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**THE NO NEED FOR  
CONSENT IN THE  
PROCESSING OF  
PERSONAL DATA AND  
THE JURISDICTIONAL  
ACTION OF THE PUBLIC  
DEFENDER'S OFFICE**

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**Abstract:** This work investigates the need for consent for the processing of personal data by the Public Defender when such body is acting in the defense of its representatives. The study is descriptive, with a qualitative approach and the thematic axis is Human Rights. Methodologically, a theoretical, bibliographical and jurisprudential exploration of the theme was carried out. The Constitutional Charters of democratic nations, such as Brazil, establish a list of principles that safeguard Human Rights, more precisely, those linked to the dignity and privacy of citizens. Thus, practices commonly adopted by organizations inconsistent with the protection of privacy are no longer accepted, being in them the prohibition of the indiscriminate treatment of personal data, emerging in the world legislations that aim to protect such data. Considering these notes, it is questioned whether the Public Defender's Offices need consent for the exercise of their institutional functions essential to the jurisdiction. It was observed in the doctrine and in the rule that there is no need for authorization from the holder/representative of personal data so that their data are processed by these defenders.

**Keywords:** consent; Public defense; Human rights; LGPD; personal data protection.

## INTRODUCTION

The right to privacy dates back to ancient times, from the moment when there was a process of separation between the public and the private (FREITAS, 2020). However, after the Second World War, nations, acting in a more globalized environment and involved by the development and increasing investment in the area of information technology, were concerned with strengthening and expanding human and fundamental rights, and, consequently, started to promote the protection of personal data, aiming to avoid unwanted leaks (RAPÔSO et al., 2019).

What is the normative prediction regarding the need for the Public Defender's Offices to need or not consent for the exercise of their institutional functions essential to the jurisdiction? As a general objective, we sought to investigate the need for consent by the holder for the Public Defender to process the personal data of his representatives.

## METHODOLOGY

As a methodology, research was carried out in articles, legislation, doctrines and jurisprudence, aiming to build the understanding related to the subject investigated, with the assumption of verifying the need or not of consent of the represented for the treatment of their data by the Public Defender. The study is descriptive, with a qualitative approach and the thematic axis is Human Rights, particularly the protection of the dignity and privacy of the person.

## RESULTS AND DISCUSSIONS

### THE PROTECTION OF PERSONAL DATA IN THE GLOBAL CONTEXT

With the separation between public and private in the Ancient Age, the right to privacy is observed. On the other hand, in the Middle Ages, although isolation was a privilege of the nobles, the house was an environment for private acts and important decision-making (FREITAS, 2020). However, it was after the Second World War that human and fundamental rights began to be guaranteed and protected, emerging, in an embryonic form, the idea of protecting personal data. In the 1960s, the USA and European countries led the first projects related to data processing, taking as a starting point the legal concern related to the protection of personal data and the use of technology (ROCHA et al., 2019).

Concerned about data protection, the European Union approved in 2016 and issued in 2018 its General Data Protection Regulation

(GDPR). The main purpose of the GDPR is to maintain people's privacy and the security of stored data. Thus, an organization only has the right to store information that allows the identification of a citizen, if it has the consent to do so (COSTA, 2022).

In Canada, in 2000, with the enactment of the Personal Data Protection and Electronic Documents Act (PIPEDA, its acronym in English), which was updated in 2014, there was concern about the protection of consumers, having established basic rules that disciplined how organizations in their commercial activities must deal with personal information, with the provision of an individual's consent when using or sharing their information (COSTA, 2022).

In Latin America, Argentina was the first country to draw up the Personal Data Protection Law (PDPA), in 2000, whose objective is the protection of privacy related to personal data, as well as the promotion of individualized access to any information stored in public and private databases and records. "In line with the European model, the PDPA was updated in 2016, through Provision 60 E/2016, regulating international transfers of personal data from the European Union" (COSTA, 2022).

## **THE PROTECTION OF PERSONAL DATA IN BRAZIL**

The Brazilian Personal Data Protection Law (LGPD), which came into force on September 18, 2019, was drafted on August 14, 2018 (Law Number) of 2016/2018 of the European Union. However, nations such as Canada and Argentina since 2000 already had regulations related to data protection. The idea of protecting personal data, brought about by the global context, forced the Brazilian State to elaborate a regulation for the LGPD, aiming to curb practices considered unacceptable regarding the processing of citizen data.

The LGPD is not intended to exhaust by itself all reprehensible conduct in the incorrect and indiscriminate use of personal and sensitive data, including images (photos and videos), needing to be analyzed together with other regulations, such as: the Federal Constitution (Article 5º, X), the Civil Code – CC (articles 11 and 20), the Consolidation of Labor Laws – CLT (article 223-C), the Consumer Defense Code – CDC (articles 6 and 81), the Statute of the Child and Adolescents – ECA (Article 1 and following), the Civil Rights Framework for the Internet (Article 3, III) and, depending on the content (sex scenes, nudity or pornography), the Penal Code – CP (Article 218-C) (COSTA, 2022).

Through Constitutional Amendment Number 115, of February 10, 2022, the protection of personal data, including in digital media, was included in the category of fundamental rights and guarantees from the inclusion of item LXXIX to Article 5 of the Federal Constitution.

Article 4 of the LGPD provides for cases in which the law does not apply. Articles 7, 11 and 14 bring the situations in which the processing of personal data can be carried out, with consent (article 7, item I) being the basic rule, particularly if it involves the processing of sensitive data (article 11, item I) or children (article 14, paragraph 1), except in situations where this is not necessary, or not legally applicable (COSTA, 2022).

Article 5 of the LGPD establishes that personal data is any information that relates to an identified or identifiable natural person. Sensitive data is all data that involves issues related to racial or ethnic origin, religious conviction, political opinion, union or organization membership (religious, philosophical or political), health or sex life, genetic or biometric data. Sensitive data deserves greater protection, as, once revealed, it can generate more disastrous consequences

for its holder. The data subject corresponds to the natural person to whom the personal data subject to processing refer.

### **THE PUBLIC DEFENDER'S OFFICE AS AN ESSENTIAL INSTITUTION TO THE JURISDICTIONAL FUNCTION OF THE STATE**

Complementary Law (LC) Number 80, of January 12, 1994, provides for the organization of Public Defenders.

Article 1 of this LC provides that the Public Defender's Office, as a permanent and essential institution for the State's jurisdictional function, acts in an integral and free manner, providing judicial and extrajudicial assistance to those in need, contributing to the promotion of human rights and defense, in all degrees, of individual and collective rights, in compliance with the provisions of item LXXIV of Article 5 and in article 134 of the Federal Constitution.

Article 8, XVI, of LC Number 80/1994 determines that it is attributions of the Public Defender General, among others: "to request from any public authority and its agents, certificates, exams, expertise, inspections, diligences, processes, documents, information, clarifications and other measures necessary for the performance of the Public Defender's Office;"

On February 21, 2022, the Federal Supreme Court, by majority (10 votes), with Justice Edson Fachin as rapporteur, dismissed the request made in the Direct Action of Unconstitutionality (ADI 6.852) against Articles 8, XVI, 44, X, 56, XVI, 89, X and 128, X, of LC n° 80/1994, rejecting the request of the Attorney General of the Republic (PGR) to withdraw from the Public Defenders the power to request public documents in favor of assisting people vulnerable.

### **HYPOTHESES FOR THE PROCESSING OF PERSONAL DATA AND THE PUBLIC DEFENDER'S OFFICE**

Article 7 of the LGPD includes in its item VI the permission for the processing of personal data, when regularly exercising rights in judicial, administrative or arbitration proceedings. From this legal permissive, it is observed that the Public Defender, in its institutional exercise, has the right of access to the personal data of its represented, not being necessary the consent.

However, pursuant to article 6 of the LGPD, the Ombudsman is obliged to observe the principles of protection of personal data, carrying out the treatments in strict compliance with its activities, and must act with legitimate, specific, explicit and informed purposes to the data subject, further processing in a way that is incompatible with these purposes is prohibited, and the shared exercise of data is also possible (ALVES SILVA, 2020).

### **FINAL CONSIDERATIONS**

The idea of privacy, despite not being recent, gained greater importance after the Second World War, with democratic nations seeking to elaborate rules aimed at strengthening and expanding human and fundamental rights, initiating the process of protecting personal data. The Brazilian Personal Data Protection Law was influenced by international movements, mainly the GDPR (Europe) of 2016/2018. In 2022, with EC n° 115, the protection of personal data in Brazil was elevated to the category of fundamental rights and guarantees, including item LXXIV to article 5 of the Federal Constitution.

The Public Defender's Office is an institution that permanently performs activities essential to the jurisdictional function of the State, assisting the

hyposufficient. Thus, for the development of its attributions, the Ombudsman may request access to information for the defense of the defendant, pursuant to Articles 1 and 8, XVI, of LC Number 80/1994.

Despite consent being the basic rule for the processing of personal data, article 7, VI, of the LGPD allows the processing of such data, when these are necessary for the regular exercise of rights in judicial, administrative or arbitration proceedings.

Therefore, it is concluded, from the legal permissives (article 5 and 134, of the CF; articles 1 and 8, of LC number 80/1994 and 7, VI, of the LGPD), that the Public Defender's Office, in its institutional exercise, has the power to request information from institutions, as well as the right of access to the personal data of their representatives, holders of personal data, not requiring their consent, aiming to guarantee the contradictory and ample defense.

## REFERENCES

BRASIL, República Federativa do. Constituição da República Federativa do Brasil de 1988. **Diário Oficial [da] União**, Brasília, 5 de outubro de 1988. Disponível em: [http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm). Acesso em: 04 abr. 2022.

BRASIL, República Federativa do. Lei Complementar nº 80, de 12 de janeiro de 1994. Organiza a Defensoria Pública. **Diário Oficial [da] União**, Brasília, DF, 13 de janeiro de 1994. Disponível em: [http://www.planalto.gov.br/ccivil\\_03/leis/lcp/lcp80.htm](http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp80.htm). Acesso em: 04 abr. 2022.

BRASIL, República Federativa do. Lei nº 13.709, de 14 de agosto de 2018. Lei Geral de Proteção de Dados (LGPD). **Diário Oficial [da] União**, Brasília, DF, 14 de agosto de 2018. Disponível em: [https://www.planalto.gov.br/ccivil\\_03/\\_ato2015-2018/2018/lei/L13709compilado.htm](https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/lei/L13709compilado.htm). Acesso em: 04 abr. 2022.

BRASIL. Supremo Tribunal Federal. Ação direta de inconstitucionalidade nº 6.852/DF - Distrito Federal. Relator: Ministro Edson Fachin. **Pesquisa de Jurisprudência**. Disponível em: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=759942307>. Acesso em: 05 abr. 2022.

COSTA, Edgard Gonçalves da. A LGPD E A UTILIZAÇÃO DE IMAGENS PESSOAIS. In: BRAGA, Daniel L. S. (org.). **Pesquisa e reflexões nacionais em ciências humanas, sociais e linguísticas**. Instituto Scientia. 2022. V. 1, ed. 1, cap. 66, p. 1.081-1099. Disponível em: <https://institutoscientia.com/wp-content/uploads/2022/04/Livro-Humanas-Sociais-Linguagens.pdf>. Acesso em: 04 abr. 2022.

ALVES SILVA, Franklyn Roger. A LGPD e o tratamento de dados dos assistidos pela Defensoria Pública. Disponível em: <https://www.conjur.com.br/2020-mar-31/tribuna-defensoria-lgpd-tratamento-dados-assistidos-defensoria>. Acesso em: 04 abr. 2022.

FREITAS, Daniel Paulo Paiva. **Proteção e governança de dados**. Curitiba: Contentus, 2020.

RAPÔSO, Cláudio Filipe Lima; LIMA, Haniel Melo de; OLIVEIRA JUNIOR, Waldecy Ferreira de; FERREIRA SILVA, Paola Aragão. LGPD-LEI GERAL DE PROTEÇÃO DE DADOS PESSOAIS EM TECNOLOGIA DA INFORMAÇÃO: Revisão Sistemática. **Revista de Administração**, v. 4, 2019. Disponível em: <https://revistas.cesmac.edu.br/index.php/administracao/article/view/1035/802>. Acesso em 04 abr. 2022.

ROCHA, Camila Pereira da; CARNEIRO, Ana Valéria Santana; MEDEIROS, Marcus Vinicius Batella; MELO, Alexandre. Segurança da informação: a iso 27.001 como ferramenta de controle para lgpd. Belém, **Revista de Tecnologia da Informação e Comunicação da Faculdade Estácio do Pará**, v. 2, n. 3, p. 78-97, ago. 2019. Disponível em: <http://revistasfap.com/ojs3/index.php/tic/article/view/285>. Acesso em: 06 abr. 2022.