FACULDADE DE DIREITO
UNIVERSIDADE DE LISBOA

ELPIS
European Legal Practice Integrated Studies Network

LMU
Lincoln Memorial University

The unbalance between the advancement of administrative law and the issue of the legal security… A twenty-first century problem

Written by **Patrícia Alexandra da Silva Domingues**,
under the regency of **Professor Vasco Pereira da Silva**

Honor Pledge:

I, **Patrícia Alexandra da Silva Domingues**, by my honor declare that the submitted work is original and adheres to the University' highest standards of academic integrity.

Abstract:
The follow work is a reflection of the influence of technology on the administrative law and a comparative analysis of the protection of legal security with reference to the Portuguese and U.S.' System.

Technology has never stepped more into our lives than now. There is not a day that goes by that we do not have access to it. Not only people use it as a distracting instrument but the number of people and companies work with it as an essential management tool. It might sound odd writing about such an, almost, unprofessional theme but, in fact, social media does affect the way our system works, and it reflects on the constant modification our administrative law has been suffering throughout the years.

The main goal of administrative law has been protecting the rule of law and the liberty of the citizens by making sure that agencies (in the United States) and entities (in Portugal) follow fair and impartial procedures, follow and respect the law, always with the ambition of preserving the human dignity. In fact, the agencies were attacked as an unconstitutional "fourth branch" of government.

Virtually, each nation has ordered some sort of information protection laws to control how data is collected, how subjects are informed, and what control an information subject has over its information once it is exchanged. Disappointment to take after pertinent information protection may lead to fines, claims, and indeed disallowance of a site's use in certain jurisdictions. Exploring these laws and regulations can be overwhelming, but all site administrators ought to be familiar with data security that affect their users.

Comparing the two administrative systems- the Portuguese and the American- we will find some differences that are important to mention.

Firstly, is definitely important to highlight the two different government systems. Quoting CARLOS BLANCO DE MORAIS, we can define government system as:

«modelo or paradigm of governance, through which ccommon and permanente attributes are grouped between diferente forms of organization of power, which its inclusion in a given category »[1].

In the United States of American runs, the Presidential government system, which is a democratic and republic system of government where a head of government leads and executive branch that is separate from the legislative branch. The executive is elected and is not responsible to the legislature. The head of the executive in this case is the President.

On the other hand, in Portugal, predominates a Semi-presidential system, also known as dual executive system. In this kind of systems, the president exists alongside a prime minister and a cabinet, with the last two controlling the legislature of the State.

Comparing the two systems we do find some big differences that might influence (or not), the method of accepting and adjusting the administrative law to this new reality.

Being the executive branch attributed, exclusively, to only one person, the President, in a crises moment, we might find some serious problems. In Portugal we will find a government formed with different political ideas which will definitely benefit the protection of the people believes.

Despite this aspect, it is crucial that we recognize that, in both countries, we will find a democracy and all the citizens will find people representing their believes in the legislative branch (the American Senate and Congress in the United States of America and the Republic Assembly in Portugal).

[1] Translation to Portuguese: *«Modelo ou um paradigma de governação, através da qual se agrupam atributos comuns e permanentes entre diversas formas de organização do poder, que possibilitam a sua inclusão numa dada categoria».*

Technology has been penetrating people's lives and, consequently, forcing the systems to take measures to keep proceeding their goals which, as mentioned earlier on this essay, is protect the human dignity. However, we must recognize that the task we are currently discussing is anything but easy.

To differentiate, we will define the administrative law of the twenty-first century as the new governance in order to emphasize the difference between the administration of the ninetieth century and the administrative system of the twenty first system.

New governance is now facing, directly and indirectly, with new challenge regarding the rights-based model of legal liberalism. For progressives seeking to strengthen norms such as antidiscrimination, the road to success of this new type of governance is not by «claiming rights», but «solving problems».

In fact, these kind of rights already existed in the ninetieth century although they were not invocated by people in order to protect themselves. With the evolution of technology, we find people using social media as an instrument to speak their minds and fight for their rights, partially because they, in my point of view, were afraid of any consequence they would get by speaking up their believes in person.

All these new realities call for new rules in sequence to adjust to this new reality the States are facing and the evolution shows that is a phenomenon that just started and is years away of having an end. Nevertheless, the evolution and the beneficial technology brings into the world, some authors have shown their concern regarding the adjustment the governments need to do in order to be able to keep up with the changes:

«The deep worry here is that the explicit provisionally of new governance framework laws obligates those who "follow" the legal rules to re-write them in the act of applying them; that this revision is at the discretion of those who do the revising; and that this inevitable exercise of discretion is incompatible with the kinds of accountability on which citizens of a democracy rightly insist in the elaboration of administrative rules and constitutional rights.».

Besides the new reality, we also have, what so called *the new governance theorists,* these group of people make the role of the rulers even harder, because they now ask for a mora ''dynamic accountability'', where agents are forced to transparently justify their decisions and are evaluated by peers, making similar decisions, better fulfills the desideratum of a government that is responsive to its citizens.

As already referred in this article, technology and, specially, social media, have been a tool used both by the population and government, however, what kind of functions does the social media have that could help the government and, specially, the democracy, so much?

It is true that the internet can bring discrimination to the world because not everyone has access to it but, it is also recognized the power this instrument has to, for example, bring back the democracy.

For example, according to studies the abstention of votes in Portugal is higher, comparing to the ninetieth century. Some people do not vote because, in their opinion, ''they do not believe in democracy any longer''. Others, do not vote because they do not find that act important at all. But there is also people that do not use their right to vote because they are not able to move to a certainly local in order to vote.

The same situation has been happening in the United States as well. After increasing for many decades, there has been a trend of decreasing voter turnout in most established democracies since the 1980's.

As a result, both countries have been taking many efforts to increase voter turnout and encourage participation in the political process. Social is definitely an instrument that both states have been using, in different ways, to increase the voter turnout. Not only, the government itself, sharing on social media the importance of the vote and sharing the evolution of this important right, but also asking influencers to do the same. In my point of view, it is a great strategy to increase the number of votes and, specially, to get the attention of the younger generation whom, in the future, will be our future and have an even bigger influence on our democracy.

In fact, Federal Agencies have embraced social media to serve a variety on non-rulemaking purposes, but also a few rulemaking contexts, meaning the world is changing because of technology. Usually, the federal rulemaking process takes two to three years for a suggestion to turn into a rule.

But the technology can also increase the voter turnout by creating new ways of voting in distance. The Covid-19 pandemic has revealed the importance of using these new tools to simplify the system and get the administration closer to the citizen. Not wanting to turn this essay into a subjective article, I would like to leave my opinion on this topic by underlining the benefits technology can bring to simplify the bureaucracy.

By reading the great book *Internet Jurisdiction and choice of law: Legal practices in the EU, US and China* written by FAYE FANGFEI WANG, the writer starts is publication by revealing the benefits of the electronic commercial transactions:

«The adoption of electronic commercial transactions has facilitated crossborder trade and business, but the com complexity of determining the place of business and other connecting factors in the cyberspace has challenged existing private international law».

In fact, the author discusses, in 200 pages, the electronic contracting and how much that has benefited the transactions by allowing people to contract in distance, and concludes by predicting some future legislative trends. Given the importance of the topic to this essay we will, in the next paragraphs analyze the conclusion and recommendations published by this author.

We can all agree that the implementation of electronic commercial transactions does make the formation of cross-border business, much easier and faster, without the need for the parties to meet in person. However, it has challenged the *«scope and sufficiency of the traditional laws».*

This constant evolution seeks the need for interpretations or explanation of traditional rules in order to adjust it to the present. However, it is not something easy to do since, in a case of conflict-of-law, we are working with different legal cultures from different countries.

Given the situation, the Professor leaves a recommendation to the future:

« (1) continuing working on the modernization and harmonization of the existing legislation; and

(2) carrying on drafting new subject-specific laws only when necessary. »

Regarding the e-contracts which, in this essay, is not a main topic, the author mentions the importance of freedom in the business world between states. As a consequence of that freedom, *«parties should be free to choose the jurisdiction and choice of law for their own contracts. The party autonomy approach will increase the legal certainty of the hearing court and*

governing law; reduce the risk of conflicts of jurisdiction and choice of law; and save time in court proceeding».

Nevertheless, technology can also bring difficulties into the system, such as, the protection of the people's rights. Analyzing the evolution of the administrative law, we will find their traumatic[2] birth around the eighteenth century, in France.

First, we have the French Revolution (1789), which turnout to became a giant trauma[3] in the history of the administrative law. In fact, in order to start practicing their new principles, *Liberté, Égalité, Fraternité*[4] and the separation of powers, a doctrine that started in France, but soon other European countries used the same model of division to guarantee the equality their population have been fighting for.

In fact, the first modern formulation of the doctrine brought by the French political philosopher MONTESQUIEI in *De l'esprit des lois*[5](1748). Although, the English philosopher John Locke has earlier argued that legislative power should be divided between the king and the Parliament.

The separation of powers is a doctrine of constitutional law under which the three branches of government (executive, legislative, and judicial) are kept separate. This is also knowing as the system of checks and balances, because each branch is given certain powers so as to check and balance the other branches.

This new way of thinking, unfortunately, affected the administrative law in such a negative way because, given the separation of powers, the judicial courts were not allowed to judge the administration, in order not to bother it (*trouble l'administration*). According to Charles Debbash, this brought a total confusion into the system because the administration would judge their own acts.

The second trauma regards the polemic case Blanco. In the opinion of the Professor Sabino Cassese, this case is a sad episode, not only to the world, but specially to the traumatic childhood of the Administrative Law. This was the first situation where we can confirm that the rules that where created where to protect the administration and not the citizens.

This case is extremely important for the evolution of the Administrative Law because it will evidence the idea of power of the administration and non-existence of rights to the population. In fact, this opinion is followed by important authors, such as, OTTO MAYER, SANTI ROMANO and HAURIOU by neglecting the idea of any kind of subjective rights.

In fact, this is something that does not correspond to nowadays. However, I believe it is important to mention this traumatic childhood of the Administrative Law in sequence of allowing us analyze the evolution of it and how we reached what we have today.

The Administrative Law we have today, still suffers from this traumatic beginning, but it has definitely changes. Its mechanism and causes of action are now being used to enforce human rights by ensuring that the public power is exercised fairly.

We are certain that a change as occurred. Actually, multiple official documents proof that. The administration has now the task of protecting the Human Rights, by creating instruments and mechanisms for their implementation and preservation. One of the mechanisms to guarantee, for

[2] VASCO PEREIRA DA SILVA, *Em Busca do Acto Administrativo Perdido, Edições Almedina*, 1996
[3] VASCO PEREIRA DA SILVA, *Em Busca do Acto Administrativo Perdido, Edições Almedina*, 1996
[4] Translation to English: *Liberty, Equality, Fraternity*
[5] Translation to English: *The spirt of Law*, 1748

example, equality is the fair trial, which can include multiple rights, such as, the right to legal assistance, the right to remain silent, the right to effective legal assistance in death penalty cases, prohibition on the use of evidence obtained through unlawful means/treatment, …

After this enunciation, we can easily conclude that the citizen has definitely rights against the administration, which means, if we analyze the perspectives, the administration also has obligations to the human.

Adjusting those obligations to the twenty-first century, the administration has now the obligation to protect their people, not only in the material world, but also the digital word.

As we discussed earlier, social medial is surely a bonus to the world and, especially the law. In December 2015, the Government Accountability Office(GAO) concluded that the Environmental Protection Agency's (EPA's) use of various social media tools in a rulemaking under the Clean Water Act violated prohibitions in federal appropriations laws, against publicity, propaganda, and lobbying. Is it something to be concerned about given the fact that the use of technology in rulemaking might violate the Administrative Procedures. However, as the Administrative Conference of the United States (ACUS) recommended, in order to use social media in an appropriate way, agencies should think carefully about what legitimate goals they expect to achieve through the use of social media in rulemaking before embarking on rulemaking and develop a strategy for using social media tools in a manner that best achieves those goals.

The *Recommendation 2013-5- Social Media in Rulemaking «addresses the various policy and legal issues agencies face when using social media in rulemaking. The study examined whether and when agencies should use social media to support rulemaking activities. It also seeks to identify relevant issues, define applicable legal and policy constraints on agency action, resolve legal uncertainty to the greatest extent possible, and encourage agencies to find appropriate and innovative ways to use social media to facilitate broader, more meaningful public participation in rulemaking activities».*

In fact, this ''revolution'', can also be seen in a positive perspective, mostly because it will allow a more broadly participation, democracy and dialogue. As ACUS recognizes, these 'grand hopes have not yet been realized», however we have to recognize how new this new procedure of rulemaking is and still in developing.

However, ACUS gives some examples that can guarantee us that the world of law is changing and, progressively, adjusting to a mora accessible, dynamic, and dialogic way of rulemaking. In order to fulfill those goal, they have created the e-Rulemaking Program Management Office*, «which operates the federal government's primary online rulemaking portal».*

Social Media can be used as a very effective tool during, for example, the notice-and-comment phase of rulemaking but on a selected basis since most of the population does not have the acknowledge to answer very complex questions.

But can also be used for more political questions. For example, the referenda, fixed on 115th article of the Constitution of the Portuguese Republic[6], can be shared online, allowing more

[6] **Artigo 115.º- (Referendo):**

« 1. Os cidadãos eleitores recenseados no território nacional podem ser chamados a pronunciar-se directamente, a título vinculativo, através de referendo, por decisão do Presidente da República, mediante proposta da Assembleia da República ou do Governo, em matérias das respectivas competências, nos casos e nos termos previstos na Constituição e na lei.

2. O referendo pode ainda resultar da iniciativa de cidadãos dirigida à Assembleia da República, que será apresentada e apreciada nos termos e nos prazos fixados por lei.

3. O referendo só pode ter por objecto questões de relevante interesse nacional que devam ser decididas pela Assembleia da República ou pelo Governo através da aprovação de convenção internacional ou de acto legislativo.

4. São excluídas do âmbito do referendo:

a) As alterações à Constituição;

b) As questões e os actos de conteúdo orçamental, tributário ou financeiro;

c) As matérias previstas no artigo 161.º da Constituição, sem prejuízo do disposto no número seguinte;

d) As matérias previstas no artigo 164.º da Constituição, com excepção do disposto na alínea i).

5. O disposto no número anterior não prejudica a submissão a referendo das questões de relevante interesse nacional que devam ser objecto de convenção internacional, nos termos da alínea i) do artigo 161.º da Constituição, excepto quando relativas à paz e à rectificação de fronteiras.

6. Cada referendo recairá sobre uma só matéria, devendo as questões ser formuladas com objectividade, clareza e precisão e para respostas de sim ou não, num número máximo de perguntas a fixar por lei, a qual determinará igualmente as demais condições de formulação e efectivação de referendos.

7. São excluídas a convocação e a efectivação de referendos entre a data da convocação e a da realização de eleições gerais para os órgãos de soberania, de governo próprio das regiões autónomas e do poder local, bem como de Deputados ao Parlamento Europeu.

8. O Presidente da República submete a fiscalização preventiva obrigatória da constitucionalidade e da legalidade as propostas de referendo que lhe tenham sido remetidas pela Assembleia da República ou pelo Governo.

9. São aplicáveis ao referendo, com as necessárias adaptações, as normas constantes dos n.ºs 1, 2, 3, 4 e 7 do artigo 113.º

10. As propostas de referendo recusadas pelo Presidente da República ou objecto de resposta negativa do eleitorado não podem ser renovadas na mesma sessão legislativa, salvo nova eleição da Assembleia da República, ou até à demissão do Governo.

11. O referendo só tem efeito vinculativo quando o número de votantes for superior a metade dos eleitores inscritos no recenseamento.

12. Nos referendos são chamados a participar cidadãos residentes no estrangeiro, regularmente recenseados ao abrigo do disposto no n.º 2 do artigo 121.º, quando recaiam sobre matéria que lhes diga também especificamente respeito.

13. Os referendos podem ter âmbito regional, nos termos previstos no n.º 2 do artigo 232.º»//

Article 115- Referenda

«1. Upon a proposal submitted by the Assembly of the Republic or the Government in relation to matters that fall within their respective competences, in the cases provided for and as laid down in the Constitution and the law, the President of the Republic may decide to call upon citizens who are registered to vote in Portuguese territory to directly and bindingly pronounce themselves by referendum.

2. Referenda may also result from the submission by citizens of an initiative to the Assembly of the Republic. Such initiatives shall be submitted and considered under the terms and within the time limits laid down by law.

3. Only important issues concerning the national interest which the Assembly of the Republic or the Government must decide by approving an international convention or passing a legislative act may be the object of a referendum.

4. The following are excluded from the scope of referenda:

a) Amendments to the Constitution;

b) Questions and acts with a budgetary, tax-related or financial content;

c) The matters provided for in Article 161 of the Constitution, without prejudice to the provisions of the following paragraph;

d) The matters provided for in Article 164 of the Constitution, except for the provisions of subparagraph (i).

5. The provisions of the previous paragraph do not prejudice the submission to referendum of important issues concerning the national interest that must be the object of an international convention pursuant to Article 161(i), except when they concern peace or the rectification of borders.

6. Each referendum shall only address one matter. Questions must be objectively, clearly and precisely formulated, shall solicit yes or no answers, and may not exceed a maximum number to be laid down by

Portuguese citizens to answer those, usually, simple questions in any part of the country, continent, or even world.

In the rulemaking, social media can be used in car an agency need to reach an elusive audience or determine public preferences or reactions so law makers can develop a more effective regulation. Following the ACUS recommendations, *«success requires an agency to thoughtfully identify the purpose (s) of using social media, carefully select the appropriate social media tool(s), and integrate those tools into the traditional notice-and-comment process. In addition, agencies must clearly communicate to the public how the social media discussion will be used in the rule making.».*

Since the administration has the obligation to the protect the people's rights, it is imperative that actions are taken when it concerns their privacy. After doing a brief review throughout the most important subjects regarding technology and law, we are now focusing on our main question, which is, *How does the privacy law work?*

The right of privacy has evolved to protect the capacity of people to decide what sort of data concerning themselves is collected, and how that data is utilized. Most websites use ''cookies'' to collect information from visitors, such as name, address, e-mail, social security number, IP address, and financial information. In most of the cases these websites then sell this information to big companies for marketing purposes. However, this can cause serious situations that demand action from authorities, such as threats of fraud and identity theft.

Before social media penetrated people's lives, privacy law was mainly created to protect privacy information from any unauthorized violations. In fact, The Privacy Act of 1974 protects personal information held by the federal government by preventing unauthorized disclosures of such information. Individuals also have the right to review such information, request corrections, and be informed of any disclosures.

By analyzing the U.S. legislation, there are multiple laws that were created throughout the years in order to protect privacy. For example, we have the Privacy Act of 1974, the Gramm-Leach-Bliley Act, the Fair Credit Reporting Act, and the Children's Online Privacy Protection Act.

---

law. The law shall also lay down the other terms governing the formulation and effective implementation of referenda.
7. Referenda may not be called or held between the dates on which general elections for the entities that exercise sovereignty, elections for the self-government organs of the autonomous regions and for local government organs, as well as for Members of the European Parliament, are called and those on which they are held.
8. The President of the Republic shall submit all draft referenda submitted to him by the Assembly of the Republic or the Government, to compulsory prior review of their constitutionality and legality.
9. The norms contained in Article 113(1), (2), (3), (4) and (7) are applicable to referenda, mutatis mutandis.
10. Draft referenda that are refused by the President of the Republic or are negatived by the electorate may not be resubmitted during the same legislative session, save new elections to the Assembly of the Republic, or until the Government resigns or is removed.
11. Referenda only have binding effect when the number of voters exceeds half the number of registered electors.
12. Citizens who reside abroad and are properly registered to vote under the provisions of Article 121(2) shall be called upon to take part in referenda that address matters which specifically also concern them.
13. Referenda may be regional in scope, in accordance with Article 232(2).»

The Gramm-Leach Bliley Act, also recognized as the Financial Modernization Act of 1999, sets up rules for the security of individuals' financial data. Financial institutions are required by law to supply a protection approach to clients, which clarifies what sorts of data are being collected and how data is utilized. Those institutions are encouraging to create shields in arrange to ensure the data they collect from the consumers.

The Fair Credit Reporting Act (FCRA), 1981, ensures individual budgetary data collected by customer detailing offices. The Act limits those who can get to such information, and consequent corrections have disentangled the method by which shoppers can get and redress the data collected almost themselves. The Fair Credit Reporting(FCT) also effectively implements denials on falsely getting individual budgetary data, a crime described as ''pretexting''.

The Children's Online Privacy Protection Act (COOPA) permits legal guardians to control what date is being collected about their children (only those who are younger than 13 years old) online. Administrators of websites that either target children or intentionally collect individual data from children are required to post protection arrangement, get parental decide how such data is utilized, and give the choice to guardians to opt-out of future collection from their child.

Since children and nowadays more and mora involved in the tech world this Act contributes to protect them, especially given the fact they are still, at such a young age, one of the most vulnerable beings in the world. The acknowledge of extra protections is surely a bonus to the U.S. law.

However, the Federal Trade Commission found that most websites do not enough illuminate buyers about their information, nor do the majority enough ensures the security of visitor's individual data. The FTC had jurisdiction over commercial entities under its authority in order to prevent unfair practices. Although it does not explicitly regulate what data should be included in website privacy policies, it employments its authority to issue directions, upholds security laws, and take requirement activities to secure buyers.

In the United States, the Supreme Court first recognized the right to privacy in Griswold VS. Connecticut, in 1965. The court used the personal protections expressly stated in the first, third, fourth, fifth and ninth Amendments, concluding that there is an implied right to privacy in the Constitution.

To conclude, we can affirm that the United States do not have a singular law that covers the privacy of all types of data. Instead, it has a mix of laws that go by acronyms. However, the data collected by the vast majority of products people use every day is not regulated.

There is a complex patchwork of sector-specific and medium-specific laws, including laws and regulations that address telecommunications, health information, credit information, financial institutions and marketing.

Before we compare the U.S. Privacy Law with the Portuguese Privacy Law, it is important to give a check Data Subjects' Rights and see what kind of rights regarding their personal information are there these days. Data Subjects are the people whose data is collected and processed, and it evolves the following rights:

- **The right to be informed**: Data subjects must be informed about the collections and usage of their personal data;
- **The right to access their data**: An individual can demand a copy of their personal data via data subject request. In order to achieve that, data controllers must explain the means of collections, what is being processed, and with whom is being shared;

- **The right of rectification**: If a data is inaccurate or incomplete, data subjects have the right to ask for a rectification;
- **The right of erasure**: Information subjects have the right to ask the eradication of individual information related to them on certain ground within 30 days;
- **The right to restrict processing**: Individuals have the right to ask the limitation or concealment of their personal information (however, data collects can still store it);
- **The right to data portability**: Data subjects can have their information exchanges from one electronic system to another at any time securely and safely without disturbing its convenience;
- **The right to object**: Individuals can question how their data is being used for marketing purposes, deals, or non-service-related purposes. The right to protest does not apple where legitimate or official specialist is carried out, as errand is carried out for open interest, or when the organization must prepare information to supply Data Subjects with a benefit for which they have signed up.

The article 26 of the Constitution of the Portuguese Republic fixes a list of personal rights, including the right to «protect the privacy of their personal and family life»[7]. From this rule we can tell that it is imperative that the administration takes action in order to protect people's privacy. In fact, the Portuguese law has been developing this topic throughout the years, creating multiples laws focusing on its main goal, the protection of the individual. This constitutional right is strictly bound with another constitutional, and fundamental right, the human dignity.

The Article 1 of the Charter of Fundamental Rights of the European Union affirms the inviolability of human dignity[8]. However, the Lisbon Treaty, that entered into force on December

[7] «***Artigo 26.º - (Outros direitos pessoais)***

1. A todos são reconhecidos os direitos à identidade pessoal, ao desenvolvimento da personalidade, à capacidade civil, à cidadania, ao bom nome e reputação, à imagem, à palavra, à reserva da intimidade da vida privada e familiar e à protecção legal contra quais formas de discrimnação

2. A lei estabelecerá garantias efectivas contra a utilização abusiva, ou contrária à dignidade humana, de informações relativas às pessoas e famílias.

3. A lei garantirá a dignidade pessoal e a identidade genética do ser humano, nomeadamente na criação, desenvolvimento e utilização das tecnologias e na experimentação científica.

4. A privação da cidadania e as restrições à capacidade civil só podem efectuar-se nos casos e termos previstos na lei, não podendo ter como fundamento motivos políticos.»//

«Article 26 (Other personal rights)

1. Everyone is accorded the rights to personal identity, to the development of personality, to civil capacity, to citizenship, to a good name and reputation, to their image, to speak out, to protect the privacy of their personal and family life, and to legal protection against any form of discrimination.

2. The law shall lay down effective guarantees against the improper procurement and misuse of information concerning persons and families and its procurement or use contrary to human dignity.

3. The law shall guarantee the personal dignity and genetic identity of the human person, particularly in the creation, development and use of technologies and in scientific experimentation.

4. Deprivation of citizenship and restrictions on civil capacity may only occur in the cases and under the terms that are provided for by law, and may not be based on political motives.»

[8] *The Charter of Fundamental Rights of the European Union(CFR)* consecrates certain political, social and economic rights for European Union(EU) citizens and residents into EU law. The Charter was drafted

1st, 2009, recognized the protection of personal data as a fundamental right. The European Union establishes that their Governments can only interfere with private life, home and correspondence when it is specifically allowed by law, and done for a good reason, such as, national security or public safety. The right to privacy is a good example to emphasize how important is this right and the obligation that the governments have not to violate it, but also to guarantee their efficiency.

To enlighten the importance of this right and how much it has affected Europe, we would like to leave a case, from 1990, not only important for the discussion of the right of privacy, but also to analyze how much technology has forced the law to change.

Jacques and Janine Huvig were a retired couple, who used to run a fruit-and-vegetable trade. The police tapped their phone, and tuned into their discussion, in connection to alleged financial abnormalities regarding their business. The instruments available for the authorities to get such wire taps were nearly boundless. The need of legitimate limitations implied that the police may get consent for wire taps on anybody, for nearly anything, for a boundless length of time. Given the facts, Mr. and Mrs. Huvig argued that the extensive powers given to the police to monitor their conversation has breached their right to privacy.

Since they were dealing with human rights, this case was brought up to the European Court of Human Rights[9], who defended that the French law has permitted the authorities to obtain permission extremely extensive broad observation on members of the public, without any limits on why the reconnaissance was being carried out, how long it would last or what should be done with the material. Of course, the police surveillance is legal and necessary in a democratic society. However, boundaries must be set out in law in order to protect the fundamental right of privacy.

In 1991, the law was changed in order to set limits on when and why an investigation over the phone may take place. Nowadays, phone surveillance is only allowed in limited cases and for a limited duration. The evidence obtained must be correctly documented and destroyed when the time limit for a prosecution has expired[10].

As mentioned on this essay, technology has exacerbated the need for robust personal data protection, because everyday people find their information being stolen online. In order to protect such important right, which is safeguarded by both European Union and Council of Europe.

In the name of privacy, European Union has been developing multiple laws to protect the European population. As the Handbook on European protection law states: «Europe is at the forefront of data protection worldwide. The EU's data protection standards are based on Council of Europe Convention 108, EU instruments- including the General Data Protection Regulation and the Data Protection Directive for Police and Criminal Justice Authorities- as well as on the respective case law of the European Court of Human Rights and of the Court of Justice of the European Union»[11].

---

by the European Convention and ratified on December 7th, 2000. Nerveless, its legal status was uncertain and it did not have full legal effect until the entry into force of the *Treaty of Lisbon* (December 1st, 2009).

[9] The European Court of Human Rights is an international court created in 1959. It judges individual cases, or State applications alleging violations of the civil and political rights set out in the European Convention of Human Rights. Article 25 of the European Convention of Human Rights states that *«The Court shall have a registry, the functions and organization of which shall be laid down in the Rules of the Court»*.

[10] For more information regarding the case of *Huvig against France*(1990) see: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-55545%22]} and https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57627%22]}

[11] *Hanbook on European data protection law*, 2018 edition

As Professor DIMITRIOS PARASHU mentions in his prestigious work for ELPIS v. LAW REVIEW, «*the data protection supervisor is actually based nowadays on the regulation 2018-1725 of the European Parliament and of the council* ».

This regulation, published on November 21st, 2018 focus on protection the personal data in the European Union, and also ensure that the «free movement of personal data within the Union» is controlled by setting limits. Quoting the mentioned Professor, the «*the position of the European protection supervisor was actually created already in 2004*». This regulation of was actually based on an elder law from 2001(Regulation number 45 of 2001).

The European Data Protection Law is based on 7 principles:

- **The Lawfulness, fairness and transparency:** it requires that personal data are processed in a lawful, fair and transparent manner in relation to data subjects. Using different words, it means that data cannot be processed unless it is needed to process them in order to achieve transparency;
- **The principle of purpose limitation**: it states that data collects for one specified purpose should not be used for a new, incompatible purpose. Expectations include further processing with the data subject's consent, processing on the basis of EU or member state law, or processing for public interest purposes;
- **The data minimization principle:** a data controller should limit the collection of personal information to what is directly relevant and necessary to accomplish a specified purpose. It should also retain the data only for as long as necessary to fulfil that purpose;
- **The data accuracy principle**: it affirms that controllers and processor should make reasonable efforts to ensure personal data is accurate. Governments must allow citizen to challenge the accuracy of data and take steps to rectify or erase the data associated with the challenge;
- **The storage limitation principle**: this principle consists of two elements: data must be collected for specified, explicit and legitimate purposes only (purpose specification). And, data must not be further processed in a wat that is incompatible with those purposes (compatible use);
- **The data security principle:** personal data must be processed in a manner that ensures appropriate security of the personal data, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organizational measures;
- **The accountability principle:** it requires authorities to take responsibility for what they do with citizen's personal data and how they comply with the other principles. There are two components of accountability: Answerability, which means providing information and justifications for one's action align with expectations, and, enforcement, which means being subject to, and accepting the consequences of failing to meet those expectations.

One of the big challenges nowadays in personal data protection is big data, algorithms and artificial intelligence. In fact, it is something in development but it can be used to both positive and negative ways. The topic itself has such a big importance that the Handbook on European data protection law dedicates a few pages to this topic[12].

Article 8 of the European Convention on Human Rights provides a right to respect one's «private and family life, his home and his correspondence», subject to certain restrictions

[12] *Hanbook on European data protection law*, 2018 edition, pp. 325 ff.

that are *«in accordance with law»* and *«necessary in democratic society»*, both expressions that we have mentioned earlier.

Article 16 of the Treaty on the Functioning of the European Union (Lisbon Treaty), that entered into force on December 1st, 2009, provides that:

« Article 16

(ex Article 286 TEC)

1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union.»

Because it is now a fundamental right, the exercise of its core elements cannot be blocked any situation. Besides this treaty, we also have a series of Europeans directives, two of which stand out as being of particular importance:

- **Directive 95/46/EC** on the Protections of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (the ‘’Data Privacy Directive’’);
- **Directive 2002/58/EC** regarding the Processing of Personal Data and the Protections of Privacy in the Electronic Communications Sector (the ‘’E-Privacy Directive).

The Data Privacy Directive sets up essential lawful framework for information protections assurance within the European Union, counting the default prerequisite of ‘’opt-in’’ assent to information sharing and the ‘’ampleness prerequisite’’ for data-sharing with non-EU companies. In reaction to this last mentioned necessity, the U.S. negotiated a ‘’safe harbor’’ framework for U.S. companies doing business in Europe or with European companies. The Data Privacy Directive also reflects the fundamental rule the EU privacy protection must be balanced against the four fundamental freedoms of the European internal market: free movement of persons, goods, services, and capital.

The E-Privacy Directive replaces the 1997 Telecommunications Privacy Directive, it has specific provision regarding unsolicited communications. Article 13 prohibits the sending of commercial e-mails that disguise or conceal the identity of the sender. The E-Privacy Directive is addressed to EU member states, which means that it was implemented trough EU member state law.

In 2012, the European Commission launched a major reform of the legal framework regarding the protections of personal data. The point is to safeguard a more

comprehensive security of personal rights whereas confronting the challenges of unused innovation. The unused system will bind together the information security rules inside the European Union trough the General Data Protection Directions that was arranged for adoption in 2014 and ought to take impact in 2016 after a two-year transition period. This reform benefited companied that answer to only one data protection authority.

The Portuguese Law also mentions the right of privacy on the Article 80 of the Civil Code. Regarding the protection of data and the constant and progressive threats the private life has been suffering due to this technological period, the current technological state is characterized by presenting more sophisticated means and multiplying the means of detections, diffusion and audiovisual and computer reproduction.

The great challenge is now to guarantee control over data privacy in this new society. People feel attracted to share their personal life and organizations increasingly capture information about their costumers, generally with the aim of improving their services, mainly as a way of monetizing information. Regarding this new challenge, Regulation (EU) 2016/679 Of the European Parliament and the of the Council, on April 27th, 2016, *«on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) ».* The regulation appears to be a response to this new paradigm: The awareness of entities that data processing is not a marginal issue, but a central one.

The General Data Protection Regulation brought a set of new challenges for the protection of personality rights, such as the right to private life, considering that is started to regulate the processing of personal data online, recognizing the problem that virtual relationships have no borders and information can quickly take on large proportions, giving us two completely different perspectives: In a positive way, it can bring great benefits but, in a more negative way, it can eventually cause irreversible damage.

In fact, the Portuguese Parliament approved a new law, recognizing the protections of the individuals regarding personal data and circulation of that kind of information. The law no. 58/2019, also known as National Law Protection Data(«*Lei Nacional de Proteção De Dados*»)[13]. This law assures the effective application of the General Data Protection Regulation in Portugal.

Something that has been under discussion is the importance of the Right to Forgotten. This new right was introduced to individual under the General Data Protection Regulation and can be invoked when there is no compelling reason for individual's data to be processed. This right is also known as the right to erasure and, given competing interests and the hyper-connected nature of the internet, the right to be forgotten is way mora complicated that an individual simply asking an organization to erase their personal data.

Article 17 states:

> *«1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:*

[13] Translation to English: *National Law of Data Protection.* See: https://dre.pt/dre/LinkAntigo?search=123815982

1. *the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;*
2. *the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;*
3. *the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);*
4. *the personal data have been unlawfully processed;*
5. *the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;*
6. *the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).*

2. *Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.*
3. *Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:*
    1. *for exercising the right of freedom of expression and information;*
    2. *for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;*
    3. *for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);*
    4. *for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or*
    5. *for the establishment, exercise or defence of legal claims.»*

According to this article, the right to be forgotten applies when the personal data is no longer necessary for the purpose an organization originally collected or processed it; An organization is depending on an individual's assent as the legal premise for handling the information which person pulls back their assent; An organization is relying on genuine interface as its defense for handling an individual's information, the person objects to this preparing, and there's no superseding authentic intrigued for the organization to proceed with the processing; An organization is processing individual information for coordinate showcasing purposes and the person objects to this processing; An organization processed an individual's personal data unlawfully; An organization must eradicate individual information in order to comply with the lawful administering or commitment; An organization has processed a child's personal data to offer their information.

However, there are some reason cited in the GDPR that *«trump the right to erasure:*

- *The data is being used to exercise the right of freedom of expression and information;*
- *The data is being used to comply with a legal ruling or obligation;*
- *The data is being used to perform a task that is being carried out it in the public interest or when exercising an organization's official authority;*
- *The data being processed is necessary for public health purposes and serves in the public interest;*
- *The data being processed is necessary to perform preventative or occupation medicine. This only applies when the data is being processed be a health professional who is subject to a legal obligation of professional secrecy;*
- *The data represent important information that serve the public interest, scientific research, historical research, or statistical purposes and where erasure of the data would likely to impair or halt progress towards the achievement that was the goal of the processing;*
- *The data is being used for the establishment of a legal defense of in the exercise of other legal claims. »*

As we can see, there are many reason to reject a request of erasure. In fact, an organization can request a ''reasonable fee'' or deny a request to erase personal information in case the organization can legitimize that the request was unfounded or excessive.

In order to conclude, the erasure right is a mere example of multiple rights that exist to protect the individual and that ask the administration to take action in order to guarantee them and make sure they are effective.

To all appearances, and despite the differences between the U.S. system and the Portuguese system, both countries have been working on developing their law in order to protect their population and face this new twenty first century problem, the violation of privacy due to technology.

Technology has definitely here to stay. In order to adjust to this new reality, the Governments have to change so they succeed doing their job something that, once finalized the research shared in these pages, we can tell they have.

References:

- CARLOS BLANCO DE MORAIS, *O Sistema Político*, Almedina, 2017
- DIOGO FREITAS DO AMARAL, *Curso de Direito Administrativo*, Volume I, 4th edition, Livraria Almedina, Coimbra, 2015
- FAYE FANGFEI WANG, *Internet Jurisdiction and Choice of Law*, *Cambridge University Press*, 2011
- H. Simon, *Solving Problems Vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004)
- GRÁINNE DE BÚRCA, JOANNE SCOTT, *Law and New Governance in the EU and the US*, Hart Publishing, Portland, 2006
- JANINA BOUGHEY, *The International and Comparative Quarterly* Vol. 62, No. 1, Cambridge University Press, 2013
- LISA HEINZERLING, MARK V. TUSHNET, *The Regulatory and Administrative State*, NY: Oxford University Press, New York, 2006
- MARKOU, THALIA PRATITOU, *EU Internet in the Digital Era*, Springer, 2020
- MAURICE LONG, PROSPER WELL, GUY BRAIBANT, PIERRE DEVOLVÉ, BRUNO GENEVOIS, *Les Grands Arrêts de la Jurisprudence Administrativ*e, 9th edition, Sirey, Paris, 1990
- OTTO BACHOF, "*Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung», in «Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer»*, n.º 30 Regensburg, 1971), Walter de Gruyter, Berlin, 1972
- Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984)
- SABINO CASSESE, VEITH MEHDE, CAROL HARLOW, PASCALE GONOD, VASCO PEREIRA DA SILVA, STEFFANO BATTINI, GERDY JURDEN, DAVID DUARTE, *Administrative procedure*, ICJP, 2011
- *Social Media and the Law*, edited by Daxton R. Stewart, 2nd edition, 2017
- TATIANA-ELENI SYNODINOU, PHILIPPE JOUGLEUX, CHRISTIANA
- VASCO PEREIRA DA SILVA, Functions and purposes of the administrative procedure: new problems and new solutions, ICJP, 2011
- VASCO PEREIRA DA SILVA, *Em Busca do Ato Administrativo Perdido*, Almedina, 1996
- SABINO CASSESE, *Le Basi del Diritto Amministrativo,* Einaudi, Torino, 1989
- ELPIS LAW REVIEW: http://www.elpisnetwork.eu/
- DIMITROS PARASHU, *The European Data Protection Supervisor, based on the Regulation 2018/1725*: https://www.youtube.com/watch?v=uYMkSZdYMBE
- https://www.coe.int/en/web/impact-convention-human-rights/-/privacy-reforms-after-retired-couple-had-their-phone-tapped
- https://www.coe.int/en/web/tbilisi/europeancourtofhumanrights

- https://www.publico.pt/2019/10/07/politica/noticia/abstencao-atinge-recorde-legislativas-1889081
- https://www.echr.coe.int/Documents/FS_Data_ENG.pdf
- https://www.corteidh.or.cr/tablas/R08079-3.pdf
- https://www.acus.gov/recommendation/social-media-rulemaking
- *https://www.ohchr.org/Documents/Publications/training9add1.pdf*
- https://www.law.cornell.edu/wex/separation_of_powers
- https://www.law.cornell.edu/wex/personal_information
- https://www.law.cornell.edu/uscode/text/15/45
- https://www.law.cornell.edu/wex/Privacy
- https://digitalcommons.law.mercer.edu/fac_pubs/37/
- https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1480616487486&uri=CELEX:12016E/TXT
- https://gdpr.eu/right-to-be-forgotten/
- https://www.bbc.com/news/election-us-2016-37634526
- https://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx
- https://www.law.cornell.edu/wex/separation_of_powers