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POSSIBILITY OF APPLICATION OF THE CDC TO REGISTRY OFFICES AND THE CONSEQUENTIAL EXTENSION OF SANCTIONS BY THE LGPD

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Abstract: This article aims to carry out an analysis of the importance of registry offices in society and their constant evolution, mainly technological, with regard to data storage. In this sense, we first seek to verify which would be the best current to define the legal nature of notary offices, whether it would have a public or private nature, and from that to verify which legislation could be applied to extrajudicial services. Among the applicable laws, the possibility of applying the Consumer Protection Code stands out if the private nature of notary offices as a service provider is verified. On the other hand, it must be noted that, regardless of their legal nature, for carrying out data processing, notary offices must be subject to the General Data Protection Law. Given this scenario, there would be a clash of norms between the CDC and the LGPD based on the definition of the private nature of the registry offices. This is because the LGPD has milder sanctions related to unlawful acts involving personal data, while the CDC already provides for more serious penalties, such as simple imprisonment.

Keywords: Registry Offices. Legal nature. Extrajudicial services. Application of the CDC to the registry offices. LGPD.

INTRODUCTION

How must the General Data Protection Law be applied to notary services? Would there be any possibility of applying the Consumer Protection Code to notary offices? What sanctions would be applied by the General Data Protection Act? Answering this problem will help answer other questions: Are all activities carried out within the notary considered a public service delegation? Which ones could give rise to strict liability? How can the LGPD revive the discussion on the application of the CDC to notaries?

The realization of this article is justified from the application of one of the main current

legislative innovations, that is, the General Data Protection Law, in particular with regard to article 1 and article 23 and following of the LGPD. This is because, according to the law, the way in which data is processed differs between public and private authorities, mainly regarding sharing and accountability. If it is possible to classify notary activities, the application of the Consumer Defense Code would be appropriate and, therefore, guaranteeing greater effectiveness to the LGPD and greater legal certainty, since the sanctions would be applied alternatively.

Due to the fact that the LGPD is very recent in our legal system, there are still not many jurisprudence on the subject, so that there could be a greater flexibility in this understanding from the publication of the LGPD, even more so due to the divergence of opinions among the judges of the higher courts about the application of the CDC to notaries. As there was no unanimity in the judgment of the subject, it is possible that there will be a new discussion on the subject from the perspective of the harmful potential that the breach of secrecy of data from the notaries could cause to society, aspects that the article will seek to demonstrate.

In this sense, with the advent of the recent General Data Protection Law, it is necessary to specify the legal nature of ordinary notary activities, mainly due to the processing of personal data. From this, these activities could give rise to the application of the strictest sanctions contained in the articles of the CDC, insofar as they would resemble the legal entity providing private services.

The primary hypothesis will serve as a guide to answer the questions that will arise next, such as, for example, the possibility of applying the Consumer Protection Code to make notary offices responsible for their notarial activities, regardless of guilt, guaranteeing greater protection to consumers.

Therefore, there could be the application of article 43, paragraph 1 of the CDC, which determines access to existing information in records, files, records and personal consumer data filed about them, including their sources, as well as giving rise to the strict liability contained in article 14 of the CDC, as a way to enhance the data protection brought by the LGPD. The general objective of the article is to analyze how the General Data Protection Law could be applied in a maximum way to notary services. This could be done from the application of the CDC itself, through analysis of its main activities in which there would be a greater risk of information leakage.

From the distinction of these activities, it would be possible to envisage the application of the Consumer Protection Code, which would bring greater legal certainty in the implementation of the General Data Protection Law, bringing a greater possibility of its effective application, as well as effective reparation by part of the registry offices in case of undue leak of data. This is because, as they are the center for storing information for the entire population, the risk of this activity is much greater than that of many others, which is why there must be greater vigilance in their actions and greater protection of citizens' data.

In view of this, it is necessary to research and analyze the origin of the responsibility of the notaries and the position that has been adopted before the Brazilian courts of justice on the application of the Consumer Protection Code due to these activities. Also to know the divergent decisions of the higher courts that have defended the application of the CDC to the registry offices, as well as the position of the doctrine on the subject. From these criteria, it will be identified which activities can be submitted to the Consumer Defense Code, in order to give greater scope, efficiency

and increase the penalties contained in the General Data Protection Law itself.

DEVELOPMENT

TECHNOLOGY AND THE EVOLUTION OF REGISTRY OFFICES

The growth of technology has brought many improvements to all fields of society. It changed human relationships, brought about changes in the way of communication, interaction and surpassed limits. It changed habits and customs, ways of working, education, the market and many other areas. Within the Law this would be no different. Technological changes help and develop the Brazilian legal system, since technology requires new legal solutions and affects the way conflicts must be analyzed.¹

Amidst so many innovations, scholars predict the emergence of the so-called “notary of the future”, where all birth, marriage, death, contract, etc. by the cell phone itself. This innovation would bring even more decentralization, autonomy and self-sufficiency, in addition to an evident greater reduction in bureaucracy in the system.²

Implementing and improving technology in Law is a way of ensuring the rights and foundations of the Federal Constitution itself, guaranteeing national development and the construction of a free, fair and solidary society, inserted in Article 3, in addition to enforcing Article 218 of the aforementioned Magna Carta, in which the State must promote and encourage scientific development, research, scientific and technological training and innovation.

In addition to the constitutional commandments, it urges to highlight the recent legislation set forth in the New General Data Protection Law - LGPD (Law 13.709/18),

1 CAMARGO, Coriolano Almeida. SANTOS, Cleorbete. **Digital law: New legal theses**. Rio de Janeiro: Lumen Juris, 2018. p. 29.

2 Ibid. P. 128.

which guarantees basic regulation and accountability for the use of personal data.³

Furthermore, Provision Number:74/2018, issued by the National Council of Justice - CNJ, provides for minimum standards of information technology for the security, integrity and availability of data for the continuity of activity by notary and registry services in Brazil and provides other measures, in order to establish minimum standards of information technology for the security, integrity and availability of data, which must be observed for the continuity of the activity by the notary and registration services in Brazil.⁴

Another example is Provision Number:23/2020 issued by the Corregedoria of the Court of Justice of São Paulo, which brings the need to implement measures such as: the need to prepare specific clauses when contracting services, data registration, the need to of communication to the permanent Juiz Corregidor and the internal affairs department in the event of any data protection incident.⁵

The priorities brought about by the challenge of implementing all the measures listed by the General Data Protection Law would be the establishment of a Data Protection Officer - DPO, who would be in charge of carrying out data protection, reviewing contacts made by companies and readjusting of institutional policies. Also, the need to record all personal data processing

through the system known as ROPA (*Record Of Processing Activities*), which stands for Processing Activity Records.⁶

In this sense, the major concern concerns security. As there are no established geographical boundaries on the Internet, the practice of illicit acts has a certain advantage in terms of repression, as they often cannot be repressed by laws subject to barriers between countries, in addition to having the potential to reach a very large number of people. big of people. Examples of significant illicit practices include software piracy, document cloning and attacks on servers, which can cause great losses and damages. Proof of this concern was Decree Number:8,771/2016, which determined that connection and application providers must adopt encryption or equivalent protection measures to guarantee the inviolability of data.⁷

Also noteworthy is the recent Provisional Measure that creates the Electronic System of Public Records (SERP), which will interconnect notary offices across the country, thus accelerating the issuance of documents, in addition to enabling the public registration of acts and businesses. legal documents electronically and provide remote assistance to registry office users, fostering interconnection and interoperability between the various extrajudicial services.⁸

Finally, in the midst of so many innovations and new scenarios to come, it is of paramount importance to better understand the

3 BELTRAME, Renan. The importance and impacts of the relationship between law and technology. [S. l.], 9 Apr. 2019. Available at: <<https://www.aurum.com.br/blog/direito-e-tecnologia/>>. Accessed on: 09 Jun. 2021.

4 Provision Number:74/2018 - CNJ. Available at: <<https://www.anoreg.org.br/site/2018/08/01/provimento-no-74-2018-disposobre-padroes-minimos-de-tecnologia-da-informacao/>> Access on: 05 Jun 2021.

5 Communication Office Anoreg/BR. Implementation of the LGPD in notary offices means the strengthening of democratic relations with the citizen. Available at: <<https://www.anoreg.org.br/site/2021/03/03/implementacao-da-lgpd-nos-cartorios-significa-o-fortalecimento-das-relacoes-democraticas-com-o-cidadao/>> Accessed on: 05 Jun 2021.

6 PRIVACY TOOLS. What is ROPA in the GDPR? Discover the Records of Treatment Activities. Available at: <<https://www.privacytools.com.br/ropa-lgpd/>> Accessed on: 11 Jun 2021.

7 TEIXEIRA, Tarcisio. Law and Electronic Procedure Course: Doctrine, jurisprudence and practice. 4 ed. São Paulo: Saraiva Educação, 2018. p. 67-70.

8 Published MP creating the Electronic System of Public Records. Available at: <<https://www.gov.br/secretariageral/pt-br/noticias/2021/dezembro/publicada-mp-que-cria-sistema-eletronico-de-registros-publicos>> Accessed on: 21 Mar. 2022.

functioning of notaries, their legal nature and the applicable laws, in order to consolidate the performance and accountability of notaries, as will be demonstrated below.

LEGAL NATURE OF REGISTRY OFFICES

Article 236 of the Federal Constitution⁹ regulates the operation of notary offices in Brazil and highlights that notary and registration services will be exercised in a private capacity, by delegation of public power, and through competition for evidence and titles. The person approved will be the notary responsible for that extrajudicial service and will remain subject to periodic inspection by the Court of Justice of the State to which it belongs.¹⁰

Registry offices are considered by Administrative Law as auxiliary bodies of the judiciary, because: (i) The creation of new registry offices must be done by law on the initiative of the respective Court of Justice (art. 96, I, “b”, and II, “b”, from CF); (ii) The local Court of Justice exercises, on a periodic or extraordinary basis, corrections to verify that the official is providing the service in an adequate manner, in addition to having the competence to inflict punishments against him in the case of disciplinary infractions and to edit infralegal acts regulating extrajudicial activity (art. 96, I, “b”, of the CF; and art. 37 of the LNR); (iii) The CNJ has normative and disciplinary powers over extrajudicial activities in addition to the powers of the local

9 Art. 236. Notarial and registry services are performed privately, by delegation of the Public Power

§ 1 The law shall regulate the activities, govern the civil and criminal liability of notaries, registrars and their agents, and shall define the supervision of their acts by the Judiciary.

§ 2 Federal law shall establish general norms for setting fees related to acts carried out by notary and registration services.

§ 3 Entry into the notary and registration activity depends on a public competition for evidence and titles, not allowing any service to remain vacant, without opening a competition for provision or removal, for more than six months.

10 OLIVEIRA, Carlos Eduardo de. Notarial and registry services: mapping and some proposals for improvement – Part I. Available at: <<https://www.migalhas.com.br/coluna/migalhas-notariais-e-registrais/350974/servicos-notariais-e-registrais--parte-i>> Accessed on: 20 Oct. 2021.

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12 Legal Scope Magazine. The nature of notary and registry services. Available at: <<https://ambitojuridico.com.br/cadernos/direito-administrativo/a-natureza-juridica-dos-servicos-notariais-e-de-registros/>> Accessed on: 20 Oct. 2021.

Courts (art. 103-A, § 4, III, and § 7, of the CF).¹¹

There is also the understanding that public registry, registry and notary services are exercised privately by delegation of the Public Power — a non-private public service. This way, notaries and registrars would exercise a state activity, however they are not holders of effective public office, nor do they hold public office, therefore they are not public servants.¹²

Finally, it is necessary to understand and consolidate the understanding about the legal nature of notary offices in order to verify which legislation is applicable in cases involving mainly civil liability, guaranteeing greater legal certainty for all.

Indeed, if understood by the legal nature of private law, there would be the possibility of applying the Consumer Protection Code to notary activities, which would completely change the way civil liability is handled today by public servants and notaries, leaving the area of culpability and entering the zone of objective responsibility, among other procedural instruments that will be better treated in the next topic.

CONTROVERSIES ABOUT THE APPLICATION OF THE CDC TO REGISTRY OFFICES

Contrary to the understandings set forth by the superior courts, it is important to highlight that some Brazilian Courts of Justice are applying the Consumer Defense Code to some notary activities, as they understand

that the issue has not yet been fully pacified.

In this sense, according to the reasoning set out in the vote of Min. Nancy Andrighi on the occasion of the judgment of special resource 625.144/SP, to which Min. Castro Filho, the CDC would indeed be applicable to notarial activity because it is an improper public service (*uti singuli*) exercised by delegation under the account and economic risk of individuals. The Minister states that there will be no obstacle to the application of the CDC to extrajudicial services, as long as the figures of consumer and service provider are characterized.¹³

In this sense, Minister Nancy Andrighi continues her reasoning that the principles of free initiative and, therefore, of consumerist norms are applicable to notary offices, which have as their scope the fulfillment of the needs of consumers, respect for their dignity, security, protection of their interests and the rationalization and improvement of the services provided, so that notary activities would be structured under a true regime of private law, accumulating profits and bearing possible losses.¹⁴

Such understandings highlight the need to develop a firm regulation system in an effective way, considering that the user himself is an integral part of the system, not only being influenced, but also influencing insofar as he is the final recipient.

What is certain is that technology develops very quickly and the Law must closely follow all this change, in addition to being an important mission for the judiciary, which is responsible for applying the laws and preventing “justice” from being done. with the

mouse itself”. Therefore, the existing model of law today may often be insufficient to resolve all conflicts arising from these new situations, so it is important to use the largest set of laws applicable to the specific case, guaranteeing the effective application of justice.¹⁵

Thus, if one understands the application of the Consumer Protection Code to notary offices, one of the effects will be the expansion of punitive power also due to data leakage or other unlawful acts disciplined in the LGPD. The topic will be dealt with according to the following topic.

CONSEQUENCES OF THE APPLICATION OF THE CDC AND LGPD TO REGISTRY OFFICES

The General Data Protection Law applies to the public sector as well as the private sector. That is, to all who, in some way, deal with personal data, regardless of the digital or analogue means, providing the data subject with the right of access to information regarding the treatment given to their data, the right to correct them, eliminate them or want their anonymization, when possible.¹⁶

Under the terms of the General Data Protection Law, notaries are obliged to protect the data of their users, as provided for in article 23, §§ 4 and 5. As a result, extrajudicial services across the country are undergoing a process of adapting to the new rules, regardless of their size or field of activity, in order to reach a level of data protection.

With a view to protecting individuals' personal data, processing and sharing data brings with it a range of rights and obligations related to the use of one of today's most valuable

13 BRAZIL. Court of Justice of Paraná, 8th Civil Chamber. Interlocutory Appeal 0012876-39.2018.8.16.0000. j. 10.04.2018, Projudi. rel. Dis. Luiz Cesar Nicolas.

14 BRAZIL. Superior Court of Justice. Special Appeal Number:625.144 - SP (2003/0238957-2). 3rd Class. rel. Min. Nancy Andrighi. J. 06/14/2006. DJE 05/29/2006.

15 TEIXEIRA, Tarcisio. Law and Electronic Procedure Course: Doctrine, jurisprudence and practice. 4 eds. São Paulo: Saraiva Educação, 2018. p. 29.

16 LIMA, Adriane Correia de. LGPD and Notary Offices: implementation and issues. São Paulo: Saraiva Educação, 2021. Pg. 298 and 299. Pg. 58.

assets: information. Therefore, the protection of personal data is based on respect for privacy, informative self-determination, freedom of expression, information, communication and opinion, the inviolability of privacy, honor and image and the protection of human rights.¹⁷

It must be noted that the extrajudicial services of notaries are part of the Public Power for the purposes of handling the LGPD, pursuant to article 23, paragraphs 4 and 5. In this sense, the law refers to the Law on Access to Information (LAI – Law Number:12,527/2011), demonstrating complementarity between the laws. It must be noted that in the case of notary offices, the complementation is even more evident, since if they are considered legal entities governed by public law, one of their tasks is to provide electronic access to their data for the Public Administration.

The great challenge facing notaries is how it would be possible to combine the right of free access to obtaining information by obtaining certificates versus the right to protect sensitive data dealt with in the LGPD. In this sense, it is necessary to have a clear discipline on the subject, in order to avoid possible convictions and punishments of notaries and registrars for the practice of their acts.

With regard to punishment, it must be noted that the General Data Protection Law does not contain any prison sentence in its articles. However, the Consumer Protection Code is clear in establishing prison sentences in specific cases. In the case of notary offices, the data controller is the public records officer, who receives and performs some type of processing of personal data and who is driven by a legal obligation.

In addition, it must be noted that all those who, in some way, participated in the process of data processing, network security and

storage procedures are jointly responsible, and all agents must care for the security of the entire process and the due GDPR compliance. Another discussion is the existence of Law n° 8.935/94 (Law of Notaries and Registrars) which determines in its article 22 that the responsibility of notaries and registrars is subjective. However, in the event of application of the Consumer Protection Code, this responsibility would become objective and joint.

There is an understanding of the Federal Supreme Court in General Repercussion (RE 842.846) that, in the event of damages to third parties, the responsibility for the acts performed by registrars and notaries would be of the State (strict liability of the State), with a return action against the agent who has acted with malice or negligence. Given this scenario, there remains a lack of definition regarding the civil liability of notaries and registrars.

The application of any penalty contained in the LGPD by the National Data Protection Authority can only occur through a prior administrative procedure that ensures full and contradictory defense, which is not required in the case of violation of a consumer right. There is also the understanding that the LGPD brings in its article 45 the reservation of the primacy of the civil liability regime of the controller or operator of personal data, defined along the lines of the objective regime of the CDC.¹⁸This is because, the LGPD itself already brings with it hypotheses of removal from its own incidence due to the principle of specialty.

Thus, the importance of studying the application or not of the Consumer Protection Code to notary offices arises. This is because, there will be different consequences of the LGPD sanctions if there is also the application of the CDC, since the LGPD does

¹⁷ Ibid. page 57.

¹⁸ LIMA, Adriane Correia de. LGPD and Notary Offices: implementation and issues. São Paulo: Saraiva Educação, 2021. Pg. 298 and 299.

not regulate the prison sentence, while this sanction is already provided for by the CDC. Furthermore, the LGPD is clear in stating that it does not exclude the application of the CDC. Thus, so that there is no conflict of rules, it is necessary to stipulate the application of each one of them and their consequences.

CONCLUSION

As explained in this article, extrajudicial services have the function of guaranteeing publicity, authenticity, security and effectiveness of the acts performed, and it is widely known that they have an extensive collection of data storage, since such storage is necessary in the face of the need to publicize the existence of legal relationships, through the practice of their acts.¹⁹

In view of all this current scenario, the General Data Protection Law was instituted to provide adequate treatment to data, including in digital media, by natural persons or legal entities governed by public or private law, with the aim of protecting fundamental rights of freedom and privacy and the free development of the personality of the natural person. According to Law 8.935/94, which provides for notarial and registration services. (Law of notaries), in its article 22 states that notaries and registration officers are civilly liable for all damages they cause to third parties.²⁰

There is also an understanding signed by the Superior Court of Justice that the notaries would not have legal personality, so that the holder of the notary would be responsible

for any damage caused.²¹ It turns out that it is important to differentiate the damages arising from the notary activity from those caused by the activities attached to the notary service.²²

Regarding the hypothesis of damage caused by typical activity, liability would be subjective. However, with regard to the attached activities, arising from the existing relationship between the service provider and the final recipient, there is the question whether strict liability could be applicable under the terms of the Consumer Protection Code and, thus, authorize the application of determinations stricter rules contained in the LGPD.²³

It is important to highlight that the General Data Protection Law does not contain any criminal sanctions in its text, but only administrative sanctions. The Consumer Protection Code lists several prison sentences for offenders.

Thus, if it is understood by the application of the Consumer Protection Code for notary services, there will be the possibility of expanding the sanctions provided for in the General Data Protection Law. This is because, when it comes to facts arising from a consumption relationship, article 45 of the LGPD applies and not articles 42 to 44.

19 LIMA, Adriane Correia de. LGPD and Notary Offices: implementation and issues. São Paulo: Saraiva Educação, 2021. Pg. 74.

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22 LEITE, Gisele. Considerations on the application of the CDC in the activity of notaries and/or registrars in the contemporary Brazilian legal order. Available at: < <https://www.jornaljurid.com.br/colunas/gisele-leite/consideracoes-sobre-a-aplicacao-do-cdc-na-atividade-de-notarios-eou-registrador-na-ordem-juridica-brasileira-contemporanea>> Accessed on: 01 Jun 2021.

23 Ibid.

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