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FUNDAMENTAL RIGHT TO DATA PROTECTION AND INFORMATIONAL SELF-DETERMINATION: CONSENT AND THE RIGHTS OF PERSONALITY IN THE FACE OF THE RISING OF ARTIFICIAL INTELLIGENCE IN THE WORKPLACE – FROM THE PORTUGUESE EXPERIENCE TO PROJECTIONS IN BRAZIL

DIREITO FUNDAMENTAL À PROTEÇÃO DE DADOS E AUTODETERMINAÇÃO INFORMACIONAL: O CONSENTIMENTO E OS DIREITOS DA PERSONALIDADE DIANTE DA ASCENSÃO DA INTELIGÊNCIA ARTIFICIAL NO AMBIENTE DE TRABALHO - DA EXPERIÊNCIA PORTUGUESA ÀS PROJEÇÕES NO BRASIL

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Abstract: Based on the evidence that Portuguese law is more structured than the Brazilian data protection culture, including in the field of labor-management relations, a reflection is proposed, sometimes comparative, from the foundations for the construction of the fundamental and autonomous right to data protection and informational self-determination, covering the main milestones in the Portuguese and European scenarios, as well as in Brazil, to then analyze the use of the legal ground/lawfulness of consent in light of the General Data Protection Regulation and understandings in Portugal, in order to present the incipient discussions, projecting scenarios for the topic in Brazil. Next, the rich European legal framework is presented – including softlaw –, in addition to Portuguese laws concerning automation and artificial intelligence (AI), in order to project overviews for Brazil, aiming at the protection of the fundamental rights of data protection and informational self-determination in the face of the rising use of automation, artificial intelligence and algorithms in decision-making that directly affects workers, with the scope of adopting an ethical and transparent artificial intelligence that offers legal security to the person subject to the jurisdiction of a court and respects the rights of personality which workers do not waive in the course of the employment relationship, as they are directly linked to the dignity of the human person.

Keywords: Data protection, informational self-determination, consent, fundamental rights, automation, artificial intelligence.

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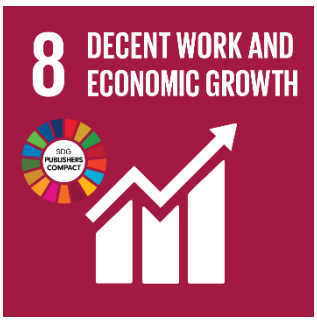

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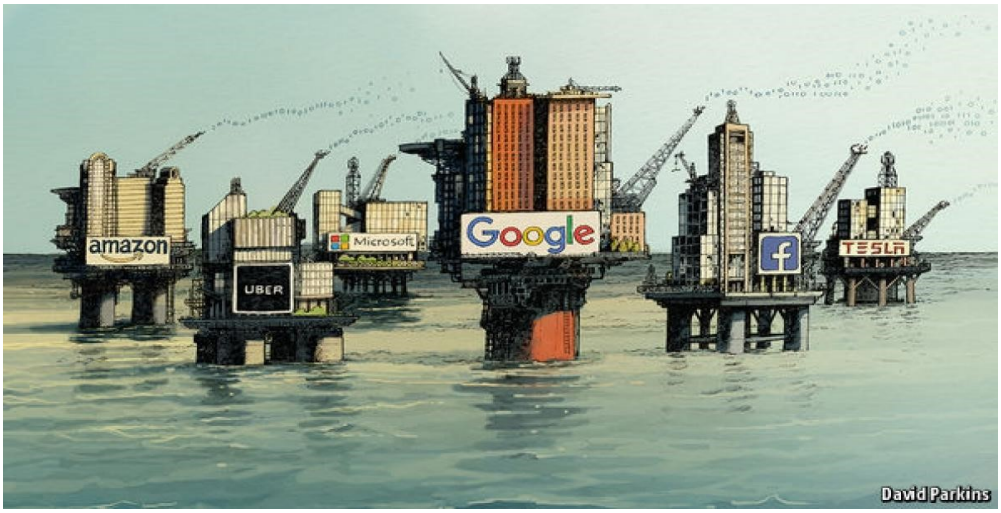
Resumo: Baseado na evidência de que o direito português é mais estruturado do que a cultura brasileira de proteção de dados, inclusive no campo das relações trabalhistas e gerenciais, propõe-se uma reflexão, por vezes comparativa, a partir dos fundamentos para a construção do direito fundamental e autônomo à proteção de dados e à autodeterminação informacional, percorrendo os principais marcos nos cenários português e europeu, bem como no Brasil, para, em seguida, analisar a utilização do fundamento legal/licitude do consentimento à luz do Regulamento Geral de Proteção de Dados e posicionamentos em Portugal, a fim de apresentar as incipientes discussões, com projeção de cenários para o tema no Brasil. Em seguida, é apresentado o valioso referencial jurídico europeu - incluído o softlaw -, bem como a legislação portuguesa relativa à automação e à inteligência artificial (IA), com o objetivo de projetar perspectivas para o Brasil, visando à proteção dos direitos fundamentais de proteção de dados e autodeterminação informacional em face do crescente uso da automação, inteligência artificial e algoritmos na tomada de decisões que afetam diretamente os trabalhadores, com o escopo de adotar uma inteligência artificial ética e transparente, que ofereça segurança jurídica à pessoa sujeita à jurisdição de um tribunal e respeite os direitos de personalidade dos quais os trabalhadores não abrem mão no curso da relação de emprego, pois estão diretamente ligados à dignidade da pessoa humana.

Palavras-chave: Proteção de dados, autodeterminação informacional, consentimento, direitos fundamentais, automação, inteligência artificial.

1. INTRODUCTION

The journal The Economist (2017) may have been the first to list data as the most valuable resource in the information society, showing figures in which technology giants appear to take the place of oil platforms.



The image reflects current society, in which oil – in principle – is no longer the most valuable resource, being surpassed by the economic importance of data, which, as it happens, are largely collected by the largest technology companies.

With the transition from the atom to the bit, data are stored in everyone's daily life, imperceptibly or even unconsciously– in a scenario in which man becomes a source of personal information (Moreira, 2010, p. 53 e 75).

'Recital 6' of the General Data Protection Regulation (GDPR) itself states that people have been increasingly making their personal information available publicly and globally. In this panorama, browsing patterns are captured through searches, purchases and messages, in an industry of data collection, processing and commercial transactions of data (data brokers), which allow the combination of data.

Massive data collection is exponentially enhanced by the Internet of Things (*IoT*), which allows household appliances to talk to each other, collecting and combining personal data, as well as consumption habits and each person's own lifestyle, with the aim of better serving the human being; one example is the Firebox, which makes it possible to serve a coffee when the weather gets cold, or even the Samsung Smart Hub, which informs the user about what needs to be bought at the supermarket – both from the use of a smartphone.

The combination and integration of artificial intelligence (AI), machine learning, cloud computing, the internet of things, and above all the internet of everything (IoE – a broader notion, not limited to things, but encompassing people, processes and data, interconnected in this network), strips individuals (Dias, 2019, p. 8 e 25), especially in a smart city where hyper–surveillance can be present. They are profiled with amplified risks to the rights of data protection and informational self-determination when the decision is automated, or made through AI.

At the same time people demand greater privacy, they behave in the opposite way, for example, authorizing successive intrusions into their privacy, establishing the phenomenon of the privacy paradox (Lopes, 2022, p. 199).

However, Inês Camarinha Lopes (2022, p. 199) warns that contradictory behaviors, with all the economic advantages associated with it, enabling transactions on a data market, do not actually facilitate the processing of personal data, but rather the lack of awareness on the part of data subjects regarding the result of their behaviors.

In this line of thought, it should be noted that Daniel J. Solove says that data subjects do not have the capacity to appropriately analyze and evaluate whether there is or there is not an advantage in giving consent, since they are not aware of the real consequences that may arise from this, which prevents free and informed consent (Solove, 2013).

And this is the point, the exercise of the right to informational self-determination, that is, control over the flow of the data subjects' data, having sufficient information about it, so that they can exercise consent when this is the case, especially with regard to automated processing or by

means of artificial intelligence information for decision-making that impacts employment relationships.

2. THE PORTUGUESE PARADIGM

The Constitution of the Portuguese Republic (CPR), like other contemporary democratic constitutions, is based on the principle of dignity of the human person, electing it, right in article 1, as the supreme value to guide the entire system.

From this vector, and in what is particularly relevant to this study, it regulates personal rights, freedoms and guarantees, among which special mention should be made to art. 35, insofar as, under the heading "Use of information technology", in a pioneering way at a global level, n. 1 considers the right to informational self-determination, and n. 2 guarantees the protection of personal data.

The Portuguese Constitution has reverberated its values to the infra-constitutional legislation, addressing the general protection of personality (Pinto, 2000, p. 153-204), alongside with the Civil Code (CC) and the Labor Code (LC) itself. The teaching of Paulo Mota Pinto is worth mentioning here, who, when approaching the open character of the general right of personality, explains that it allows for "the protection of new property and of the renewed threats to the human person, always having the respect for personality as a reference, either from a static perspective or in its dynamics of realization and development" (Pinto, 2000).

In this vein, the Labor Code enshrines and recognizes the rights of personality, protecting them in a careful and express way, in Title II, Chapter I, Subsection II, highlighting, for this study, freedom of expression (art. 14); physical and moral integrity (art. 15); reservation of the privacy of private life (art. 16); protection of workers' personal data (art. 17). And, in Subsection III, Division I, it presents concepts on equality and non-discrimination (art. 23); as well as the express provision for the right to equal access to employment and work (art. 24); the prohibition of discrimination (art. 25); in Division II, the prohibition of the practice of harassment (art. 29); and in Division III, access to employment, professional activity or training (art. 30); equal working conditions (art. 31); and, the regulation of registration of recruitment processes (art. 32).

It is noted, therefore, that the Portuguese Labor Code already showed concern with provisions regarding workers' data protection, in order to regulate data collection, following the constitutional order (art. 35), and Law 67/98 regarding access, control and knowledge of the purpose of collection or processing (Redinha, 2005), which transposed Directive 95/46/CE (Moreira, 2010, p. 322) into the Portuguese legal system, later repealed by the GDPR, as will be seen next.

2.1. Foundations of the construction of the fundamental and autonomous right to data protection and informational self-determination

2.1.1. The European Community

The 1981 Council of Europe Convention 108 on the protection of individuals' fundamental rights with regard to automated processing of personal data has great relevance.

In fact, Convention 108, executed in Strasbourg, in France, was the first legally binding international instrument adopted on data protection, aimed at guaranteeing all individuals respect for their fundamental rights and freedoms, and especially for their right to privacy, concerning the automated processing of personal data.

In the wake of Convention 108, Recommendation 89 (2) (Council of Europe, 1989) was published in 1989 on the specific field of labor-management relations. It has a non-binding character[2] and addresses employees' personal data in the workplace, recommending a series of precautions, which start with the guideline that employers should inform workers about the data of their private life to be entered into computerized systems. Its art. 2 provides for the respect for the privacy and dignity of workers, recognizing the possibility for workers to exercise individual and social relationships in the workplace (Oliveira Neto, 2022).

Although more comprehensive than the European terrain, the United Nations General Assembly cannot be ignored. In 1990, in a pioneering way, it addressed the basic principles concerning computerized files, by means of Resolution 45/95, listing the principles of lawfulness, fairness, accuracy, purpose (including the period for which the personal data are kept to achieve the purpose), non-discrimination and security (Moreira, 2010, p. 129 e 130).

Year 1995 was special for data protection because of the publication of Directive 95/46/EC (European Union Law, 1995) on the *protection of individuals with regard to the processing of personal data and on the free movement of such data*, based on which the European Community started to count on a guideline to be followed by Member States.

In 1997, Directive 97/66/EC was published, on *the processing of personal data and the protection of privacy in the telecommunications sector*, repealed by 2002/58/EC, which regulates *the processing of personal data and the protection of privacy in the electronic telecommunications sector*, and amended by 2006/24/EC, which deals with *the retention of data in electronic communications*.

It is important to remember the publication of Directive 2000/31/EC concerning electronic commerce, in 2000, and that in the same year the Charter of Fundamental Rights of the European

[2] As it is known, recommendations are not bind to Member States.

Union was enacted – widely used as a guide and basis for decisions of the European Court of Human Rights (HUDOC) –, especially in view of the content of art. 8, n. 1, which addresses the protection of personal data, establishing that such data must be subject to legal treatment, and used for specific purposes with the consent of the person concerned or other legitimate bases laid down by law, among other provisions.

In 2010, during the Internet Governance Forum, in Lithuania, the Charter of Human Rights and Principles for the Internet was launched and it guarantees the right to be free from surveillance, to privacy, to use encryption and to anonymity on the internet.

In 2012, the Proposal for a Regulation on the Protection of Personal Data was presented, which, as will be noted, ended up becoming the General Data Protection Regulation (GDPR).

In 2015, Recommendation CM/REC (2015/5) of the Committee of Ministers on the processing of personal data in the context of employment was published, replacing Recommendation 89, considered outdated by reason of new technologies.

In 2018, the text of Convention 108 was also updated, and so Convention 108+ was enacted, with the aim of also adapting it to new technologies (Fachinetti & Camargo, 2021), covering topics such as the proportionality of processing, specific legal grounds, the obtainment of qualified consent, in addition to rules relating to automated decisions, among others.

As previously mentioned, after a long legislative debate, the 2012 Proposal for a Regulation was approved, enacting General Data Protection Regulation 2016/679, of April 27, which took effect on May 25, 2016, with full force from May 25, 2018 onwards, repealing Directive 95/46, and with binding force, that is, generating the duty of compliance on the part of the Member States, with the scope of seeking legislative harmonization among the countries of the European Community.

2.1.1.1. Local reception of the GDPR

In Portugal, therefore, there is a culture of data protection, from the constitutional scope (art. 35, CPR) to infra-constitutional legislation, with express mention of the topic in the Labor Code. In addition to the valuable support provided by local law, there are also the Directives of the European Community mentioned in the previous section, being Directive 95/46 the main reference, repealed when the GPDR came into force.

In fact, article 88 of the General Regulation is addressed exclusively to the processing of data in the employment context, stipulating that it is up to Member States to establish, in their systems or in collective agreements, more specific rules to guarantee the defense of the rights and freedoms in the processing of workers' data for the purposes of recruitment, performance of the

contract, equality and diversity, health and security and termination of the employment contract, among others.

Irrespective of the binding character of the GDPR, there is room for Member States to provide for specific regulation , as expressly provided in art. 88, concerning the processing in the employment context, for the purposes of recruitment, performance of the employment contract (including compliance with the obligations provided for in the legal system or in collecting agreements), management, planning and organization of work, equality and diversity in the workplace, occupational health and security, protection of the property of the employers or clients, exercise and (individual) enjoyment of work-related rights and benefits, and termination of the employment relationship. [3]

This condition is in Recital 155, which allows for collective agreements, including "works agreements", to

> provide for specific rules on the processing of employees' personal data in the employment context, in particular for the conditions under which personal data in the employment context may be processed on the basis of the consent of the employee, the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organization of work, equality and diversity in the workplace, health and safety at work, and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

Portuguese Law expressly regulates the GDPR, in Law 58/2019, which repeals Law 67/98 (which transposed Directive 95/46/GC into the Portuguese legal order)[4], and ensures the performance of Regulation (UE) 2016/679 of the European Parliament and of the Council in the domestic legal order, including an express provision concerning employment relationships, in accordance with art. 28.

2.1.2. The fundamental and autonomous right to data protection and informational self-determination

The 1983 Census Act prescribed that German citizens had to provide varied data for statistical purposes, such as: name, residence, phone number, gender, date of birth, professional, academic and religious data; there was also a provision for cross-referencing these data for the general purpose of carrying out administrative activities.

When evaluating the unconstitutionality of the Census Act, the German Constitutional

[3] It is noted, according to Joaquín García Murcia and Iván Antonio Rodríguez Cardo (2017, p. 53), that the wording of art. 88 uses the phrase "more specific rules", in order to allow general protection systems in the workplace to be reduced by rules of Member States, provided that the fundamental rights and interests at stake are always protected. (own translation).

[4] Art. 66-A, of Law 26/2016, with amendments of the Enforcement Law.

Court understood that the right to the free development of personality presupposes: (i) data subjects' knowledge about the information that the other has about them, at what time and in what context; (ii) freedom to act without having their actions or decisions monitored.

The decision of the German Constitutional Court also set out that there is no absolute right, so that data subjects do not have total control over their data, but it is the responsibility of the data subjects themselves to determine the terms under which their personal data can be disclosed and processed.

It also decided, in a nutshell, that the restrictions on the right to informational self-determination can only occur in the public interest and with constitutional support, applying and respecting the principle of proportionality (Cordeiro, 2020, p. 258-259).

The German Court understood that the data should be restricted to the purpose of census, pointing out in its reasons for the decision that data protection should be an autonomous right, separate from the right to privacy.

With Directive 95/46, the construction of a new right was already forged, and gained expression with art. 8 of the Charter of Fundamental Rights, according to Joaquín García Murcia and Iván Antonio Rodríguez Cardo, when dealing with the protection of personal data as a fundamental right to integrate a new generation closer to the current days and needs (Murcia & Cardo, 2017, p. 40 e 46).

In the constitutional field, Portugal was a pioneer when it guaranteed the right to informational self-determination, under the terms of art. 35, n. 1, of the CPR, which encompasses the right of access to computerized data concerning the data subject, who can require correction and updating, and the right to know the purpose for which it is intended.

Teresa Coelho Moreira explains that with information technology there was a need to review the concept of privacy, in order to broaden the merely negative view (of not being disturbed in one's secret place), changing it into a positive view, in order to allow control over the information that concerns the individual, whether intimate or not. Informational self-determination is therefore included as a dynamic function of privacy (Moreira, 2010, p. 124).

Thus, art. 35 of the Portuguese Constitution includes the insertion of this positive view, concerning a number of rights that reveal the right to informational self-determination.

According to Carlos André Ferreira Dias (2019, p. 11-12), "first and foremost, it is a right of individuals to control their personal data, allowing them, if they choose so, to dispose of them and define under what conditions".

This author explains that this right is divided into three others: (i) the right of access to information records in order to be aware of their own personal data that are possessed by a third

party; (ii) the right not to have sensitive data processed; (iii) the right not to establish a data interface, combining data of the same character (Dias, 2017, p. 12).

In the same vein, art. 35, n. 2, among others, guarantees the protection of personal data, as laid down by law; it also determines the compliance with the conditions applicable to automated processing, n. 2 of art. 35 of the CPR.

Art. 17, of the LC, n. 3, reverberates the constitutional values relating to informational self-determination by providing for the right of job candidates or workers to control the data provided, being able to know about the content and purposes, and also to require correction and updating.

2.2. Consent in employment relationships

Directive 95/46/EC defined consent, under the terms of art. 2, subitem "h", as "any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed" (European Union Law, .[5]

In the initial proposal of the Commission responsible for the drafting of the GDPR, consent was addressed in art. 7, n. 4, which provided that this base (consent) was not a valid legal ground for processing when there was a significant imbalance between the position of the data subject and the controller.

Recital 34 of the Proposal expressly mentioned the employment relationship:

> Consent should not provide a valid legal ground for the processing of personal data where there is a clear imbalance between the data subject and the controller, in particular if the former is dependent on the latter, especially when the personal data of the data subject are processed by his or her employer in the employment context ...

However, the final wording of the GDPR in force does not have a provision that is similar to the wording of art. 7, n. 4, nor its recitals expressly address the employment relationship, and art. 4 of the GDPR, n. 11, makes the scope of consent clearer, if compared to Directive 95/46, providing that:

> Consent of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

It is true that Recital 43 of the GDPR states that consent should not be a valid legal ground when there is a clear imbalance between the data subject and the controller; next, it names the situation: "in particular where the controller is a public authority".

Even though the employment relationship covers material inequality between the

[5] EUROPEAN UNION LAW. *Directive 95/46/CE...*, cit.

contracting parties, it appears that Recital 43 is "*numerus clausus*", that is, it does not have an exemplary character, and only addresses consent when it is given before a public authority.

This position is reinforced by the original wording of Recital 34, during the preparatory work of the legal text, the draft of which was amended, excluding the provision that mentioned the employment context.

Following this line of reasoning, in comparative law, it should be remembered that the German Labor Court held that consent can be given freely in an employment relationship (Cordeiro, 2020, p. 177). The topic was considered in view of the alleged unconstitutionality of paragraph 4 of the *Bundesdatenschutzgesetz* (BDSG = Germany Civil Code), by which it was understood that the employee's consent to the employer could never be free, given the fear of reprisals.

It should be noted, however, that the employment relationship has an original and unquestionable material imbalance, a situation that is maintained and even optimized in data processing, as recognized by Portuguese jurists. In this regard, João Leal Amado teaches that the contract, although executed on the basis of free consent, appears as an asymmetrical relationship. (Amado, 2011, p. 31)[6]

Maria do Rosário Palma Ramalho speaks of "a component of ownership, due to the ownership of the employer's directive and disciplinary powers, which corresponds to a position of subordination on the part of the worker" (Ramalho, 2014). António Monteiro Fernandes (2014) addresses the possibility of unilateral termination of the employment contract as an additional element to confirm the material imbalance between the parties.[7]

When addressing the fundamental right to data protection of workers in the face of the powers of businessmen, particularly with regard to consent, Alicia Villalba Sánchez (2018, p. 474) approaches the irrelevance of consent, given the relationship of subordination, which ends up equating the employment contract to an instrument of adhesion.

In the same vein, Opinion 2/2017 GT29, for which "employees are seldom in a position to freely give, refuse or revoke consent, given the dependency that results from the employer/employee relationship", and when referring specifically to the lawful bases for processing, the opinion is in the sense that "for the majority of such data processing at work, the

[6] "Labor Law aims at regulating a relationship which, although it arises from the free consent given by both parties, conveyed in the voluntary execution of the employment contract (in this sense, the contract always represents an ineliminable sign of personal freedom), it also appears as a strongly asymmetrical relationship in the performance of which the person of the worker is deeply involved." (A*mado,* 2011, p. 31). (own translation).

[7] "But beyond the initial inequality, the very development of employment relationships, if merely covered by the agreement of the parties and by the general regime of contracts, highlights the weakness of the employee's position, due to the subordination and the corresponding status of 'power' or 'authority' of the employer. The ability to unilaterally terminate the contract is particularly important here, as a possible instrument of the employer's supremacy – a perspective in which the factors of the employee's original weakness are reproduced." (own translation) (Fernandes, 2014).

legal basis cannot and should not be the consent of the employees (article 7, subitem a) …" (European Data Protection Board, 2017, Art. 29).

And precisely because of this material imbalance in the employment relationship, Teresa Coelho Moreira states that the GDPR "removed the emphasis on consent as a valid legal ground for processing personal data", referring to Recital 43, and proposing that "in view of the irrelevance of consent, the processing of personal data in employment relationships should only occur "taking account of certain fundamental principles", pointing out as such the rights of personality regulated in articles 14 to 22 of the LC, now "clarified and reinforced" by the GDPR (Moreira, 2017, p. 22-23).

When regulating the application of the GDPR, Law 58/2019, Portuguese legislators chose art. 28 to expressly consider labor-management relations, defining that employers can process the data of their employees in accordance with the purpose and limits defined in the LC and other applicable legislation, and also for the purpose of processing carried out by a subcontractor, as long as under the terms of a provision of a services contract.

Article 28, n.3 of Law 58/2019 establishes that unless there is a legal provision to the contrary, workers' consent is not a requirement for the legitimacy of the processing of their personal data: (i) if the processing results in a legal or economic advantage for the employee; (ii) if this processing is covered by the provision in subitem "b", n.1 of article 6 of the GDPR (the latter being necessary for the performance of a contract or pre-contractual measures) (Oliveira Neto, 2022, p. 293-294).

Given the relationship of material inequality, in order to protect the weakest party in the use of their fundamental rights, Portuguese legislators chose to restrict the worker's right to the free exercise of consent within the scope of an employment relationship; however, they went beyond the basis of lawful performance of a contract or contractual measures, and also denied validity to consent when the processing results in a legal or economic advantage for the worker.

In an attempt to protect workers from possible harm caused by the exercise of free consent, legislators may, however, have removed the right to informational self-determination. In other words, when seeking to protect a fundamental right, n. 3 of art. 28 of Law 58/2019, they risked killing the essential core of another equally fundamental right.

In this scenario, by making use of the principle of proportionality (Amado, 2019, p. 213)[8]

[8] When workers' fundamental rights are conflicting with rights of free enterprise, João Leal Amado proposes that a "careful and laborious task of a practical agreement between them be carried out, in accordance with the principle of proportionality in its triple dimension (conformity or adequacy, eligibility or necessity, proportionality in the *strict sense*)". (own translation) (Amado, 2019, p. 213).

as a means to resolve conflicts between fundamental rights or fundamental rights with rights provided for in the constitutional order, the National Commission for Data Protection (NCDP), by virtue of Deliberation 2019/494, decided for the Non-Application of Law 58/2019, highlighting the following argument:

> Although the non-equal character of the employment relationship is admitted, **according to the principle of dignity of the human person, the individual should get, even in the context of legal relationships in which, as a rule, he or she lacks protection in relation to the other party, the minimum of free will to enjoy his or her fundamental right of informational self-determination** – therefore in the legal fundamental dimension of control of the data concerning him or her -, recognized in article 35 of the CPR and in article 8 of the Charter of Fundamental Rights of the European Union. (National Commission for Data Protection, 2019)

And it concludes that,

> In short, **because it entails an inappropriate, unnecessary and excessive restriction of the fundamental right to informational self-determination or data protection, as a right to control one's own data,** beyond what is necessary to safeguard workers' rights and interests, subitem a) of n. 3 of article 28 of Law 58/2019 restricts the scope of application of subitem a) of n. 1 of article 6 and of subitem a) of n. 2 of article 9 of the GDPR. On this basis, the NCDP, in order to ensure the full effectiveness of the GDPR, will disapply this rule in the situations it will evaluate. (National Commission for Data Protection, 2019).

It is worth reflecting that since the Census Act decision, in 1983, it has been understood that informational self-determination does not necessarily imply the primacy of consent. In fact, when considering the issue, the German Constitutional Court determined that, even with consent, the use of data must be restricted to the purpose of the census (statistics), and the State cannot go beyond what is necessary.

Self-determination must guarantee control over the data in the entire data processing cycle, in accordance with the legitimate expectations of the data subjects. However, in an asymmetrical relationship, consent itself can remove the effectiveness of the data subjects' self-determination over their data, and so the leading role of consent must be accompanied by the protection given to the relationships of material inequality, in order to make informational self-determination effective.

What is concluded is that in concrete cases, by using the principle of proportionality and its sub-principles, the conflicting rights must be analyzed, questioning whether: (i) based on the sub-principle of adequacy, the use of the legal ground of consent fulfills the intended purpose; (ii) based on the sub-principle of necessity, there is another means of protecting the chosen right with the same effectiveness, or else, it is possible to use another legal ground or to adopt another means that achieves the intended purpose with the same effectiveness; (iii) and, finally, based on the sub-principle of proportionality in the strict sense, a balancing is established, comparing the importance of the achievement of the end with the intensity with which the fundamental right was restricted,

seeking a certain balance between the benefits arising from the limitation and the loss generated by the right that was intervened, in such a way that it generates more benefits than losses, under the penalty of the measure not justifying the purpose, always respecting the essential core of the fundamental right – an analysis that does not fit in the abstract (Oliveira Neto, 2015, p. 99).

3. FROM THE PORTUGUESE PARADIGM TO PROJECTIONS IN BRAZIL

The realization of the rights of personality arises from the principle of dignity of the human person, provided for in art. 1, item III of the Brazilian Constitution.

For the purposes of this work, emphasis will be given to art. 5, especially with regard to the free expression of thought (item IV); the right of reply proportional to the offense, in addition to compensation for property, pain and suffering and for damages to the image (item V); privacy, private life, honor and image, ensuring the right to compensation in the event of violation (item X).

These constitutional guidelines are essential not only for the full exercise of the rights of personality, which are directly linked to the dignity of the human person, but also for the construction and maintenance of a democratic society that abides the rule of law, since otherwise, the will of the State or of those in power would prevail, and the pluralism of opinions and ideologies would be rejected.

Art. 4 of the Brazilian Constitution, when addressing international relations, expressly ascribes the principle of prevalence of human rights. Right after that, Title II protects Fundamental Rights and Guarantees, listing rights inherent to the condition of the human person (Oliveira Neto, 2022, p. 76).

And paragraph 1 of art. 5 of the Brazilian Constitution deals with the immediate application of fundamental rights, which allow the extension of the positive rights of personality, given that paragraph 2 of art. 5 of the Brazilian Constitution deals with the non-exclusion of rights and guarantees provided for in international treaties, that is, the expansion of the rights expressly provided for in the Constitution.

All the provisions listed must be read together and guided by art. 1 of the Brazilian Constitution, respecting the dignity of the human person and the social values of work and free enterprise. This is because, in the course of work, employees do not lose their status as a human being, which remains intact, in such a way that employers' directive and supervisory power must be coordinated to preserve the employees' rights of personality.

Following the Constitutional order of 1988, the Brazilian Civil Code of 2002 (CCB) started to address the matter, dedicating Chapter II to this theme, under the title *Rights of Personality*.

Under the terms of art. 11 of the Civil Code (CCB), because they are inherent to the dignity

of the human person, except for the cases provided for in law, the rights of personality are recognized in the infra-constitutional legislation with their character of non-waivability and non-transferability.

Art. 12 of the Civil Code, in turn, allows for the cessation of threats or injuries to the rights of personality, as well as claims for damages. Arts. 16 to 19 address the protection of the name and pseudonym, while art. 20 preserves the right of image, and art. 21 guarantees the inviolability of private life.

The provisions that concern the rights of personality must therefore be read in the light of the constitutional order, and combined, where appropriate, with articles 186, 187, 927 and 932 — all of the Brazilian Civil Code — relating to, respectively: unlawful acts; abuse of rights; the obligation to compensate for the unlawful act; and the employers' liability for the acts of their agents.

Law n. 13.709, of August 14, 2018, General Data Protection Law, was expected to enter the Brazilian legal system within 24 months after its publication.

Several measures and laws were published after the publication of Law 13.709 until it entered into force, among which Provisional Presidential Decree 869, of December 27, 2018, stands out. It was converted into Law 13.853, of July 8, 2019, creating the National Data Protection Authority (ANPD) – an entity responsible for enforcing, implementing and supervising compliance with the GDPL throughout the country, in a similar way to the NCDP in Portugal.

It was only with the sanction of Law 14.058, on September 18, 2020, that the LGPD came into force, aiming at protecting the rights of freedom and privacy and the free development of the personality of individuals.

It can be estimated that at least 90% of the main provisions of the RGPD are reproduced by the GDPL, which allows us to say, without fear of error, that the Brazilian legislation on data protection has its main source in the common law of the European legislation on data protection.

In this line of thought, considering the use of the same language and the similarity of different labor institutes – which sometimes served as an inspiration to Brazilian legislators – the choice of Portuguese Law as a paradigm to face labor issues related to the protection of personal data is reinforced, learning from it in order to project scenarios, making the necessary considerations and conforming to Brazilian Law.

3.1. Foundations of the construction of the fundamental and autonomous right to data protection and informational self-determination

3.1.1. Data protection: a fundamental and autonomous right

The Brazilian Supreme Court recognized data protection and informational self-determination as a fundamental and autonomous right.

And it did so on the basis of the German Court's decision on the application of the Census Act, when trying Direct Action for the Declaration of Unconstitutionality ADI 6387 filed by the Brazilian Bar Association (OAB), ADI 6388 filed by the Brazilian Social Democratic Party (PSDB), ADI 6389 filed by the Brazilian Social Party (PSB) and ADI 6390 filed by the Social Party (PSOL), regarding Provisional Presidential Decree MP 954/2020, which allowed landline and mobile telephone companies to share data of telecommunication users (telephone number and address) with the Brazilian Institute of Geography and Statistics (IBGE), for statistical purposes during the pandemic.

The Brazilian Supreme Court understood that the Provisional Presidential Decree violated fundamental guarantees, among which data confidentiality, recognizing, in an appellate decision issued by Minister Rosa Weber, the existence of an autonomous fundamental right to the protection of personal data.

In this vein, the Brazilian Supreme Court faced Action for the Declaration of Unconstitutionality ADI 6649 and Action against the Violation of a Constitutional Fundamental Right ADPF 695, whose controversy was in "the scope of protection and the axiological dimension of the fundamental rights to privacy and the free development of personality, specifically with regard to the processing of personal data by the Brazilian State"[9], an opportunity in which the scope of protection of the right to informational self-determination was examined.

It is true that the matter was examined in the context of the sharing of information between agencies and entities of the federal government, examining the constitutionality of Decree 10.046/2019; however, what matters is the understandings drawn from it, especially with regard to data protection as an autonomous fundamental right, as well as the scope of protection of the right to informational self-determination.

Indeed, Decree 10.046/2019 instituted the Citizen's Base Registry, creating a unified base of information comprising the collection of the Federal Government, including the creation of the Central Data Governance Committee with powers mentioned by the appellate decision of the Brazilian Supreme Court to:

> (i) decide on the exact extent of the biographical data that will appear in the Citizen's Base Register (items VII and VIII); (ii) define the situations of broad, restricted and specific sharing; and (iii) set forth rules and parameters for data sharing between entities of the Federal Government (items I and II). (STF, ADI 6649/DF, 2022)

The sharing of data could potentially harm fundamental precepts, given the "obscure attempt to massively share the personal data of 76 million Brazilians with agencies that are part

[9] According to what was reported by Min. Gilmar Mendes.

of the Brazilian Intelligence System" (STF, ADI 6649/DF, 2022), so that the Brazilian Supreme Court analyzed the issue guided by the principle of dignity of the human person, especially with regard to the preservation of intimacy and private life, and data protection as an autonomous fundamental right.[10]

The appellate decision refers to Provisional Presidential Decree MP 954/2020, which served as a guide for the matter to reach the Supreme Court, considering the determination that telephone companies should share names, phone numbers and addresses of millions of users of telecommunication services with the IBGE, pointing out, at that time, "the flagrant unconstitutionality of the provisional presidential decree and the risk it posed to the public freedoms enshrined by the democratic regime" (STF, ADI 6649/DF, 2022), as considered in Action for the Declaration of Unconstitutionality ADI 6.387.

Furthermore, the created Central Data Governance Committee included full name, address, Individual Taxpayer Identification Number (CPF), Social Identification Number (NIS), electoral registration number, marital status, date of birth, phone number and e-mail address in data to be shared – that is, a real feast of sharing direct and indirect personal data, which could also be combined.

The appellate decision goes on to express concern about the use of personal data by governments and companies through algorithms and data analysis tools, generating discrimination against social groups, such as "opportunities for access to employment, business and other corporate property" (STF, ADI 6649/DF, 2022).

The awareness that governments must treat the legal regime of privacy as a collective purpose for structuring democratic regimes, and not as a countervailing value for the protection of individual interests, is corollary of the very recognition of the autonomy of the fundamental right to the protection of personal data, and supports the decision of the Brazilian Supreme Court (STF, ADI 6649/DF, 2022) .

Data protection was therefore already a constitutional value, even if implicit. [11] In any

[10] Remembering that in ADI 6.387, data protection was recognized as an autonomous fundamental right.

[11] In this regard, we can add the doctrine of Ingo Wolfgang Sarlet and Giovani Agostini Saavedra (2020, p. 53), who, before the publication of Constitutional Amendment EC 115 argued as follows: "Therefore, in the absence of an express provision for such a right, at least as an explicitly autonomous fundamental right, in the text of the Brazilian Constitution, and following the example of what has happened in other constitutional orders, the right to the protection of personal data can (and even should) be associated and reappointed to some fundamental rights and principles of a general and special character, such as the principle of dignity of the human person (also implicitly positive) and the right to the free development of the personality, the general right to freedom and the more relevant special rights of personality in this context, which are – here under the terms of the Brazilian Constitution – the rights to privacy and intimacy, in the sense of what some also call a "computer intimacy" (p. 42). And, when concluding the work developed under the philosophical bases of Hegel, Honnet and Solove, they point out that "a solid base has been demonstrated for the foundation of a right to the protection of personal data as a fundamental right implicit to the Brazilian Constitution, especially considering its binding with the values/principles and rights of dignity of the human person and the free development and self-determination of the personality, all of which reinforced by special rights of personality (expressly and/or implicitly)

case, this was more than settled with the approval of Brazilian Constitutional Amendment EC 115, of February 10, 2022, whose publication took place on the following day, expressly inserting the following provisions in the Brazilian Constitution:

> a) item LXXIX to art. 5 of the Brazilian Constitution, which expressly included the guarantee of protection of personal data, on the following terms:
>
> Art. 5, Brazilian Constitution – All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:
> **(addition) LXXIX** – the right to the protection of personal data, including digital means, is ensured, according to the law.
> b) item XXVI to art. 21 of the Brazilian Constitution, which established the jurisdiction of the Federal Government "to organize and supervise the protection and processing of personal data, according to the law."
> c) item XXX to art. 22 of the Brazilian Constitution, to establish the private jurisdiction of the Federal Government to "legislate on the protection and processing of personal data";
> d) complement to item XII of art. 5 of the Brazilian Constitution in order to ensure, according to the law, the right to the protection of personal data, including digital media;
> e) addition of item XXX to art. 22 of the Brazilian Constitution, which started to provide for the protection and processing of personal data.

Constitutional Amendment EC 115 had the merit, recognized by the Brazilian Supreme Court itself, of "consolidating, once and for all, the constitutional status inherent to the right to the protection of personal data" (STF, ADI 6649/DF, 2022), thus clarifying any doubts that could still remain.

3.1.2. Informational self-determination: an autonomous and fundamental right

In Bruno Bioni's (2021) opinion, if in the past the relationship was person-information-confidentiality, in the present it takes on another aspect, establishing itself as person-information-movement-control (Bioni, 2021). It is common sense that personal data are moved, especially in a virtual environment. However, data subjects must have control over this movement.

Informational self-determination, in a nutshell, consists of the right of data subjects to have control over their own data (Oliveira Neto, 2022, p. 292), from the confirmation of the collection and maintenance of the data, to the correction, anonymization as the case may be, blockage, deletion, portability, or even revocation of consent.

According to Manoel Jorge e Silva Neto (2021, p. 909),

> the fundamental right to informational self-determination is the individual's right, binding upon the State, to protect personal data captured by public and private bodies, which can be exercised by means of deterrent actions (right of defense) or to demand positive actions, of an individual or collective character, capable of challenging deviations in purpose in the acts of capturing, processing and disclosing personal data by public institutions.

covered by the Brazilian positive constitutional law, such as the right to privacy and intimacy and the so-called right to free informational self-determination" (p. 53). (own translation)

When analyzing Direct Action for the Declaration of Unconstitutionality ADI 6.387, the Brazilian Supreme Court recognized the right to not only the protection of personal data, but also to informational self-determination – both as autonomous fundamental rights, with specific legal protection and own normative dimension.

When evaluating Direct Action for the Declaration of Unconstitutionality ADI 6649 and the Action against the Violation of a Constitutional Right ADPF 695, the Brazilian Supreme Court refers to the decision of the Census Act, of 1983, of the German Court, in which the right of personality was understood beyond the simple constitutional protection to confidentiality, and from there the power of individuals "to decide on the disclosure and use of their personal data", as well as "to decide when and within what limits the facts of their personal life can be revealed", and also "to have knowledge about who knows and what is known about them, when and on what occasion" (STF, ADI 6649/DF, 2022), maintaining the "right to informational self-determination as a counterpoint to any concrete context of data collection, processing or transmission that could constitute a situation of danger" to privacy and intimacy (STF, ADI 6649/DF, 2022).

3.1.3. The autonomous and fundamental right to data protection and informational self-determination

Given the approach to the topic in Portugal and in Brazil, it is observed that the protection of personal data and informational self-determination has taken on a role that is separate from the rights of privacy and intimacy, as an autonomous right. This is because, in essence, it currently has its own legal interest, which goes far beyond the inner sphere of the human person. It concerns freedom as individuals, and also as citizens in their relationships with others, where data subjects can express their ideas, with freedom of thought, and even, if they wish, make use of the economic bias in view of the value of personal data.

Therefore, it has a distinct purpose from the one that originated it, becoming a kind of sub-branch of law, given the transversality and its own logic, which became very clear with the publication of the GDPR and the GDPL, which cross the protection of personality and even turn it into a commodity – despite all the precautions to preserve fundamental rights – disconnecting itself from the exclusivity of the preservation of private life.

And this takes on the character of collective protection, surpassing the individual perspective, insofar as the violation of this right undermines the democratic order itself, which contributes as a basis for the autonomy of this right.

It corresponds to the evolution of the right to privacy itself, which was the purpose of the

initial study by Samuel Warren and Louis Brandeis (1890, p. 193-220), when they explored the risks that photography represented in the face of the possibility that the person could be photographed without having knowledge of it, supporting, in 1890, the existence of the right to privacy regardless of property, and more than that, as a right to non-intervention in the sphere of privacy. At that time, the right to be alone was defended.

The information society has demonstrated the need for new contours, so as to include the dynamic aspect of the right to privacy, which corresponds to the ability of individuals (data subjects) to have access to the content and flow of information, having control over the information that concerns them.

3.2. Consent in employment relationships

There is no hierarchy between the legal grounds that authorize the processing of data in Brazil. In any case, the order in which the lawful bases are presented may be due to at least two reasons: (i) consent was the only legal ground in the drafts of 2010 and 2015 regulating data protection; (ii) the law protects data of people, not of companies, and informational self-determination represents control over one's own data, and, as a rule, finds its apex in consent.

Consent means being in agreement, freely expressing one's will on a subject that has already been sufficiently clarified, being able to consider it, and as the case may be, refuse it.[12]

Art. 5 of the GDPL defines consent as "free, informed and unequivocal pronouncement by means of which the data subjects agree to the processing of their personal data for a specific purpose". Therefore, for consent to be valid, it must be freely and unequivocally expressed and informed by the worker. What should be understand by:

> a) free: consent that is not vitiated, without the influence of those who hold the power;
> b) informed, consent whose information is provided with quality (clearly and appropriately), in a way that is sufficient in quantitative terms;
> c) unequivocal, consent cannot be tacit, it must be formal and overt. (Bioni, 2018)

Consent is directly linked to the foundations and principles that govern data protection. However, as it is known in a relationship of material imbalance, the manifestation of consent can be vitiated, which calls for special care (Oliveira Neto, 2022, p. 292).

Luciane Cardoso Barzotto and Leandro do Amaral Dorneles (2020) address the change in model based on the GDPL, teaching that "we have overcome the paradigm that the documents produced in the employment relationship are for unilateral use by employers and a form of limitation, resulting from the power of command", insofar as, "when they portray employees'

[12] [...] In addition to the indispensable consent (free, clarified and thoughtful will). (Martinez, 2016, p. 268). (own translation)

life, they cannot be used without due consent because they represent part of workers' rights of personality, in light of the principle of informative self-determination" – this, of course, reiterating that there are other legal grounds for processing.

In this regard, the decision rendered in case 0010137-92.2023.5.03.0077, in which judge Fabrício Lima Silva, of the Labor Court of Teófilo Otoni/Minas Gerais understood, in short, that the dances requested by the employer to the female employee to be broadcast on the owner's TikTok network in order to stimulate sales, with sometimes even sexual and embarrassing connotations, represented a violation of dignity of the human person (art. 1, item. III, Brazilian Constitution).

From there, he highlighted the violations of intimacy, private life, honor and image (art. 5, item X, Brazilian Constitution), and the protection of personal data (art. 5, item LXXIX, Brazilian Constitution), making reference, at the infra-constitutional level, to the foundations of the GDPL and to the bases for processing, pointing out that, if consent is used, the burden of proof is on the controller (TRT3, 2023).

The judge considered, in his decision, that employment implies a relationship of material imbalance, especially in view of the weakness of the worker, and made use of comparative law, including a reference to Opinion 2 GT29 – as well as to the punishment applied by the Hellenic authority to PricewatershouCoopers concerning the misuse of the legal ground of consent.

Thus, he based the worker's right to compensation according to the rules of the Brazilian Civil Code relating to the harm, causation and fault or intent of the wrongdoer (arts. 186 and 927), as well as to the implicit constitutional principles of reasonableness and proportionality and the requirements prescribed in art. 223-G of the Consolidation of Labor Laws with regard to the measurement of the harm for compensation purposes.

3.2.1. Consent in collective employment relationships – illustrative cases

In Brazil, so far, the biggest disputes regarding consent involve whether or not workers are obliged to provide their data to representative trade union entities.

On the one hand, companies argue that providing their employees' personal data to the union would violate the GDPL; on the other hand, trade unions claim that providing information related to employment contracts derives from the constitutional right to union representation, and therefore the duty of representation by trade unions – based on collective agreements that provide for the provision of data.

By way of example, when trying the appeal in case 0010640-49.2021.5.15.0013, the 10th Chamber of the Regional Labor Court of Region n. 15, in the decision issued by Appellate Judge

Edison dos Santos Pelegrini, confirmed the decision of the court of origin that denied the request of the Trade Union of Employees in Food Supply Centers of the State of São Paulo (Sindbast) for the company to provide data relating to its employees (TRT15, 2022).

The lawsuit was filed because the company refused to provide the union with data on its employees requested by an extra-judicial notice, given the express provision in the collective labor agreement to provide, every six months, the name, job title, place of service, admission date, Individual Taxpayer Identification Number (CPF), date of birth and material status of workers, in accordance with the previous six-month period linked to the General List of Employed and Unemployed Persons (CAGED), and annually, a copy of the Annual Social Information Report (RAIS).

The ground is the freedom of association provided for in art. 8, item III of the Brazilian Constitution, in particular the prerogative of the union to defend collective or individual rights and interests of the category prescribed in art. 8, item III of the Consolidation of Labor Laws.

The judgement of the 1st Labor Court of São José dos Campos/São Paulo had already denied the union's request on the grounds that the company does not have legal or constitutional authorization to provide the union with the data "without the express and specific participation of workers".

This is because, "at no point in the Brazilian Constitution/88 there can be verified the authorization for processing employees' personal data, therefore, unwaivable individual rights provided for in art. 5 of the Brazilian Constitution/88", citing provisions relating to the inviolability of intimacy, private life, honor and image of individuals (item X), freedom of association and non-association (item XX), concluding, in short, that collective or individual union representation does not authorize it to access or process workers' sensitive data, "among which, name, date of birth, Individual Taxpayer Identification Number (CPF), marital status".

Then, it refers to art. 611-A of the Consolidation of Labor Laws (fruit of the Labor Reform of 2017), which provides for the prevalence of the collective rule over the labor legislation itself, but highlights that this does not imply authorization to violate employees' right to intimacy and private life, through access to data concerning workers' personality.

Therefore, the decision says that in order to have access to workers' sensitive data, it is necessary to obtain their express and prior authorization, so as not to violate individual constitutional rights and guarantees in compliance with the GDPL.

In this sense, the original decision is grounded in art. 11, which addresses the non-transferability and non-waivability of the rights of personality, art. 16, which guarantees the right to the name, art. 21, concerning the inviolability of private life – all of them in the Brazilian Civil

Code, and combines them with art. 2 of the GDPL[13], which encompasses the foundations of the law, and with art. 7, which lists the legal grounds for data processing, highlighting paragraph 4, since consent must refer to specific purposes and generic authorizations are null and void.

Even though this decision deserves some applause, it must be noted that it addresses all the data that are the purpose of the collective rule as if they were sensitive, when, in fact, sensitive data should be understood as those able to generate discrimination, under the terms of art. 5 of the GDPL: "personal data on racial or ethnic origin, religious belief, public opinion, affiliation to union or religious, philosophical or political organization, data relating to the health or sex life, genetic or biometric data, whenever related to a natural person.".

In the case being analyzed, the name may indicate ethnic origin, but it is not a sensitive datum. Job title, date of employment, place of service, Individual Taxpayer Identification Number (CPF) and date of birth, in spite of being personal data, are not sensitive.

When confirming the decision, Regional Appellate Labor Court 15 expressly provided for the need for "prior authorization of each worker", understanding that the clause of the collective rule would have to be redrafted or supplemented, adapting to current legislation, in order to enable compliance by the employer. At last, the appellate decision states that:

> Obtaining the authorization of each worker regarding the delivery of personal data to the union does not prevent compliance with the clause, but only complements it and ends up giving the union a guarantee that it cannot be charged with a practice that would contravene the aforementioned legislation. (own translation)

The big issue concerns the exercise of defense by workers through the union that represents them, a basis that has led to decisions contrary to that mentioned above, such as the one rendered in case 0000876-17.2021.5.12.0015 (Nogueira, 2022).

The lawsuit was filed by the Union of Vehicle Drivers and Workers in Road Transport of Freight and Passengers of the Far West of Santa Catarina, on the grounds that it needed workers' data for the purpose of collecting and transferring union dues, and the position of the company was that workers would have to authorize the transfer of information in view of the application of the GDPL.[14]

The labor appellate judge of the Court of São Miguel do Oeste rendered judgment pointing out that the compliance with the constitutional role assigned to the union must be exercised, regardless of individual will, to defend the interests and rights of the members of the category, as

[13] Respect for privacy (item I), informational self-determination (item II), freedom of expression, information, communication and opinion (item III), inviolability of intimacy, honor and image (item IV), economic and technological development and innovation (item V), free enterprise, free competition and consumer defense (item VI), human rights, free development of personality, dignity and exercise of citizenship by natural persons (item VII).

[14] VARA DO TRABALHO DE SÃO MIGUEL DO OESTE, *Processo 0000876-17.2021.5.12.0015, in* https://pje.trt12.jus.br/consultaprocessual/detalhe-processo/0000876-17.2021.5.12.0015/1#0f572ca (May 15, 2023).

provided for in art. 8, item III of the Brazilian Constitution/88.

In this context, the decision was to the effect that compliance with the GDPL does not exempt employers from providing the data requested by the union, imposing a fine to employers for not complying with the provisions of the collective labor agreement, and the action was terminated by agreement in compliance with the judgment.

The theme deserves consideration by the National Authority for Data Protection (ANPD). In the meantime, however, it seems that the analysis of the matter should be systematized. To begin with, when providing workers' data in collective bargaining, in compliance with the principles that govern the GDPL (art. 6), taking permission to highlight in the case at hand: purpose, adequacy, necessity and transparency.

The collective rule must therefore inform the purpose of the collected data, providing sufficiently clear information so that it can be verified whether there is a less burdensome means to achieve the same result. Speaking of a less burdensome means, note that when it comes to information provided by companies through an official document, the trade union has a more moderate means of obtaining such information directly from the Ministry of Labor (Marcondes, 2022, p. 120-134).

In this sense, the decision of the 2nd Panel of the Superior Labor Court (TST) understood that a fine should not be imposed for non-compliance with a collective rule, if the company does not provide information whose data can be obtained by the union from the RAIS.

> DAILY FINE – SUBMISSION OF A COPY OF THE RAIS – OBLIGATION ESTABLISHED IN A COLLECTIVE RULE. The Regional Court reported that, despite 'the determination of clause 85 of the Collective Labor Agreement (p. 161v), which established the obligation to submit the RAIS annually, the understanding that has prevailed in this Panel is that the imposition of a fine is not justified, since this document can be obtained from the Ministry of Labor and Employment'. In this context, the *a quo* Court did not deny the effectiveness of the collective rule, but understood that the imposition of a fine was unnecessary, since the union itself could obtain copies of the RAIS from 2007 to 2011. Precedents. Article 7, XXVI, of the Brazilian Constitution/88 therefore unenforceable. Lastly, it should be clarified that an appeal for review based on the allegation of a violation to art. 5, II, of the Brazilian Constitution, is not admissible either, when the dispute is restricted to the examination of infra-constitutional legislation, as this circumstance makes it impossible to configure its literal and direct violation (Precedent 636 of the Brazilian Supreme Court). (TST, AIRR-597-43.2012.5.02.0009, 2 Turma, Rel. Mallmann, DeJT 6.9.2019*)*. (own translation)

It must also check if there is another legal ground that justifies the provision of data by the company to the union entity. If there is no legal ground other than workers' consent, this must be provided individually, in writing, and it cannot be granted by the collective rule, respecting the terms of art. 9 of the GDPL.

This means that, before consenting, workers must be informed in a clear, adequate and overt manner about: (i) the specific purpose of the data collection; (ii) the form and retention time

of the processing of their data, with due regard for commercial and industrial secrets; (iii) controllers' identification; (iv) controllers' contact information; (v) information about the shared use of data by the controller and also about the purpose of this sharing with the union entity, which may become a co-controller if it starts making decisions; (vi) responsibilities of all the agents that will carry out the processing; (vii) express information on the rights of the data subject[15]; (vii) information regarding the public and private entities with which the controller has shared data; (viii) information on the possibility of not providing consent and the consequences of refusing to do so; and (ix) the possibility of repealing consent.

3.2.2. Limits of collective autonomy

It is known that the material inequality of employment relationships[16] can have the balance of powers adjusted via collective bargaining, and so union representation becomes especially important. It is believed that the union that represents the category of employees, however, cannot validly consent to the processing of personal data, due to the requirements for consent regarding rights of personality.

In other words, in the case of the GDPR, consent must derive from a free, specific, informed, explicit and revocable expression of will, whereas in the case of the GDPL, it must be free, informed, unequivocal and revocable – situations of a very personal nature.

Given the possible violation of rights of personality when it comes to personal data, however, there is a vast scope for trade unions to negotiate rules aimed at not only preserving workers' right to free consent, but also at exercising informational self-determination and protecting the personal data of those they represent.

As part of the content of agreements, one can think of provisions that:

i) are able to preserve the rights to intimacy and privacy, especially when it comes to capturing sounds and images;

ii) have the power to preserve the right to intimacy and privacy, and to the free development of personality when it comes to analyzing teleworkers' professional performance – an analysis that is not prohibited by the Brazilian legal system;

iii) are sufficient to protect against the processing of metadata collection due to

[15] In a few words: I – confirmation of the existence of the processing; access to the data; correction of incomplete, inaccurate or outdated data; anonymization, blockage or deletion of unnecessary or excessive data, or those that do not comply with the GDPL; data portability; at the end of the processing – deletion of personal data processed with the consent of the data subject, except if resulting from compliance with a legal or regulatory obligation, study by a research agency, transfer to a third party, or exclusive use of anonymized data by the controller.

[16] António Monteiro Fernandes refers to the "devaluation of the individual stipulation of working conditions" as a striking feature of Labor Law.
ANTÓNIO MONTEIRO FERNANDES, *Direito do Trabalho*, cit.

geolocation;

iv) there is clarity with regard to the processing of all personal data, providing clear and intelligible information to workers, with respect for informational self-determination.

Although it relates to teleworking, Argentinian Law n. 27.555/2020 is a paradigm, even though it should be applied more widely. Article 15 of the law establishes that supervision and control systems aimed at protecting the property and information of companies must rely on union participation to safeguard the intimacy and privacy of the teleworkers' home.[17]

With regard to control, it is worth addressing the issue of measuring professional performance in collective bargaining, when performance analysis is carried out by means of AI or automation, in order to avoid discrimination or even unequal treatment.

Nonetheless, it seems that unions are not allowed to give consent on behalf of workers, whether be it with regard to the information collected, monitoring or performance evaluation, especially because there are other legal grounds/lawfulness for processing data in employment relationships.

Moreover, consent has to be personal and workers must keep control over their own data with respect for informational self-determination. Nevertheless, union entities must negotiate the necessary protection for consent, so that its protagonism is accompanied by the protection given to unequal relations, giving effectiveness to informational self-determination.

Therefore, the role of trade unions must be to negotiate the paths and steps to be followed when the basis is consent so that, in compliance with the protection of personal data, it is: (i) free, that is, not vitiated; (ii) informed, so that workers make the decision based on clear and appropriate, as well as sufficient and overt information; (iii) unequivocal, that is, without any doubts in relation to the expressions of will, which are aimed at specific purposes, with the prohibition of generic authorizations.

The provision of art. 21, n. 4 of the Portuguese Labor Code concerning the opinion of the workers' committee on the use of remote surveillance means should be used as an incentive for collective bargaining in Brazil, aiming at the protection of workers' personal data and informational self-determination.

[17] Argentinian Law n. 27.555/2020: *Artículo 15. Sistema de Control y Derecho a la Intimidad. Los sistemas de control destinados a la protección de los bienes e informaciones de propiedad del empleador deberán contar con participación sindical a fin de salvaguardar la intimidad de la persona que trabaja bajo la modalidad de teletrabajo y la privacidad de su domicilio.*

4. AUTOMATION AND THE USE OF ARTIFICIAL INTELLIGENCE IN EMPLOYMENT RELATIONSHIPS

Considering the recently launched *ChatGPT*, which has shed even more light to AI, it is necessary to reflect on the challenges of ethical and transparent AI in accordance with the fundamental right to data protection and informational self-determination.

It is worth noting that it took the mechanized loom 120 years to conquer Europe, the internet conquered the world in ten years (Oliveira Neto, 2022, p. 36), while the ChatGPT reached 100 million users in two months (Lisboa, 2023). Perhaps this first piece of data is enough to justify the proliferation of questions and uncertainties involving the hitherto most advanced artificial intelligence.

However, a certain fact that must be taken into account from the outset is the speed of change, just like Klaus Schwab had already predicted, when addressing the combination of the physical, digital and biological worlds as a trigger for economic, social and cultural changes, to such an extent that it will not be possible to predict them (Schwab, 2016, p. 11).

In this regard, Bill Gates, in an interview to German newspaper Handelsblatt, compared *ChatGPT* to the invention of the internet in terms of importance. The co-founder of Microsoft said that *ChatGPT* "will make a lot of office work more efficient", prophesying that this technology will change the world (Schendes, 2023).

Not only can mechanized activities be performed, but also functions that require reasoning capacity, to the point that *ChatGPT* was successful in the first phase of the exam of the Brazilian Bar Association (Romani, 2023), and above all, it was used to draft the judgment by a judge in Cartagena/Colombia in a lawsuit that involved a mother's claim for her autistic son to be exempt from paying for medical appointments (O Tempo, 2023).

Dora Kaufman takes an interesting approach when she points out that "artificial intelligence in the twenty-first century, with machines carrying out tasks previously exclusive to humans, is a scientific revelation that, in some sense, questions human supremacy" (Kaufman, 2023).

There is a report of an AI-generated picture of art winning the first prize at the Colorado State Fair; when referring to it, the columnist of New York Times first describes how attractive it seems, but upon a second glace it appears lifeless (Roose, 2022).

An experiment at the University of Minnesota Law School showed that highly prepared students were far superior to *ChatGPT* in four school exams, in which, if compared to the students, AI had a "mediocre" performance, but enough to pass (Melo, 2023) – remembering that *ChatGPT* and AI in general are in an embryonic phase.

Recently, the CNET website made a gross mathematical mistake, easily noticeable, but

the website in question indicated the "CNET Finance Team" as the one responsible for its reports, omitting the information that they had made use of AI for some texts. After the company having publicly apologized, it began to inform that the text was produced by a robot, but reviewed by a human (Freitas, 2023).

From these brief mentions, it can be seen that *ChatGPT* has been pioneeringly used as a work aid, including intellectualized activities, such as the aforementioned judicial decision rendered by the Colombian judge.

It has been reported that Amazon is making use of an intelligence system which, without any human participation, automatically warns employees it they spend a long time without scanning a product or registering an activity, and may even dismiss employees if they fail to meet targets or if they repeat offenses. According to the article published in Brazilian magazine Época Negócios, Amazon informs that the employees can protest against the dismissal, in which case it is submitted to human review by a hierarchical superior (Época Negócios, 2019).

Newsletter Forbes Daily reported that, when considering an issue relating to the algorithm used by *Deliveroo*, the Italian Court understood that the algorithm generated discrimination by not distinguishing between workers' absences for legitimate reasons, such as an illness, and those resulting from workers' free choice (Keane, 2021).

When addressing teleworking, Teresa Coelho Moreira referred to the potential of the growing use of AI combined with video surveillance, audio surveillance, geolocation, control through social networks, instant messaging, biometric data and facial recognition, which allow to virtually monitor all the aspects of workers' professional and extra-professional life (Moreira, 2022, p. 181-197).

After approaching the several issues raised by the book *Livro Verde sobre o Futuro do Trabalho* ("Green Book on the Future of Work"), with regard to AI, João Leal Amado points out that

> The issues that arise are multiple and highly complex. The algorithm, for example, is beginning to occupy a growing place in the various areas of the employment relationship (in the selection phase of workers to be hired, in the distribution of tasks and in the monitoring and evaluation of the services carried out by workers, in the selection of workers to be dismissed, etc.), and the risks of old discrimination being reproduced and relegitimized are becoming increasingly evident, under the guise of alleged scientificity, neutrality and objectivity of the algorithm. (Amado, 2021, p. 239-265)

And he goes on showing concern about the adoption of prejudiced behaviors of AI, by explaining that:

> The algorithm, as an occupational system of applied mathematics, has no heart or sensitivity, but artificial intelligence can reproduce the prejudice, conscious or not, of those who program it, that is, those who provide the algorithm with the data (input) that will enable the algorithm to make its decisions (output).(Amado, 2021, p. 247) (own translation)

The point is that the use of both AI and automation requires transparency and ethics, and this is one of the great challenges to be faced, which legislation in several counties seeks to address, mainly in terms of data protection and informational self-determination, especially because of the risks that these tools pose to workers when making decisions that affect them, above all in a context of embryonic development, with greater potential for making mistakes, after all, paraphrasing Júlio Gomes, "citizenship does not stay at the doorstep of the company" (Gomes, 2007, p. 265).

4.1. The Portuguese experience

The principle of transparency is provided for in chapter III of the GDPR, as a right of the data subject, and it is applied with even greater emphasis when it comes to decisions made solely based on the automated processing of data that affect the interests of the data subject.

In this regard, art. 13, n. 2, item "f"; 14, n. 2, item "g"; and 15 n. 1, item "h" of the GDPR provide that automated decisions must be informed to the data subject, including profiling, providing useful information on the logic used, as well as informing the importance and envisaged consequences for the data subject as a result of the processing of those data.

For the application of the principle of transparency, among other provisions, Recital 58 of the GDPR requires that the information provided to the data subject be concise, easy to access and understand, formulated in simple and clear language, while Recital 60 requires that the data subject be informed of the processing operation and its purposes, including profiling and the consequences of it. This must be read together with Recital 63, which addresses the right of the data subject to have access to his or her personal data, being informed about the purposes of the collection.

Along the same line, Joaquín García Murcia and Iván Antonio Rodríguez Cardo point out that the GDPR, in terms of principles, is based on the ideals of respect and transparency, and operations have to take into account the purpose and need for using the data, as well as the interests of the data subject, to whom sufficient and appropriate information about the purposes must always be provided.[18]

As it can be seen, automated processing requires transparency on the part of the controller, so that the data subject can enjoy the fundamental right to informational self-determination, and can even consent in a free, specific, informed and explicit way, when applicable.

[18] "En el plano de los principios, el Reglamento se asienta sobre las ideas de respeto y transparencia, en el sentido de que las operaciones de obtención y tratamiento de datos personales habrán de tener en cuenta la finalidad y necesidad de su uso como los intereses del afectado, y al que habrá que proporcionar la información oportuna". (Murcia & Cardo, 2017, p. 40 e 45).

It should also be highlighted that Recital 71 of the GDPR, concerning the right of the data subject "not to be subject to a decision, which may include a measure, evaluating personal aspects concerning him or her, which is based solely on automated processing and which produces legal effects concerning him or her similarly significantly affects him or her", giving the example of the automated refusal of a credit application by electronic means, or even the express mention to electronic recruitment without any human intervention.

Continuing, Recital 71 addresses the scope of profiling, expressly including, among others, and in a special way "the analysis and provision of aspects concerning the data subject's performance at work", as well as "the location or movements", this "where it produces legal effects concerning him/her or similarly significantly affects him or her".

Nonetheless, Recital 71 accepts decision-making, including profiling, if expressly authorized by the Federal Government or Member State law, applicable to the controller in cases expressly mentioned, among which the performance of a contract between the data subject and the controller, or upon the explicit consent of the data subject.

This possibility of automated processing, even if consented, must be accompanied by the appropriate guarantees, which, for a better understanding, will now be presented separately: (i) specific information to the data subject; (ii) the right to obtain human intervention; (iii) the right of the data subject to express his or her point of view; (iv) the right to obtain an explanation of the decision taken after this assessment; (v) the right to challenge the decision.

Recital 71 also shows concern about discrimination, making use of the principles of transparency, privacy by design and by default, as well as prevention, establishing the use of "appropriate mathematical or statistical procedures for the profiling" through the application of "technical and organizational measures appropriate to ensure, in particular, that factors which result in inaccuracies in personal data are corrected and the risk of errors is minimized", aiming at the protection of personal data taking into account possible risks, so as to prevent, for example, discriminatory effects due to "racial or ethnic origin, political opinion, religion or beliefs, trade union membership, genetic or health status or sexual orientation", or even "processing that results in measures having such an effect."

Opinion 2/2017 WP29 shows concern about the automated processing of workers' facial expressions on video surveillance cameras, as this would be disproportionate to employees' rights and freedoms and, therefore, as a rule, unlawful – recommending that employers refrain from making use of facial recognition technologies.(European Data Protection, 2017).

Art. 22 of the GDPR provides for human review of decisions taken solely based on automated processing, by stating "the right not to be subject to a decision based solely on

automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her".

WP29 understands human review as an assessment that has the power to change the result, that is, the assessment is carried out by a person "with the authority and competence to change the decision" (European Data Protection, 2017).

The Charter of Fundamental Rights of the European Union, in art. 5, concerning Automated Systems and Decisions, n.1, provides that: "ethical-normative principles can only be proposed by human beings, and decisions that affect fundamental rights can only be made by human beings".[19]

In Portugal, NCDP Resolution 840/2010 states that:

> "Decisions **that produce effects on worker's** legal sphere or significantly affect him or her, **taken solely on the basis of automated data processing aimed at assessing** certain **aspects** of his or her personality, namely his or her **professional capacity**, are not admissible." (own translation)

In the same sense, the European Commission supports the need for human supervision to use reliable artificial intelligence, as well as for systems to be safe, transparent, ethical and impartial.

In Portugal, Decree Law 260/2009, in art. 25, n. 1, advocates that "job candidates have the right to be informed, in writing, about the recruitment methods and techniques they must be subject to and the rules regarding the confidentiality of the results obtained".

And in a special way, Law 27/2021 established the Portuguese Charter of Human Rights in the Digital Age, whose art. 9 deals with AI and robots, establishing that the use of AI, n. 1, is "guided by respect for fundamental rights, guaranteeing a fair balance between the principles of explainability, security, transparency and responsibility", and this to be assessed in the concrete case, according to the circumstances, aiming to "avoid prejudice and discrimination".

It also determines, with emphasis on n. 2, that decisions taken by an algorithm that have a significant impact on recipients must be informed to the interested parties, allowing for appeal and auditing under the terms of the law.

As for n. 3, it provides for the creation and use of robots of the principles of beneficence, non-maleficence, respect for human autonomy and justice, as well as non-discrimination and tolerance.

4.2. Projections in the Brazilian scenario

It is because of experience that the renowned Portuguese culture is the basis to face issues concerning data protection and informational self-determination in the face of the advancement

[19] EUROPEAN PARLIAMENT, 2000 (own translation).

of automation and artificial intelligence for decision-making in employment relationships, allowing for projections, including the application of Portuguese Law, where appropriate, in the light of the rule of art. 8 of the Consolidation of Labor Laws in the Brazilian scenario, where the protection of personal data is still very incipient.

In fact, given the lack of a consolidated data culture in Brazil, Alexandre Agra Belmonte (2022) proposes the application of Portuguese Law:

> In the absence of a rule in the Consolidation of Labor Laws on the specific issue that the general regulation of the GDPL does not provide a solution, on the basis of art 8 of the Consolidation of Labor Laws, head provision, it is possible to resort to comparative law (in this case, to Portuguese legislation).[20]

In order to have an idea of the extent to which the use of AI has provoked inconclusive debates in Brazil, it is important to mention that the National Council of Public Prosecutors evaluated Claim for Measures n. 1.00085/2023-10, through which the applicant sought to establish rules for the use of *Open AI,* fearing that Brazilian citizens would have their issues evaluated by AI and not by appellate prosecutors and prosecutors.

The measure sought to grant emergency relief, which was denied due to the arguments, briefly summarized here, that there is no knowledge of practical situations involving the use of technological tools within the scope of the Public Prosecutor's Office, and that there are no risk factors, just like tools do not have the power to replace human beings in decision-making, but to serve as support.

Unsatisfied, the claimant appealed, raising a series of questions, which ended up being partially reformed, in a decision of April 28, 2023, which did not have a mandatory character, but a guiding one, in view of the special concern about sensitive data to be inserted into artificial intelligence systems in private databases, particularly those based in other countries, in order to observe the risks of non-officially adopted technological tools, the use of which could imply the "release of sensitive confidential or personal procedural informational, in a private database, not subject to supervision or control by the State". (own translation)

The decision also instructed Information Technology Secretariats to present a technical opinion on the possible risks that the use of AI tools could bring to the participation of the Public Prosecutor's Office, and ordered the preparation of complementary studies on the matter.

The GDPL does not prohibit exclusively automated decisions, but only establishes conditions concerning the application of the principle of transparency and review of the decision, without, however, an express provision for human participation. In effect, art. 20 provides for the review of the decision taken solely based on the automated processing of data that affects the

[20] BELMONTE, 2022. (own translation).

interests of the data subject, mentioning those aimed at defining personal, professional, consumer and credit profiles or aspects of his or her personality.[21]

It is true that paragraph § 1 of art. 20 prescribes that the controller must provide, whenever requested, clear and appropriate information about the criteria and procedures used for automated decisions, with due regard to commercial and industrial secrets (Oliveira Neto & Calcini, 2020).

The point is that if the decision is made by an algorithm or AI, often not even the programmer will be able to decipher how it was made, and the task of complying with the principle of transparency embedded in the aforementioned legal provision becomes complex.

When referring to informed consent on the internet of things, Carlos André Ferreira Dias addresses the unpredictability and interpretability of automated processing as:

> On the one hand it seems to be impossible for either the data subject or the controller to foresee the uses to which the data will be subjected to after collection. On the other hand, the excessive technical complexity of the analytical methods used in processing prevents them from being 'translated' into a language accessible to the data subject. (Dias, 2019, p. 41)

In addition, as a rule, people believe in the neutrality of the algorithm, which increases the risk of harm, as the reading adopted by the algorithm will possibly adopt a pattern, which can generate discrimination, if equal opportunities are not observed on the grounds of race, gender and other data liable to discrimination (Oliveira Neto, 2022).

A practical example is the case of *Amazon*, in which, based on its hiring history, the tool used in the selection process was led to discrimination against women (Salomão, 2018), as sometimes algorithms repeat discriminatory behaviors already embedded in society, or can even lead to incorrect results if a database with outdated or incomplete data is adopted.

As a historical example, it is worth remembering *Tay*, a *chat bot* created by Microsoft as a social experiment, with the aim of interacting and learning with users. However, less than 24 hours of its activation, its creator had to take it offline because *Tay*, having learned from its interactions with human beings, ended up becoming aggressive and prejudiced.

Another unusual case that leads to reflection was the chess-player robot, in Moscow, which grabbed and broke the finger of its opponent in the game – a seven-year-old boy – as the child allegedly had violated safety rules by moving a piece too quickly.

[21] Art. 20, GDPL. The data subject has the right to request for the review of decisions made solely based on automated processing of personal data affecting her/his interests, including decisions intended to define her/his personal, professional, consumer and credit profile, or aspects of her/his personality. (New Wording Given by Law No. 13,853/2019) Effectiveness. § 1 Whenever requested to do so, the controller shall provide clear and adequate information regarding the criteria and procedures used for an automated decision, subject to commercial and industrial secrecy. § 2 If there is no offer of information as provided in §1 of this article, based on commercial and industrial secrecy, the national authority may carry out an audit to verify discriminatory aspects in automated processing of personal data.

The report published in *Tribuna Expresso* refers to *The Guardian*, which "recalls that robots which play chess are still machines like any others, which perform functions in companies, for example", and based on this observation, points out that according to a 2015 study, "one person is killed each year by an industrial robot in the US alone"(Expresso, 2022) Another example is a family suing Tesla after their son died in an accident caused by Autopilot (UOL, 2021).

Not coincidentally, during the seminar "The construction of the Regulatory Framework in Brazil", in a panel whose theme was "Algorithmic Discrimination", the director of *DataSphere* showed special concern about the possible perpetuation of racism, sexism and systemic oppression, pointing out the need to use the potential of AI, which is here to stay, so as to benefit all, in an inclusive, not exclusive or oppressive way (Consultor Jurídico, 2023).

Aiming at making the use of AI transparent, the *Ley de Riders* (Law of Riders), in Spain, already obliged companies to inform trade unions about algorithms that affected working conditions (Waeyaert, 2022).

The absence of a provision, in the GDPL, for human review of automated decisions amplifies the challenge of using ethical artificial intelligence, in a scenario where AI can be used to map job candidates' emotions during the interviews (Oliveira Neto, 2022, p. 290).

Special attention therefore must be given to issues involving automated decision-making, or even by means of algorithms and/or artificial intelligence, from the stage of recruitment and selection process, avoiding discriminatory processes, to the purposes of performance evaluation, which can even lead to contract terminations, either in the employment sphere or in labor-management relations in the broad sense.

Indeed, a decision has been recently rendered by the 8th Panel of the Superior Labor Court, reported by Min. Alexandre Agra Belmonte, in which it is pointed out that the phrase "algorithmic subordination" used by the court in the ordinary instance is a "poetic license", since "workers do not establish employment relationships with mathematical formulas or business mechanisms, but with individuals or legal entities that own the means of production", referring to art. 6 of the Consolidation of Labor Laws which equates telematic and computerized means of command, control and supervision, for the purposes of legal subordination, to personal and direct means, concluding that "what Uber does is codifying drivers' behavior, through programing its algorithm, into which it inserts its management strategies, storing this programming in its source code" (Feijó, 2022).

In the employment sector, or even if there is a choice for the exclusion of workers that work on digital platforms, given the opacity of algorithms, it is not an easy task to understand

how an algorithm came to a conclusion, which makes it imperative to be transparent about the decision-making process by AI and/or algorithms, right from its conception, adopting transparency and non-discrimination as a standard.

Jailson de Souza Araújo proposes that decisions should not only be justified, but also auditable by independent committees, so that the modes of operation used for resolution can be examined in a transparent manner, enabling judicial review, especially when affecting fundamental rights or the possibility of discriminatory practices (Araújo, 2023, p. 51-77).

During the 20th edition of *the Congresso Nacional dos Magistrados da Justiça do Trabalho* (CONAMAT – Brazilian Congress of Labor Courts), held in 2022, Statement 6 was approved under the title "A Ilegalidade da Despedida Gamificada" ("The Illegality of Gamified Dismissal"), whose syllabus is as follows: "It is illegal to dismiss employees by algorithms, as it demeans art. 20 of the GDPL, the due process of law and information, as subjective rights of workers".

In the same event, Statement 7 was also approved, under the title "Discriminação Algorítimica e Acesso à Justiça – Inversão do Ônus da Prova" ("Algorithm Discrimination and Access to Justice – Inversion of the Burden of Proof"), whose syllabus provides for the inversion of the burden of proof in lawsuits relating to discrimination in the selection phase or in the course of the employment relationship, based on automated decisions or algorithmic formulas (AMATRA, 2022).

Even though CONAMAT's precedents are not binding, they are valid as guidance and/or support. In addition, the provisions of the *Organização para a Cooperação e Desenvolvimento Econômico* (OCDE – Organization for Economic Cooperation and Development) (Belchior, 2020) establish that an ethical and reliable AI must be transparent, have human supervision, and secure and reliable algorithms, subject to rules of privacy and data protection.

It can be seen, therefore, that caution must be adopted in automated decision-making, especially when this is done through artificial intelligence, which recommends the preparation of an Impact Report, given the potential for the algorithm to make decisions that could violate the GDPL (Oliveira Neto, 2022, p. 290).

Therefore, either through *ChatGPT*, Calm (announced by Google) (Alencar, 2022) or so many other existing and yet-to-be-created AI, the greatest challenge is to observe the principle of transparency and offer an ethical AI, which allows the data subject not only to be aware of the data and the purpose for which they are being collected, but above all that AI respects the right to knowledge with regard to the impacts of this collection so that the human person can consent to the processing, as the case may be, and when the right to informational self-determination is not complied with.

Spain, through the seventh provision of Law 28/2022, on December 21, 2022, became the first country to have a state agency to supervise AI (Fernández, 2022), thus complying with the rule in the Proposal for Regulation of the European Parliament and of the Council "laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts" (European Union Law, 2021).

The path adopted by Spain when creating the Spanish Agency for the Supervision of Artificial Intelligence (AESIA) represents a guide, as, in its scope, among others, it aims at "the development and responsible, sustainable and reliable use of artificial intelligence", as well as the supervision of systems that include artificial intelligence, especially when they pose significant risks for health, safety and fundamental rights.

It can be noted that both Spain and the own proposal of the European Commission have, as a guide, the protection of fundamental rights, which, indeed, is the core of both the social right to work and informational self-determination and data protection – recognized as fundamental and autonomous rights.

What is to come?

In the legislative field, emphasis should be given on Bill 2.338/2023, of May 03, 2023, known as the Legal Framework for Artificial Intelligence in Brazil, by Senator Rodrigo Pacheco (2023), which, among its provisions, highlights, in a nutshell:

a) the carrying out of a preliminary and risk evaluation even before new technologies are distributed on the market;

b) classification of the risks of using AI, among which excessive risk and high risk;

c) prohibition of the use of AI that represents excessive risk, considered as such if its purpose is inducing individuals to behave in a way that is harmful or dangerous to their health, safety or even against the foundations of the law;

d) in the case of high-risk AI, the establishment of extreme governance measures, namely, those that have the greatest impact on employment relationships: d1) applications in the health area, including diagnoses and medical procedures; d2) use of biometric identification systems; d3) recruitment, selection, filter, evaluation of job candidates, decision-making on promotions or terminations of employment contracts, control and evaluation of performance in the areas of employment, management of workers and access to self-employment; d4) the system has the potential to negatively impact the exercise of rights and freedoms; d5) AI has a high potential for material or moral harm, as well as discrimination; d6) a low degree of transparency, explainability and auditability of the system, which makes it difficult to control or supervise AI; d7) AI enables a high

level of identifiability of data subjects, including the processing of genetic and biometric data for the purpose of uniquely identifying a natural person;

e) the implementation of governance systems throughout the entire cycle, from the conception to the end of data processing, adopting transparency measures, as well as measures to mitigate and prevent potential discriminatory biases;

f) the evaluation of the algorithmic impact whenever it is a high-risk activity, establishing the procedure to be carried out;

h) the obligation of full compensation in the event in which AI agents cause property, moral, individual or collective loss, regardless of the degree of autonomy of the system;

i) supervision, inspection and an express provision for administrative sanctions to be applied to companies in the case of irresponsible use of AI.

Hopefully, the bill will go through the Brazilian Congress[22] without substantial changes, providing legal security to the those subject to the jurisdiction of a court; and, above all, offering transparency and prevention in all processing cycles from conception onwards, so that Brazil can have a law regulating the use of AI that gives greater effectiveness to the principle of transparency, guaranteeing the preservation of the fundamental rights of data subjects with regard to data protection, informational self-determination and very personal rights, especially mitigating discriminatory and/or arbitrary procedures.

Meanwhile, the European GDPR framework and Portuguese Law can contribute significantly, by applying art. 8 of the Consolidation of Labor Laws to preserve workers' fundamental rights, including very personal rights, which are directly linked to the dignity of the human person.

5. CONCLUSION

Portugal was chosen as a paradigm, as it has a culture of data protection, from the constitutional scope (art. 35, CPR) in a pioneering way, to infra-constitutional legislation, with express mention to the theme in the LC. The precious support of the GDPR can be added as well, observing the estimate that 90% of the GDPL is based on the European regulation, the reason why even the softlaw of the European Community should be used as well.

[22] It is worth noting that Brazil is currently working on Bill 21/2020 (pending), by Congressman Eduardo Bismark, which aims at establishing foundations, principles and guidelines for the development and application of artificial intelligence in Brazil, as well as other measures, creating a legal framework for the development and use of AI by the government, companies, various entities and individuals (Bismarck, 2020).

Added to this is the similarity of several labor institutes – which sometimes served as an inspiration to Brazilian legislators –, reinforcing the choice of Portuguese Law as the model for dealing with labor issues concerning the protection of personal data, learning from it in order to project scenarios, making the necessary considerations and conforming to Brazilian law.

In Brazil, the Federal Supreme Court did well when it recognized data protection and informational self-determination as an autonomous and fundamental right even before the approval of Constitutional Amendment 115, which expressly inserted the right to data protection in the Brazilian Constitution.

It was possible to observe that the protection of personal data and informational self-determination has taken on a role that is separate from the rights of privacy and intimacy, as an autonomous right. This is because the information society has demonstrated the need for new contours, so as to include the dynamic aspect of the right to privacy, which corresponds to the ability of individuals (data subjects) to have access to the content and flow of information, having control over the information that concerns them.

As for consent, given the relationship of material inequality, in order to protect the weakest party, Portuguese legislators chose to restrict the worker's right to the free exercise of consent within the employment relationship, which may have removed the right to informational self-determination, which led to the decision of the National Commission for Data Protection CNPD for the non-application of Law 58/2019.

Self-determination must guarantee the control over the data in the entire cycle of the processing cycle, according to the legitimate expectations of the data subject. However, in an asymmetrical relationship, consent can remove the effectiveness of the data subjects' self-determination over their data, and so the leading role of consent must be accompanied by the protection given to relationships of material inequality, in order to make informational self-determination effective.

It is believed that the trade union representing the professional category cannot validly consent to the processing of personal data, due to the requirements for consent regarding rights of personality. Nonetheless, there is plenty of room for trade unions to negotiate rules aimed at protecting workers' right to free consent, as well as informational self-determination and the protection of personal data of those they represent.

Having gathered support and analyzed concepts, it could be noted that the use of both AI and automation requires transparency and ethics, and this is one of the greatest challenges to be faced, which legislation in several countries have tried to address, especially when it comes to data protection and informational self-determination, due to the risks that these tools pose to

workers in decision-making that concerns them.

And this is the central issue; after all, exercising the right to informational self-determination presupposes sufficient information about it, so that consent can also be exercised when this is the case, especially when using automated processing or through artificial intelligence for decision-making that impacts employment relationships.

It is hoped that Brazil can have a law that regulates the use of AI which gives greater effectiveness to the principle of transparency, guaranteeing the preservation of the fundamental rights of data subjects with regard to data protection, informational self-determination and very personal rights, especially mitigating discriminatory and/or arbitrary procedures.

Meanwhile, the European GDPR framework and Portuguese law can contribute significantly, by applying art. 8 of the Consolidation of Labor Laws, including very personal rights, which are directly linked to the dignity of the human person.

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