ago. 2020; AMOS, Merris. Human Rights Law and the COVID-19 Pandemic in the United Kingdom Part 2. *SSRN*. S/L, 16 abr. 2020. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577779. Acesso em 07 ago. 2020.

[19] DONEDA, Danilo. Da privacidade à proteção de dados pessoais. Renovar: Rio de Janeiro, 2006, p. 141-142; MENDES, Laura Schertel. Habeas data e autodeterminação informativa: os dois lados da mesma moeda. *Direitos Fundamentais & Justiça*, Belo Horizonte, ano 12, n. 39, p. 185-216, jul./dez. 2018. p. 188. Disponível em: http://dfj.emnuvens.com.br/dfj/article/view/655. Acesso em 07 ago. 2020.

the average transmission rate R0 is between 2 and 2.5, meaning that for every carrier of the virus, 2 to 3 people will get infected.[20] This is R0 in its natural state, that is, prior to the adoption of any preventative measures: in other words, carefully designed rules and policies can help to reduce the spreading of the disease. Contact tracing is one strategy to facilitate the reduction of R0, based on tracking infected patients' steps, by helping them recall everyone whom they have had close contact with, in order to warn these individuals of their potential exposure. Once those individuals are notified of this likelihood, the expectation is that they test their status and (unless proven negative) isolate themselves, preventing possible spread.

In certain countries dealing with COVID 19, and more broadly during the outbreaks of other epidemics (for instance HIV and Ebola), this process was done analogically, involving hundreds of public health workers that would sit down for an interview with infected patients to identify all possible exposures.[21] This analogical approach is more likely to work at lower scales: an example is Vietnam, a country that, as of now, has only 1050 cases (and 35 deaths). Vietnam's policy was that, after a case was confirmed, a detailed travel history of that individual was published on social media and local newspapers in order to alert people that may have had contact with them.[22] To increase the efficiency, the government adopted a mobile app, so people could alert authorities about suspected infections where they live. It also updated citizens via regular text messages and with more creative educational material about the virus, such as songs and art broadcast by famous and influential personalities.[23]

On the other hand, tracing the contacts of an entire population is not only more affordable but also comparatively more effective at higher scales if done through technological means, most typically through the widespread installation of designated mobile apps. Contact tracing apps use either Bluetooth signals or location data. Location data is not very precise, potentially giving rise to a high number of false positives; in addition, it is typically very specific and sensitive to

[20] MC-FALL JONHSEN, M.; BENDIX, A. An average coronavirus patient infects at least 2 others. To end the pandemic, that crucial metric needs to drop below 1 — here's how we get there. *BUSINESS INSIDER*, NYC, 18 abr. 2020. Disponível em: https://www.businessinsider.com/coronavirus-contagious-r-naught-average-patient-spread-2020-3. Acesso em: 07 ago. 2020.

[21] HOWELL O'NEILLARCHIVE, P. Five things we need to do to make contact tracing really work. *MIT Technology Review*, Massachusetts, 28 abr. 2020. Disponível em: https://www.technologyreview.com/2020/04/28/1000714/five-things-to-make-contact-tracing-work-covid-pandemic-apple-google/. Acesso em: 07 ago. 2020.

[22] THE GUARDIAN. Aggressive testing and pop songs: how Vietnam contained the coronavirus. *The Guardian*, Londres, 01 mai. 2020. Disponível em: https://www.theguardian.com/commentisfree/2020/may/01/testing-vietnam-contained-coronavirus. Acesso em: 07 ago. 2020.

[23] *Id.*

share, as it might reveal a significant amount of information about the individual which is not necessary for the stated purpose. Bluetooth-based solutions are rather more specific and non-intrusive: through a centralized application of this technology, a smartphone is set to constantly be pinging out a beacon and to also be receiving similar messages coming from other devices within a specific radius (e.g. 2 meters), which allows a central (presumably health) authority to identify *ex post* those devices that have been in proximity of individuals who have tested positive. This presupposes the revelation of each user's phone number, so that users can be notified once the central authority finds their number in the encrypted data logs that an infected user has shared. An alternative way of achieving the same purpose is through anonymized IDs, randomly generated at short time intervals (e.g. 15 minutes) and stored in an encrypted form on each individual's phone: here, there is no centralized database, and thus no third party becomes privy to individuals' social graph. These features, originally developed by the DP3T consortium,[24] were ultimately adopted by Apple and Google creating a protocol allowing to build these types of apps for their devices.[25]

Thus, on top of the dilemma between digital and analogical contact tracing, a second important question concerns the type of technology, including a choice between the centralized and a decentralized model. The decentralized approach has now been adopted by a variety of countries, including Switzerland, Austria, Italy, Latvia, Estonia, Finland, Ireland, and Canada, Norway, Australia, Colombia, and most recently England.[26] The centralized approach was adopted first in Singapore, where the Government Technology Agency instructed its citizens to download the *TraceTogether* app.[27] Its use was hailed as a success due to Singapore's quick reduction of R0, which is also explained by the substantial adoption rate that the app enjoyed: 2.1 million people, which amounts to roughly 35% of the population. This is considerably more than the reported average rate of 9% measured in

[24] GITHUB – Documentos. São Francisco - USA, 2020. Disponível em: https://github.com/DP-3T/documents. Acesso em: 07 ago. 2020.

[25] APPLE. COVID-19. Disponível em: https://www.apple.com/covid19/contacttracing. Acesso em: 07 ago. 2020.

[26] CRIDDLE, C.; KEILION, L. Coronavirus contact-tracing: World split between two types of app. BCCNEWS. Londres, 07 de mai. 2020. Disponível em: https://www.bbc.com/news/technology-52355028. Acesso: 07 ago. 2020 and RIVERO, N. The global tide has turned against centralized contact tracing apps. *QUARTZ*. Nova York, 18 jun. 2020. Disponível em: https://qz.com/1870907/privacy-issues-push-countries-to-decentralize-contact-tracing-data/. Acesso em: 07 ago. 2020.

[27] WESTLAKE, B. TraceTogether – the virus tracking app that has been a big winner out of the COVID-19 pandemic – but will YOU be the loser? *Digital Initiative*, Austrália, 2 mai. 2020. Disponível em: https://digital.hbs.edu/platform-digit/submission/tracetogether-the-virus-tracking-app-that-has-been-a-big-winner-out-of-the-covid-19-pandemic-but-will-you-be-the-loser/. Acesso em: 07 ago. 2020.

the 13 most populous countries with government-endorsed apps.[28] It should be noted however that an expert study advised that these applications would only be effective with 60% of adoption rate, but that a reduction in the spreading is also estimated at lower rates.[29] Given these numbers, a crucial question presents itself for governments wishing to introduce these tools and technologies to manage their own population: how should adoption be obtained? Should these apps be mandatory for the entire population, or for some specific subsets, or should they be entirely voluntary? What about the design of incentives to encourage an otherwise voluntary adoption, for instance tokens for participation in lotteries[30] or reward points gained through usage? Aside from questions regarding the voluntariness of consent, the major concern is that these solutions only work for a subset of the population (those who has access to smartphones and who can test and/or isolate), thus reinforcing existing societal disparities.[31]

2.2 Contagion risk scoring

A second type of technology that helps prevent the coronavirus from spreading is an app that collects different information about its bearer's risk of infection and generates a prediction score, often turned into a "digital pass" that determines whether that individual is allowed to enter certain places. In China, a Health Code service was developed by the government in partnership with the two major tech companies in the country: Alibaba and Tencent. The system required users to fill a record, including their names, IDs, cell phone numbers, symptoms and a detailed

[28] CHAN, S. COVID-19 Contact Tracing Apps Reach 9% Adoption In Most Populous Countries. In: Katie Jansen. *SensorTower*, São Francisco - USA, 14 jul. 2020. Disponível em: https://sensortower.com/blog/contact-tracing-app-adoption. Acesso em: 07 ago. 2020.

[29] HOWELL O'NEILLARCHIVE, P. No, coronavirus apps don't need 60% adoption to be effective. *MIT Technology Review*, Massachusetts, 05 jun. 2020. Disponível em: https://www.technologyreview.com/2020/06/05/1002775/covid-apps-effective-at-less-than-60-percent-download/. Acesso em: 07 ago. 2020. HINCH, Robert, et al. Effective configuration of a Digital Contact Tracing App: A report to NHSX; 16 April. 2020. Disponível em: https://www.research.ox.ac.uk/Article/2020-04-16-digital-contact-tracing-can-slow-or-even-stop-coronavirus-transmission-and-ease-us-out-of-lockdown, Acesso em: 07 ago. 2020

[30] FLORIDI, L. Mind the App— Considerations on the Ethical Risks of COVID-19 Apps. *SPRINGER NATURE*, Switzaerland – AG, v. 33, Article ID 2210-5441, 2020. DOI 10.1007/s13347-020-00408-5. Disponível em: https://link.springer.com/article/10.1007/s13347-020-00408-5. Acesso em: 07 ago. 2020.

[31] See, to that effect, the Resolution of the Inter-American Commission of Human Rights (OAS. Organização dos Estados Americanos – Comissão interamericana de direitos humanos. *Resolution 1/2020.* Washington, 2020. Disponível em: http://www.oas.org/en/iachr/decisions/pdf/Resolution-1-20-en.pdf?fbclid=IwAR02rUpICiFbojztmx302JtkeRKUio4ASsZVX12tr9DdqkNatB3l_Ln0zOI. Acesso em 07 ago. 2020); see also WHO. World Health Organization. *Ethical considerations to guide the use of digital proximity tracking technologies for COVID-19 contact tracing*: interim guidance. 20 may 2020. Disponível em: https://apps.who.int/iris/bitstream/handle/10665/332200/WHO-2019-nCoV-Ethics_Contact_tracing_apps-2020.1-eng.pdf. Acesso em 07 ago. 2020.

travel history, notifying if they have been in close contact with an infected person or one under suspicion of being so in the previous 14 days. After a verification process by the authorities, each user is given a QR Code, which will determine whether and for how long that user must quarantine.[32]

At its core, this app performs a function that encompasses some form of contact tracing, but with the important differences that: (1) the inputs are made through self-declaration by individuals, thus being less effective due potential under-reporting; (2) the results of the risk analysis are obtained through an automated decision-making process, typically without full awareness over the logic and functioning of the underlying algorithm; (3) at least in its Chinese version, it does not merely advise users to self-isolate, but it also automatically sends the analysis to a central database; (4) the codes may be used not only to track people's movements in public areas, but also to restrict entrance in certain establishments or access to certain services.[33] Because the State's interference with people's freedoms is more significant with this technology, the introduction of safeguards of transparency and due process in the design of such apps must be considered especially carefully,[34] on top of all the questions that have been highlighted in the previous subsection.

2.3 Bottom-up tracking and sharing initiatives

What we have considered so far is the rolling out of new technologies as an extension of the State in the digital sphere. The questions raised in that scenario are important and call for more serious thinking and planning around *public* data governance. However, a less than infrequent planning scenario is where the technological solutions are produced not by the state, but by individuals or corporations, i.e. citizens or community-led enterprises that aim to complement or improve governmental approaches to dealing with the virus. Examples include self-reporting apps (for instance, the "David-19" launched by the Interamerican

[32] GAN, N.; CULVER, D. China usa QR code digital para combater o coronavírus. Saiba como funciona. *CNNBrasil*, Hong Kong, 20 abr. 2020. Disponível em: https://www.cnnbrasil.com.br/tecnologia/2020/04/20/china-usa-qr-code-digital-para-combater-o-coronavirus-saiba-como-funciona. Acesso em: 07 ago. 2020.

[33] DAVIDSON, H. China's coronavirus health code apps raise concerns over privacy. *The Guardian*, Londres, 01 abr. 2020. Disponível em: https://www.theguardian.com/world/2020/apr/01/chinas-coronavirus-health-code-apps-raise-concerns-over-privacy. Acesso em: 07 ago. 2020.

[34] See in particular with regard to the effects of automated decision-making, FINCK, M. Automated Decision-Making and Administrative Law. *Oxford Handbook of Comparative Administrative Law*, Oxford, Oxford University Press, Max Planck Institute for Innovation & Competition Research Paper No. 19-10. 5 ago. 2019. Disponível em: https://ssrn.com/abstract=3433684. Acesso em 07 ago. 2020.

Development Bank)[35] and solutions based on data collaboratives (e.g., the datasets collected by NYU's Governance Lab).[36]

In this scenario of bottom-up solutions, a whole different set of question applies: the key challenges here are about the organizational and technological measures to ensure accountability for these private initiatives. What safeguards can be adopted to prevent misuse of these tools, and ultimately harm to individuals and communities? It should also be mentioned that apps that are primarily focused on one particular function (for instance, contact tracing) often include a host of different functionalities and thus purposes for data processing (including some use of aggregate data, for instance heat maps, diagnostics and information on availability of equipment). With that in mind, it appears of utmost importance that users can freely choose to use one or the other function of the app, without additional data sharing being a pre-condition for the proper functioning. Furthermore, it is worth noting that from an entrepreneur's viewpoint, the long-term goal is not necessarily the control of the epidemic, but rather the ability to generate engagement and extract value from the operation of the app, which can lead to problematic instances of nudging and manipulation.[37] There may be different considerations depending on how the app is financed, and thus the business model that is allowed to operate in any particular country: for instance, is it legitimate for the app to be funded with advertising relying on the sensitive data provided by its users?

All these are crucial issues for app developers and entrepreneurs. Although the answers to some of these questions could be obtained through a purposeful interpretation of the law, the complexity and uncertainty associated with this process in countries lacking specific guidelines may pose too great a threat to the development of valuable tools for the fight against the pandemic, or to allow their

[35] TOLEDO-LEYVA, C. David19, un "rastreador digital" contra la COVID-19 en América Latina. Made for minds. Bonn/Berlin, 22 mai. 2020. Disponível em: https://www.dw.com/es/david19-un-rastreador-digital-contra-la-covid-19-en-américa-latina/a-53538288. Acesso em: 07 ago. 2020.

[36] GOVLAB - #DATA4COVID19. Brooklyn, NY: GOVLAB, 2020. Disponível em: https://data4covid19.org/. Acesso em: 07 ago. 2020.

[37] SUSSER, D.; ROESSLER, B.; NISSENBAUM, H. Online Manipulation: Hidden Influences in a Digital World. *Georgetown Law Technology Review.* 4 GEO, L., TECH., REV. 1, ano 2019. Disponível em: https://georgetownlawtechreview.org/online-manipulation-hidden-influences-in-a-digital-world/GLTR-01-2020/. Acesso em 07 ago. 2020; CALO, Ryan. Digital Market Manipulation. *George Washington Law Review*. Vol. 82 (2014) p. 996-1050. Disponível em: http://www.gwlr.org/wp-content/uploads/2014/10/Calo_82_41.pdf Acesso em 07 ago. 2020. ZARSKY, Tal Z. Privacy and Manipulation in the Digital Age. *Theoretical Inquiries in Law.*Vol. 20, n.º 1, ano 2019, p; 157-188. Disponível em: http://www7.tau.ac.il/ojs/index.php/til/article/view/1612. Acesso em 07 ago. 2020; LANZING, Marjolein. "Strongly Recommended" Revisiting Decisional Privacy to Judge Hypernudging in Self-Tracking Technologies. *Philosophy & Technology*. N.º 32, ano 2019, p. 549-568. Disponível em: https://link.springer.com/article/10.1007/s13347-018-0316-4. Acesso em 07 ago. 2020.

download in such jurisdictions. It is arguably for this reason that, with the rise of the pandemic, a range of data protection authorities rushed to provide guidance.[38] This has not been possible in Brazil, however, due to the fact the data protection authority is (at the time of writing) not yet in place. In addition, as illustrated in section 4 below, there are important interpretative legal issues due to the lack of detail of some of the provisions of the applicable data protection law, something on which the authority is asked to provide guidance. The following section will provide an overview of the data protection law in the country, including some of the recent judicial developments in connection with the pandemic.

3 The framework for data protection in Brazil: ready to fight a pandemic?

3.1 The long and winding road to the LGPD

Until recently, Brazil lacked a framework to deal specifically with the right to data protection. While privacy was recognized by article 5 of the Brazilian Constitution, which proclaims the inviolability of privacy, private life, honor and image of individuals,[39] no general legislation existed to ensure a consistent interpretation of this provision, or the recognition of the positive measures it required. Privacy and secrecy of communications were protected under a fragmented framework including consumer protection rules[40] and other laws and regulation in different sectors, including telephony and telecommunications.[41]

The situation changed significantly with the entry into force of the so called "Marco Civil da Internet", a law that was drafted through a collaborative process

[38] See IAPP - DPA guidance on COVID-19, NH: IAPP, 2020. Disponível em: https://iapp.org/resources/article/dpa-guidance-on-covid-19/. Acesso em: 07 ago. 2020.

[39] This right includes that to compensation for property or moral damages resulting from violation thereof. See article 5 (X) of the Federal da Constituição da República Federativa do Brasil de 1988 (BRASIL, 2016).

[40] BRASÍLIA. Lei Nº 8.078 de 11 de setembro de 1990. *Diário Oficial da República Federativa do Brasil.* Poder Executivo, Brasília, DF. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/l8078compilado.htm (Acesso: 07 ago. 2020).

[41] Specifically: Lei No 9507/1997 ("Lei sobre o direito de acesso a informações e disciplina o rito processual do *habeas data*); "Lei do Cadastro Positivo" (Lei 12.414/2011); "Decreto" 7.962/2013 (Regulamentação do e-commerce); "Resolução 1.821/2007 do Conselho Federal de Medicina";"Resolução Normativa 305/2012 da Agência Nacional de Saúde Suplementar"; "Decreto" 4.489/2002; "Lei" 12.527/2011 – "Lei de Acesso à Informação" – LAI; "Decreto" 8.777/206 – "Política de Dados Abertos do Poder Executivo federal"; "Decreto" 8.789/2016 "Lei" 9.472/1997 – "Lei Geral de Telecomunicações"; "Resolução 245/2007 do Conselho Nacional de Trânsito". Resolução que aprova o Regulamento dos Serviços de Telecomunicações ; Regulamento do Serviço de Comunicação Multimídia; e do Serviço Móvel Pessoal (Resolução No. 477/2007); Regulamento do Serviço Telefonico Fixo Comutado (Resolução No. 426/2005) (Acesso: 07 ago. 2020).

involving a variety of stakeholders and which made it a priority to secure the protection of civil liberties on the Internet.[42] It did so by erecting as its pillars privacy and freedom of expression of Internet users, and creating an overarching framework of rights and responsibilities of different Internet players. The specific legislative provisions for data protection, arguably a result of the strong participation of civil society organizations to the drafting process, came from a rigid stance towards the collection, use, storage and processing of personal data: the law requires free, express, and informed consent separate from other contractual clauses;[43] the sharing of personal data is only permissible with the free, express and informed consent or in other situations specifically provided by law; and the further collection, use, storage, processing and protection of personal data is legal only if disclosed in the terms and conditions of the contractual relationship with the users, where collection of those data was justified in the first place.[44] Thus, consent was assigned a major role for any type of data processing,[45] being required except where otherwise prescribed by law. However, the law was incomplete in this respect, as it did not clarify what grounds would be legitimate for processing data outside the consent justification.[46]

On 14 August 2018, Brazil adopted Law nº 13.709/2018, better known under its Portuguese acronym "LGPD" (*Lei Geral de Proteção de Dados Pessoais*).[47] The law filled the gaps left by the Marco Civil in some detail, including by extending protection outside the Internet context, but in doing so created several new gaps or uncertainties. For instance, one of its key innovations is the introduction of the "legitimate interest"[48] as a legal basis for processing personal data, which is an open-ended concept allowing the pursuit of the interest of data controllers or third parties as long as that is not outweighed by the fundamental rights and interests of data subjects. On the one hand, this legal basis is a welcome step forward as

[42] BRASÍLIA. Federal Law No. 12965/2014, previously Bill No. 2126/2011. *Diário Oficial da República Federativa do Brasil*. Poder Executivo, Brasília, DF. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm (Acesso: 07 ago. 2020).

[43] Art 7 (IX), Federal Law No. 12965/2014, previously Bill No. 2126/2011 (BRASILIA, 2014).

[44] Art. 7 (VIII), Federal Law No. 12965/2014, previously Bill No. 2126/2011 (BRASILIA, 2014).

[45] See e.g. BIONI, Bruno Ricardo. Proteção de dados pessoais: a função e os limites do consentimento. São Paulo: Editora Gen, 2019, p. 95

[46] See article 7 (VII), which remands to specific hypotheses "provided by law". This is not the only aspect of incompleteness in the framework designed by the Marco Civil: as far as data protection is concerned, the law also fails to clarify the relationship between the obligation for internet application providers to retain data for 180 days "as detailed by regulation" (see art 15 (I)), but upon request by the user at the end of the contractual relationship must "permanently delete his/her personal data" (see Art. 7 (X)).

[47] BRASÍLIA. Lei Nº 13.079, de 14 de Agosto de 2018. *Diário Oficial da República Federativa do Brasil*. Poder Executivo, Brasília, DF. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/l13709.htm (Acesso: 07 ago. 2020).

[48] BIONI, Bruno Ricardo. Proteção de dados pessoais: a função e os limites do consentimento. São Paulo: Editora Gen, 2019, p. 249

it fills the gap left by the Marco Civil by aligning with the model of the EU General Data Protection Regulation.[49] On the other hand, however, it opens up a whole new challenge: how are data controllers supposed to ensure transparency of this processing and determine when the fundamental rights and interest of the data subject prevail, without official guidance on this new and potentially dangerous (because highly context-dependent) legal basis?

Given this uncertainty, and several other aspects (for instance the requisite transparency of data processing) on which the law calls for more specific guidance by the data protection authority, the establishment of the latter was a matter of absolute priority since the adoption of the LGPD. Unfortunately, despite the urgency,[50] the government failed to create the *Autoridade Nacional de Proteção de Dados* (ANPD) until very recently (27 August), when a dedicated presidential decree finally institutionalized it.[51] It should be noted, however, that it will take time before the authority becomes fully operational, and at the time of writing the names of its appointed Commissioners have not been announced. It should also be noted that a number of delays have affected the entry into force of the LGDP: the initial *vacatio legis* period of 18 months was extended to 24 in August 2019 (while the application of administrative sanctions was suspended until August 2021), and a number of legislative projects were introduced to delay the entry into force of the law even further.[52] The Presidency added to the complexity of the situation by

[49] EUROPE, Council of. *Regulamento (UE) 2016/679 do Parlamento europeu e do Conselho.* Luxemburgo, 2016. Disponível em: https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=celex%3A32016R0679. Acesso em: 07 ago. 2020.

[50] Although the creation of the Authority was initially vetoed by former President Temer, the understanding of its fundamental value to give meaning to the LGPD led to its reintroduction in the LGPD together with the prescription of the immediate entry in force of the norms establishing the authority.

[51] BRASÍLIA. Decreto n.º 10.474, de 26 de agosto de 2020. *Diário Oficial da República Federativa do Brasil*. DF, Brasília. Poder Executivo. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/decreto/D10474.htm. Acesso: 07 ago. 2020.

[52] BRASÍLIA. *Camara*. Projeto de Lei nº 5762/2019. Altera a Lei nº 13.709, de 2018, prorrogando a data da entrada em vigor de dispositivos da Lei Geral de Proteção de Dados Pessoais - LGPD - para 15 de agosto de 2022. Disponível em: https://www.camara.leg.br/propostas-legislativas/2227704 Acesso em: 09 set. 2020. BRASÍLIA. *Senado*. Projeto de Lei nº 1164 de 2020. Acrescenta o inciso III ao artigo 65 da Lei nº 13.709 de 14 de agosto de 2018 Lei Geral de Proteção de Dados Pessoais – LGPD para prever prazo de aplicação das sanções previstas na referida Lei em virtude do estado de calamidade pública reconhecido pelo Decreto Legislativo nº 6 de 20 de março de 2020 e da emergência de saúde pública de importância internacional decorrente do coronavírus (covid-19). Disponível em: https://www25.senado.leg.br/web/atividade/materias/-/materia/141295. Acesso em: 09 set. 2020. BRASÍLIA. *Senado*. Projeto de Lei nº 1027, de 2020. Altera a Lei nº 13.709, de 2018, prorrogando a data da entrada em vigor de dispositivos da Lei Geral de Proteção de Dados Pessoais - LGPD - para 16 de fevereiro de 2022. Disponível em: https://www25.senado.leg.br/web/atividade/materias/-/materia/141225 Acesso em: 09 set. 2020. BRASÍLIA. *Senado*. Projeto de Lei nº 1179, de 2020. Dispõe sobre o Regime Jurídico Emergencial e Transitório das relações jurídicas de Direito Privado (RJET) no período da pandemia do Coronavírus (Covid-19). Disponível em: https://www25.senado.leg.br/web/atividade/materias/-/materia/141306 Acesso em: 09 set. 2020.

the adoption of Executive Order MP959/2020,[53] which included in its article 4 a postponement of the entry into force until 3 May 2021. Both Congress and Senate voted to convert the decree into law, but Senate excluded from the "conversion law" precisely article 4, thus annulling the postponement and causing the law to enter into force in September 2020.

3.2 The right to data protection emerging from the only government attempt to capitalize on citizen data to fight the pandemic: disproportionate collection to measure unemployment

Both the entry into force of the law and the establishment of the ANPD are landmark events, whose importance in stepping up the level of data protection in Brazil cannot be overstated. However, the temporal focus of the present paper is on the period leading up to such landmark legislation, so as to offer a snapshot of the uncertainty that data controllers have been facing during the pandemic. One interesting piece of evidence about this uncertainty is the fact that even the government, on the occasion of its first measure involving substantial collection of personal data, tried to specifically assuage the data protection concerns arising from the absence of specific regulation: this is the case of Executive Order MP 954/2020,[54] which mandated telecom operators to share name, telephone numbers, and addresses of their than 200 hundred million subscribers with the governmental agency responsible for the national census, the Brazilian Institute of Geography and Statistics (IBGE). According to the Executive Order, the subscriber data shared by telecom operators would be used by IBGE to conduct non-presential interviews "for the production of official statistics" during the pandemic. As mentioned , the text of the Order included some basic guarantees with regard to the collected data, namely: they would be maintained under strict confidentiality; they would not be used for any other purpose, including for certification or as evidence in administrative, fiscal or judicial proceedings; and they would be deleted, at the latest, 30 days after the official end of the emergency situation.

[53] BRASÍLIA. Medida Provisória de Nº 959, de 29 de abril de 2020. *Diário Oficial da República Federativa do Brasil*. DF, Brasília. Poder Executivo. Disponível em: http://www.normaslegais.com.br/legislacao/medida-provisoria-959-2020.htm (Acesso: 07 ago. 2020).

[54] BRASÍLIA. Medida Provisória Nº 954, de 2020. *Congresso Nacional*. DF, Brasília. Poder Executivo. Disponível em: https://www.congressonacional.leg.br/materias/medidas-provisorias/-/mpv/141619 (Acesso: 07 ago. 2020).

Unsurprisingly, those guarantees were deemed vague and insufficient, especially by several political parties and by the Federal Council of the Brazilian Bar Association, all of which brought direct challenge before Brazil's Supreme Court to obtain a declaration of unconstitutionality (and thus annulment) of the Order. The petitioners stressed the broad formulation of the purpose of the data processing and the absence of effective controls (for instance oversight by a data protection authority) over IBGE's responsible handling of subscriber data, among other procedural and substantive flaws. Based on such considerations, petitioners relied on the core argument that such measures violated the constitutional protections of human dignity, intimacy, honor, confidentiality and (most importantly) the right to informational self-determination. Although informational self-determination is explicitly listed by art. 2 of the LGPD as one of the its founding principles, the Brazilian Supreme Court had never formally recognized it a fundamental right. In this case however, the Court seized the opportunity, reminiscing the landmark Census case which gave birth to informational self-determination in Germany in 1983.[55] To give an illustration of the fundamental importance of this ruling, let us highlight here some of the key passages of the two judicial opinions that have been made publicly available: the monocratic decision by judge Rosa Weber[56] to grant injunctive relief to the petitioners (and thus suspend the decree) pending the final judgment, and the opinion by judge Gilmar Mendes[57] that followed that ruling and voted in favor of the declaration of unconstitutionality on the merits. This is also the position followed by the majority of the judicial college, which resulted in the annulment of the decree on 7 May 2020, with a resounding 9 to 1 vote.[58]

First, Judge Weber convincingly pointed out that the vaguely formulated purpose of "official statistics" does not permit the identification of the legitimate purpose that the government intends to pursue with the measure in question, much less its necessity and proportionality. She further noted, crucially for the establishment of the right to data protection, that the Order did not establish any

[55] BUNDESVERFASSUNGSGERICHT. Schlossbezirk, 2020. Disponível em: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215_1bvr020983en.html. Acesso em: 07 ago. 2020.

[56] BRASÍLIA. Medida Cautelar na Ação Direta de Inconstitucionalidade. 6.387. Distrito Federal. *Supremo Tribunal Federal*. DF, Brasília. Disponível em: http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI6387MC.pdf (Acesso: 07 ago. 2020).

[57] BRASÍLIA. Voto de Gilmar Mendes em Referendo na Medida Cautelar na Ação Direta de Inconstitucionalidade 6.389. Distrito Federal. *Supremo Tribunal Federal*. DF, Brasília. Disponível em: https://www.conjur.com.br/dl/pandemia-reforca-necessidade-protecao.pdf (Acesso: 07 ago. 2020).

[58] BRASÍLIA. Referendo na Medida Cautelar na Ação Direta de Inconstitucionalidade 6.389. Distrito Federal. *Supremo Tribunal Federal*. DF, Brasília. Disponível em: http://portal.stf.jus.br/processos/detalhe.asp?incidente=5895168 (Acesso: 09 set. 2020).

suitable technical or administrative mechanism to protect the personal data from third party access, data breach or unauthorized use. A couple of weeks later, in a well-written and academically referenced opinion, Judge Mendes endorsed that position tracing the evolution from the right to privacy to data protection in the scholarly debate, and through some landmark cases and statutes in US and EU. Emphasizing the fundamental character of adaptability of constitutional protections to a changing (technological) world, he grounded the recognition of the right to data protection on (i) the fundamental right to human dignity; (ii) the right to protection of intimacy in light of new risks derived from technological advancements; and (iii) the substantive protection offered by the *Habeas Data*, a consolidated procedure in the Brazilian system which provides data subjects with the right to request access to any of their personal information that is used in publicly owned or publicly used databases. Against this backdrop, Judge Mendes reiterated Weber's criticism for the purpose and the absence of limits on data processing, and made clear that the State has not absolved itself from the duty to establish the necessary technical and administrative safeguards, such as the anonymization of data and a minimum of transparency. Among those safeguards, he stressed the necessity of an independent data protection authority, which is recognized as a constitutive element of the fundamental right to data protection from the EU Charter for Fundamental Rights.

This case demonstrated that the Brazilian framework for data protection, while promising on paper, was not ready to provide effective limits to executive power, and *mutatis mutandis* to private action, in the fight against the pandemic. To the eyes of Judge Mendes and Judge Weber, what was particularly problematic in the context of governmental action was the absence of a DPA and of a horizontal regime for data protection law, both of which provided a motivation for the Supreme Court to act in a more assertive fashion in keeping the government in check. It remains debatable, however, that the safety valve of the Supreme Court can be used to absolve a country's responsibility for putting in place an adequate system that ensures the protection of the fundamental rights of its citizens, and that can help to save lives during the pandemic. For this reason, we now turn to an assessment of the positive obligations of States members of the Inter-American Human Rights system.

4 The gene is out of the bottle: drawing the implications of positive obligations under the American convention of human rights

4.1 The concept of positive obligations under the convention

The American Convention of Human Rights is a regional human rights treaty signed on 22 November 1969, to which Brazil is a party since 1992. The reason why this Treaty is particularly important for our discussion is that it establishes a duty for States to take the necessary measures to ensure effective protection of human rights: this is a so called "positive obligation" to act, not merely a duty of non-interference. In practice, this means that States have not exhausted their homework by merely recognizing and respecting the rights enshrined in the Convention (*duty to respect*), but must also provide for an adequate framework to guard against possible interference by any person (*duty to ensure full and effective enjoyment*), be it public or private, individual or collective, physical or juridical.[59]

Three different legal provisions can be used for the construct of positive obligations in the ACHR: articles 1(1), 2 and 25. First of all, article 1 (entitled "obligation to respect rights") provides the following:

> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
>
> 2. For the purposes of this Convention, "person" means every human being.

While the language of this provision explicitly identifies a positive obligation for States, it is not immediately clear what should be its exact content: what is the temporal focus of the obligation? Would it be sufficient, for instance, that the system allows any violation to be remedied *ex post*, even if this may come at significant cost, delay or other inconvenience for the aggrieved victim? This interpretation would adversely affect the ability of less affluent members of society

[59] ESPIELL, Héctor Gros. La Convención Americana y la Convención Europea de Derechos Humanos. Análisis comparativo. Editorial Jurídica de Chile. Santiago, 1991.

to obtain an effective remedy, thus falling foul of the proviso contained in the second part of art 1 (1). This was quickly confirmed by the Court's jurisprudence in its leading case on positive obligations: in *Velasquez v Honduras*,[60] the IACtHR was called to examine the effectiveness of the responses of the local authorities to a series of complaints about the forced disappearance of several individuals, including Mr. Velásquez Rodríguez. The Court condemned Honduras on account of the lack of serious investigations over these crimes, and in doing so clarified that the States parties to the Convention have the obligation to organize the governmental apparatus and, in general, *all the structures through which public power is exercised*, so that they are capable of juridically ensuring the free and full enjoyment of human right.[61] The Court added the following, which is particularly telling for the conduct of public servants: "The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it *possible* to comply with this obligation: it also requires *the government* to conduct itself so as to effectively ensure the free and full exercise of human rights".[62] At least in part, this answers the question raised above regarding the sufficiency of *ex post* remedies: this safety valve cannot be accepted as a defense when it comes to *governmental conduct* that systematically fall shorts of taking the positive steps needed to ensure the free and *full* exercise of human rights.

However, the ruling left some uncertainty with regard to the conduct of private parties, and the extent to which state responsibility can be implicated on account of inaction. In that particular case, the fact that the criminal actions were committed by private entities did not prevent the Court from finding state responsibility on account of a lack of due diligence, support, acquiescence or tolerance.[63] Though conceding that it is not possible to make a detailed list of all the necessary measures to be taken, since they vary depending on the law and the conditions of each State Party, it affirmed that a complaint generates the specific positive obligations to "*prevent, investigate and punish* any violation of the rights recognized by the Convention and, moreover, if possible attempt to *restore* the right violated *and provide compensation* as warranted for damages resulting from the violation".[64] The scope of this duty of activation was recently detailed in *López Soto et. Al. v. Venezuela* as including *all juridical, political, administrative and cultural measures*

[60] IACHR (Judgment), *Velásquez Rodríguez v.; Honduras*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), 29 July 1988.

[61] Id., para. 166.

[62] Para. 167 (emphasis added).

[63] In the words of the Court: "if the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights".

[64] Paras 175-176 (emphasis added).

which promote the respect of human rights and which ensure that any possible violation be treated as an illegal act, liable of triggering sanctions for perpetrators, and to indemnify victims for the personal consequences.[65] While this is interlinked with the general measures required under with article 2 of the Convention,[66] it can also apply with regard to a specific State conduct (or lack thereof) in relation to the acts of a private entity: this may be due to *ex ante* behavior if at the time of the event the public authorities knew, or had reason to know, of the existence of a real and immediate risk for the enjoyment of the protected right of one or more identified individual(s), and did not take the measures that were within their competence and that could reasonably be expected to prevent such risk.[67] It can also be for *ex post* behavior, in particular depending on whether the State brought the violation of a Convention right to a halt and repaired the consequences of the measure or situation that triggered such violation.[68]

A second provision on which positive obligations can be grounded is article 2, which requires members of the Convention to undertake the necessary measures to give domestic legal effects to the rights and freedoms enshrined in the Convention. Specifically, Article 2 says the following:

> Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

From the text of this provision, it can be evinced that the obligation imposed is of structural nature, rather than about the behavior of public authorities in particular scenario: the goal is to ensure that there is an adequate legal system in place to prevent, investigate and punish the rights and freedoms enshrined in the Convention. In that sense, it is complementary to article 1(1): its focus is on adequacy *in abstracto*, whereas the inquiry on whether these legal tools have been functioning

[65] ACtHR (Judgment) Caso *López Soto y otros Vs. Venezuela*. Fondo, Reparaciones y Costas. Sentencia de 26 de septiembre de 2018. Serie C No. 362, §129.

[66] FERRER MAC-GREGOR, Eduardo and PELAYO MÕLLER, Carlos María. 'La obligación de "respetar" y "garantizar" los derechos humanos a la luz de la jurisprudencia de la corte interamericana. Análisis del artículo 1º del pacto de San José como fuente convencional del derecho procesal constitucional mexicano'. Estudios Constitucionales, vol. 10, núm. 2, 2012, pp. 141-192.

[67] ACtHR (Judgment). *Caso López Soto y otros Vs. Venezuela*. Merits, Reparations and Costs. ACtHR (Judgment). 26 September 2018. Series C No. 362, §141.

[68] ACtHR (Judgment). Case *Colindres Schonenberg Vs. El Salvador*. Fondo, Reparaciones y Costas. Sentencia de 4 de febrero de 2019. Series C No. 373, §75.

in the particular case will fall within the scope of article 1(1). As a practical matter, however, the inquiries are closely linked. For this reason, the two provisions are typically used together to support a claim of violation of positive obligations. This occurs not only when the State has failed to enact domestic legislation to implement the Convention rights and obligations, but also when it establishes provisions that are incompatible with what is required under the Convention (regardless of whether such provisions are legitimate under domestic law).[69]

A third and related provision on which positive obligation can be grounded, and which is seldom used in light of its specificity, is article 25 of the Convention, which establishes the following:

> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
>
> 2. The States Parties undertake:
>
> a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
>
> b. to develop the possibilities of judicial remedy; and
>
> c. to ensure that the competent authorities shall enforce such remedies when granted.

The Court has had occasion to rule on this provision and reinforce its connection with articles 1 and 2, of which it can be seen as a specific instantiation. In *Xákmok Kásek Indigenous Community v. Paraguay*,[70] it held that "Article 25 of the Convention [the right to judicial protection] is closely related to the general obligations contained in Articles 1(1) and 2 thereof, which attribute protective functions to the domestic law of the States Parties." Specifically, "the State has

[69] ACtHR (Judgment). Case *Comunidad Campesina de Santa Bárbara Vs. Perú*. Excepciones Preliminares, Fondo, Reparaciones y Costas. 1 September 2015. Series C No. 299, §228; ACtHR (Judgment), Caso *Velásquez Paiz y otros Vs. Guatemala*. Preliminary objections, Merits, Reparations and Costs. ACtHR (Judgment), 19 November 2015. Series C No. 307, §153; Caso *Favela Nova Brasília Vs. Brasil*. Preliminary objections, Merits, Reparations and Costs. Judgment of 16 February 2017. Series C No. 333, §182; Caso *Pacheco León y otros Vs. Honduras*. Merits, Reparations and Costs, Judgment of . 15 November 2017, Series C No. 342, §81.

[70] ACtHR (Judgment) 24 August 2010, *Xákmok Kásek Indigenous Community* v. *Paraguay.* Merit, Reparations and Costs. Series C No 214.

the responsibility to design and establish an effective legal remedy, as well as to ensure the due application of the said remedy by its judicial authorities".[71] In this regard, it has been held for instance that access to justice is in violation of article 2 when a legal procedure turns into a means of delaying and hindering the judicial process and a factor in favor of impunity.[72]

Despite the close link with articles 1 and 2, it bears noting that the scope of this obligation can go further than the protection afforded by those articles: an effective remedy must be granted *vis a vis* a violation of any fundamental right recognized, not only by the Convention, but also by national Constitutions, and even ordinary laws. While some debate can be had about the extent to which ordinary law ought to be sufficient to recognize the character of certain rights as "fundamental", this is particularly relevant for our discussion regarding Brazil considering the recent recognition of the fundamental right to data protection, or informational self-determination,[73] which may not coincide with the scope of protection granted under article 11 of the Convention. The following subsection will specifically explore the implications of positive obligations in the context of the Brazilian scenario.

4.2 Is Brazil fulfilling its obligations under the convention?

Having seen that the ACHR sets out a wide range of positive duties to ensure the full enjoyment of Convention rights, it is now possible to discuss the implications of this article at the time of a pandemic such as the one we are facing, and ultimately ascertain whether the approach currently followed by Brazil can be deemed compliant.

Most relevant for our purposes is the right to privacy, which is established by article 11 of the Convention as follows:

> 1. Everyone has the right to have his honor respected and his dignity recognized.
>
> 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

[71] Id., Para 141.

[72] ACtHR (Judgment) *Caso de la "Masacre de Mapiripán" Vs. Colombia*. 15 September 2005. Series C No. 134, §113; ACtHR (Judgment). *Caso de la Masacre de Pueblo Bello Vs. Colombia*. 31 January 2006. Series C No. 140, §116.

[73] See *supra*, section 4.2

> 3. Everyone has the right to the protection of the law against such interference or attacks.

Although the ACHR does not include the right to data protection, much like its European counterpart (the European Court of Human Rights, or ECHR), it can be argued that the scope of the protection afforded under article 11 is broad enough to encompass this right in some form.[74] For instance, the Court explained that private life is not limited to the right to privacy because it encompasses a series of factors related to the dignity of all individuals, including the ability to develop their own personality and aspirations, to determine their own identity and define their own personal relationships.[75] It also confirmed, citing with approval case-law from the ECHR, that the concept of private life encompasses aspects of physical and social identity, including the right to personal autonomy and personal development and the right to develop and establish relationships with other human beings and with the outside world.[76]

All the above suggests that the existence of adequate rules of data protection is essential to ensure the full enjoyment of the privacy right recognized under article 11. The crucial question however, in the case of Brazil under the LGPD, is whether the mere fact of having in place a framework of open-ended rules, and thus the failure to provide guidance on their implementation, would constitute a violation of its positive obligation arising from article 11. Note that this question is separate from the inquiry as to whether there is an effective legal remedy for violations of fundamental rights, which, as mentioned in the previous section, is bound to apply to data protection in Brazil after the recent Supreme Court case. In this latter respect, a doubt can be casted on the effectiveness of a remedy system that imposes on victims the burden (significant in terms of time and resources) of taking a data controller to court and alleging the unfairness of data processing operations over which they have no detailed knowledge and understanding: for this reason, the institutionalization of data protection authority, as well as its dialogue with civil society organizations that shed light on, are of crucial importance in overcoming informational asymmetry.[77]

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[74] SOUZA, Carlos Affonso, et al. The International Journal Of Human Rights. From privacy to data protection: the road ahead for the Inter-American System of human rights, The International Journal of Human Rights, 2020. DOI: 10.1080/13642987.2020.1789108.

[75] IACtHR, *Case Artavia Murillo et al. vs. Costa Rica*, Judgement of 28 November, 2012, Merits, Reparations and Costs, para. 143.

[76] *Id.*

[77] WIEWIÓROWSKI, W. Civil society organizations as natural allies of the data protection authorities. *EDPS Blog*. Bruxelas, 15 maio 2018. Disponível em: https://edps.europa.eu/press-publications/press-news/blog/civil-society-organisations-natural-allies-data-protection_de. Acesso em 07 ago. 2020.

Let us now consider the elements identified in the doctrine of positive obligations in relation to the technologies described in section 2 above. To start, there are fundamental questions of voluntariness: the risk is that individuals be forced to reveal their history of movements and connections, and potentially more intrusive types of data, without this interference being justified and proportionate to a proven public policy need. This would amount to a clear violation of the second prong of article 11, and thus an adequate legal framework would require any State considering the introduction of such technologies to conduct a comprehensive Data Protection Impact Assessment (DPIA). Unfortunately, the LGPD does not identify the specific instances in which such assessment would be required, leaving that largely to ANPD guidance. In addition, authorities would not be required to comply with the new legislation if the data they collected were to be anonymized; however, the definition of what constitute acceptable measures of anonymization remains to be defined. Anonymization was indeed the premise justifying the partnership between telecommunication operators and the Ministry of Science, Innovation, Technology and Communication for the provision of "heat maps", which was announced in April[78] and subsequently withdrawn without further explanation. This however did not prevent the states of Alagoas, Amapá, Amazonas, Ceará, Maranhão, Goiás, Mato Grosso do Sul, Mato Grosso, Minas Gerais, Pará, Paraíba, Piauí, Santa Catarina and Rio Grande do Sul, in addition to the municipalities of Recife, Teresina and Aracaju to establish a similar arrangement with Inloco, a digital security firm that is already present in the phones of approximately 60 million Brazilian citizens.[79] Unfortunately, the risk posed by this public-private partnerships[80] has been significant without a clear framework for vetting the data processing of these companies, and most importantly, a data protection authority to oversee the implementation of any promises made. In this regard, it should be noted that the lack of standardized procedures for investigation and administration of justice has been deemed sufficient by the Court to find a violation of the duty to prevent risks pursuant to article 1(1).[81] As stated by the IACtHR in a case against Brazil, where there is delegation of public services to private entities,

78 DIEB, D.; GOMES, H. S. Governo vai monitorar celular para controlar aglomeração na pandemia. *tilt*. São Paulo, 02 abr. 2020. Disponível em: https://www.uol.com.br/tilt/noticias/redacao/2020/04/02/para-combater-a-covid-19-o-governo-federal-vai-monitorar-o-seu-celular.htm. Acesso em: 07 ago. 2020.

79 SCHREIBER, Mariana. Coronavírus: uso de dados de geolocalização contra a pandemia põe em risco sua privacidade? BBC News Brazil. Brasília. Disponível em https://perma.cc/KAB9-7QNU. Acesso em: 07 ago. 2020.

80 In addition to this example, see the case of IP.TV above at note 14.

81 IACtHR (Judgment) *Caso González y otras ("Campo Algodonero") Vs. México.* Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 16 de noviembre de 2009. Series C No. 205, §502.

2 IACtHR (Judgment). *Caso Espinoza Gonzáles Vs. Perú.* Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 20 de noviembre de 2014. Series C No. 289, §322.

the State "continues being responsible for providing such public services and for protecting the public interest concerned".[82] In the context of delegation of health care services, the Court has stated that positive obligations include a duty to "create official supervision and control mechanisms for health care facilities, as well as procedures for the administrative and judicial protection of victims, the effectiveness of which will evidently depend on the way these are implemented by the competent administration".[83] This is linked not only to the monitoring of private conduct, but also to the need for clarity and comprehensiveness of the principles governing the delegated activity. The requirements of clarity and predictability in the application of the law constitute a general principle of art 2, on the basis of which the Court has in some cases required the introduction of soft-law, such as ethical guidelines, to complement the existing framework.[84]

As to the use of contagion risk scoring, the heightened risks posed by automated decision-making warrant an even more comprehensive data protection impact assessment, as well as meaningful information about the functioning of these systems and the way in which it can be challenged.[85] However, in addition to the aforementioned problem with DPIAs, the scope of information obligations of data controllers under the LGPD remains something to be detailed by the ANPD. As it will be clear by now, the lacuna left by the absence of an authority was one of the most conspicuous challenges to the effectiveness of the protection that the LGPD would aim to accord, both under the specific inquiry of art 1(1) and the general inquiry of art 2. The resulting system is in stark contrast with the obligation under the Convention not only to prevent risk factors but also to strengthen the institutions that could provide an effective response to eventual violations.[86] The recent closing of the gap with the establishment of the ANPD and the entry

[82] IACtHR (Judgment) 4 July 2006, *Ximenes-Lopes v. Brazil,* para. 96.

[83] IACtHR (Judgment) 21 May 2013, *Suárez Peralta v. Ecuador*, para. 132.

[84] IACtHR (Judgment) *Caso Apitz Barbera y otros ("Corte Primera de lo Contencioso Administrativo") Vs. Venezuela*. Preliminary objections, merits, reparations and costs. 5 August 2008, Serie C No. 182, §253. IACtHR (Judgment). *Caso Reverón Trujillo Vs. Venezuela*. Preliminary objections, merits, reparations and costs, 30 de junio de 2009. Series C No. 197, §191.

[85] See FINCK, supra note 34; MALGIERI, Gianclaudio, COMMANDÉ Giovanni. Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation. *International Data Privacy Law*. Volume 7, Issue 4, November 2017, p. 243–265. Disponível em: https://academic.oup.com/idpl/article-abstract/7/4/243/4626991?redirectedFrom=fulltext. Acesso em 07 ago. 2020; BRKAN, Maja, BONNET, Gregory. Legal and Technical Feasibility of the GDPR's Quest for Explanation of Algorithmic Decisions: of Black Boxes, White Boxes and Fata Morganas. *Cambridge University Press*. Volume 11, Issue 1, 30 mar. 2020, pp. 18-50. Disponível em: https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/legal-and-technical-feasibility-of-the-gdprs-quest-for-explanation-of-algorithmic-decisions-of-black-boxes-white-boxes-and-fata-morganas/7324CDE80A300179C170C5BA8CA7E851. Acesso em 07 ago. 2020.

[86] MAC-GREGOR, E. Ferrer. La obligación de 'respetar' y 'garantizar' los derechos humanos a la luz de la jurisprudencia de la Corte Interamericana", 10 Estudios Constitutionales. 2012, p. 165.

into force of the LGPD must be welcomed as a substantial improvement in that respect. Some appreciation should also be made for the recent introduction of a decentralized contact tracing function in the Corona app made available (up to that moment only for general information about the virus) by the Ministry of Health.[87] Prior to the introduction of this functionality into the app, Brazilian residents were forced to resort to unvetted private initiatives (typically provided by foreign companies), which could potentially put at risk the personal data. This functionality was only enabled (relying on a protocol offered for implementation by Apple and Google) at the end of July, after the pandemic had been for more than 3 months at its peak in the country.

Finally, a special consideration should be made for the trade-offs between privacy and other rights or interests. At least in principle, one could try to justify the postponement of the law or even of the creation of the ANPD by pointing to the costs for business and the resources spent on other state measures, including government-run apps & tools to fight the pandemic and financial measures aimed to support the unemployed. While the IACtHR has not specifically addressed this issue, the European Court of Human Rights has explicitly recognized that the obligation of prevention "must be interpreted so that an impossible or disproportionate burden is not imposed upon the authorities", "[t]aking into account the difficulties involved in the planning and adoption of public policies and the operative choices that have to be made in view of the priorities and the resources available".[88] However, making such claims requires the showing of a strategy for dealing with the pandemic that sufficiently takes into account the serious risks posed to one's citizens, including the adoption of due diligence in preventing and remedying violations. So far, the government has failed to show such strategy and behavior, not only with regard to the right to privacy, but also with regard to the containment of risks posed by the pandemic to the rights to life[89] and personal integrity,[90] which the IACtHR has declared directly and immediately

[87] PENEDA, Alexandre. Aplicativo coranavírus-SUS vai alertar contatos próximos de pacientes com Covid-19. *Agência Saúde*. Brasília, 31 jul. 2020. Disponível em: https://www.saude.gov.br/noticias/agencia-saude/47292-aplicativo-coronavirus-sus-vai-alertar-contatos-proximos-de-pacientes-com-covid-19. Acesso em 07 ago. 2020.

[88] EUROPEAN COURT OF HUMAN RIGHTS, caso, *Kiliç v. Turkey*, judgment of 28 March 2000, Application No. 22492/93, paras. 62 and 63; *Osman v. the United Kingdom* judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, paras. 115 and 116.

[89] In particular, Article 4 of the Convention establishes the following: "1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life [...]".

[90] In particular, Article 5 of the Convention establishes the following: "1. Every person has the right to have his physical, mental, and moral integrity respected [...]".

linked to attention to human health.[91] Data protection does not simply serve the purpose of protecting personal data, but also that of legitimating the circulation of information, allowing individuals (and in this case an entire population) to benefit from the insights derived from such data.[92] Accordingly, the government's inertia[93] in establishing an effective data protection framework despite facing the relentless advancement of the pandemics, combined with the absence of data-driven measures to tackle the crisis and the lack of engagement with scientific evidence, are indicia of a failure to meet positive responsibilities imposed by the Convention: not only to ensure the requisite protection of privacy, but also, to adopt the necessary information-related measures that would help citizens combat the pandemic irrespective of the "hands off" approach adopted by the government. Aside from implementing an effective data protection law, additional measures could have been taken include to ameliorate citizens' understanding of their own specific risks: for instance, the publication of more granular data in portable format, the provision of official heat maps, the production or endorsement of safe contact tracing apps, and the promotion of an evidence-based discussion on chloroquine and other medicines. The cost of all this, even if combined with a substantial increase in testing capacity, would have been minimal compared to the alternative measures taken in support of the ailing economy, and would have had a better chance of constituting an effective response in the medium and long term. As a result of the above, it is argued that the law and jurisprudence of the ACHR provide grounding for a possible action of responsibility of the State for violation of articles 1, 2, 4, 5 11, and 25.

Conclusion

This Article has examined the peculiar case of the fight against the pandemic in Brazil, where the government has pursued a strategy centered on the priorities of providing health care and sustaining the economy, rather than on the awareness and prevention of contagion risks. While staying clear of a detailed accounting of

[91] IACHR (judgment), *Case of Albán Cornejo et al.*, supra, para. 117, and *Case of Vera Vera et al. v. Ecuador*. Preliminary objections, merits, reparations and costs. Judgment of May 19, 2011. Series C No. 226, para. 43.

[92] For an in-depth analysis of the interaction of these two objectives in the European context, see LYNSKEY, Orla, The Foundations of EU Data Protection Law. Oxford, Oxford University Press, 2015, p. 46-88.

[93] It should be clarified that Congress and Senate are accomplices in this inertia, having repeatedly voted to postpone the entry into force of the LGPD. However, for the purpose of international law, and thus of establishing a violation of the ACHR, it is irrelevant which branch of power had the competence of committing one or more acts, as the corresponding responsibility falls onto the State as a whole.

costs and benefits of each measure, this analysis has provided criticism on the government's posture for the lack of preventative measures that could reasonably be expected, including most notably the failure to create an adequate data protection framework, which would have facilitated the adoption of technologies to promote conscientization and risk prevention. The constitutional challenge against the only government attempt to use citizen data to fight (economically) the pandemic has made that evident, actually offering an opportunity for the Supreme Court to give constitutional recognition to the fundamental right to data protection. This case-study thus illustrates that the importance of an effective data protection framework is even more crucial at a time of pandemic, so as to simultaneously provide adequate protection to individuals and legitimize initiatives that take advantage of the enormous insights that can be derived from the processing of personal data.

Perhaps more notably, it was shown that a failure to create such framework can trigger serious consequences under the American Convention of Human Rights. In fact, the Convention provides a legal basis to hold its signatories accountable for inaction, in particular where measures could reasonably be expected for the prevention of human rights violations and the guarantee of an effective remedy. As illustrated, such measures could be expected not only for privacy reasons, but also to give effectiveness to the protection of the rights to life and both physical and psychological integrity of individuals. In this sense, this case-study conveys a strong message both to Brazil and to other signatories of the Convention, in particular those who do not have yet a comprehensive data protection law in place. Furthermore, the Brazilian scenario is particularly interesting as it reveals an important consequence of the recognition of the fundamental rights character of data protection -that States must ensure the availability of effective remedies against its violation- making the case for the establishment of an authority even stronger. While Brazil has taken the right steps as of late with the institutionalization of the authority, it remains to be seen the extent to which the benchmark of an "effective remedy" can be met considering its characteristics: in particular, given the very limited number of staff (36) and its attachment to the Presidency, who will appoint members to all top-level positions. On the bright side, however, a specific provision in the LGPD (art. 55§1º) permits the transformation of the legal nature of the authority (converting it into an "autarchy", the equivalent of an independent administrative agency) within two years since its coming into existence; and at the time of writing, a legislative proposal has already been introduced to provide

more autonomy and independence to the ANPD.[94] All in all, it may well be that an important silver lining of the pandemic will be the creation of a stronger data protection environment, and an increasing appreciation of the two-fold role of data protection: protecting individuals and legitimizing the use of personal data. It is the author's hope that this article stimulates further thinking by lawyers and policy-makers on steps that should be taken to ensure that this potential silver lining does not remain a merely theoretical possibility.

Um direito mais forte à proteção de dados durante a pandemia? A Convenção Americana de Direitos Humanos enquanto instrumento contra a inação governamental: um estudo de caso brasileiro

Resumo: Este artigo apresenta um estudo de caso para ilustrar a singular importância de ter uma lei de proteção de dados eficaz na luta contra as pandemias, e avaliar criticamente até que ponto a ausência de tal estrutura pode configurar uma violação da Convenção Americana de Direitos Humanos. A análise se concentra no Brasil por ser esse um exemplo emblemático, que tem enfrentado a pandemia sem ser capaz de contar com uma lei de proteção de dados abrangente e devidamente supervisionada, ao mesmo tempo em que não adotou medidas baseadas em dados a fim de auxiliar e impulsionar a conscientização e prevenir a propagação do vírus. Embora a relação entre as políticas adotadas e o aumento expressivo de contágios e mortes seja de correlação, e não necessariamente de causalidade, argumenta-se que um exame dos fatos através das lentes da Convenção e de sua jurisprudência poderia embasar suficientemente uma reivindicação de responsabilidade por falha na garantia da proteção da privacidade, da vida e da integridade tanto física como moral.

Palavras-chave: Covid-19. Proteção de dados. Utilização de dados. Obrigações positivas. Autoridade supervisora. Proteção efetiva

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[94] BRASÍLIA. *Camara*. Projeto de Decreto Legislativo de Sustação de Atos Normativos do Poder Executivo no. 394 de 2020. Susta os efeitos de dispositivos do Decreto nº 10.747, de 26 de agosto de 2020. Disponível em: https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2262148 Acesso em: 09 Setembro 2020.

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