CIVIL RESPONSIBILITY AS A WAY TO CORRECT INJUSTICES IN CASE OF VIOLATION TO DATA PROTECTION BY THE JUDICIARY

A RESPONSABILIDADE CIVIL COMO INSTRUMENTO DE CORREÇÃO DE INJUSTIÇAS NO CASO DE VIOLAÇÃO À PROTEÇÃO DE DADOS PELA FUNÇÃO JURISDICIONAL

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ABSTRACT

In the doctrine and jurisprudence, only in cases provided for in specific legislation and in the Federal Constitution, is the State's civil liability arising from the jurisdictional function allowed. However, as the protection of personal data is a fundamental right, one must glimpse about the State's responsibility in relation to judicial acts beyond these assumptions. The Judiciary seeks to adapt itself, by technology, for the development of its activity. At the same time, it needs to preserve citizens' privacy. It is a complex reality, which needs to be understood by the operators of the law, seeking the best interpretation of the law to meet the public interest and the data protection.

KEYWORDS: State civil liability. Protection of Personal Data. Judiciary.

RESUMO

É assente na doutrina clássica e na jurisprudência que apenas nas hipóteses previstas na legislação específica e na Constituição Federal é admitida a responsabilidade civil do Estado que decorre da função jurisdicional. Todavia, reconhecido que a proteção de dados pessoais é direito fundamental, deve-se conjecturar a responsabilidade do Estado em relação aos atos judiciais para além dessas hipóteses. O Judiciário busca se adequar, a partir da tecnologia, para o desenvolvimento de sua atividade. Ao mesmo tempo, todavia, precisa preservar a privacidade dos cidadãos. Trata-se de uma realidade complexa que deve ser entendida pelos operadores do Direito, buscando-se a melhor interpretação normativa a atender ao interesse público e à proteção de dados.

PALAVRAS-CHAVE: *Responsabilidade civil do Estado. Proteção de Dados Pessoais. Judiciário.*

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INTRODUCTION

The issue of the storage, sharing and disclosure of personal data is an essential issue of interest to States. For this reason, many laws have emerged for the purpose of regulating this matter.

In Brazil, the Law nº 13.709/2018 was recently published, better known as General Law of Protection of Personal Data (*Lei nº 13.709/2018, Lei Geral de Proteção de Dados Pessoais – LGPD*). According to article 1, this law aims to "protect the fundamental rights of freedom and privacy and the free development of the personality of the natural person" (*"proteger os direitos fundamentais de liberdade e de privacidade e o livre desenvolvimento da personalidade da pessoa natural"*) (BRASIL, 2018).

There are other constitutional norms and principles that also address the issue; the Law on Access to Information (Law nº 12.527), the Internet Civil Rights Law (Law nº 12.965), the Consumer Protection Code, and among others, prevailing in all of them the orientation that restrictions should be envisaged in the processing of personal data, as well as greater control over their use.

The use of personal data imposes the idea of surveillance and security, and it is relevant to consider the legal consequences that may arise in the event of leaks or misuse of personal data.

The Judiciary, in the exercise of its jurisdictional function, has access to several types of personal data, among them: identity documents, personal taxpayer registration (*CPF - cadastro de pessoa física*), passport, voter registration and other extremely sensitive data.

Article 5, item II of the Brazilian law in focus (*LGPD*) provides that sensitive personal data is all personal data about racial or ethnic origin, religious beliefs, political opinion, affiliation to a union or organization of a religious, philosophical or political nature, health-related information or to sexual life, genetic or biometric information, when linked to a natural person. These are kinds of information that open up scope for discrimination, and can be used to harm people in various ways, creating prejudice/preconception (BRASIL, 2018).

The problem, however, presents itself in the accessibility of these data by third parties, inasmuch as, when they become public processes, they can be used to awaken prejudiced actions, being able to violate the dignity of the human person, sometimes in a definitive way, allowing discrimination (FRAZÃO, p. 34, 2019).

The Judiciary therefore faces a major challenge: to inform the whole of society of judicial processes and judgments and, at the same time, to preserve the privacy of those under jurisdiction or of those subject to the jurisdiction.

With regard to liability and compensation for breach of data protection rules, the article 42 of the *LGPD* provides that the controller or operator of the data that, in his activity, causes harm to others, is obliged to repair it. which is a "repetition" of the general rule of accountability of the Brazilian Civil Code (arts. 186 e 927) (BRASIL, 2002).

In view of this, it is noted that the *LGPD* is generic, not expressly mentioning how the law itself should be applied to the Judiciary services.

This article deals with this issue, considering the possibility of State civil liability in the event of serious damage caused by the Judiciary due to violation of data protection rules.

The Brazilian Supreme Court (*Supremo Tribunal Federal – STF*), in the judgment of the Precautionary Measure in Direct Actions of Unconstitutionality (*Medida Cautelar nas Ações Diretas de Inconstitucionalidade*) nº 6387, 6388, 6389, 6393, 6390, made a historic decision, expressly recognizing the fundamental right to the protection of personal data, when suspending the application of Provisional Measure 954/2018 (*Medida Provisória 954/2018*), which obliged telephone operators to pass on to Brazilian Institute of Geography and Statistics (Instituto Brasileiro de Geografia e Estatistica – IBGE) data identified from their consumers of mobile telephones, cell phones and addresses (BRASIL, 2020).

The *STF* Ministers, even before the inclusion of this right in the constitutional text, already consider the protection of personal data as an autonomous fundamental right, which differs from the protection of intimacy and privacy, since the protected object is distinct[2].

The importance of the fundamental right to the protection of personal data and the current influence of the Judiciary in the Brazilian social context are crucial to highlight the relevance of accountability or responsibility, guaranteeing, to those affected by the jurisdictional provision, the right to compensation, considering the objectives and foundations of Federative Republic of Brazil and the Democratic State of Law.

The State has the duty to indemnify anyone who, by state act or omission, suffers losses. Thus, it is essential to find a way to reconcile the judicial function, the protection of personal data and the right to compensation in the event of damage.

At this point, it is a challenge to adapt the data protection rules to the public interest and the access to justice, mainly because, as already noted, the Judiciary also uses sensitive data, subject to special processing conditions.

In order to analyze this identified problem, it was considered, as a theoretical reference, works and scientific articles, as well as pragmatic issues, mainly in view of the little theoretical and unprecedented development on the theme.

In introductory lines, the expectation is that this study will be useful to the legal community and society, delimiting the subject and deepening the central issues, in order to contribute to the construction of an analysis according to the dictates of the Democratic State of Law.

1 THE PROBLEM OF THE STATE'S IRRESPONSIBILITY IN THE EXERCISE OF THE JURISDICTIONAL FUNCTION

The Civil Procedure Code of 2015 (*Código de Processo Civil Brasileiro de 2015 – CPC*), in article 143, I and the Complementary Law nº 35/1979 – Organic Law of the National Judi-

2 For further information on the unconstitutionality defects raised in MP 954, see the indicated article. Available in: https://www.jota.info/opiniao-e-analise/artigos/a-encruzilhada-da-protecao-de-dados-no-brasil-e-o-caso-do-ibge-23042020. Accessed on: March 4, 2020.

ciary (*Lei Complementar nº 35/1979 – Lei Orgânica da Magistratura Nacional*), in article 49, I, prescribe that the magistrate will answer for losses and damages when, in the exercise of his functions, proceed with intent or fraud (BRASIL, 2015).

In addition, under the terms of item II of Article 143 of the Civil Procedure Code of 2015 – *CPC*, if the judge refuses, omits or delays, without just reason, a measure that must order ex officio or at the request of the party, this judge may also be held responsible. However, these hypotheses will only be verified after the party requests the judge to determine the measure and this request is not considered within 10 (ten) days (BRASIL, 2015).

The Brazilian Constitution also provides for State accountability, due to judicial error, with imprisonment beyond the time fixed in the sentence, according to article 5, item LXXV (BRASIL, 1988).

In assumptions different from those presented above, in classical doctrine and jurisprudence, the rule is that of the State's irresponsibility, based on several arguments pointed out.

Defenders of the state irresponsibility thesis argue, first, that judicial decisions are subject to appeal.

Thus, if the instrument is made available to the party in order to protect itself from the "injustices" committed in the process, it would be unnecessary to discuss, in another action, the decision or possible judicial liability.

> The argument used is that judicial decisions are normally subject to appeal and that the appeal is exactly the regular and sufficient instrument of the parties to protect themselves against judicial injustice. (*O argumento empregado é o de que as decisões judiciárias são normalmente sujeitas a recurso e que o recurso constitui exatamente o instrumento regular e suficiente das partes para protegerem-se contra injustiça judiciária*) (CAPELLETTI, 1989, p. 27).

However, it should be noted that the appeal doesn't present itself as a capable means to allow the parties the full possibility of evidentiary instruction, available in the event of a civil liability lawsuit.

In addition, the appeal may not reform an eventual irregular decision and, when it is no longer applicable, it will allow this decision, as a res judicata, to be no longer subject to discussion. On the issue, Cappelletti also points out:

> But, once the judge's decision, no longer subject to appeal, becomes definitive, it acquires the authority of res judicata [...]. Although, by hypothesis, erroneous in fact or in law, the unappealable decision creates its own "truth" and its own right; she *facit jus*. And the conclusion is that civil liability cannot even be recognized, given that this responsibility presupposes the act contrary to the law, the "damnum iniuria datum", an injury that, in principle, cannot derive from the decision that facit jus. (*Mas, uma vez que a decisão do juiz, não mais se sujeita a recurso, torna-se definitiva, adquire a autoridade de coisa julgada [...]. Ainda que, por hipótese, errônea de fato ou de direito, a decisão passada em julgado cria a sua própria "verdade" e o seu próprio direito; ela facit jus. E a conclusão é que a responsabilidade civil sequer pode ser reconhecida, dado que dita responsabilidade pressupõe o ato contrário ao direito, o "damnum iniuria datum", injúria que, por princípio, não pode derivar da decisão que facit jus*) (CAPELLETTI, 1989, p. 27).

It is also argued about the absolute judicial irresponsibility because the act of the judge is considered an act of the State, protected by the principle of legitimacy, thus verifying an accentuated dependence of the judges on the Executive (CAPELLETTI, 1989, p. 25).

However, the principle of the presumption of legitimacy, present in state acts, is not suitable to remove civil liability in relation to judicial acts, since the principle of general irresponsibility of the State in the exercise of activities has long been abandoned.

It is observed that there is another argument, presented by Mauro Capelletti, also historically used to remove responsibility, namely: from the authority of res judicata in judicial decisions.

> The strength of the res judicata principle, in particular, is not in the dictates of an abstract logic, but only in the ends or values that the legal systems try to pursue through that principle. It is generally recognized that such an end or value is found in social peace and in the certainty of the right: the judicial decision, regardless of the fact that it is correct or not (in fact and in law), must at some point end the litigation. (*A força do princípio da coisa julgada, em particular, não está nos ditames de uma lógica abstrata, mas apenas nos fins ou valores que os sistemas jurídicos intentem perseguir mediante aquele princípio. É geralmente reconhecido que tal fim ou valor se encontra na paz social e na certeza do direito: a decisão judiciária, prescindindo do fato de que seja ou não correta (de fato e de direito), deve em determinado ponto dar fim ao litígio*) (CAPELLETTI, 1989, p. 29).

The principle of res judicata (*res judicata facit jus*) is related to the idea of sovereignty of state power, which is more specifically revealed in the independence of the judges (CAPELLETTI, 1989, p. 24).

However, in the "responsive" model, which does not admit its total denial, there is an effort "to achieve the balance between independence and social responsibility-control, in order to avoid, at the same time, subjection and also the closing and the isolation of the judiciary" (*"em realizar o equilíbrio entre independência e responsabilidade-controle social, com o fim de evitar, ao mesmo tempo, a sujeição e igualmente o fechamento e o isolamento da magistratura"*) (CAPELLETTI, 1989, p. 10).

In these terms, the premise is: where there is power there must be responsibility.

Thus, in a rationally organized society, there is a directly proportional relationship between power and responsibility. Judges exercise a power. And "a power not subject to accountability represents pathology" (*"um poder não sujeito a prestar contas representa patologia"*) (CAPELLETTI, 1989, p. 18).

> [...] it seems beyond doubt that a system of liberal-democratic government - a system, therefore, that wants to guarantee the fundamental freedoms of the individual in a regime of social democracy, as provided for in the Italian Constitution - is above all one in which there is a reasonable ratio of proportionality between public power and public responsibility, in such a way that the growth of power itself corresponds to an increase in controls over the exercise of such power. This correlation is inherent in what is commonly called a system of checks and balances, checksand balances. (*[...] parece fora de dúvida que um sistema de governo liberal-democrático - um sistema, pois, que queira garantir as liberdades fundamentais do indivíduo em um regime de democracia social, como é previsto na Constituição Italiana - é*

> *sobretudo aquele em que exista razoável relação de proporcionalidade entre poder público e responsabilidade pública, de tal sorte que ao crescimento do próprio poder corresponda um aumento dos controles sobre o exercício de tal poder. Esta correlação é inerente ao que se costuma chamar de sistema de pesos e contrapesos, checksand balances*) (CAPELLETTI, 1989, p. 18).

Continuing with this analysis, it should be considered that the "immunity" of judges, provided for in practically all legal systems, constitutes a problem of balance between values guarantees and independence, as demonstrated by Mauro Capelletti:

> [...] the problem of the judges' immunity is, more precisely, the problem - less absolute and more pragmatic, of limits of responsibility, that is, a problem of balance between the guarantee value and the instrumental of independence, external and internal of the judges, and the other modern (but also ancient, as it turned out) value, of the democratic duty of accountability (*[...] o problema da imunidade dos juízes é, mais precisamente, o problema – menos absoluto e mais pragmático, de limites da responsabilidade, vale dizer, um problema de equilíbrio entre o valor de garantia e instrumental da independência, externa e interna dos juízes, e o outro valor moderno (mas também antigo, como se viu). do dever democrático de prestar contas*) (CAPELLETTI, 1989, p. 33).

When quoting TROCKER, the author points out:

> As Trocker wrote, [...] "the privilege of the magistrate's substantial irresponsibility cannot constitute the price that the community is called to pay, in exchange for the independence of its judges" (*Como escreveu Trocker, [...] "o privilégio da substancial irresponsabilidade do magistrado não pode constituir o preço que a coletividade é chamada a pagar, em troca da independência dos seus juízes"*) (CAPPELLETTI, 1989, p. 33).

For these reasons, it is seen that immunity and independence shouldn't be seen as concepts capable of nullifying democratic values, as is already the case with regard to the responsibility of other agents who exercise public power.

The unique jurisdictional function cannot be a pretext for irresponsibility, especially in the light of the Democratic State of Law.

> It cannot sustain state irresponsibility in the fact that the exercise of the judicial function is a 'manifestation of sovereignty' (it would be justified in the maxim regalengathe king can do no wrong). The idea of sovereignty isn't opposed to that of State responsibility, which is also subject to law. On the other hand, if the argument were admitted, the State would also be irresponsible for acts of the Executive, which, today, is no longer admitted (either in doctrine or in jurisprudence) (*Não pode sustentar a irresponsabilidade estatal no fato de ser o exercício da função judiciária uma 'manifestação da soberania' (seria justificá-la na máxima regalengathe king can do no wrong). A idéia de soberania não se contrapõe à de responsabilidade do Estado, que também se submete ao Direito. Por outro lado, se se admitisse o argumento, o Estado também seria irresponsável por atos do Executivo, o que, hoje, não mais se admite (seja na doutrina seja na jurisprudência)*) (DERGINT, 1994, p. 227).

The Judiciary has the traditional mission of applying the law to the specific case, controlling the other "powers", protecting fundamental rights and guaranteeing the Democratic Constitutional State of Law.

The model of irresponsibility in the face of judicial acts isn't in line with the principles of the Constitution of the Republic.

> If, on the one hand, it is certain that the State should not respond indiscriminately in cases in which it has not contributed in any way to the advent of the damage; on the other hand, it cannot be overlooked the fact that its performance is based on the protection and respect for the rights of the community, making its irresponsibility inadmissible in cases where it serves as an instrument of perpetuation of injustices and violation of the fundamental principles of Law (*Se por um lado é certo que o Estado não deve responder indiscriminadamente em hipóteses nas quais não contribuiu de qualquer modo para o advento do dano; por outro, não se pode negligenciar o fato de que sua atuação tem como pressuposto a proteção e o respeito aos direitos da coletividade, tornando inadmissível sua irresponsabilidade nos casos em que esta sirva como instrumento de perpetuação de injustiças e de violação dos princípios fundamentais do Direito*) (SILVA, p. 11, 2002).

Therefore, it's essential to create a model of legal responsibility, which finds a balance between independence guaranteed to the career of magistrate and the responsibility for the exercise of a state function.

2 CIVIL RESPONSIBILITY AS AN INSTRUMENT FOR CORRECTION OF INJUSTICES IN THE EVENT OF BREACH OF DATA PROTECTION BY JURISDICTIONAL FUNCTION

Among the fundamental rights guaranteed by the Constitution of the Republic is access to justice.

For Mauro Cappelletti and Bryant Garth, access to justice is "the fundamental requirement - the most basic of human rights – for a modern and egalitarian legal system that aims to guarantee, and not just proclaim the everyone's rights" (*"o requisito fundamental – o mais básico dos direitos humanos – de um sistema jurídico moderno e igualitário que pretenda garantir, e não apenas proclamar os direitos de todos"*) (CAPPELLETTI, 1988, p. 12).

From there, it is possible to conclude that the doctrinal impediment of accountability through the judicial system violates access to justice, being abusive to prevent injuries by judicial acts - in the legal spheres, injuring citizens, from being liable for compensation.

It should be noted that, in relation to state acts issued by the Executive, the so-called Theory of Objective State Responsibility, provided for in the Brazilian Constitution of 1988, in § 6º of art. 37.

> Art. 37. The direct and indirect public administration of any of the Powers of the Union, the States, the Federal District and the Municipalities will obey the principles of legality, impersonality, morality, publicity and efficiency and, also, to the following: (Wording given by Constitutional Amendment nº 19, 1998).
>
> [...] § 6º - Legal entities governed by public law and those governed by private law that provide public services shall be liable for the damages that their

> agents, as such, cause to third parties, ensuring the right of recourse against the person responsible in cases of intent or guilt.
>
> (*Art. 37. A administração pública direta e indireta de qualquer dos Poderes da União, dos Estados, do Distrito Federal e dos Municípios obedecerá aos princípios de legalidade, impessoalidade, moralidade, publicidade e eficiência e, também, ao seguinte: (Redação dada pela Emenda Constitucional nº 19, de 1998).*
>
> *[...] § 6º - As pessoas jurídicas de direito público e as de direito privado prestadoras de serviços públicos responderão pelos danos que seus agentes, nessa qualidade, causarem a terceiros, assegurado o direito de regresso contra o responsável nos casos de dolo ou culpa*) (BRASIL, 1988).

According to this provision, legal entities governed by public law have strict liability for damages caused by their agents.

The State's strict liability represents the State's obligation to indemnify, regardless of fault, in the exercise of its activities (functions), the damages caused by any of its agents, as a result of unilateral, lawful or unlawful, commissive or omissive, material or legal, subject to legal exclusions and future right of return/compensation (*"direito de regresso"*).

At this point, it is worth mentioning that acts considered functional, administrative, atypical to the function of judging, such as measures taken for the administration and functioning of the Judiciary, if they mean harm to third parties, based on national doctrine and jurisprudence, can generate strict liability of the State, under the terms of art. 37, § 6º of the Brazilian Constitution of 1988 (BRASIL, 1988).

> The State's liability is restricted to damages caused by administrative officials, as such, to third parties; doesn't answer the State for possible damages, resulting from wrong decisions or judicial acts, according to the doctrine already accepted and enshrined in the jurisprudence of the courts (*A responsabilidade do Estado se restringe aos danos causados por funcionários administrativos, nessa qualidade, a terceiros; não responde o Estado por possíveis danos, oriundos de decisões ou atos judiciais errados, segundo a doutrina já aceita e consagrada pela jurisprudência dos tribunais*) (STOCO, 1996, p. 414).

In addition to acts of an administrative nature, some indoctrinates argue that, although state accountability is possible, this would be applicable only in the cases expressed in law, as already registered in this article.

Yussef Cahali, however, rejects this argument:

> The argument that the State only responds for judicial acts in the cases expressly stated in the law, which, thus, would represent exceptions to an alleged immunity of the State, doesn't proceed - even without legal correspondence. In any case, the principle of state responsibility is enshrined, literatim, in a constitutional rule (art. 37, § 6º, BC/1988 (LGL\1988\3)), applicable to harmful executive, legislative and judicial acts. It cannot be said that there is a gap in the legal system. Even if there were, it wouldn't exempt the judge from judging, and he should resort to analogy, customs and general principles of law (*Não procede o argumento de que o Estado somente responde por atos judiciais nas hipóteses expressamente declaradas em lei, que, assim, representariam exceções a uma pretensa imunidade do Estado - igualmente sem correspondência legal. De qualquer forma, o princípio da*

> *responsabilidade estatal encontra-se consagrado, textualmente, em regra constitucional (art. 37, § 6.º, CF/1988 (LGL\1988\3)), aplicável aos atos danosos executivos, legislativos e judiciais. Não se pode dizer que existe uma lacuna no sistema jurídico. Mesmo se houvesse, ela não eximiria o juiz de julgar, devendo ele recorrer à analogia, aos costumes e aos princípios gerais do direito*) (CAHALI, 2007, p. 512).

Although this discussion isn't new, it's observed that civil liability in the face of damages arising from acts of the Judiciary hasn't yet been accepted by the legislation or even by the Judiciary itself, as highlighted by Marcus Paulo Queiroz Macedo.

> As Augusto do Amaral Dergint warns (1994, p. 225), "it's impossible to talk about state responsibility for legal acts without controversy", since "the dominant Brazilian doctrine defends the thesis of responsibility; however, it's still on a purely theoretical level, because it wasn't accepted either within the scope of legislation or within the scope of the Judiciary" (DI PIETRO, 1994, p. 86). In the same sense, adds Ruy Rosado do Aguiar Júnior (1993, p. 6): "the idea of state responsibility for jurisdictional acts has made little progress in law and in the application of the Courts, despite today the majority support of the doctrine, predominantly favorable to its full incidence". Indeed, this accountability has been defended for a long time in the country, having as seminal positions those of Juary C. Silva (1965), José Cretella Jr. (1970) and Aguiar Dias, who, still under the aegis of the 1946 Constitution, stated (2006, p. 864): "Whatever the role of the Judiciary, it is certain that Judges are servants of the State and act on their behalf. And the Constitution, when considering the responsibility of the State, doesn't allow questioning except the causal relationship between the damage and the public service, and there should be no privilege for impunity for damage caused by an act classified by the Judiciary itself as manifest illegality"
>
> (*Como adverte Augusto do Amaral Dergint (1994, p. 225), "é impossível falar sobre a responsabilidade estatal por atos judiciais sem polemizar", uma vez que "a doutrina brasileira dominante defende a tese da responsabilidade; no entanto, ela ainda está no plano puramente teórico, porque não foi acolhida quer no âmbito da legislação, quer no âmbito do Poder Judiciário" (DI PIETRO, 1994, p. 86). No mesmo sentido, aduz Ruy Rosado do Aguiar Júnior (1993, p. 6): "a idéia da responsabilidade estatal por ato jurisdicional pouco avançou na lei e na aplicação dos Tribunais, apesar do hoje majoritário apoio da doutrina, preponderantemente favorável à sua plena incidência". Com efeito, esta responsabilização já é defendida há muito no país, tendo por posições seminais as de Juary C. Silva (1965), José Cretella Jr. (1970) e Aguiar Dias, o qual, ainda sobre a égide da Constituição de 1946, afirmou (2006, p. 864): "Qualquer que seja o papel do Judiciário, o certo é que os Juízes são servidores do Estado e agem em seu nome. E a Constituição, ao cogitar da responsabilidade do Estado não permite indagação senão sobre a relação de causalidade entre o dano e o serviço público, não devendo haver privilégio para impunidade de um dano causado por ato classificado pelo próprio Judiciário como ilegalidade manifesta"*) (MACEDO, 2008, p. 229).

However, it appears that the failure to adopt the theory of state responsibility is even more serious today, in which the central role of the Judiciary is seen, considered as the protagonist of the political and social scenario, and given the inclusion of technology in the service of the Judiciary.

Parallel to the increased participation of the Judiciary, the process was implemented in electronic media, increasingly intensifying the use of technology to maintain jurisdictional activities.

Without moving from his office, the lawyer may, from a register made with the Judiciary, file lawsuits, consult procedural documents, manifest himself and receive subpoenas.

In this case, lawyers need to register themselves in electronic judicial systems, "when they will create an identifier and password to access the system, as well as create a digital signature, which will enable procedural acts to be carried out with maximum security, maximum authenticity and maximum speed" (*"momento em que criarão um identificador e uma senha de acesso ao sistema, bem como criarão uma assinatura digital, a qual possibilitará a realização dos atos processuais com a máxima segurança, máxima autenticidade e máxima celeridade"*) (CARVALHO, 2010).

The virtualization of the judicial procedure also occurs in other situations, such as, for example, "tele-sustainability" (*"telessustentação"*) or oral distance support. In this "tele-attendance" (*"telecomparecimento"*), the lawyer accompanies the judgment session from a distance, intervening in it, even if he didn't physically appear.

However, in times of "big data", there is no doubt that everyone who has databases of other people's information has a duty to promote forms of control, protection and adequate management of that data, in order not to compromise citizens' rights.

The term "Big Data" describes not only the appropriate technology for data capture, but also the growth, availability and exponential use of structured and unstructured information that circulates on the internet (SIMÃO FILHO; SCHWARTZ, 2018, p. 217).

The existence of technology-based platforms for the generation, reception and transmission of data that will be processed, analyzed and transformed into algorithms is a phenomenon that works as the basis for this concept of Big Data, to characterize the Fourth Industrial Revolution.

> At least two technological revolutions are directly linked to the genre of what was conventionally called the fourth industrial revolution, namely: the data-based business revolution resulting from the discovery and use of new data sources generated by social media and the growth of mobile telephony and diversified digital systems for capturing information and images, with the potential to completely modify a company's traditional value generation process. The good agglutination of these data, in an adequate digital base, can generate additional knowledge about the user's interest, passions, affiliations, networks and relationships, as well as loyalty elements of such an order that the process of attracting and prospecting customers is infinitely optimized, and another revolution arising from the implantation of the Internet of Things (*Pelo menos duas revoluções tecnológicas estão diretamente ligadas ao gênero do que se convencionou denominar de quarta revolução industrial, qual seja: a revolução dos negócios baseados em dados decorrente da constatação e utilização de novas fontes de dados gerados por meios sociais e pelo crescimento da telefonia móvel e sistemas digitais diversificados de captação da informação e imagens, com potencial para modificar por completo o processo tradicional de geração de valor de uma companhia. A boa aglutinação destes dados, em uma base digital adequada, pode gerar conhecimentos adicionais sobre o interesse, as paixões as afil-*

> *iações, redes e relações do usuário, além de elementos de fidelização de tal ordem que se otimize ao infinito o processo de captação e prospecção de clientela, e a outra revolução decorrente da implantação da Internet das Coisas*) (SIMÃO FILHO; SCHWARTZ, 2018, p. 224-225).

At this point, there is an essential issue to be considered, namely, the privacy of the citizen, especially in view of the constant concerns about its violation with the evolution of the information society. On this new reality Laura Schertel Mendes defends:

> In a connected society, data protection is no longer a right among many, but an essential element for maintaining citizens' trust in the communication and information structures, as well as for the necessary flow of data and innovation resulting from it. As a regulation of a communicational and informational order, which is by definition multidimensional, data protection aims to balance the rights of protection, defense and participation of the individual in communicative processes (*Em uma sociedade conectada, a proteção de dados não é mais um direito entre tantos, mas um elemento essencial para a manutenção da confiança dos cidadãos nas estruturas de comunicação e informação, bem como para o necessário fluxo de dados e inovação dele decorrente. Como regulação de uma ordem comunicacional e informacional, que é por definição multidimensional, a proteção de dados tem como objetivo equilibrar os direitos de proteção, de defesa e de participação do indivíduo nos processos comunicativos*) (MENDES, 2020).

Personality protection in the digital society must also consider the individual's capacity for interactional development, that is, the human person's capacity for progress, which only develops through other people, which reinforces the need to protect privacy.

On the one hand, however, there is a concern with the defense of the privacy of individuals, engaging in intense discussions about data leaks, public and private; on the other, there is a need to verify the existence of a public interest related to that citizen, relevant to the community.

So, how to make the public interest of procedural information compatible with the right to privacy?

Initially, it should be kept in mind that the Judiciary must also comply with the Law of Protection of Personal Data (*Lei Geral de Proteção de Dados - LGPD*) (BRASIL, 2018).

This law dedicates a chapter with nine articles (Chapter IV) exclusively to address the topic "Treatment of Personal Data by the Public Sector" ("*Tratamento de Dados Pessoais pelo Setor Público*"), indicating integration with the Access to Information Law ("*Lei de Acesso à Informação*").

Therefore, in the same way that private institutions must observe a specific purpose for carrying out the processing of personal data, the legal entity of public law must also adopt the specific public purpose and public interest for carrying out the processing of their data.

It's verified, then, that it will be up to the Judiciary to guarantee that the use of the data follows the special purposes that concern the execution of the functions of that body and, at the same time, the balance between the need to publicize the information and the rights of the holders.

The articles 25, 26 and 27 of the *LGPD* are responsible for describing how and when the sharing of personal data managed by the public sector can occur. (BRASIL, 2018)

The data must be maintained in an interoperable and structured format for shared use, with a view to legitimate, expressed and previously defined purposes, namely: execution of public policies, provision of public services, decentralization of public activity and dissemination, and access information by the general public.

As a rule, the transfer of personal data to private entities is prohibited. The exception occurs in situations where the data is publicly accessible; when there is a legal provision or the transfer is supported by contracts, agreements or similar instruments; or that the performance of a service or measure requires it. Exceptions are also made in the event that the transfer of data is intended solely to prevent fraud and irregularities, or to protect and safeguard the security and integrity of the data subject, provided that processing for other purposes is prohibited.

The article 27 further states that there must be consent from the owner of the data so that it can be shared between the Public Administration and a private entity, with some exceptions (BRASIL, 2018).

Article 31, on the other hand, provides that public bodies are subject to specific administrative measures; as a result, it is up to the national authority to ensure that appropriate and proportionate measures are taken when the processing of personal data is breached in public bodies (BRASIL, 2018).

This idea is complemented by the determination of article 32, which announces the need for public institutions to foresee the impact of privacy within the scope of public administration, which will certainly have great consequences, as it will require several public policies to adapt and conform the public sector to the new regulation (BRASIL, 2018).

From the law, it is also seen that the administrative sanctions to which public entities are subject are milder than those to which private entities are subject, being established in § 3º of article 52. Examining the aforementioned article, although there is no penalty for public entities, sanctions such as blocking personal data can have a major impact on public performance (BRASIL, 2018).

Having said these considerations, there is no doubt that the Judiciary must respect the *LGPD*, under penalty of creating effective legislation only for the private sector, without observance for the public sector, which has the largest volume of stored data.

Based on this, the National Council of Justice (*Conselho Nacional de Justiça*) created, through Ordinance 63/2019 (*Portaria 63/2019*), a working group designed to prepare studies and proposals on policies for access to court procedural databases, especially when there are commercial purposes. According to Minister Dias Toffoli, the main concern is with "the caution that must be kept regarding unrestricted access to relevant information about the citizen" (*"a cautela que se deve guardar quanto ao acesso irrestrito a informações relevantes sobre o cidadão"*) (RACANICCI, 2019).

Along the same lines as the other "powers", the *CNJ* published, after these previous studies were carried out, Recommendation 73/2020 (*Recomendação 73/2020*), with guidelines for the adequacy of all Judiciary bodies, instituting a national standard for the protection of personal data existing in its databases (BRASIL, 2020).

Regarding the importance of regulating this theme, the guidelines of Yuval Noah Harari are:

> Thus, we would do better to invoke jurists, politicians, philosophers and even poets to turn their attention to this puzzle: how to regulate data ownership? This is perhaps the most important political issue of our age. If we are unable to answer that question soon, our socio-political system may collapse (*Assim, faríamos melhor em invocar juristas, políticos, filósofos e mesmo poetas para que voltem sua atenção para essa charada: como regular a propriedade de dados? Essa talvez seja a questão política mais importante da nossa era. Se não formos capazes de responder a essa pergunta logo, nosso sistema sociopolítico poderá entrar em colapso*) (HARARI, p. 110-111).

The judicial process is public by virtue of the provision in item LX of article 5º, that provides: "the law can only restrict the publicity of procedural acts when the defense of privacy or social interest so requires" (*"a lei só poderá restringir a publicidade dos atos processuais quando a defesa da intimidade ou o interesse social o exigirem"*) (BRASIL, 1988).

This publicity ends up also reaching the personal data that may appear in the lawsuits, which, due to article 7º, § 4º, of the General Law of Protection of Personal Data (*LGPD*), are made manifestly public by their owners (BRASIL, 2018).

For this reason, it is difficult to measure the impacts resulting from the exercise of the jurisdictional function in relation to data protection, especially with regard to the scope of the damage that can be verified, as well as in relation to the illegality of state conduct.

However, it is certain that the eventual creation of bureaucratic embarrassments and constraints - or even the restriction of consultation by the parties on the processes - will not eliminate the risk of leaks and the access to personal documents.

In spite of this, it is important to highlight that, in relation to jurisdictional processes, there is no doubt that the State and society may have a right, as a general rule, to knowledge of the "other", but only if necessary. Otherwise, it is necessary to preserve the privacy of citizens to the maximum, in compliance with the constitutional protection of privacy and data protection.

The exposure of personal data needs to be measured in order to allow the control of jurisdictional acts and comply with the principle of publicity, without becoming excessive, to the point of configuring sensational or purposeless exposure.

At this point, it's necessary to bring some considerations by Laura Mendes on the constitutional protection of the right to data protection:

> Advancing, then, in its contours, it can be said that the fundamental right to data protection entails both a subjective right of defense of the individual (subjective dimension), as well as a duty of state protection (objective dimension). In the subjective dimension, the attribution of a subjective right to the citizen ends up delimiting a sphere of individual freedom from not suffering undue intervention from state or private power. The objective dimension represents the need for the realization and delimitation of this right through state action, from which the State's protection duties arise to guarantee this right in private relations. This means that the actions of the State come to be controlled both by its action, as well as by its omission (*Avançando, então, em seus contornos, pode-se dizer que o direito fundamental à proteção de dados enseja tanto um direito subjetivo de defesa do*

> *indivíduo (dimensão subjetiva), como um dever de proteção estatal (dimensão objetiva). Na dimensão subjetiva, a atribuição de um direito subjetivo ao cidadão acaba por delimitar uma esfera de liberdade individual de não sofrer intervenção indevida do poder estatal ou privado. A dimensão objetiva representa a necessidade de concretização e delimitação desse direito por meio da ação estatal, a partir da qual surgem deveres de proteção do Estado para a garantia desse direito nas relações privadas. Isso significa que os atos do Estado passam a ser controlados tanto por sua ação, como também por sua omissão*) (MENDES, 2020).

Furthermore, it's possible that the exposure may cause significant damage to the data subject, which needs to be conjectured and analyzed, according to the rules of the existing legal system, also considering an interpretation consistent with the Democratic State of Law.

With regard to civil liability and compensation, the article 42 of the *LGPD* provides that the controller or operator of the data that, in its activity, causes harm to others, is obliged to repair it. Processing agents will not be held responsible only when they prove: that they have not carried out the processing of personal data attributed to them; that, although they have carried out the processing of personal data attributed to them, there has been no violation of data protection legislation; or that the damage is due to the sole fault of the data subject or third party (art. 43) (BRASIL, 2018).

The *LGPD*, in its article 6º, also foresees the principle of responsibility and accountability, being registered that it is the burden of the agent to demonstrate the adoption of effective measures capable of proving compliance with the rules of protection of personal data and its effectiveness. If he doesn't demonstrate, in the case of damage resulting from a breach of data security, the one who, when failing to adopt the security measures provided for in art. 46 of the same law, give cause to the damages (BRASIL, 2018).

Regarding the duty to observe the data protection and security legislation, the article 44 is clear in stating that the processing of personal data will be irregular considering some relevant circumstances, including: the way in which it is carried out; the result and the risks reasonably expected of it; the techniques for processing personal data available at the time it was carried out (BRASIL, 2018).

Note that the provisions of the *LGPD* are general, not expressly mentioning how the law should be applied to the services of the Judiciary. It's a mere repetition of the general rule of civil liability of the Civil Code, present in articles 186 and 927 (BRASIL, 2002).

At this point, by not specifically dealing with the civil liability of public entities or bodies, the Law leaves the interpreter to the task of integrating the protective system.

The Constitution of the Federative Republic of Brazil brings the theory of strict responsibility, in the form of administrative risk, in art. 37, § 6º (BRASIL, 1988).

The specific rule of thumb on the matter must admit the invocation of the referred rule to give the State responsibility for legal and illegal acts, on the grounds that, within the scope of the Democratic State of Law, all jurisdictional action is subject to the Law itself, being referred to the general principle of civil liability of the State.

Majority doctrine defends that it is a theory that allows the adoption of causes that are excluded from the State's responsibility, namely: victim's fault, third party's fault, act of God

or force majeure, with the theory of integral risk being excluded, which doesn't admit such exclusions (CARVALHO FILHO, 2007, p. 498-499).

Mostly, it is also permitted to apply strict responsibility in the event of a commission act (action). There is divergence, however, with regard to omissive acts, when Subjective Responsibility is applied for some authors.

A more conservative doctrine states that the original constituent legislator wanted to predict the appropriateness of the rule of the aforementioned provision only for commissive acts. On the other hand, other indoctrinators affirm the thesis to the contrary, advocating the application of strict responsibility for commissive and omissive acts. The controversy stems from the presence of the verb "cause" in the wording of article 37, § 6º, of the Brazilian Constitution.

According to Luiz Carlos Figueira de Melo and José Luiz de Moura Faleiros Júnior:

> With regard to said divergence, on the one hand, there is the doctrinal current led by Celso Antônio Bandeira de Mello, José dos Santos Carvalho Filho, Maria Sylvia Zanella di Pietro, Oswaldo Aranha Bandeira de Mello, Rui Stoco, among other authors , who maintain that the State's civil responsibility must follow the subjective theory in the omissive behaviors, being proof of the element of fault ('faute') essential for its configuration. In another, minority aspect, in contrast to the subjectivist thesis, there is the current led by Hely Lopes Meirelles, Celso Ribeiro Bastos, Odete Medauar, Álvaro Lazzarini, Weida Zancaner Brunini, Yussef Said Cahali, among others, advocating the thesis that the State, in view of the provisions of article 37, § 6º, of the Constitution of the Republic, must respond objectively for the damages caused to third parties, either by action or omission, focusing on both types of conduct as possible causes of the damage (*No que diz respeito à dita divergência, de um lado, posiciona-se a corrente doutrinária capitaneada por Celso Antônio Bandeira de Mello, José dos Santos Carvalho Filho, Maria Sylvia Zanella di Pietro, Oswaldo Aranha Bandeira de Mello, Rui Stoco, dentre outros autores, que sustentam que a responsabilidade civil do Estado deve seguir a teoria subjetiva nas condutas omissivas, sendo imprescindível a comprovação do elemento culpa ('faute') para sua configuração. Numa outra vertente, minoritária, contrapondo-se à tese subjetivista, tem-se a corrente liderada por Hely Lopes Meirelles, Celso Ribeiro Bastos, Odete Medauar, Álvaro Lazzarini, Weida Zancaner Brunini, Yussef Said Cahali, dentre outros, advogando a tese de que o Estado, em face do disposto no artigo 37, §6º, da Constituição da República, deve responder objetivamente pelos danos causados a terceiros, seja por ação ou omissão, enfocando ambas as modalidades de conduta como possíveis causas do dano*) (FALEIROS JÚNIOR; MELO, 2019, p. 100).

Subjective responsibility is that originated from the Administration for the malfunction of the service, delayed operation or due to its non-existence, the outcome of which must be concretely evaluated and analyzed. According to José dos Santos Carvalho Filho:

> The theory was enshrined in the classic Paul Duez doctrine, according to which the victim would not need to identify the state agent causing the damage. It was enough for him to prove the malfunction of the public service, even if it was impossible to name the agent who caused it. The doctrine, then, called the fact as: anonymous guilt or lack of service (*A teoria foi consagrada pela clássica doutrina de Paul Duez, segundo a qual o lesado não precisaria identificar o agente estatal causador do dano. Bastava-lhe comprovar o mau funcionamento do serviço público, mesmo que fosse impossível apontar o*

> *agente que o provocou. A doutrina, então, cognominou o fato como culpa anônima ou falta do serviço*) (CARVALHO FILHO, 2007, p. 489).

In these cases, it's a matter of subjective responsibility, since it is founded on the anonymous fault of the service. It's necessary to emphasize that the State's guilt is only presumed when the service worked late or didn't work (ANDRADE, 2005, p. 29).

It is worth mentioning that for those who understand that state responsibility is always objective, regardless of whether it was caused by state action or omission, responsibility for acts, even if lawful, must consider social solidarity or the principle of equality.

Social solidarity (or the principle of equality) is to compensate for any inequality created by the state activity itself and is justified insofar as all members must compete for the repair of the damage. Discourse on this hypothesis Celso Antônio Bandeira de Melo:

> In effect: the legal order can foresee and provides for the eventual contrast between two interests, both valuable and both deserving of guardianship and protection. It also provides for a solution in these cases. If a public interest cannot be satisfied without the sacrifice of a private interest, also protected, the normative solution will dictate the preponderance of the first, in cases where it should prevail, without, however, ignoring or undermining the protection of the private interest to be reached. A duty is then established to indemnify those whose rights have been sacrificed in order to be able to pursue another greater interest. That is to say: there is a conversion of the right reached into its equivalent equity expression (*Com efeito: a ordem jurídica pode prever e prevê o eventual contraste entre dois interesses, ambos valiosos e ambos merecedores de tutela e proteção. Prevê igualmente solução nestes casos. Se um interesse público não pode ser satisfeito sem o sacrifício de um interesse privado, também tutelado, a solução normativa ditará a preponderância do primeiro, nos casos em que deva prevalecer, sem, contudo, ignorar ou menoscabar a proteção do interesse privado a ser atingido. Estabelece-se, então, um dever de indenizar àquele cujo direito foi sacrificado a fim de poder-se realizar outro interesse maior. Vale dizer: opera-se uma conversão do direito atingido em sua equivalente expressão patrimonial*) (MELO, 2003, p. 853).

On the other hand, for those indoctrinators who differentiate the applicability of subjective or objective responsibility depending on dealing with omissive or commissive acts, current with which it is affiliated, it's important to point out that the situations of abnormal functioning or defective functioning of the jurisdictional public service is hypothesis denial of justice, meaning omissive state activity (DIAS, 2004, p. 195).

In these cases, one should defend the adoption of the subjective theory of responsibility, coined in French law, which is shaped by the anonymous fault of the public service.

The malfunctioning of justice can result from the fault of its agent, determined and individualized, or from anonymous fault, simple lack of service.

The accumulation of work, whose entrance cannot be controlled, the insurmountable lack of Judges and servers and the lack of security or sufficient resources (including technological) are determining factors of abnormal functioning, without being able to determine who should be assigned the lack. For the injured party, it is enough to demonstrate the failure of the service, the damage and the causal link.

Malfunction corresponds to the most general hypothesis of denial of justice. It is usually characterized by procedural illegality that can occur in any plan, due to the agent's action in the performance of his procedural function, and serves as an example: the excessive execution of the sentence (art. 5°, LXXV, of the Brazilian Constitution) (AGUIAR JÚNIOR, 1993, p. 49-50).

For acts of an activist character, even if lawful, the responsibility will be objective, when, as already defended, the interpreter must use social solidarity or the principle of equality. At this point, it is also worth pointing out that, for lawful acts, it's not necessary to individualize guile or guilt.

In short, in the proposed study hypotheses, civil liability for an act arising from the jurisdictional function, even if lawful, commissive or omissive, is feasible through the article 37, § 6º of BC/88. In the case of a commission act, lawful or unlawful (occasion when the interpreter must use the principle of equality), by applying the theory of administrative risk, in an objective manner; in the case of an omissive and unlawful act, by the application of subjective liability for administrative fault (BRASIL, 1988).

With these considerations in mind, the next step will be to investigate jurisdictional acts in which the State's theory of civil liability is liable.

It should be noted, as relevant, that the theory of Administrative Risk, in tune with the majority current of the indoctrinated already presented, defends that the causal nexus and consequently the State's civil liability is not extended to any case in which the loss has been proven, being possible to disregard the duty to indemnify when those excluded from liability are present.

In the case of exclusionary or mitigating causes for liability for legal acts, Aguiar Júnior exemplifies:

> The following are exonerating causes of the State's responsibility: a) when the damage results exclusively from the intentional or wrongful action of the party (failing to provide evidence, providing inaccurate clarifications, omitting the acts to be attended, colluding with the other party , inducing witnesses, withholding or losing records, failing to practice acts of duty, corrupting those who participate in the judicial scene, etc.). If there is competition from blame, the State's responsibility will be mitigated in proportion to its causal participation; b) the damage results from a misinterpretation given by the Judge to the law. The indeterminate concepts ('honest woman', 'relevant reason', 'public interest', etc.) and the general clauses (in which the Judge must previously establish which standard of conduct should have been observed for the case, as in art. 159 of the CC), leave to the Judge a wide spectrum of decisions, the option of which must be admitted while not arbitrary, that is, while based on the current legal system; c) the damage results from force majeure, as it is a cause foreign to the service, ordinarily unpredictable in its production and always absolutely irresistible. The fortuitous event, being an internal event, directly connected with the functioning of the service but with an unknown cause, doesn't exempt the State from being responsible for the malfunctioning of the service. While in force majeure the cause of the damage is external, with no causal link between the action of the Judge or the service and the result, in the fortuitous case the cause is the lack of service, although unknown; d) the damage was caused by a third party, the result of which wasn't for the State to avoid, in the circumstances of the event;

> e) the State of defensive need, when the danger was created by the injured person, who thus suffers the damage resulting from the necessary action of the State to remove the danger. In other cases, there is no exclusion: 'The state of need pre-excludes wrongdoing, not the responsibility' (*São causas exoneratívas da responsabilidade do Estado: a) quando o dano decorre com exclusividade da ação dolosa ou culposa da parte (deixando de fazer prova, prestando esclarecimentos inexatos, omitindo-se nos atos a que deve comparecer, conluiando-se com a outra parte, induzindo testemunhas, retendo ou extraviando autos, deixando de praticar atos de seu dever, corrompendo os que participam da cena judiciária, etc.). Se há concorrência de culpas, a responsabilidade do Estado será atenuada na proporção de sua participação causal; b) decorrer o dano de má interpretação dada pelo Juiz à lei. Os conceitos indeterminados ('mulher honesta', 'motivo relevante', 'interesse público', etc.) e as cláusulas gerais (nestas devendo o Juiz estabelecer previamente qual a norma de conduta que deveria ter sido observada para o caso, como no art. 159 do CC), deixam ao Juiz largo espectro decisório, cuja opção deve ser admitida enquanto não arbitrária, isto é, enquanto fundamentada dentro do sistema jurídico vigente; c) resultar o dano de força maior, pois é uma causa estranha ao serviço, ordinariamente imprevisível em sua produção e sempre absolutamente irresistível. O caso fortuito, por ser um evento interno, diretamente conectado com o funcionamento do serviço mas com causa desconhecida, não isenta de responder o Estado pelo mau funcionamento do serviço. Enquanto na força maior a causa do dano é externa, inexistindo nexo de causalidade entre a ação do Juiz ou do serviço e o resultado, no caso fortuito a causa é a falta do serviço, ainda que desconhecida; d) ter sido o dano produzido por terceiro, cujo resultado não incumbia ao Estado evitar, nas circunstâncias do fato; e) o Estado de necessidade defensivo, quando o perigo foi criado pelo lesado, que assim sofre o dano resultante da ação necessária do Estado para afastar o perigo. Nos demais casos não há exclusão: 'O estado de necessidade pré-exclui a ilicitude, não a responsabilidade'* (AGUIAR JÚNIOR, 1993, p. 51-52).

It is clarified that in cases of omission regarding the duty of prevention and security in relation to personal data in jurisdictions, this study adopts the position that liability for lack of service is applicable, which results from non-functioning or insufficient functioning, defaulting, late or slow of the service that the Judiciary should provide.

As pointed out, the liability will be objective for legal acts of an activist character, even if lawful; it will, however, be subjective, in the case of an omissive and unlawful act, as described above.

It's imperative to state that the *LGPD*, in its article 6º, also provides that the activities of processing personal data must observe good faith and the principles of security and prevention (BRASIL, 2018).

The first principle refers to the use of technical and administrative measures capable of protecting personal data from unauthorized access and accidental or illicit situations of destruction, loss, alteration, communication or dissemination; the second, advocates the adoption of measures to prevent the occurrence of damages due to the processing of personal data (BRASIL, 2018).

The violation of these principles must allow the configuration of moral or material damage to the claimants, subject to indemnity when the malfunctioning of the Judiciary caused serious damage.

However, it is argued that the harmful situation caused by the exercise of lawful judicial function cannot necessarily imply joint and several liability of the State and the magistrate; rather, it implies a direct and exclusive responsibility of the first, considering the judge's responsibility only if, in the exercise of his munus, he acts with intent or fraud.

Thus, the typical jurisdictional act, if harmful, should involve the State's civil liability, regardless of the configuration of the magistrate's personal responsibility, which is more restricted.

This is because the possibility of personal liability of the judges for the damages arising from the exercise of the judicial function must be restricted, in view of the concern to safeguard their essential independence.

In fact, a certain degree of immunity ends up lending itself to guarantee the magistrate the performance of his duties with full autonomy, for the benefit of the claimants.

But, as already defended, a balance must be sought between this independence and a so-called responsibility-control and sanction before society, in order to allow the right to compensation.

Moreover, it should be noted that we aren't here to advocate that any data dissemination by the Judiciary act is reprehensible. Only in view of the marked degree of violation of the rights to privacy and intimacy should accountability be allowed.

As an example, we can consider the case of the 10-year-old child who became pregnant after suffering a series of rapes by her uncle, who started since she was 6 years old, in São Mateus, Espírito Santo, Brazil.

After the Court of Justice of Espírito Santo (*Tribunal de Justiça do Espírito Santo*) granted the child the right provided by law to terminate the pregnancy, conservative movements sought information in the process about where the infant would undergo the procedure to terminate the pregnancy. Her personal data was also collected and improperly posted on social media, which culminated in protests in front of the hospital, calling the victim of the crime "murderer" (ANGELO, 2020).

It is true that Article 17 of the Brazilian law called the Child and Adolescent Statute (*Estatuto da Criança e do Adolescente – ECA*) provides: the inviolability of the physical, psychological and moral integrity of children and adolescents, which includes the protection of the image, identity, autonomy, values, ideas and beliefs, spaces and personal objects (BRASIL, 1990).

This Statute also establishes that it is the duty of the family, the community and society in general, especially the government: to ensure, with absolute priority, the realization and effectuation of the rights relating to life, health, food, education, sport, leisure, professionalization, culture, dignity, respect, freedom and family and community coexistence (BRASIL, 1990).

In the case described above, in addition to the fundamental right to the protection of personal data, the right to respect and dignity of the child was violated in the light of the disclosure of procedural and confidential information.

In this case, the principles of security and prevention were also violated, which should govern all activities of processing personal data, considering that the law established as a mandatory rule in relation to these crimes: the secret of justice. Article 234-B of the Brazilian Penal Code states that "the proceedings in which crimes defined in this Title are determined [Crimes Against Sexual Dignity] will run in secret" ("*os processos em que se apuram crimes definidos neste Título [Crimes Contra a Dignidade Sexual] correrão em segredo de justiça*") (BRASIL, 1940).

According to lessons from Julio Fabbrini Mirabete and Renato N. Fabbrini on this article:

> Although the rule is that of publicity for procedural acts, the Federal Constitution admits the confidentiality necessary to defend privacy (art. 5º, LX) and the Penal Procedure Code authorizes the decree of the secret of justice for the preservation of privacy, private life, honor and image of the victim (art. 201, § 6º). In sexual crimes, in addition to the damage resulting from the infraction itself, the victim must, as a rule, also bear the brunt of the public exposure of her privacy resulting from the initiation of criminal proceedings. To that end, the law established, in relation to these crimes, as a mandatory rule, the secret of justice. In such cases, the judge is not allowed the same discretion as the procedural law affords him. Although the law refers only to the process, secrecy must reach the police investigation, and it is up to the police authority and the judge to adopt in the case records the measures necessary to preserve the victim's privacy. (*Embora a regra seja a da publicidade dos atos processuais, a Constituição Federal admite o sigilo necessário à defesa da intimidade (art. 5º, LX) e o Código de Processo Penal autoriza a decretação do segredo de justiça para a preservação da intimidade, vida privada, honra e imagem do ofendido (art. 201, § 6º). Nos crimes sexuais, além do dano decorrente da própria infração, havia de suportar a vítima, via de regra, também os malefícios da exposição pública de sua intimidade decorrente da instauração do processo penal. Com essa finalidade, a lei estabeleceu, em relação a esses delitos, como regra obrigatória, o segredo de justiça. Não se permite ao juiz, nesses casos, a mesma discricionariedade que lhe faculta a lei processual. Embora se refira a lei somente ao processo, o sigilo deve alcançar o inquérito policial, incumbindo à autoridade policial e ao juiz a adoção nos autos de providências necessárias à preservação da intimidade da vítima.*) (MIRABETE; FABBRINI p.1612).

In cases like this, in which the person is identified from data collected in jurisdictional processes that should run under secrecy, the latter, when suffering various attacks from society itself, such as prejudiced notes, violation of her/his right to locomotion, expression, participation, suffers serious damage liable to indemnity.

In these cases, prejudice and discrimination would leave this individual at the margin, which was only possible due to an illegal act, even if omissive by the State, in relation to the registration of the judicial process and its progress with the possibility of adopting strict/objective liability.

Being thus present: the cause and effect relationship between state behavior and damage, qualified damage ("legal damage" – *"dano jurídico"*), which goes beyond the inconvenience and sacrifices that are reasonable, tolerable or demandable by the individual.

It should be noted that, in the Democratic State of Law, the suppression or violation of fundamental rights isn't authorized. The application of liability in the event of a breach of data protection by the jurisdictional function is an important instrument for correcting or for reducing injustices and for violating fundamental principles of law.

Therefore, it's necessary to define the proper fulfillment of citizens' rights, making them compatible with the public interest of disclosing data in lawsuits, especially in view of the possibility of serious damage in the case of leaks or disclosure of personal information present in lawsuits.

3 FINAL CONSIDERATIONS

The efficiency of the Judiciary through the use of technology depends on overcoming the technical and legal challenges regarding privacy and protection of personal data, allowing greater adaptation of the institutes in the process to the worrying virtual era.

It's a complex and dynamic reality, which needs to be understood by the operators of the Law, taking into account the fundamental rights and principles of the Constitution, which is only possible if the protection of personal data, privacy and intimacy are considered.

The present work presents as a problem the application of accountability by the State in relation to judicial acts in addition to those expressly provided for in the constitutional text.

Civil liability for a commissive or omissive judicial act, even if lawful, is feasible through article 37, § 6º of BC/88. In the case of a commission, lawful or unlawful act (when the interpreter must use the principle of equality), by applying the theory of administrative risk, in an objective manner; in the case of an omissive and unlawful act, by the application of subjective responsibility for administrative fault.

Thus, once the causal link and the serious damage have been verified, the citizen must be allowed to use legal mechanisms that enable the reimbursement/refund.

The application of liability in case of violation of data protection by the judicial function is an important instrument for correction or reduction of injustice and violation of fundamental principles of Law.

If, on the one hand, it is certain that the State shouldn't respond indiscriminately, it is also certain that, in the event of serious damage, its accountability guarantees an action with a focus on protecting and respecting the rights of the community in the information society.

From all that has been said, it's observed that arguments of irresponsibility don't justify the Judiciary appearing, in isolation, from the rest of the state organization, in particular, in view of the evolution and the considerable increase of its performance in modern society.

Furthermore, based on the requirements of the Democratic State of Law, the rule should be the State's responsibility for damages arising from the jurisdictional provision and the irresponsibility being the exception.

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