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The Brazilian Data Protection Law for LGBTQIA+ People: Gender identity and sexual orientation as sensitive personal data

A Lei Geral de Proteção de Dados Brasileira para Pessoas LGBTQIA+: Identidade de gênero e orientação sexual como dados pessoais sensíveis

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Abstract

Data protection laws are an advancement in protecting individuals but are not without criticism. Although discrimination on the grounds of "sexual orientation" and "gender identity" systemically violate LGBTQIA+'s fundamental rights and freedoms, the Brazilian National Congress failed to explicitly list either personal information as sensitive in the Brazilian General Data Protection Law. Exploring the hermeneutical flexibility of this law, this article argues that both "sexual orientation" and "gender identity" are under the sensitive data list. The aliases used in this protection are "sex life" and "race." A human rights-based interpretation of the former leads to the conclusion that "sex life" encompasses "sexual orientation" and/or "gender identity" due to, *inter alia*, human dignity and non-discrimination imperatives. In turn, Brazil's Supreme Court decisions have considered discrimination over "sexual orientation" and/or "gender identity" to be a form of social racism. Thus, while not explicitly listed, both "sexual orientation" and "gender identity" compose the list of sensitive data under LGPD.

Keywords: Sexual orientation; Gender identity; Sensitive data; Human rights; Supreme Federal Court.

Resumo

Leis de proteção de dados pessoais são um avanço na proteção de indivíduos, mas não estão isentas de críticas. Embora discriminações com base em "orientação sexual" e "identidade de gênero" sistematicamente violem os direitos e liberdades fundamentais de LGBTQIA+, o Congresso Nacional não listou expressamente esses dados pessoais como sensíveis na Lei Geral de Proteção de Dados. Explorando a flexibilidade hermenêutica desta lei, este artigo argumenta que tanto "orientação sexual" como "identidade de gênero" são dados sensíveis, seja em virtude do termo "vida sexual", seja em virtude do termo "raça". Uma interpretação de "vida sexual" baseada em direitos humanos requer a inclusão de "orientação sexual" e "identidade de gênero" nesse termo por força, *inter alia*, de imperativos de dignidade da pessoa humana e não-discriminação. Por sua vez, o Supremo Tribunal Federal consolidou o entendimento de que discriminação baseada em "orientação sexual" e/ou "identidade de gênero" são formas de racismo social. Portanto, embora não expressamente listados, tanto "orientação sexual" quanto "identidade de gênero" compõem a lista de dados sensíveis sob a LGPD.

Palavras-chave: Orientação sexual; Identidade de gênero; Dados sensíveis; Direitos humanos; Supremo Tribunal Federal.

1. Introduction

In a data-driven economy, technological advancements (e.g., predictive data mining tools, machine learning, and artificial intelligence) constantly widen and deepen the challenges to the enjoyment of fundamental rights and civil liberties. For instance, research concerning the possible impacts of automated data processing techniques by the Committee of Experts on Internet Intermediaries ("MSI-NET") of the Council of Europe concluded that algorithms risk violating or undermining the enjoyment of a range of human rights, including, *inter alia*, the rights to privacy, to a fair trial, to freedom of expression, freedom of assembly and association, and non-discrimination (MSI-NET, 2018). The materialisation of these and other risks related to technological advancements can already be seen worldwide with varying degrees of complexity. In Egypt, since at least 2014, information collected from social networks and dating mobile apps have been used to identify and detain members of the LGBTQIA+ community (TANRIVERDI, 2014). As reported by the Human Rights Watch, this practice is often followed by torture, inhuman and degrading treatment and punishment, denial of medical care, denial of legal counselling, among other violations (HRW, 2020). In this multi-layered reality, data protection laws are instrumental in securing the enjoyment of fundamental liberties and rights.

The recent Constitutional Amendment nº 115/2022 recognised the right to data protection as a fundamental right in the Brazilian legal system (BRAZIL, 1998, Art. 5 LXXIX). The regulation of this right is primarily based on the Federal Law nº 13.709/2018, often referred to as the Brazilian General Data Protection Law (from Portuguese, "LGPD") (BRAZIL, 2018). This law categorises information into two groups: "personal data" and its subcategory "sensitive personal data." The former refers to any "information regarding an identified or identifiable natural person" (authors' translation) (BRAZIL, 2018, Art. 5 I) whereas the latter comprehends personal data "concerning racial or ethnic origin, religious belief, political opinion, trade union or religious, philosophical or political organization membership, data concerning health or sex life, genetic or biometric data, when related to a natural person" (authors' translation) (BRAZIL, 2018, Art. 5 II). The LGPD does not define sensitive personal data, simply listing the categories of data that are encompassed. Nonetheless, LGPD acknowledges a grey zone of personal data "that reveals sensitive personal data and that may cause harm to the data subject" (authors'

translation) (BRAZIL, 2018, Art. 11 § 1) and shall only be processed under one of the legal bases applicable to sensitive data. Similar to the European General Data Protection Regulation ("EU GDPR") (EUROPEAN UNION, 2016, Art. 9), LGPD's rules for processing sensitive personal data are generally stricter than for processing non-sensitive data.

Confronted with the absence of sexual orientation and gender identity on LGPD's list of sensitive personal data, the second section of this article will argue that the legal concept of sensitive data has certain shortcomings. These include but are not limited to i) defining the practical limits between personal and sensitive data, ii) being influenced by socioeconomic and cultural paradigms reflected in society when a law is enacted, and iii) risking an underinclusive protection. The third section will argue that "sex life" can be interpreted in different ways, but a human rights-based interpretation is the only one compatible with national and international law, and it mandates the inclusion of "sexual orientation" and "gender identity" within the concept of "sex life." In addition, the fourth section argues that the Brazilian Supreme Federal Court (from Portuguese, "STF") jurisprudence also independently provides a solid basis for "sexual orientation" and "gender identity" to be recognized as sensitive data under the alias of "race", despite STF's rulings not having concerned data protection. The fifth section consolidates the interpretation that "sexual orientation" and "gender identity" are sensitive personal data under LGPD's article 5 II. Finally, the sixth section indicates some of the social and individual benefits of having "sexual orientation" and "gender identity" be considered sensitive personal data.

Prior to developing each argument, two preliminary remarks are necessary. First, mindful of the different interpretations of sexual orientation and gender identity proposed by scholars, this article will adopt by default the legal definitions proposed by the Yogyakarta Principles:

> UNDERSTANDING 'sexual orientation' to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;
>
> UNDERSTANDING 'gender identity' to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerisms; (YOGYAKARTA, 2006)

Second, the authors recognize that the LGBTQIA+ population is not homogeneous: individuals experience their sexual orientation and gender identity differently, and other social markers influence how each person enjoys their fundamental rights and liberties.[1] However, these differences should not prevent the analysis of aspects that are universal to them.

2. Limitations of Sensitive Data in Current Data Protection Laws

While the broadness of LGPD's legal definition of personal data fostered the hitherto embryonic Brazilian culture of data protection, the separation between the categories of personal data and sensitive personal data is not without criticism. Accordingly, this section will go on to address three of them: i) the limits between sensitive and non-sensitive data, ii) the existence of legislative bias when defining which information is "sensitive," and iii) the use of open and closed lists of sensitive data. The authors highlight that these critiques are not exhaustive.

2.1. The Limits Between Personal and Sensitive Data

The dichotomy between sensitive and non-sensitive data fails to confront and resolve concerns imposed by modern technologies. Two examples provide insights on the problem. Researchers of the University of Cambridge and Stanford University have demonstrated that computer models are able to predict characteristics related to one's personality based on their digital footprint. These characteristics include information concerning "depression, political orientation, [...] impulsivity, values, […] substance use, physical health" (YOUYOU; KOSINSKI; STILLWELL, 2015, p. 1038), and others. Meanwhile, researchers of the University of Saskatchewan concluded that emotional states (e.g., confidence, hesitance, nervousness, relaxation, sadness, tiredness, and anger) can be deduced from a person's keyboard typing patterns (EPP; LIPPOLD; MANDRYK, 2011, p. 715–724). However vivid and contentious it might still be the academic debate on the

[1] Different scholars have proposed different analytical frameworks to understand how social markers overlap and interrelate. For instance, for a study on the intersectionality between race and gender, see: KIMBERLÉ, Crenshaw. **Background paper for the expert meeting on the gender-related aspects of race discrimination**. Estudos Feministas, Florianopolis, v. 10, n. 1, p. 171-188. 2002.

challenges posed by modern technologies, it follows from these two examples the lesson that current technology already allows, *inter alia*, non-sensitive personal data to be used as a proxy for sensitive data. Consequently, modern data processing practices blur the lines that separate these categories, regardless of how clear the distinction on paper may arguably be.

As it stands, the fluid limits between the categories of personal and sensitive data open a margin for inadvertent and deliberate misuse of personal information. Different scenarios can be imagined for illustrative purposes. As an example, take a social network with all of its data protection obligations met, and that seeks to direct advertisements to consumers of a particular ethnic group. For users that are prone to disclose their ethnicity, said social network could lawfully collect this sensitive data on the ground of the free, unequivocal, informed, specific, and highlighted consent of users (BRAZIL, 2018, Art. 7 I). Conversely, some users will be unwilling to provide said information, leading the social network to one of two options. The first option would be to attempt to predict users' ethnicity based on their non-sensitive online footprint (CHEN *et al.* 2017). For instance, while geolocation is not *per se* a data listed as sensitive by LGPD, it might indicate one's ethnicity in cities where ethnic groups are highly segregated to particular neighbourhoods. However, the lawfulness of this prediction would depend on fulfilling LGPD's legal bases applicable to the processing of sensitive data (BRAZIL, 2018, Art. 11), because sensitive information was inferred. The second option would be to process the same non-sensitive online footprint without actually drawing the inference. Once no sensitive data is used, and arguably no harm has been caused to the data subject, the social network could legally justify the ethnically targeted advertisement on the grounds applicable to non-sensitive data processing (BRAZIL, 2018, Arts. 7 and 11 § 1). The above-described scenario is not detached from reality. In 2015, Universal Studios used Facebook's tool "racial affinity targeting" to show users different versions of the trailer for the movie "Straight Outta Compton'' according to their ethnicity (HERN, 2016).

2.2. The Legislative Bias

While the scope of this article is not to assess the extent to which the Brazilian National Congress has accommodated social diversity and pluralism, its under-representation is well documented and creates legislative biases. By analysing the

Brazilian Superior Electoral Court's records, the Observatory of the Brazilian Legislature concluded that out of 541 federal deputies who served in office as either incumbents or substitutes in 2019, just above 24% of them self-declared black or brown (OLB, 2019). According to the "Women in politics: 2020" map, which was created by the Inter-Parliamentary Union (IPU) and the United Nations Entity for Gender Equality and the Empowerment of Women, congresswomen accounted for only 14.6% and 13.6% of the parliamentarians serving, respectively, in the Chamber of Deputies and in the Federal Senate (UN WOMEN; IPU, 2020). In 2018, Joênia Batista de Carvalho was elected as the first female indigenous deputy in Brazil (XAVIER, 2018). Since 1983 an indigenous person was not elected for the Chamber of Deputies (XAVIER, 2018). No openly transgender person has ever been elected to the Brazilian National Congress; similarly, the LGB community is also underrepresented at this venue. The absence of adequate political representation undermines the influence of said social groups.

However neutral LGPD's list of sensitive data might appear to be, political underrepresentation caused it to be biased. Because lawmakers act as cultural intermediaries/filters to what will become law, the social, cultural, and economic paradigms not reflected in the Brazilian National Congress are less likely to crystallise in the domestic legal framework. These cultural filters may have blinded legislators to the highly offensive potential of certain personal data that are not listed as sensitive. Three examples are particularly illustrative of this fact but are unlikely exhaustive. First, the LGPD is silent on the processing of personal data relating to criminal charges, convictions, and offences.[2] Second, the LGPD disregards the discriminatory potential that may derive from processing one's citizenship or immigration status, particularly in the circumstance of refugees and undocumented migrants.[3] Finally – and foremost to the scope of this article – the LGPD failed to explicitly list "sexual orientation" and "gender identity" as sensitive personal data.

2 Criminal charges, convictions, and offences have been acknowledged as a special category of data under the legislation of some countries other than Brazil. For instance, see the European General Data Protection Regulation and the South African Protection of Personal Information Act 2013.

3 Some countries other than Brazil have explicitly acknowledged the sensitivity of this information. For examples, see the Virginia Consumer Data Protection Act (CDPA), the Colorado Privacy Act (CPA), and the Organic Law on the Protection of Personal Data of Ecuador.

2.3. Open and Closed Lists of Sensitive Data

Countries legislating on data protection have been adopting – by and large – two different legislative techniques when listing which personal information shall be considered to be sensitive data, namely open and closed lists. In regards to the former technique, some countries explicitly indicate that the types of information listed are examples, or that the list includes, but is not limited to, certain information. Other countries may simply indicate parameters to identify what shall be considered sensitive under their domestic law, at times without indicating a single example. In Costa Rica, article 3(e) of the Law on the Protection of Persons Regarding the Processing of their Personal Data nº 8968/2011 considers to be sensitive all "information concerning the intimate sphere of a person, **such as** [...]" (authors' translation) (emphasis added) (COSTA RICA, 2011, Art. 3[e]). Panama's Law nº 81 on Personal Data Protection 2019 provides that sensitive data is information "that refers to the intimate sphere of its data subject, or whose misuse may give rise to discrimination or entail a serious risk for the data subject. **As an example,** are sensitive the personal data that may reveal aspects **such as** [...]" (authors' translation) (emphasis added) (PANAMA, 2019, Art. 4[11]). In Ecuador, the definition of sensitive data provided for the Ecuadorian Organic Law on the Protection of Personal Data comprehends all personal data "whose improper processing may give rise to discrimination, infringe or be likely to infringe fundamental rights and freedoms" (authors' translation) (ECUADOR, 2021, Art. 4).

In regards to the latter, the identification of a closed list can be done by exclusion. Where there is no indication that a list of items is open, one can arguably conclude that it is closed. For example, in Australia, the Privacy Act 1988 (nº 119, 1988), as amended, has a closed list of sensitive data, which includes the following items:

> (a) information or an opinion about an individual's: (i) racial or ethnic origin; or (ii) political opinions; or (iii) membership of a political association; or (iv) religious beliefs or affiliations; or (v) philosophical beliefs; or (vi) membership of a professional or trade association; or (vii) membership of a trade union; or (viii) sexual orientation or practices; or (ix) criminal record; that is also personal information; or (b) health information about an individual; or (c) genetic information about an individual that is not otherwise health information; or (d) biometric information that is to be used for the purpose of automated biometric verification or biometric identification; or (e) biometric templates. (AUSTRALIA, 1988, Section 6(1) I)

In Brazil, LGPD adopts a structure similar to that of Australian law. LGPD's article 5 has a fixed list of sensitive data:

> Art. 5 For the purposes of this Law, it is considered to be: [...] II - sensitive personal data: personal data on racial or ethnic origin, religious conviction, political opinion, membership of a trade union or organization of a religious, philosophical or political nature, data concerning health or sex life, genetic or biometric data, when linked to a natural person; (authors' translation) (BRAZIL, 2018, Art. 5 II)

The Brazilian legislative choice for a closed list of sensitive personal data is relevant insofar as open and closed lists entail different benefits and drawbacks. On the one hand, open-ended lists are flexible, thereby enabling data protection laws to include new items under the special protection of sensitive data and to keep up to date *vis-à-vis* social change. However, open lists often beg essential questions: what are the limits for the inclusions? Who decides which items to include in these lists? When does new information crystallise as sensitive data? On the other hand, closed lists are more rigid and cannot be expanded by similarity. While this rigidness is praised for ensuring legal certainty and foreseeability, it is criticised for curbing the potential of greater legal protection, particularly for vulnerable individuals. Being harder to update, closed lists usually need to either be amended or rely on novel conceptions of previously listed concepts to be expanded.

3. Differing Interpretations of the Concept of Sex Life

Although LGPD's list of sensitive data does not explicitly include "sexual orientation" and "gender identity," it indicates that one's "sex life" is sensitive. While the rule of law principles require lawmakers to draft legislation in a sufficiently accessible and precise manner so as to clearly specify what their content, scope, and reach are (WEBBER, 2011, p. 7-11), the Brazilian Congress opted for an unspecified and dubious concept: "sex life." By doing so, it has opened a margin for disputes over this term's contours, thereby enlarging the discretion of, *inter alia*, judges, lawyers, and processing agents. Ultimately, this legislative choice increases uncertainty over the protection of the LGBTQIA+ population, because it subjects protection standards to the interpretation given to LGPD. In this section, the authors articulate two conceptions of "sex life" that could entail contrasting conclusions: from a human rights and from a literal perspective.

3.1. Human Rights-Based Interpretation

A human rights-based interpretation of LGPD would likely lead to the inclusion of "sexual orientation" and "gender identity" under the alias of "sex life." At an international level, Brazil has ratified both the Vienna Convention on the Law of Treaties 1969 and the American Convention on Human Rights, from which emanate interpretative techniques informed by good faith (BRAZIL, 2009, Art. 31[1]), *raison d'être* (BRAZIL, 2009, Art. 31[1]), and the *pro personae* principle (BRAZIL, 1992, Art. 29). At a domestic level, the Brazilian Federal Constitution has established that human dignity is a foundation of the Brazilian Republic (BRAZIL, 1988, Art. 1 III), whereas the eradication of marginalisation and the reduction of social inequalities are part of its fundamental objective (BRAZIL, 1988, Arts. 3 III and IV, and 5 *caput*). As such, both this foundation and objectives shall inform the interpretation and application of the law. Aligned with these provisions, article 5 of the Introductory Legislation on the Norms of Brazilian Law requires the law to be applied according to the "social ends to which it is directed and the demands of the common good" (author's translation) (BRAZIL, 1942, Art. 5). Two primary consequences emanate from this legal framework. First, the interpretation and application of the LGPD shall pay due regard to human dignity, eradication of marginalisation, and non-discrimination. This entails that the LGPD shall not be granted an interpretation that impairs the enjoyment of fundamental rights and freedom by *all* persons. Second, the interpretation and application of the LGPD shall also account for its *raison d'être*, namely the "protection of fundamental rights of freedom and privacy and the free development of the personality of the natural person" (author's translation) (BRAZIL, 2018, Art. 1). Said fundamental rights encompass the right to data protection, as provided for article 5 LXXIX of the Brazilian Federal Constitution (BRAZIL, 1998). Cognizant of the high discriminatory potential of the deliberate or inadvertently misuse of "sexual orientation" and "gender identity," and that in a data-driven world personal data protection is a condition without which human dignity cannot thrive, the sensitive data "sex life" listed on LGPD's article 5 II needs to be read as encompassing "sexual orientation" and "gender identity." To conclude otherwise would not only deny the LGBTQIA+ population adequate protection to (at least part) of their data but also undermine the foundations on which the Brazilian Republic stands.

Different international regulations and bodies support a human rights-based interpretation of “sex life” to include a protection to LGBTQIA+ individuals, as many have seen the language used to refer to them evolve over time. At a regional level in the European Union, the terms “sex life” and “sexual orientation” are cumulatively listed in the EU GDPR's special categories of personal data (EUROPEAN UNION, 2016). However, the recitals of this regulation suggest that the terms are interchangeable, insofar as recital 71 only mentions “sexual orientation” (EUROPEAN UNION, 2016) whereas recital 75 is restricted to “sex life” (EUROPEAN UNION, 2016). In Africa, the African Commission on Human and Peoples' Rights' Resolution 275 established that “the interpretation of article 2 of the African Charter is open-ended and inclusive, and aims at offering the maximum protection to all Africans, hence the inclusion of sex, gender and sexual orientation as prohibited grounds of unfair discrimination” (ACHPR, 2014, p. 3). At a global level, the United Nations Human Rights Committee held in **Toonen v. Australia** that “in [the Committee's] view the reference to ‘sex’ in articles 2, paragraph 1, and 26 (of the International Covenant on Civil and Political Rights) is to be taken as including sexual orientation” (NEW YORK. OHCHR, 1992, Para. 8.7). The Committee reiterated its decision in **Edward Young v. Australia** (NEW YORK. OHCHR, 2003, Para. 10.4) and in **X v Colombia** (NEW YORK. OHCHR, 2007, Para. 7.2) more recently.

Domestic jurisprudences and other soft law instruments support the same human rights-oriented conclusion. In Brazil, while voting on the Query nº 0604054-58/DF, Superior Electoral Court Justice Tarcísio Vieira de Carvalho adopted an evolutive interpretation of the expression “each sex” used in the Federal Law nº 9.504/97 (BRAZIL. TSE, 2017). Justice Vieira de Carvalho concluded that this expression refers to “gender” rather than “biological sex,” thereby recognizing the changeability of lay terms transposed to the law (BRAZIL. TSE, 2017, p. 3). Meanwhile, although the Brazilian National Data Protection Authority has not so far provided explicit interpretative criteria for LGPD’s article 5 II (BRAZIL, 2018, Art. 55-J XX), it has published, in partnership with the Superior Electoral Court, the following extract on the “Guidelines for the Application of the General Data Protection Law by processing agents in the electoral context”:

> The LGPD determined that sensitive data should be treated with greater caution, observing more restrictive rules than those that apply to other personal data. The law assumed that the misuse of this information has the potential to generate significant restrictions on the exercise of fundamental rights, such as discrimination acts on the grounds of race, ethnicity, or **sexual orientation**, considering the data subject in a more vulnerable position in

> relation to processing agents. (emphasis added) (authors' translation) (BRAZIL. TSE, 2021, p. 10)

Similar to the GDPR's recital, the Brazilian National Data Protection Authority itself appears to suggest in this extract that the terms "sex life" and "sexual orientation" are, at the very least, interchangeable. In the United States, the Supreme Court found in **Bostock v. Clayton County** that the prohibition of discrimination on one's "sex" under Title VII of the Civil Rights Act of 1964 encompassed the prohibition of discrimination against employees for being homosexual or transgender (UNITED STATES. SCOTUS, 2020). In Canada, the Quebec Human Rights Tribunal held in ***Commission des droits de la personne et des droits de la jeunesse v Maison des jeunes*** (QUÉBEC. TDP, 1998) that the term "sex" provided for article 15(1) of the Canadian Charter of Human Rights and Freedoms and article 10 of the Quebec Charter of Rights and Freedoms had "much more than a taxonomic value" (QUÉBEC. TDP, 1998, Para. 110). Therefore, "discrimination on the basis of transsexuali[ty] could hardly be anything other than discrimination based on sex" (QUÉBEC. TDP, 1998, Para. 175).

Having established the argumentative, legal, and jurisprudential grounds for interpreting the term "sex life" as encompassing "sexual orientation" and "gender identity," the authors emphasise two remarks. First, underlying the above reasoning there is, at least to certain extent, the assumption that the Brazilian legislative choice for "sex life" is either a *lapsus linguae* or an outdated expression to refer to the LGBTQIA+ community. Confirming this hypothesis through extensive empirical research would go beyond the scope of this article, but even if the use of "sex life" is neither *lapsus linguae* nor an outdated expression this would not *per se* invalidate the arguments in this section. Second, the authors recognize the above proposition departs from the definitions for sexual orientation and gender identity as adopted in the Yogyakarta Principles. Notwithstanding, cognizant of the obstacles inherent to legislative changes – particularly considering the difficulty of maintaining legislators updated regarding new taxonomies and developments on LGBTQIA+ rights debates – the authors sought to advance arguments that explore the current wording of LGPD to further the protection of the LGBTQIA+ community. While updating the language would be the ideal outcome, the authors understand this option to be, at best, a mid-term goal solution.

3.2. Textual and Original Interpretations

While a human rights-based interpretation of article 5 II of the LGPD would likely lead to a comprehensive definition of the term “sex life,” an interpretation based on textualism or originalism could conclude that the use of said term was not accidental. Instead, one could argue that it aimed to place “sexual orientation” and “gender identity” outside the realm of special protections, thereby only safeguarding the core aspects of how individuals experience sex itself. An analogous line of reasoning is seen, for instance, in Justice Samuel Alito's dissenting opinion in **Bostock v. Clayton County**, in which he stated that:

> The answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The ordinary meaning of discrimination because of “sex” was discrimination because of a person’s biological sex, not sexual orientation or gender identity. The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds. (internal references omitted) (UNITED STATES. SCOTUS, 2020, Id. at 1766, 1772)

In summary, Justice Alito reasoned that the original meaning of "sex" prevented it from encompassing “sexual orientation” or “gender identity.” While this understanding was not prevailing during said judgement, it shows that adopting this interpretative fashion could lead to curtailing LGBTQIA+ rights.

Nonetheless, neither textualism nor originalist interpretations seem to be compatible with the LGPD. This paragraph will refute each of these interpretative techniques in turn. In regards to textualism, one must be mindful that when lay concepts are transposed into legal provisions, they may acquire legal definitions that are not coincidental with their literal and ordinary meaning. Quoting George Letsas’ illustrative words, “(l)ay persons may think that an oral agreement to sell real property or a promise to marry someone are contracts. But lawyers know better” (2017, p. 45). To guide the meaning that shall be attributed to legal concepts, articles 4 and 5 of the Introductory Legislation on the Norms of Brazilian Law require legal provisions to be interpreted and applied according to their underlying social purpose, general principles of law, and the requirements of common well-being (BRAZIL, 1942, Arts. 4 and 5). As such, it follows that the interpretation of the term “sex life” needs to pay due regards to, *inter alia*, human dignity, eradication of marginalisation, non-discrimination, the fundamental right to data

protection, and LGPD's *raison d'être* (BRAZIL, 1988, Art. 1 III, 3 III and IV, and 5 *caput* and LXXIX). Doing so appears to exclude literal interpretations that deny the inclusion of "sexual orientation" and "gender identity" under the alias of "sex life." In regards to originalism, one must consider that the primary source of law is the legislation itself, rather than lawmakers' possible original intentions. As such, the former shall not be overturned by the latter. Because of LGPD's article 1 states that its objective is "to protect the fundamental rights of freedom and privacy and the free development of the personality of the natural person" (BRAZIL, 2018, Art. 1), lawmakers' possible intention when adopting the term "sex life" shall only be factored in to the extent that they do not depart from this purpose. In conclusion, only a human rights-based interpretation appears to be compatible with the Brazilian legal system and, therefore, "sex life" must be interpreted as including "sexual orientation" and "gender identity."

4. The Jurisprudence of the Brazilian Supreme Federal cCourt

This section will argue that "sexual orientation" and "gender identity" are sensitive data under the LGPD regardless of the meaning attributed to "sex life." To do so, this section will draw from the Brazilian Supreme Federal Court (from Portuguese, "STF") interpretation of "race" and "racism" in two precedents, namely the case of Siegfried Ellwanger and the case of the criminalization of homophobia and transphobia. The *ratione dicendi* adopted in both cases is based on a social-historic interpretation of the concepts of "race" and "racism." According to the majority of justices, "race" refers to inferiorizing power dynamics among social groups, as opposed to being restricted to biological or phenotypic characteristics. In June of 2019, when deciding on the criminalization of homophobia and transphobia, the STF held that these conducts are criminal offences under the Federal Law nº 7.716/89 (also known as "Anti-Discrimination Law") (BRAZIL, 1989), solidifying the interpretation that "sexual orientation" and "gender identity" are encompassed within the category of "race." This section's argument is not incompatible with the human rights-based interpretation of the term "sex life," nor was it designed to oppose it. Instead, this section intends to demonstrate that regardless of the interpretative technique adopted and regardless of the chosen alias (either "sex life" or

"race"), both "sexual orientation" and "gender identity" are to be recognized as sensitive data.

4.1. The Case of Siegfried Ellwanger

Siegfried Ellwanger was a historical denialist who founded the publisher *Revisão Editora* LTDA. in 1987 (JESUS, 2006, p. 21). Known by the pseudonym S. E. Castan, Siegfried Ellwanger edited, distributed, and commercialized books of his own authorship (e.g., "Jewish or German Holocaust? - Behind the scenes of the lie of the century" [authors' translation] and "The gas is over!... The end of a myth - The Leuchter Report on the alleged gas chambers" [authors' translation]) and books of other national and international writers (e.g., "The Protocols of the Elders of Zion", translated by Gustavo Barros; "The International Jew" by Henry Ford; "Hitler: guilty or innocent?" [authors' translation] by Sérgio Oliveira; and "The Conquerors of the World" by Louis Marschalko) (JESUS, 2006, p. 52-55). As summarised by the historian Carlos Nóbrega de Jesus, most of these books "question events and personalities linked [...] to the Second World War and the Holocaust. [...] Other books are directly and specifically linked to antisemitism" (authors' translation) and/or deny the very existence of the Holocaust (JESUS, 2006, p. 52-55).

In 1991, the Public Prosecutor's Office of the state of Rio Grande do Sul (in Portuguese, MPRS) issued an indictment against Siegfried Ellwanger for disseminating antisemitic content aimed at promoting racial discrimination and hatred against persons of Jewish origin. In the first instance, the MPRS's request was dismissed primarily on the grounds of Siegfried Ellwanger's right to freedom of expression. The MPRS appealed, and the Court of Justice of Rio Grande do Sul convicted Siegfried Ellwanger for the crime of practicing discrimination or prejudice against race. This sentence was based on article 20 of the Anti-Discrimination Law, as amended by the Federal Law nº 8.081/90, which read at the time as follows:

> Art. 20 – To practice, induce or incite, through the means of social communication or publications of any nature, discrimination or prejudice of race, religion, ethnicity or national origin.
> Penalty: imprisonment for two to five years. (authors' translation) (BRAZIL, 1989, Art. 20)

In light of his conviction, Siegfried Ellwanger filed the petition of *Habeas Corpus* n° 15.155/RS (BRAZIL. STJ, 2001) in Brazil's Superior Court of Justice, arguing for the extinction of his punishment on the grounds that the State's punitive claim had reached its statute of limitation. According to Siegfried Ellwanger's defence, the Jewish community could not be considered a "race" for the purposes of article 20 of the Anti-Discrimination Law, which implied that the imprescriptibility clause in article 5 XLII[4] of the Brazilian Federal Constitution could not be applied. Therefore, according to the prescription rules provided for the Brazilian Penal Code (BRAZIL, 1940, Art. 109), his sentence could no longer be enforced. Similar reasoning was replicated by Siegfried Ellwanger's petition of *Habeas Corpus* nº 82.424/RS (BRAZIL. STF, 2003), which was filed in the Brazilian Supreme Federal Court after Brazil's Superior Court of Justice ruled against him in 2001. In his judgement report, the former STF Justice Moreira Alves summarised the controversy in the following words: "[...] the question that arises at this '*habeas corpus*' is to determine the meaning and scope of the expression 'racism' [...]" (authors' translation) (BRAZIL. STF, 2003, p. 8).

In answering the question Justice Moreira Alves posed, the Brazilian Supreme Federal Court held by a majority of eight to three votes that "to write, edit, advertise, and commercialize books 'advocating prejudiced and discriminatory ideas' against the Jewish community (Law 7716/89, article 20, as amended by Law 8081/90) constitute a crime of racism subject to the non-bailable and imprescriptible clauses (CF, Article 5, XLII)" (authors' translation). The *ratione dicendi* adopted by the majority of Justices argued that there is no scientific basis to support the existence of different biological races within the unicity of the human species. Therefore, in the words of Celso Lafer's *amicus curiae* brief in the case of Siegfried Ellwanger, "[...] from a biological perspective, not just Jews, but also black, Indians, gipsies or any other groups, religions or nationalities are not a race [...]" (authors' translation) (LAFER, 2004, p. 42). Since race is not a biological or phenotypical concept, the Brazilian Supreme Federal Court concluded that the legal concept of "racism" intends to criminalize socio-historical discrimination that was conceived to justify inequalities. In the words of Justice Maurício Corrêa:

> [...] racism, far from being based on the simplistic concept of race, actually reflects reprehensible behaviour that stems from the conviction that there is a hierarchy among human groups, sufficient to justify acts of segregation,

[4] Article 5, XLII reads as follows: "Art. 5º [...] XLII - the practice of racism constitutes a non-bailable and imprescriptible crime, subject to reclusion, in accordance with the law."

> inferiorization, and even elimination of persons. (authors' translation) (internal references omitted) (BRAZIL, 2003, p.37)

Applying this understanding to the antisemitic books written and commercialized by Siegfried Ellwanger, the Brazilian Supreme Federal Court held that the content they conveyed and Siegfried Ellwanger's acts amounted to racism. Consequently, the *habeas corpus* petition was rejected.

4.2. The Criminalization of Homophobia and Transphobia

The Brazilian Federal Constitution establishes in article 5 XLI and XLII that "the law will punish any discrimination against fundamental rights and freedoms" (authors' translation) (BRAZIL, 1988, Art. 5 XLI) and "the practice of racism constitutes a non-bailable and imprescriptible crime, subject to the penalty of imprisonment, under the terms of the law" (authors' translation) (BRAZIL, 1988, Art. 5 XLII). Driven by these constitutional norms, the Brazilian National Congress introduced two primary changes in the domestic legal framework since the enactment of the Constitution in 1988. First, it enacted the Anti-Discrimination Law, which "defines the crimes resulting from racial or colour prejudice" (authors' translation) (BRAZIL, 1989) and provided the legal grounds on which Siegfried Ellwanger was convicted. This law was later amended by the Federal Law nº 9.459/97 to also criminalize discrimination and prejudice on the grounds of race, colour, ethnicity, religion, and national origin. Second, it amended article 140 § 3 of the Penal Code in 2003 to criminalise libel and slanders "consistent on the use of elements referring to race, colour, ethnicity, religion, origin, or the condition of elderly or disabled people" (BRAZIL, 1940, Art. 140 § 3). Yet, in spite of these changes, the Brazilian National Congress took no action regarding homophobia and transphobia.

Confronted with this legislative omission, the Socialist People's Party and the Brazilian Gay, Lesbian, and Transgender Association both took legal action. Each entity filed a lawsuit against the Brazilian National Congress, respectively the Direct Action to Declare Unconstitutionality by Omission nº 26 (from Portuguese, ADO 26/DF) (BRAZIL, 2019a) and the Injunction Order nº 4.733 (from Portuguese, MI 4733/DF) (BRAZIL, 2019b). Without disregarding the nuances of each action, their similarities justify a joint analysis for the purpose of this article. The claimants of ADO 26/DF and MI 4733/DF argued that homophobia and transphobia are forms of discrimination that violate fundamental rights

and freedoms and amount to the jurisprudential threshold of racism established in the case of Siegfried Ellwanger. Hence, Brazil's National Congress' failure to criminalise homophobia and transphobia violated article 5 XLII and, alternatively, violated article 5 XLI both of the Brazilian Federal Constitution. Seeking to resolve this unconstitutional omission, the claimants pleaded to the Brazilian Supreme Federal Court to establish a deadline for the Brazilian National Congress to legislate on the matter. In case the Brazilian Supreme Federal Court considered it unnecessary to set a deadline, or the allotted time was exceeded, the claimants required the Supreme Court to recognize the criminalization of discrimination or prejudice due to sexual orientation or gender identity through the provisions of the Anti-Discrimination Law.

In a landmark joint judgement, the majority of Justices reasoned that the LGBTQIA+ population in Brazil remains stigmatised, subjugated, and marginalised, despite the legislative and judicial advancements achieved so far. As such, they are continuously deprived of fundamental rights and freedoms. To shed some light on this reality, Justice Edson Fachin stated in his MI 4733/DF vote that:

> [t]he Inter-American Commission has expressed its concern over public officials in different States of the region promoting harmful stereotypes of, and expressing discriminatory views regarding LGBTI persons. For example, the IACHR received information regarding the use of expressions of stigmatisation and intolerance by the President of the Human Rights Commission of the Chamber of Deputies in Brazil in 2013. According to the information received, he has publicly indicated that LGBT people "want to impose a gay dictatorship in the country, in order to expel God out of Brazil" and that "the putrefaction of gay feelings leads to hate, crime and rejection." (author's translation) (internal references omitted) (BRAZIL, 2019b, p. 7)

In 2018, the Inter-American Commission on Human Rights ("IACHR") published the report "Advances and challenges towards the recognition of the rights of LGBTI persons in the Americas," whose content adds to the picture portrayed by Justice Edson Fachin:

> 176. (...) With respect to the State of Brazil, the IACHR previously noted that, "Brazil far surpasses the number of killings [of LGBTI persons] reported in any other OAS Member State." According to the information received, Brazil has the highest number of transgender and gender-diverse homicides in the world. In addition, the IACHR has been informed that at least 343 LGBTI persons were murdered in Brazil in 2016 and, by 2017, an increase of 30% was reported, reaching 445 murders, which equates to the highest number of violent deaths since civil society began collecting unofficial data on this issue 38 years ago. (internal references omitted) (IACHR, 2018, Para. 176)

These crimes are often committed with daunting cruelty, as the IACHR documented in the 2015 report "Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas":

> 125. The disturbing brutality of the killings reported in Brazil can be grasped through the following examples. In April 2014, a bisexual woman — who had a 6-year-old son and who had left her boyfriend to live with a woman — was viciously stabbed, disembowelled, and her body abandoned near a railroad track. The perpetrator cut out the victim's vulva and inserted it in her mouth before leaving. (...) During 2013, the IACHR was informed of numerous killings of trans women who were sex workers, most of the killings allegedly perpetrated by their clients. These included victims who were — among many other violent acts — smashed in the head with rocks, stoned to death while offering their services, beaten to death with a broken bottle, stabbed while waiting in their regular spots, repeatedly shot when approaching a car, and shot following a disagreement over fees. (internal references omitted) (IACHR, 2018, Para. 125)

Cognizant of this reality, the majority of Justices concluded that the Brazilian National Congress' failure to provide adequate legal protection to the LGBTQIA+ population is an unconstitutional omission. Reiterating the Siegfried Ellwanger precedent, which established that the concept of "race" is informed by socio-historical inferiorizing discrimination as opposed to biological or phenotypical elements, the Brazilian Supreme Federal Court held that discriminations on the grounds of sexual orientation and gender identity amount to racism, because they result from a historic-cultural manifestations of power aimed at socially segregate and inferiorize LGBTQIA+. In his vote in the ADO 26/DF, Justice Celso de Mello insightfully details this argument:

> It has already been seen, from the important precedent set in the plenary judgement of HC 82. 424/RS (the case of Siegfried Ellwanger), that the concept of racism – which involves a clear manifestation of power – allows it to be identified as an instrument of ideological control, of political domination, of social subjugation, and of the denial of the otherness, dignity, and humanity of those who, for not integrating the dominant social group nor belonging to the stratum that holds a position of hegemony in a given social structure are considered "outsiders" and are degraded, for this very reason, to the condition of true outcasts of the legal system, exposed, as a result of hateful and unjust inferiorization, to a perverse and profoundly harmful situation of exclusion from the system of protection of the Law.
>
> Hence, the verification that prejudice and discrimination resulting from aversion to homosexuals and other members of the LGBT group (typical components of a vulnerable group) constitute the very manifestation – cruel, offensive, and intolerant – of racism, for they represent the expression of its other face: social racism. (authors' translation) (internal references omitted) (BRAZIL, 2019a, p. 95)

As such, the Brazilian Supreme Federal Court held that the crimes prescribed by the Anti-Discrimination Law should apply to homophobia and transphobia, regardless of the means for the discrimination, until the Brazilian National Congress legislates on the matter.

4.3 Sexual Orientation and Gender Identity as Sensitive Personal Data Under the Alias of Race

While the above-described jurisprudences are not primarily linked to data protection, meaningful insights unfold from their content for the application of the LGPD. First, because there are no closed circuits within the Brazilian legal framework, domestic legislation should be cohesively and dialogically applied. Doing so prevents fragmentation, reinforces legal certainty and foreseeability, curbs decision-makers' margin of discretion, and promotes isonomy *vis-à-vis* the law. Second, article 102 § 2 of the Brazilian Federal Constitution establishes that Supreme Federal Court final decisions on the merits of direct actions of unconstitutionality and declaratory actions of constitutionality shall produce *binding* and *erga omnes* effects (BRAZIL, 1988, Art. 102 § 2). Therefore, the ruling handed down on the ADO 26/DF binds all the Judiciary and the direct and indirect public administration at the federal, state, and municipal levels. Cognizant of these remarks, although the case of Siegfried Ellwanger, the ADO 26/DF, and the MI 4733/DF were not concerned with data protection, the interpretation of "race" and "racism" laid down on them should guide and be replicated to other domestic legislation.

As provided for LGPD's article 5 II, the following information are sensitive: "**racial** or ethnic origin, religious belief, political opinion, trade union or religious, philosophical or political organization membership, data concerning health or sexual life, genetic or biometric data, when related to a natural person" (emphasis added) (BRAZIL, 2018, Art. 5 II). Because the Brazilian Supreme Federal Court has ruled that homotransphobic practices qualify as a species of the *genus* (social) racism, the LGPD shall logically be read as comprehending under the umbrella of sensitive data those two personal information. Two benefits stem from this approach. First, this interpretation does not require reaching a conclusion over the debate of whether the domestic list of sensitive data is open or closed, because "race" is already explicitly included in LGPD.

Second, this interpretation does not rely on the meaning attributed to "sexual life," because "race" is a self-standing sensitive personal data that has already been interpreted by STF to include "sexual orientation" and "gender identity". In conclusion, regardless of the path chosen, "sexual orientation" and "gender identity" are to be considered sensitive data under Brazilian data protection legislation.

5. Positive Consequences of Recognizing Sexual Orientation and Gender Identity as Sensitive Data

Recognizing "sexual orientation" and "gender identity" as sensitive data has several implications. This section will briefly touch on some of them. First, by being integrated into the sensitive data subcategory, any processing encompassing "sexual orientation" and "gender identity" would have to comply with stricter formal rules. For example, because the legal bases "legitimate interest" (BRAZIL, 2018, Art. 7 IX) and "credit protection" (BRAZIL, 2018, Art. 7 X) can only authorise the processing of non-sensitive personal data, recognizing "sexual orientation" and "gender identity" as sensitive data would set aside these hypotheses for data processing. Second, including "sexual orientation" and "gender identity" under the umbrella of sensitive data would mitigate risks. The application of stricter processing rules tends to materially raise the protection standard, which induces a reduction of the very own use of these data. This is particularly meaningful in the current digital economy, where data leaks appear more and more to be a matter of *when* rather than *whether* they will happen. Third, classifying certain information as sensitive data raises the attention required from processing agents. As such, it contributes to raising social awareness over the discriminatory potential that emerges from the deliberated or inadvertently unlawful uses of these data and over the overall vulnerability of the LGBTQIA+ population in Brazil.

6. Conclusion

The protection of LGBTQIA+ people is multifaceted. While all ends of this issue require due attention, the protection of personal information is paramount in a data-driven

economy. Countries have been enacting laws to regulate the use of personal information since the 1970s,[5] but these legislations have been falling short of paying due regards to LGBTQIA+ data protection concerns. Although listing "sexual orientation" and "gender identity" as "sensitive data" is not a panacea, LGPD's failure to do so deepens the vulnerability to which the LGBTQIA+ people are exposed in Brazil. Exploring the hermeneutical flexibility of LGPD's article 5 II, this article has proposed two cumulative paths to address this legislative omission. The first path is adopting a human rights-based interpretation for the term "sex life," which leads to the conclusion that it includes "sexual orientation" and "gender identity." While not necessarily aligned with LGBTQIA+ most current literature, "sex life" has historically been used in domestic and international legislation, jurisprudence, and other legal instruments to identify LGBTQIA+ people. The second path is reading "sexual orientation" and "gender identity" in the concept of "race," according to the Brazilian Supreme Federal Court interpretation of "racism" in its jurisprudence. While it would be desirable that the Brazilian National Congress had explicitly listed "sexual orientation" and "gender identity" as sensitive data in LGPD's Article 5, II, it is that clear sensitive data protection standards fully apply to the processing of information of the LGBTQIA+ community.

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