

THE REGULATORY ROLE OF THE BRAZILIAN DATA PROTECTION AUTHORITY IN SHAPING THE PERSONAL DATA MARKET

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Abstract: This study aims to discuss the issue of the regulatory activity of the Brazilian National Data Protection Authority (ANPD) in the creation of the Brazilian personal data market design. We propose that regulation should create a simple market design, avoiding crony capitalist practices, forbidding, however repugnant personal data transactions, protecting fundamental rights, but not handicapping free market.

Keywords: National Data Protection Authority; Data Protection Law; Regulation; Market design.

INTRODUCTION

Starting with industrialization—which, together with demographic growth, led to increased demand for consumer goods—we witnessed technological and economic developments that drove individuals toward new consumer interests, sometimes detached from their actual needs.

For more than twenty years, the field of information technology has become essential for all countries seeking insertion into the international arena, especially in a context of interconnected computer networks and data of all types, particularly personal data. Today, accessing personal data has become extremely easy, as such information is available from various sources, such as social media profiles and websites of public and private entities. Considering the massive exchange of information, especially in a scenario where protecting the legal interest of privacy has become increasingly difficult, regulating this flow is fundamental¹.

More and more, the virtual needs embedded in individuals by suppliers themselves lead to new commercial practices². In this sense, it is necessary

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¹ Zanin Júnior, João Paulo, A ANPD e a Regulação da Lei 13.709/18, in *Congresso Internacional Desafios e Perspectivas das Autoridades de Proteção de Dados Pessoais e Privacidade* (FDRP/USP 2020), 58.

² Croce, Bruno Bóris Carlos, *As Cláusulas Abusivas e o Código de Defesa do Consumidor* (M.A. thesis, Universidade Presbiteriana Mackenzie 2010), 40.

to mention Big Data, whose technological structures evolve far too quickly for the law to keep pace³.

In the context of e-commerce, it is common to use algorithms that generate competition among various economic agents, which creates a false impression of freedom of choice for consumers. It is false because the algorithms are controlled and manipulated by large companies that dominate information and market dynamics⁴.

Another particularly relevant aspect is that the economy is formed by social actors and is, therefore, influenced by social context and structure, meaning that any economic analysis must consider the social reality to which it belongs⁵.

Accordingly, it is important to bear in mind that preserving institutions is crucial for economic performance and the development of societies. That is, governance rules are essential for economic activity and social progress, making state mediation necessary—represented here by legal limits imposed on economic activity⁶.

It is within this framework that Richard Thaler and Cass Sunstein coined the expression “libertarian paternalism” to describe state mediation aimed at expanding consumer freedom of choice, protecting individuals from the confusing spread of information and from mechanisms that enhance their vulnerability, demanding from ordinary people a level of rational ability above average. Thus, the consumer is only free if the law ensures access to information and protects their sphere of empowerment through norms that facilitate their consumption experience⁷.

³ Pinto, Felipe Chiarello de Souza & Yuri Nathan da Costa Lannes, *Economia Criativa: A Aliança entre Desenvolvimento Econômico e a Proteção dos Direitos Fundamentais*, 3(56) *Revista Jurídica Unicuritiba* 129 (2019), 129-152.

⁴ Martins, Guilherme Magalhães, *O Geopricing e Geoblocking e Seus Efeitos nas Relações de Consumo*, in *Inteligência Artificial e Direito: Ética, Regulação e Responsabilidade* (Ana Frazão & Caitlin Mulholland coords., Thomson Reuters Brasil 2019), 633. It is worth mentioning here the criticism raised, for example, by mathematician Cathy O’Neil regarding the use of a consumer’s place of residence in credit analysis, since this is private information that should not be accessed by the technology company, as well as the discriminatory prejudice generated through an arbitrary judgment based on the individual’s geographic origin. O’Neil, Cathy, *Weapons of Math Destruction* (Penguin Books 2017), 145-146.

⁵ Cfr. Polanyi, Karl, *The Great Transformation* (Beacon Press 2001).

⁶ In this regard, the study developed by Douglass North, recipient of the 1993 Nobel Prize in Economics, is particularly important. North, Douglass, *Institutions, Institutional Change, and Economic Performance* (Cambridge Univ. Press 1990). This analysis was later developed and refined by 2009 Nobel Prize in Economics Elinor Ostrom: Ostrom, Elinor, *Governing the Commons* (Cambridge Univ. Press 1990). See also: Català, Pierre, *Ebauche d’une Théorie Juridique de l’Information*, *Informatica e Diritto* (Naples), Jan./Apr. 1983.

⁷ Sunstein, Cass & Richard Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 *U. Chi. L. Rev.* (2003), 1159.

Nowadays, much of innovative activity, especially on the internet, involves data processing operations. In other words,

Essential products of today's global economy are data, information, and personal references. With this raw material, initially unrefined, it is possible to achieve significant results in business efficiency or governmental action. However, the same sets of data and information also give rise to the major cases of abuse and distortion currently debated in academic, corporate, and public policy-making environments⁸.

It is in this context that Brazilian Law No. 13.709/18⁹, commonly known as the General Data Protection Law (LGPD), emerges, aiming to protect data subjects from abusive data-processing practices. The LGPD also creates the National Data Protection Authority (*Autoridade Nacional de Proteção de Dados*—ANPD), which assumes regulatory functions (among others).

In this sense, the *leitmotiv* of this work lies in answering the following question: *What are the challenges and perspectives for the design of the personal data market after the LGPD, and how can the ANPD overcome these challenges?*

Under the first hypothesis, there is a need for the ANPD to design a highly regulated market, with strong legal influence over the economic system, in order to protect the fundamental rights involved in data-processing operations.

However, a second hypothesis suggests that the ANPD's role should be more about organizing this market rather than imposing heavy regulation. This would not be a model of pure *laissez-faire*, but rather one less hindered by excessive regulation, facilitating enforcement and allowing the market to remain as free as possible while still protecting the fundamental rights truly at risk.

Thus, the general objective of this work is to analyze ANPD's regulatory activity through the lens of market design. Pursuing this general objective will make it possible to achieve specific objectives, such as: studying the importance of market design for economic development; conducting an in-depth analysis of the rights protected by the LGPD; and examining the rationale for the existence of the ANPD.

Regarding methodology, from the standpoint of scientific methods, the approach will be hypothetical-deductive, as we have two hypotheses that will

⁸ Vasconcelos, Beto & Felipe de Paula, *A Autoridade Nacional de Proteção de Dados, in Lei Geral de Proteção de Dados Pessoais e Suas Repercussões no Direito Brasileiro* (Gustavo Tepedino, Ana Frazão & Milena Donato Oliva coords., RT 2019), 718.

⁹ In any case, it is important to state that Brazil is far from being a pioneer in legislation of this kind.

be confronted with each other, enabling critical analysis and eventual confirmation or refutation.

From a methodological perspective—understood as the procedures and techniques used in addressing the research problem—the article adopts a qualitative approach, in which the interpretation and analysis of phenomena, and the attribution of meaning to them, cannot be analyzed only quantitatively, but especially with regard to their effects within the social context¹⁰.

As to its nature, this is an applied study¹¹, meaning that given the problem identified—the challenges and perspectives of ANPD's regulatory activity in shaping the personal data market—there is an evident empirical element. Such studies can generate knowledge for legal science as a whole and produce practical insights aimed at solving specific problems, particularly serving as a reference for ANPD's activities.

With respect to its objectives, the article aims to carry out exploratory research, whose principal aim is the refinement of ideas or the discovery of insights. Its planning is highly flexible and allows consideration of various aspects related to the phenomenon under study¹².

As for methodological procedures¹³, technical research procedures were used for data collection and analysis, including bibliographic and documentary research. As the theoretical framework for the bibliographic component, the study draws on Nobel Prize winner Alvin E. Roth, who addresses market design in his work *How Markets Work*¹⁴.

I. PERSONAL DATA AND ITS PROTECTION

It is common for users, when registering for internet applications, to be required to read and agree to terms of use and privacy policies. However, it is well known that most users do not read such documents, and even in the rare instances when they do, they struggle to understand their content or need a great deal of time to do so¹⁵. Worse still, if a person disagrees with the presented terms, they will often be prevented from accessing the application,

¹⁰ Mezzaroba, Orides & Cláudia Servilha Monteiro, *Manual de Metodologia da Pesquisa do Direito* (Saraiva 2006), 110.

¹¹ Gerhardt, Tatiana Engel & Denise Tolfo Silveira, *Métodos de Pesquisa* (UFRGS 2009), 35.

¹² Gil, Antonio Carlos, *Como Elaborar Projetos de Pesquisa* (4th ed., Atlas 2008), 41.

¹³ Gil, Antonio Carlos, *Como Elaborar Projetos de Pesquisa* (4th ed., Atlas 2008), 43.

¹⁴ Roth, Alvin E., *Como Funcionam os Mercados* (Isa Mara Lando & Mauro Lando trans., Portfolio–Penguin 2016).

¹⁵ McDonald, Aleecia M. & Lorrie Faith Cranor, The Cost of Reading Privacy Policies, 4 *J.L. & Pol'y for the Info. Soc'y* 543 (2008), 2008.

thereby losing access to important online products and services¹⁶.

Alvin E. Roth, discussing consumer rejection of offers perceived as unfair, teaches:

The cases in which consumers reject offers they consider unfair are more common than one might imagine, surprising even marketing giants. In 1999, for example, Coca-Cola tested vending machines that could automatically raise prices when the ambient temperature increased. The negative reaction was swift—and the company was equally quick to abandon the idea. We can see that ordinary people who find certain transactions particularly distasteful have a strong voice when they can buy elsewhere or simply not buy—and this plays a role in shaping markets¹⁷.

This, however, is not the case when it comes to rejecting the abusive privacy policies of certain social networks. Rejecting them would impose considerable personal and social costs on the “dissenting” user, since such application providers are increasingly integrated into social life and even into the political–economic relations among individuals, the State, private companies, and the broader community¹⁸. It is quite different from choosing not to drink a Coca-Cola.

Within this context, many authors emphasize that mere consent is insufficient to safeguard privacy and protect personal data in the face of contemporary challenges such as behavioral advertising, Big Data, tracking and monitoring of web users, among others¹⁹.

The debate on personal data protection predates the popularization of the internet. As early as 1981, for example, Vittorio Frosini had already highlighted the need to protect data through *habeas data*, recognizing an individual’s right to dispose of their own data—analogue to the right to dispose of one’s own body (protected by *habeas corpus*)²⁰.

Indeed, in Brazil’s 1988 Federal Constitution, *habeas data* appears as a

¹⁶ Cate, Fred H. & Viktor Mayer-Schönberger, Notice and Consent in a World of Big Data, 3(2) *Int’l Data Privacy L.* 67 (2013), 67.

¹⁷ Roth, Alvin E., *Como Funcionam os Mercados* (Isa Mara Lando & Mauro Lando trans., Portfolio–Penguin 2016), 38.

¹⁸ Mendes, Laura Schertel, *Privacidade, Proteção de Dados e Defesa do Consumidor* (Saraiva 2014), 22.

¹⁹ Mendes, Laura Schertel & Gabriel Campos Soares da Fonseca, Proteção de Dados para Além do Consentimento, in *Tratado de Proteção de Dados Pessoais* (Danilo Doneda et al. coords., Forense 2021), 74.

²⁰ Frosini, Vittorio, La Protezione della Riservatezza nella Società Informatica, *Informatica e Diritto*, Jan./Apr. 1981. Today, the metaphor of *habeas mente* has already been proposed, aimed at protecting consumers from being disturbed by abusive online advertising practices. See, in this regard, Basan, Arthur Pinheiro, *Publicidade Digital e Proteção de Dados Pessoais* (Foco 2021).

constitutional action. Former Justice Sepúlveda Pertence observed:

It must be understood that the purpose of explicitly creating habeas data is less about crafting procedural instruments—which, strictly speaking, would be unnecessary—and more about emphasizing the substantive right, ensuring that any citizen has access to data about themselves contained in records or databases held by governmental or public-facing entities, as well as the right to the compulsory rectification of inaccurate data²¹.

From there, the issue of data protection gradually entered the political debate, as illustrated by the Santa Cruz de La Sierra Declaration signed by Brazil in 2003, which recognizes the fundamental nature of the right to personal data protection²².

Domestically, the Consumer Protection Code provided guiding principles for consumer protection and established an efficient system for safeguarding this group—absorbing countless demands involving personal data, especially since data processing operations frequently occur within consumer relations. Indeed, many principles of data protection can be observed through the lens of the Brazilian Consumer Protection Code²³.

The Superior Court of Justice (STJ), since the 1990s—particularly in its case law on the applicability of the Consumer Protection Code to negative credit databases—had already begun treating privacy differently from the classic notion of excluding third-party interference. In 1995, for example, when deciding REsp 22.337-8/RS, Justice Ruy Rosado mentioned the fundamental right to informational self-determination, which had emerged in Germany²⁴.

The consumer-relation debate eventually led to the enactment of the Positive Credit Registry Law (Law 12.414/2011).

Later, the issue reached the public sector with the promulgation of the

²¹ Pertence, Sepúlveda, Dos Instrumentos de Garantia de Direitos, in *Seminário sobre Direito Constitucional*, Série Cadernos CEJ (Conselho da Justiça Federal 1992), 54, *apud* Doneda, Danilo, Panorama Histórico da Proteção de Dados Pessoais, in *Tratado de Proteção de Dados Pessoais* (Danilo Doneda et al. coords., Forense 2021), 13.

²² Doneda, Danilo, Panorama Histórico da Proteção de Dados Pessoais, in *Tratado de Proteção de Dados Pessoais* (Danilo Doneda et al. coords., Forense 2021), 13.

²³ Doneda, Danilo, Panorama Histórico da Proteção de Dados Pessoais, in *Tratado de Proteção de Dados Pessoais* (Danilo Doneda et al. coords., Forense 2021), 14. On the application of data-protection principles from the perspective of the Consumer Protection Code, see Carvalho, Ana Paula Gambogi, O Consumidor e o Direito à Autodeterminação Informacional, 46 *Revista de Direito do Consumidor* 77 (2003).

²⁴ Cueva, Ricardo Villas Bôas, A Proteção de Dados Pessoais na Jurisprudência do Superior Tribunal de Justiça, in *Lei Geral de Proteção de Dados Pessoais e Suas Repercussões no Direito Brasileiro* (Gustavo Tepedino, Ana Frazão & Milena Donato Oliva coords., RT 2019), 88-89.

Access to Information Act (Law 12.527/2011), which regulated the principle of transparency and introduced specific rules for protecting personal data held by public authorities²⁵.

In 2014, the Brazilian Internet Civil Rights Framework (*Marco Civil da Internet* – Law 12.965/2014) was enacted. It established user rights online and addressed, among other relevant matters, procedures and rights related to users' personal data. However, as the global economy became increasingly data-driven, a new law was needed to more broadly and effectively protect personal data.

Beyond governments, major economic actors have created what is known as the “one-way mirror,”²⁶ knowing a great deal about individuals without those individuals necessarily knowing much about them. It is the constant surveillance and monitoring of people's lives that makes this mirror possible²⁷.

Nonetheless, it was only in 2018 that the General Data Protection Law (LGPD) was enacted, aiming to empower data subjects in this relationship. The new legislation seeks to “circumvent, as far as possible, the harmful effects of a capitalism increasingly grounded in surveillance and opacity.”²⁸

It is unnecessary to restate that what the LGPD does is formally enshrine, at the statutory level, a fundamental right that already existed²⁹: the right to data protection—connected to already-consolidated notions such as human dignity, the free development of personality, informational self-determination, and privacy.

Indeed, because human dignity is one of the most important values in the legal system, it often becomes a kind of “wild card” invoked to justify almost anything. However, as Ingo Sarlet teaches, dignity is a value to which data protection adapts perfectly:

The connections between the principle of human dignity and the fundamental right to the protection of personal data are profound, although not always understood uniformly across different legal systems. The two main points of contact, however, are the principle of autonomy (self-determination) and personality rights, represented here by the general right to the free development of personality and the

²⁵ Doneda, Danilo, Panorama Histórico da Proteção de Dados Pessoais, in *Tratado de Proteção de Dados Pessoais* (Danilo Doneda et al. coords., Forense 2021), 15.

²⁶ We freely translate this expression to “*espelho de uma só via*” in Portuguese.

²⁷ Pasquale, Frank, *The Black Box Society* (Harvard Univ. Press 2015), 42 *et seq.*

²⁸ Cueva, Ricardo Villas Bôas, A Proteção de Dados Pessoais na Jurisprudência do Superior Tribunal de Justiça, in *Lei Geral de Proteção de Dados Pessoais e Suas Repercussões no Direito Brasileiro* (Gustavo Tepedino, Ana Frazão & Milena Donato Oliva coords., RT 2019), 88-89.

²⁹ On fundamental rights not expressly set out in the Constitution, see, among others, Santos, Eduardo Rodrigues dos, *Direitos Fundamentais Atípicos* (Juspodivm 2017).

specific rights to privacy and informational self-determination, which are themselves interconnected and do not exhaust the range of alternatives³⁰.

Evidence of this perfect alignment lies in the fact that the first landmark decision concerning data protection, issued in Germany, involved protecting citizens' data from the Public Administration, with the Federal Constitutional Court suspending the effects of a law that established a nationwide census. The first commissioner of the German federal data protection authority states:

The moral and political core of the Court's concerns was (and is) ensuring citizens' freedom in the face of State repression. Thus, the reasoning in the decision was oriented toward protecting human freedom of action, with the transparency of information collection serving as a means to achieve that aim³¹.

Considering that the first generation³² of fundamental rights concerned precisely the protection of individual liberties against State oppression³³, the fact that the first German Constitutional Court decision on data protection was directed against the Public Administration makes the connection between this right and human dignity—as the foundation of all fundamental rights—clear.

II. REPUGNANCE, THE ISSUE OF THE FREE MARKET, AND TRANSACTIONS INVOLVING PERSONAL DATA

First, to understand the need for regulating data-processing operations, we turn to Alvin Roth's concept of repugnant transactions: "*Let's call a transaction repugnant when some people want to engage in it and others do not.*"³⁴ According to the author, this is what happens, for example, with the consumption of horse meat in California or with the sale of human organs.

It goes without saying that a transaction may be legal even if repugnant,

³⁰ Sarlet, Ingo Wolfgang, Fundamentos Constitucionais: O Direito Fundamental à Proteção de Dados, in *Tratado de Proteção de Dados Pessoais* (Danilo Doneda et al. coords., Forense 2021), 30.

³¹ Sarlet, Ingo Wolfgang, Fundamentos Constitucionais: O Direito Fundamental à Proteção de Dados, in *Tratado de Proteção de Dados Pessoais* (Danilo Doneda et al. coords., Forense 2021), 31.

³² We understand that, in most cases, the term "dimension" is more appropriate than "generation." However, for the purposes of this study, we have chosen "generation," as we are discussing fundamental rights from a historical perspective.

³³ On this point, see, among others, Bonavides, Paulo, *Do Estado Liberal ao Estado Social* (7th ed., Malheiros 2008).

³⁴ Roth, Alvin E., *Como Funcionam os Mercados* (Isa Mara Lando & Mauro Lando trans., Portfolio–Penguin 2016), 225.

as was the case with the consumption of horse meat in California, which remained lawful until 1998, although much of the population viewed it as repugnant. Similarly, some transactions—despite their repugnance—are lawful due to the difficulty of enforcement, or because prohibition might increase crime and expand the black market, as happened during Prohibition in the United States, which not only failed to curb alcohol consumption but also strengthened organized crime³⁵.

Naturally, a market's perceived repugnance can change, sometimes abruptly. A clear example is same-sex marriage³⁶, which has even given rise to a significant and growing market, such as dating apps targeted at the gay community—like Grindr. These shifts in repugnance can have far-reaching effects, considering that markets—especially nowadays—are intertwined with webs of connections to many other markets.

In any case, the central issue surrounding the repugnance of a market is that, as Roth explains, “‘yes or no’ is never black and white. Since markets are collective enterprises, we can design them, but we cannot necessarily control them.”³⁷

This brings us to the problem of regulating transactions involving personal data. One thing is sharing data such as your name, phone number, and email address with a store in exchange for discounts (even knowing that this store may later use the data to send advertisements). It is quite another for a mobile phone carrier to know exactly where a user is at all times, through continuous monitoring.

For this reason, it becomes necessary to design the market. Some might argue that such design compromises the idea of a free market, which is of great importance to many. Roth also addresses this:

What exactly allows a market to operate freely? When we talk about a ‘free market,’ we should not imagine a free-for-all, but rather a market with well-crafted rules that make it function properly. A market that can operate freely is like a wheel that can spin freely: it needs an axle and well-lubricated bearings. How do we provide this axle and maintain the lubrication? That is what market design is about³⁸.

According to Austrian economist Friedrich August von Hayek, markets require effective rules in order to function freely. He clearly distinguished between creating a system that maximizes the benefits of competition

³⁵ Roth, Alvin E., *Como Funcionam os Mercados* (Isa Mara Lando & Mauro Lando trans., Portfolio–Penguin 2016), 225.

³⁶ Roth, Alvin E., *Como Funcionam os Mercados* (Isa Mara Lando & Mauro Lando trans., Portfolio–Penguin 2016), 227.

³⁷ Roth, Alvin E., *Como Funcionam os Mercados* (Isa Mara Lando & Mauro Lando trans., Portfolio–Penguin 2016), 241.

³⁸ Roth, Alvin E., *Como Funcionam os Mercados* (Isa Mara Lando & Mauro Lando trans., Portfolio–Penguin 2016), 23.

(through regulation) and simply accepting institutions as they are³⁹. Hayek described himself as a liberal⁴⁰ and compared the liberal's stance toward society to that of a gardener toward a plant: he must understand its structure and functioning in order to create conditions conducive to its growth, just as the liberal must understand society.

A key point of disagreement today between liberals and conservatives concerns the scope of market regulation. The expression “free markets” often appears as a slogan aimed at reducing regulation solely to property rights, leaving everything else to laissez-faire. However, “just like in a garden, only some plants grow without any help—and some of those are weeds.”⁴¹

There are also economists who oppose regulation, not because they believe unregulated markets produce better outcomes, but because they distrust the political process that generates regulation. Once interest groups capture the regulatory process, the “solutions” may be worse than the problems⁴².

Turning to our research problem, we must remember that at least since the 1990s, Lawrence Lessig⁴³ has argued that it is not only the law that regulates the internet—other forces also play this role: society, market dynamics, and even technology itself. Technology, in fact, enables architectures and designs that can either support or hinder the enjoyment of fundamental rights—such as freedom, privacy, and equality—within virtual environments.

Neil Postman emphasizes that technology can generate both benefits and harms (what he calls the “burden and blessing”), depending on how it is conceived or used⁴⁴. Undeniably, technology creates risks to individuals' personalities, but it can also support their protection⁴⁵.

³⁹ Hayek, Friedrich August von, *The Collected Works of F.A. Hayek, vol. 2: The Road to Serfdom—The Definitive Edition* (Univ. of Chicago Press 2007).

⁴⁰ And he provides an explanation of this term, since today, in the United States, what is called “liberal” is what in Europe would be considered “socialist.” Thus, when he refers to himself as a liberal, he means what some people today would call a “conservative,” aligning himself with the liberal principles of the nineteenth century. See Hayek, Friedrich August von, *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Routledge & Kegan Paul 1982).

⁴¹ Roth, Alvin E., *Como Funcionam os Mercados* (Isa Mara Lando & Mauro Lando trans., Portfolio–Penguin 2016), 257.

⁴² Zingales, Luigi, *Um Capitalismo para o Povo* (Augusto Pacheco Calil trans., Bei Comunicação 2015), 167.

⁴³ Lessig, Lawrence, *Code and Other Laws of Cyberspace* (Basic Books 1999).

⁴⁴ Postman, Neil, *Technopoly: The Surrender of Culture to Technology* (Vintage Books 1992), 4-5.

⁴⁵ Mendes, Laura Schertel & Gabriel Campos Soares da Fonseca, *Proteção de Dados para Além do Consentimento*, in *Tratado de Proteção de Dados Pessoais* (Danilo Doneda et al. coords., Forense 2021), 85.

Neither law nor technology alone can protect people from violations of fundamental rights⁴⁶. Thus, it is necessary to ensure the adequacy of technology and data-processing practices, increasing individuals' confidence that no manipulation, interception, or unauthorized access will occur, while also enabling data subjects to personalize their experience by defining their preferences about how their data is processed⁴⁷.

Of course, laws are exclusively within the realm of governments, but some norms and regulations are also issued by private entities—such as franchises, shopping malls, and associations—and they often work well. The fact is that “both governments and market-shaping citizens have roles to play; and both can err by regulating too slowly and without sufficient vigor, but also by acting too hastily.”⁴⁸

In any event, even when rules are created by governmental bodies—such as the ANPD—they must be as simple and streamlined as possible, avoiding lobbying pressures and facilitating enforcement. Luigi Zingales calls attention to the fact that some experts prefer regulations to be more complex, as this increases the value of their expertise and human capital:

In 2010, we witnessed the approval of the Dodd–Frank financial reform bill, with an astonishing 2,319 pages. [...] It is quite telling that Dodd–Frank was popularly referred to as the “2010 Full Employment Act for Lawyers and Consultants”—it may have created more jobs than President Barack Obama’s original 2009 stimulus package⁴⁹.

We do not deny that, at least in a strictly economic sense, simple regulation tends to be inefficient, but complex regulation is not necessarily better. The more complex the regulation, the more expensive enforcement becomes, and the greater the risk posed by lobbying activities surrounding that regulation.

When we take enforcement costs and lobbying costs into account, many choices that initially seemed inefficient become more efficient in a broader sense. By simplifying laws, we may make them less effective at limiting the distortions they are designed to address, but in practice we reduce their real cost and increase their transparency. By ignoring

⁴⁶ Zanatta, Rafael A. F., A Proteção de Dados entre Leis, Códigos e Programação, in *Direito & Internet III: Marco Civil da Internet* (Newton de Lucca, Adalberto Simão Filho & Cíntia Rosa Pereira de Lima eds., Quartier Latin 2015), 465.

⁴⁷ Mendes, Laura Schertel, Segurança da Informação, Proteção de Dados Pessoais e Confiança, 22(90) *Revista de Direito do Consumidor* (2013), 246.

⁴⁸ Roth, Alvin E., *Como Funcionam os Mercados* (Isa Mara Lando & Mauro Lando trans., Portfolio–Penguin 2016), 258.

⁴⁹ Zingales, Luigi, *Um Capitalismo para o Povo* (Augusto Pacheco Calil trans., Bei Comunicação 2015), 180.

enforcement and lobbying costs, policymakers often fall into the “nirvana fallacy,” comparing real-world markets to ideal regulation. Simple rules allow for better comparisons between realistic markets and realistic regulation⁵⁰.

As an additional benefit, simpler legislation makes it easier for the general public to participate actively in monitoring compliance.

III. MARKET DESIGN FOR PERSONAL DATA AND THE ROLE OF THE BRAZILIAN DATA PROTECTION AUTHORITY (ANPD)

Fábio Konder Comparato teaches that “*the earliest notion of political economy coincides with the emergence of the liberal state and corresponds to a static conception of economic life, entirely centered on the natural equilibrium in the production and circulation of wealth.*”⁵¹

At that time, the State’s role was merely to guarantee the general conditions necessary to maintain such equilibrium and, eventually, to mitigate crises. Over time, however, the State began to act systematically on economic structures, prompting a parallel transformation in legal techniques and institutions⁵².

Thus, the “new economic law” emerges to regulate State intervention in the structures of the economic system, to plan economic policy, and to oversee the instruments for implementing it⁵³. “And in countries such as Brazil, the task of economic law is to transform economic and social structures with the aim of overcoming underdevelopment.”⁵⁴

Today, law in general—and normative acts in particular—consists of structuring institutional arrangements capable of enabling the effective implementation of public policies. Diogo Coutinho argues that law can serve as an objective (as it renders political aims binding and incorporates political decisions into the legal order), as a tool (providing means to achieve these aims), as an institutional arrangement (structuring the execution of policy), or as a means of vocalizing social demands (creating participatory conditions

⁵⁰ Zingales, Luigi, *Um Capitalismo para o Povo* (Augusto Pacheco Calil trans., Bei Comunicação 2015), 183.

⁵¹ Comparato, Fábio Konder, O Indispensável Direito Econômico, in *Ensaio e Pareceres de Direito Empresarial* (Forense 1978), 463.

⁵² Comparato, Fábio Konder, O Indispensável Direito Econômico, in *Ensaio e Pareceres de Direito Empresarial* (Forense 1978), 465.

⁵³ Comparato, Fábio Konder, O Indispensável Direito Econômico, in *Ensaio e Pareceres de Direito Empresarial* (Forense 1978), 465-467.

⁵⁴ Bercovici, Gilberto, O Ainda Indispensável Direito Econômico, in *Direitos Humanos, Democracia e República: Homenagem a Fábio Konder Comparato* (Maria Victoria de Mesquita Benevides, Gilberto Bercovici & Claudineu de Melo eds., Quartier Latin 2009), 517.

within democracy)⁵⁵.

Assuming that good regulatory models—capable of managing a public policy—depend on adequate normative production to direct behavior, monitoring and information-handling mechanisms to implement and evaluate effects, and the establishment of proper enforcement structures, assigning responsibilities for these functions is central to any public-policy-oriented regulatory framework⁵⁶.

When discussing data-protection policies, the institutional design responsible for monitoring, implementing, ensuring compliance, and evaluating either the new legislation or the public policy it structures is crucial to its success.

Although the standard of an autonomous, independent, and highly specialized authority was almost unanimously favored throughout the Brazilian debate on data protection, we cannot ignore that it is not the only possible model, nor a *conditio sine qua non*⁵⁷. It is entirely feasible to create alternative institutional arrangements without establishing a new authority. Still, roughly 90% of countries that enacted data-protection laws created independent authorities to manage the new policy⁵⁸.

Moreover, developing countries tend to display institutional isomorphism. Thus, whether due to the influence of international guidelines or the training of domestic experts who adopt foreign experiences, designs previously tested abroad—especially in OECD countries—emerge readily and are treated as suitable for transplantation into the Brazilian context⁵⁹.

When discussing personal data protection, we are not merely referring to restricting institutional access to such data. It goes further: it is about ensuring that the flow of personal information about individuals occurs in an appropriate manner that respects contextual integrity⁶⁰.

⁵⁵ Coutinho, Diogo, O Direito nas Políticas Públicas, in *Política Pública como Campo Interdisciplinar* (Eduardo Marques & Carlos Alberto P. de Faria eds., Unesp 2013).

⁵⁶ Vasconcelos, Beto & Felipe de Paula, A Autoridade Nacional de Proteção de Dados, in *Lei Geral de Proteção de Dados Pessoais e Suas Repercussões no Direito Brasileiro* (Gustavo Tepedino, Ana Frazão & Milena Donato Oliva coords., RT 2019), 721.

⁵⁷ Lemos, Ronaldo et al., O Brasil Precisa de uma Autoridade de Proteção de Dados?, *Jota* (Mar. 20, 2018), <https://www.jota.info/opiniao-e-analise/artigos/o-brasil-precisa-de-uma-autoridade-de-protecao-de-dados-20032018>.

⁵⁸ Mendes, Laura Schertel & Danilo Doneda, Lei de Proteção de Dados Não Pode Morrer na Praia, *Folha de S. Paulo* (June 20, 2018), <https://www1.folha.uol.com.br/opiniao/2018/07/laura-schertel-mendes-e-danilo-doneda-lei-de-protecao-de-dados-nao-pode-morrer-na-praia.shtml>.

⁵⁹ Vasconcelos, Beto & Felipe de Paula, A Autoridade Nacional de Proteção de Dados, in *Lei Geral de Proteção de Dados Pessoais e Suas Repercussões no Direito Brasileiro* (Gustavo Tepedino, Ana Frazão & Milena Donato Oliva coords., RT 2019), 723.

⁶⁰ Nissenbaum, Helen, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford Univ. Press 2010), 2.

The ANPD is responsible for protecting personal data, noting that sensitive data—whose exposure may cause significant personal or professional harm—are also included in this category. There may also be violations of personality rights, as the mishandling of data (especially sensitive data) can increase the likelihood of discrimination⁶¹.

The *ratio* of the ANPD, in very succinct terms, is to materialize the specific protection of the right to privacy⁶². That is:

The idea behind the creation of the ANPD is rooted in the theoretical model of risk regulation, according to which risks constitute the central element of legal norms aimed at safeguarding collective liberties and rights. To minimize the risks associated with personal data exposure and ensure effectiveness, the LGPD assigns the enforcement of its regulatory model to a regulatory agency (the ANPD)⁶³.

In any case, there was substantial learning from existing foreign examples. It is widely recognized that specialization, technical expertise, speed and consistency of decision-making, thematic depth, and, above all, administrative, financial, and budgetary autonomy are essential for implementing, monitoring, and enforcing data-protection policy. This is because the high mutability of the sector demands constant updating, technical sophistication, and expertise, as well as guarantees of independent action⁶⁴.

There were also less noble motivations, linked to the Brazilian institutional landscape. First, the goal was to avoid the diffuse and decentralized enforcement structures existing across various sectors, where overlap and lack of coordination—similar to what occurred with leniency agreements under the anti-corruption law—generated institutional friction that has yet to be fully resolved⁶⁵.

Another relevant factor was the existing data-protection landscape in Brazil. Agencies such as PROCONs, Public Prosecutors' Offices, and the National Consumer Secretariat (SENACON) carried out highly competent

⁶¹ Doneda, Danilo, *Da Privacidade à Proteção de Dados Pessoais* (Renovar 2006), 163.

⁶² Machado, Joana de Moraes Souza, A Tutela da Privacidade e o Controle de Dados Pessoais no Direito Brasileiro, 2(2) *Arquivo Jurídico* 43 (2015), 50.

⁶³ Zanin Júnior, João Paulo, A ANPD e a Regulação da Lei 13.709/18, in *Congresso Internacional Desafios e Perspectivas das Autoridades de Proteção de Dados Pessoais e Privacidade* (FDRP/USP 2020), 60.

⁶⁴ Zanin Júnior, João Paulo, A ANPD e a Regulação da Lei 13.709/18, in *Congresso Internacional Desafios e Perspectivas das Autoridades de Proteção de Dados Pessoais e Privacidade* (FDRP/USP 2020), 60.

⁶⁵ Vasconcelos, Beto & Marina Lacerda e Silva, Acordo de Leniência – A Prática de um Jogo Ainda em Andamento, in *Colaboração Premiada* (Maria Thereza de Assis Moura & Pierpaolo Cruz Bottini orgs., RT 2018).

work, but often with duplication of efforts or without a clearly defined responsible authority for each situation⁶⁶.

Additionally, it was essential to ensure that the new data-protection legislation would be effective and applicable not only to the private sector but also to the public sector. That is, data processing by public administration must also be subject to controls of purpose limitation, proportionality, and transparency⁶⁷.

Thus, the creation of the ANPD simultaneously replicated successful international models and addressed intrinsic problems in the Brazilian context. To ensure independence and expertise, a single entity with multiple functions was created.

The ANPD is seen as a potential authority responsible for regulating, implementing, and shaping the implementation of the law. Its powers range from broad normative and regulatory authority to competencies in auditing and managing international data transfers.

However, it is crucial to emphasize that regulation must be as simple as possible, facilitating understanding by the general population—who are the true recipients of these norms—as well as enabling effective enforcement of data-protection rules in Brazil.

CONCLUSION

By way of conclusion, we may now answer the research question posed at the beginning of this text: the great challenge of the ANPD's regulatory activity is to reconcile the broadest possible protection of the fundamental right to data protection without, however, harming the free market or legislating in an overly complex manner, which would hinder enforcement and leave the authority vulnerable to lobbying.

It is therefore expected that the authority will fulfill its role by crafting a market design that neither obstructs the exercise of rights by data subjects (which would result from excessively complex regulation) nor succumbs to the economic power of the large companies operating in the data market.

If ANPD's regulatory activity ends up making any data processing unfeasible, the result will be stagnation in digital innovation, thereby harming Brazil's economic development.

⁶⁶ Vasconcelos, Beto & Felipe de Paula, A Autoridade Nacional de Proteção de Dados, in *Lei Geral de Proteção de Dados Pessoais e Suas Repercussões no Direito Brasileiro* (Gustavo Tepedino, Ana Frazão & Milena Donato Oliva coords., RT 2019), 723.

⁶⁷ Vasconcelos, Beto & Felipe de Paula, A Autoridade Nacional de Proteção de Dados, in *Lei Geral de Proteção de Dados Pessoais e Suas Repercussões no Direito Brasileiro* (Gustavo Tepedino, Ana Frazão & Milena Donato Oliva coords., RT 2019), 723.

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