The right to privacy in digital era: brief considerations[1]

O Direito à privacidade na era digital: breves considerações

José Alberto Rodríguez Lorenzo González[2]
Filipa Pais d'Aguiar[3]

ABSTRACT
The AI presence in everyday life, in the most diverse ways, both represents a world of endless opportunities than ever before in world history and, simultaneously, countless risks rising from its use. Hence, it urges for a brief pondering on one of the main challenges of digital era, i.e., the right to privacy scope. Therefore, starting from the analysis of the right to privacy in national, European and international levels, this article intends to ponder on the framing of the right to privacy in digital era considering, in this context, the main challenges emerging from AI use, the current legislation and the multidisciplinary approaches contributions. For this research, it was used the deductive and hypothetical-deductive approach methods as well as the historical, comparative and monographic procedure methods (Markoni & Lakatos, 2007).

KEYWORDS:
Fundamental Rights; Privacy; Digital Rights; AI.

RESUMO
A presença da IA na vida cotidiana, das mais diversas formas, representa um mundo de infinitas oportunidades e, simultaneamente, inúmeros riscos decorrentes de seu uso. Por isso, pede uma breve reflexão sobre um dos principais desafios da era digital, ou seja, o direito ao escopo da privacidade. Portanto, partindo da análise do direito à privacidade nos níveis nacional, europeu e internacional, este artigo pretende refletir sobre o enquadramento do direito à privacidade na era digital, considerando, nesse contexto, os principais desafios emergentes do uso da IA, a legislação vigente e as abordagens multidisciplinares. Para esta pesquisa, foram utilizados os métodos de abordagem dedutiva e hipotético-dedutiva, bem como os métodos de procedimentos históricos, comparativos e monográficos (Markoni & Lakatos, 2007).

PALAVRAS-CHAVE:
Direitos Fundamentais; Privacidade; Direito digital.

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[2] Ph.D. Deputy Director of Universidade Lusíada de Lisboa Law School. CEJEA Senior researcher and coordinator of the Private and Labour Law research group. 13000239@edu.ulusiada.pt; http://cejea.ulusiada.pt/en-us/.
[3] Ph.D. Auxiliar Professor of Universidade Lusíada de Lisboa Law School. CEJEA Junior researcher from the Public Law and Political Theory research group. 13001224@lis.ulusiada.pt; http://cejea.ulusiada.pt/en-us/

§ 1. According to the article 26.º par. 1 and 2, *in fine*, of the Constitution of the Portuguese Republic (henceforth CPR), the right to reserve the privacy of private life, i.e. the right to privacy, refers to a double dimension encompassing both the limitation of access and the limitation of sharing information related to private and family life, which is also provided for in article 80.º of the Portuguese Civil Code[4]. Both dimensions are guaranteed within the scope of the CPR itself, in compliance with the principle of proportionality, in the articles 34.º and 35.º as well as in the Portuguese Civil Code (art. 75.º to 78.º); and, concerning article 26.º, par. 2 of the CPR, there is also protection provided by law, particularly, the personal data protection law n.º 58/2019, 8th August, which conveys, into the Portuguese legal system, the Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 th April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation); and, finally, there is also protection of the referred dimensions provided by the articles 7th and 8th of the EU Charter of Fundamental Rights[5]. In spite of not intending, at least for now, to develop a pondering on the right to privacy's normative dimension delimitation, still we cannot fail to mention the relevance of the triptych civilizational reference in its consideration[6], with significative refractions in the context of the right to privacy in the digital age[7]. And hereupon, although the extent of privacy reservation must be determined according to the "condition of each individual", it is not possible to infer from this the justification for any and all intrusions in privacy, especially in the case of so-called notorious people. On the other hand, it can only be guaranteed that there are people whose privacy sphere is larger than others

[4] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*. 4.ª ed. rev. Coimbra: Coimbra editora. P. 467 ss.

[5] *Idem, ibidem.* PORTUGAL. Assembleia da República. LEI n.º 58/2019. D.R I Série. 151 (2019-08-08) 3- 40. [Consult. 15 Jan. 2020]. Available at WWW: . E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: .

[6] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*. 4.ª ed. rev. Coimbra: Coimbra editora. P. 467 ss. Civilizational reference pondering, essentially, "[…] under three aspects: (1) behaviour respect; (2) anonymity respect; (3) relationship life respect.", p. 468, translated by the authors from the original text: "[…] sob três aspectos: (1) o respeito dos comportamentos; (2) o respeito do anonimato; (3) o respeito da vida em relação.", p. 468.

[7] Also, RODRIGUES, Cunha (1996) – Informática e reserva da vida privada. In MONTEIRO, António J.M. – *Comunicação e defesa do consumidor: actas do congresso internacional organizado pelo Instituto Jurídico da Comunicação da Faculdade de Direito da Universidade de Coimbra, de 25 a 27 de Novembro de 1993*. Coimbra: FDUC. P. 287-292. About the right to digital privacy concept vide, v.g., art.º 6.º of the draft law n.º 1217/XII /4th that approves the charter of fundamental rights in the digital age, an initiative which, however, has expired on the 24th October 2019. BUCHHOLTZ, Gabriele (2020) – Artificial Intelligence and Legal Tech: Challenges to the Rule of Law. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – Regulating Artificial Intelligence. Springer: Switzerland. P. 175-198. ISBN 978-3-030-32361-5 (eBook). P. 194-195.

to whom, on the contrary, belongs a thinner privacy reservation scope. The public figure (i.e. VIP), in particular, also keeps a sphere of privacy reservation; what happens is this case is that a public figure's privacy reservation scope is thinner than, by comparison, the intimacy sphere of those who do not hold such status (judgment of the Lisbon Court of Appeal / Tribunal da Relação de Lisboa of 23/09/2004, R. 6700/2004, Col. de Jur., 2004, IV, 96: *"I - The privacy of a public figure is reduced but in no way can it be considered eliminated. II - The privacy of private life will always exist, including the essential manifestations of isolation or anonymity. III - All manifestations that are not necessarily related with the activity by which the person became notorious, they are covered by privacy. IV – Exposure, to the public, in a magazine, of a house that a certain public figure built in a given location constitutes a violation of their right to privacy. V - The illegality of the conduct is in no way excluded by the legitimate exercise of a right, namely the right to inform."*[8]).

In the Northern American doctrine, M. Reid, through the metaphorical construction of a robot police officer (*Joe Roboto*), discusses several controversial issues raised by the activity of this officer, amongst which we highlight the protection of privacy and the challenges raising from the observance of the 4th Amendment[9]. In the author's view, the activity of the officer Joe Roboto, based on AI algorithms, may be engulfed by multiple prejudices, given that "[…] the human beings that created the algorithm embed their own value-based judgments into the black box algorithm itself."[10] , and the information to which it has access will be shared by all police officers[11]. For the author, the activity of officer Joe Roboto must comply with the same standards applicable to human officers and the "Abuse of the Fourth Amendment is triggered

[8] Judgment of the Lisbon Court of Appeal / TRL AC 23/09/2004, R. 6700/2004, Col. de Jur., 2004, IV, 96, translated by the authors from the original text: *"I – A privacidade duma figura pública é mais reduzida mas de forma alguma poderá considerar-se eliminada. II – A intimidade da vida privada existirá sempre, compreendendo as manifestações essenciais de isolamento ou anonimato. III – Todas aquelas manifestações que não têm relação necessária com a actividade por virtude da qual a pessoa se tornou notória, estão abrangidas pela privacidade. IV – A exposição ao público numa revista, duma casa que determinada figura pública construía num dado local constitui uma violação do seu direito à reserva da intimidade da sua vida privada. V – A ilicitude da conduta não está de modo algum excluída pelo exercício legítimo dum direito nomeadamente do direito de informar."*

[9] REID, Melanie (2017) - Rethinking the Fourth Amendment in the Age of Supercomputers, Artificial Intelligence, and Robots. W. Va. L. Rev. [Online]. 119:3 (2017) 863-889. [Consult. 10 Dec. 2019]. Available at WWW: . P. 872-974.

[10] REID, Melanie (2017) - Rethinking the Fourth Amendment in the Age of Supercomputers, Artificial Intelligence, and Robots. W. Va. L. Rev. [Online]. 119:3 (2017) 863-889. [Consult. 10 Dec. 2019]. Available at WWW: . P. 873-874.

[11] REID, Melanie (2017) - Rethinking the Fourth Amendment in the Age of Supercomputers, Artificial Intelligence, and Robots. W. Va. L. Ver…

only if the person whose data was accessed had a reasonable expectation of privacy relating to that data."[12].

On the other hand, in Northern American law, based on the decision of a litigation (*Roe vs. Wade*) - that, from then on, became a landmark case in the United States Supreme Court jurisprudence -, the right to abortion is largely understood, although with differences in its extension, as an emanation of the right to privacy[13]. In the decision dated 01/22/1973, the Court found that despite "*the Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U. S. 250,141 U. S. 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.*"[14]. Accordingly, the *"right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician will necessarily consider in consultation."*[15].

[12] REID, Melanie (2017) - Rethinking the Fourth Amendment in the Age of Supercomputers, Artificial Intelligence, and Robots. *W. Va. L. Rev*…., p. 874 and footnote 53.
[13] "Individualism has left… a very strong mark on the personality rights that are presented. It culminates in Northern American privacy, which translates into the "right to be alone". Understood in this way it is an associative right, which has nothing to do with the development of the human person. Do not disturb...". Translated by the authors from the original text: "O individualismo deixou … uma marca muito forte nos direitos de personalidade que se apresentam. Culmina na *privacy* norte-americana, que se traduz como o «direito de estar só». Entendido nestes termos é um direito associal, que em si nada tem que ver com o desenvolvimento da pessoa humana. *Do not disturb..."* (Oliveira Ascensão, Pessoa, Direitos Fundamentais e Direitos de Personalidade, Revista Mestrado em Direito, Osasco, Ano 6, n.º 1, 2006, pág. 157).
[14] US Supreme Court of Justice (1973) - *Roe v. Wade caselaw* [Online]. US: Supreme Court. [Consult. 17 Jan. 2020]. Available at WWW: .
[15] US Supreme Court of Justice (1973) - *Roe v. Wade caselaw…*

Amongst the Portuguese doctrine, the right to privacy or the right to intimacy of private life (article 80.º, Portuguese Civil Code), despite the breadth encompassing it receives in constitutional ground (v.g. articles 6.º, par. 1, art. 34.º, 35.º of the CPR) in its multiple expressions, however, it never assumed a scope so extensive that it allowed it to become a source (including) of the right to abortion[16]. In fact, the understanding goes exactly in the opposite direction, as it is stated by the judgment of the Portuguese Constitutional Court No. 25/84 (of 03/19/1984, Proc. No. 38/84): *"[...] going back to the positive obligation to protect human life, including intra-uterine life, which for the State stems from the constitutional recognition of the inviolability of this legal value - there will be no difficulty in concluding, limiting ourselves to the aspect that now matters, that this recognition certainly imposes criminalization, in general, of abortion (or pregnancy termination). For what it is about indeed is protecting an essential community value or legal asset - protecting, in this regard, the supreme legal asset, the one which is the «vital basis» of human dignity, the presupposition of all other fundamental rights, and the groundings of the very meaning of a legal community itself; and to protect that legal asset by the only «effective» way, namely, making it clear that its violation constitutes an «unlawful» act, «against the law». And certainly there will also be no doubt in concluding that such an imperative of criminalization even extends to the conduct of pregnant women - since it will not even be admissible (certainly not in our cultural tradition) for her to invoke her "right to privacy", or "disposing of one's own body", nor can pregnancy be seen exclusively from the perspective of a woman's right to full personal fulfilment"*[17].

[16] MEDEIROS, Rui; MIRANDA, Jorge (2005) – *Constituição Portuguesa Anotada, tomo I.* Coimbra: Coimbra editora. Art.º 26.º, note VI: "The right to reserve the intimacy of private and family life is possibly one of the most practical rights. However, the law does not deserve the scope that American jurisprudence has given it, where the right to privacy appears as the expression of all personal rights." Translated by the authors from the original text: "O **direito à reserva da intimidade da vida privada e familiar** é possivelmente um dos que tem maior alcance prático. O direito não merece contudo a abrangência que lhe tem dado a jurisprudência americana, onde o right to privacy surge como a expressão de todos os direitos pessoais.", original text graphical highlights', p. 290.

[17] PORTUGAL. T.C. (2003) – Ac. 25/84 [Online]. Lisboa: T.C. [Consult. 17 Jan. 2020]. Available at WWW: . Portuguese Constitutional Court No. 25/84 (of 03/19/1984, Proc. No. 38/84), translated by the authors from the original text: *"(...) voltando à obrigação positiva de protecção da vida humana, incluindo a vida intra-uterina, que para o Estado decorre do reconhecimento constitucional da inviolabilidade desse valor jurídico – nenhuma dificuldade haverá em concluir, cingindo-nos ao aspecto que agora importa, que esse reconhecimento impõe, decerto, a criminalização, em geral, do aborto (ou da interrupção da gravidez). Pois do que se trata, com efeito, é de proteger um valor ou bem jurídico comunitário essencial – de proteger, bem vistas as coisas, o bem jurídico supremo, aquele que é a «base vital» da dignidade humana, pressuposto de todos os outros direitos fundamentais, e fundamento mesmo do próprio sentido de uma comunidade jurídica; e de proteger esse bem jurídico pelo único modo «eficaz», nomeadamente em termos de ficar claro que a violação dele constitui um «ilícito», um acto «contrário ao direito». E decerto também não haverá dúvida*em concluir que um tal imperativo de criminalização se estende mesmo à conduta da mulher grávida — já que nem será admissível (seguramente não o é na nossa *tradição cultural) invocar ela em contrário o seu «direito à privacidade», ou a «dispor do próprio corpo», nem a*

There is, therefore, no other solution that does not include the ascription of an autonomous subjective right nature to the power attributed to pregnant women to demand abortion in the cases typified in article 142.º of the Portuguese Penal Code. Even if they only maintain this nature for the purpose sought by the precept: justification of illegality concerning criminal liability.

§ 2. In Common Law rights, the *ownership* over body parts that have been detached from it can be granted to a third person - that is, a person other than the one to whom they were previously linked - based on the so-called *skill exception*[18]. "There is an exception to the traditional common law rule that «there is no property in a corpse», namely, that once a human body or body part has undergone a process of skill by a person authorised to perform it, with the object of preserving for the purpose of medical or scientific examination or for the benefit of medical science, it becomes something quite different from an interred corpse. It thereby acquires a usefulness or value. It is capable of becoming property in the usual way, and can be stolen" [Court of Appeal, *R v Kelly, R v Lindsay* (1999) QB 621 (CA)[19]]. The Court, therefore, accepted the idea that the referred body parts had acquired new attributes or different properties because of the work incorporated in them. For this reason, they would be things that could constitute an object of *private property* to be recognized in favour of *specificatio* authors.

gravidez pode exclusivamente ser encarada na perspectiva de um direito da mulher à sua plena realização pessoal".

[18] In its early days, one of the most historically prominent decisions that was used was in *Doodeward vs Spence* [(1908) 6 CLR 406]: The body of a stillborn baby with two heads was preserved in alcohol by the doctor who had given it childbirth assistance. After the clinician's death, it was sold. Then it passed to the possession of another. This (*plaintiff*), looking forward to obtaining profits, publicly displayed it as a rare curiosity. A policeman, however, seized him for the purpose of giving him proper burial. Based on *detinue*, the *plaintiff* took action to recover it. The Court (High Court of Australia) upheld its claim on the ground that "when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it".

[19] 7 "The facts were these. Between 1992 and 1994, the appellant, Kelly, who is an artist, had privileged access to the premises of the Royal College of Surgeons in order to draw anatomical specimens held on display and used for training surgeons. The appellant, Lindsay, was employed by the college during that period as a junior technician. Between 1993 and 1994, Kelly, who was then in his late thirties, asked Lindsay, who was under 21, to remove a number of human body parts from the college. Some 35 to 40 such parts, including three human heads, part of a brain, six arms or parts of an arm, ten legs or feet, and part of three human torsos were removed and taken to Kelly's home. He made casts of the parts, some of which were exhibited in an art gallery. Neither appellant intended to return the body parts, many of which Kelly buried in a field in the grounds of his family home. Part of a leg was kept in the attic of his home. The remaining parts were recovered from the basement of a flat occupied by one of Kelly's friends". In England and Wales Court of Appeal (1999) - R v Kelly, R v Lindsay (1999) QB 621 (CA). [Online]. London: Court of Appeal. Available at WWW:.

However, it had already stood out in Yearworth vs North Bristol NHS Trust [(2009) EWCA Civ 37, (2010) QB 1, (2009) 3 WLR 118, (2009) 2 All ER 986 CA], *"a distinction between the capacity to own body parts or products which have, and which have not, been subject to the exercise of work or skill is not entirely logical. Why, for example, should the surgeon presented with a part of the body, for example, a finger which has been amputated in a factory accident, with a view to re-attaching it to the injured hand, but who carelessly damages it before starting the necessary medical procedures, be able to escape liability on the footing that the body part had not been subject to the exercise of work or skill which had changed its attributes?"*[20]. This observation, however, only acquires its exact meaning, that from the transcribed passage the Court draws from it, when it is assumed that «there is no property in a corpse». If, instead, it is understood that the body has an owner, the *skill exception* is not used to justify the original acquisition of the property over parts of it, but rather to justify its *transfer* (from the ownership of the person to whom the body belongs to that of the person who, as a result of its *expertise*, has modified or metamorphosed it).

In the UK law, the *skill exception* ended up receiving legislative recognition. Regarding the "prohibition of commercial dealings in human material for transplantation", and in accordance with section 32/9/c) of the *Human Tissue* Act of 2004, there is an exception for "the following kinds of material - material which is the subject of property because of an application of human skill".

The *skill exception* suggests, to legitimize its usage, the use of the *specificatio* institute (art. 1336.º to 1338.º, Portuguese Civil Code).

The use of *specificatio* as a way of justifying the skill exception supposes, in any case, that by the work of a person, something that belongs to someone else is metamorphosed. What it certainly does not allow is the framing of the operation that led to the so-called mapping and sequencing of the human genome. This is not a thing; it is an idea or a concept. That, being found, was not transformed, but discovered. Therefore, there can certainly be an issue over industrial property and patentability but not over acquisition of the related private property. Although each person is endowed with its own genetic characteristics, the human genome - as

[20] England and Wales Court of Appeal (2010) - *Yearworth vs North Bristol NHS Trust [(2009) EWCA Civ 37, (2010) QB 1, (2009) 3 WLR 118, (2009) 2 All ER 986 CA*. [Online]. London: Court of Appeal. Available at WWW: .

a sequence of the twenty-three pairs of chromosomes that are found within the nucleus of each diploid cell -, it is obviously a common heritage of humanity (Universal Declaration on the Human Genome and Human Rights, article 1.º). Each individual, in turn, has a right to his genetic material. But, to the extent that it cannot be understood as a thing, the right that applies to it cannot be one of sovereignty. On the contrary, it will be a right to reservation since it contains private information. Before others, *privacy* and the right to intimacy of private life (Article 80.º, Portuguese Civil Code) is, therefore, at stake. In this sense, also article 35.º, par. 3 *in fine* of the CPR, concerning the limitation of collecting certain categories of personal data, allows exceptions, namely, in the case of processing non-individually identifiable statistical data, that is to say, data that, not being individualizable, loses the essence of personal data[21].

§ 3. In the Labour scope, there is also a special protection of privacy ascribed by the requirements of a fair procedure as well as the application of the principle of proportionality, in all its extension[22], conveyed, particularly, by the access, collection and processing of information related to workers as long as it is verified the need, proportionality and suitability of that information for the performance of their working assignments[23]. In similar terms, par. 2, article 16.º of the Portuguese Labour Code contains perhaps the most complete definition of the content and extension of privacy related to other people's lives: "the right to privacy encompasses both the access and the disclosure of aspects related to the intimate and personal spheres of the parties, namely the ones related to family, affective and sexual life, health *status* and political and religious convictions". Some guidance was sought, above all, in the provisions of par. 3 of art. 35.º of the CPR. And, from the adopted formulation, it can be safely concluded that it was adopted a privacy understanding defined in *absolute* terms, i.e., in ways that allow the identification of an intangible *nucleus* of data or personal information that under no

[21] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada*, vol. I. 4.ª ed. rev. Coimbra: Coimbra editora. P. 556.
[22] CANOTILHO, J.J. Gomes (2002) – *Direito constitucional e teoria da constituição*. 6.º ed. Coimbra: Almedina. P. 269-273.
[23] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada*, vol. I…, p. 467 ss. Também, Ac. TC 306/03, In PORTUGAL. T.C. (2003) – Ac. 306/03 [Online]. Lisboa: T.C. [Consult. 17 Jan. 2020]. Available at WWW: . Particularly about the evolution of Labour Law in digital era, vide HERRERO, Laurentino Javier Dueñas (2019) - The necessary recovery of social dialogue to address the regulation of the impact of new technologies on workers' rights. *e-Revista Internacional de la Protección Social* [Online]. IV:2 (2019) 111-123. [Consult. 18 Jan. 2020]. Available at WWW: .

circumstances may be subject to unauthorised intrusion. In this regard, the "condition of each individual" or the "nature of the case" do not interfere.

It is clear, however, that the transcribed legal provision does not constitute more than a guideline (judgment of the Portuguese Supreme Court of Justice of 04/09/2003, R. 3513/2002, Col. de Jur., 2003, II, 159: "*II - The right to privacy includes the reservation of family, sexual life and also health, being able to include other types of personal intimacy*"[24]; or, more generally, the judgment of the same Court of 17/12/2009, Proc. N.º 159/07.6TVPRT-D.P1.S1: *"V - The right to privacy protects the scope of intimate or secret life, comprising all those aspects that are part of the most private and intimate domain that one wants to keep away from all other people's knowledge, excluding the normal relationship life, i.e., the facts that the interested person, despite intending to subtract them from the public eye, i.e., from publicity, does not protect from knowledge and access by others"[25]*). Thus, for example, the right to inviolability of correspondence or, more generally, to inviolability of communications is certainly another aspect of private intimacy that is also protected [judgment of the Lisbon Court of Appeal / Tribunal da Relação de Lisboa of 06/29/1994, R. 33.028, Col. de Jur., 1994, 3, 161: *"II - The right to inviolability of correspondence works as a guarantor of the right to privacy of private and family life. III - The right to inviolability of correspondence is imposed both in Stateindividual relations and in private legal relations (horizontal relations), having constitutional protection (articles 34.º, par. 1, 26.º, par. 1, and 18.º, par. 1 of the Constitution of the Portuguese Republic)"[26]]*.

[24] Translated by the authors from the original text: *"II – O direito à intimidade da vida privada inclui a reserva da vida familiar, sexual e também da saúde, podendo compreender outros tipos de intimidade pessoal"*, In judgment of the Portuguese Supreme Court of Justice / STJ AC 04/09/2003, R. 3513/2002, Col. de Jur., 2003, II, 159.

[25] PORTUGAL. S.T.J. (2009) – Acórdão de 17/12/2009, Proc. N.º 159/07.6TVPRT-D.P1.S1. Lisboa: S.T.J. [Consult. 17 Jan. 2020]. Available at: WWW:. Translated by the authors from the original text: *"V - O direito à reserva sobre a intimidade da vida privada tutela a esfera da vida íntima ou de segredo, compreendendo todos aqueles aspectos que fazem parte do domínio mais particular e íntimo que se quer manter afastado de todo o conhecimento alheio, com exclusão da vida normal de relação, ou seja, dos factos que o próprio interessado, apesar de pretender subtraí-los ao domínio do olhar público, isto é, da publicidade, não resguarda do conhecimento e do acesso dos outros"*, In judgment of the Portuguese Supreme Court of Justice of 17/12/2009, Proc. N.º 159/07.6TVPRT-D.P1.S1.

[26] Translated by the authors from the original text: *"II – O direito à inviolabilidade de correspondência funciona como garante do direito à reserva da intimidade da vida privada e familiar. III – O direito à inviolabilidade de correspondência impõe-se quer nas relações Estado-indivíduo quer nas relações jurídicas privadas (relações horizontais), gozando de protecção constitucional (artigos 34º, n.º 1, 26º, n.º 1, e 18º, n.º 1, da Constituição da República Portuguesa)", In* judgment of the Lisbon Court of Appeal / TRL AC 06/29/1994, R. 33.028, Col. de Jur., 1994, 3, 161.

What essentially must be underline is that, besides the aforementioned untouchable essence, the perimeter of the reservation is defined in terms of the "nature of the case" and the "condition of each individual". This means, in other words, that only before a certain (concrete) case can one ascertain what is and what is not included in the scope of the reservation. Thus, for example, *"it is framed in the crime of offense of private life, of article 179.º, par. 1, of the Portuguese Penal Code, the act of (against the targeted individual consent and without any cause that can or should be considered fair) photographing someone at their workplace, with no inclusion of any public framework or landscape, isolated from other people"*[27] (judgment of the Lisbon Court of Appeal / Tribunal da Relação de Lisboa of 02/15/1989, R. 24.114, Col. de Jur., 1989, 1, 154).

The art. 20.º, par. 1 of the Portuguese Labour Code, that addresses the employment contract provisions, is actually an application of the rule contained in that precept: "the employer cannot use means of remote surveillance in the workplace, through the usage of technological equipment, with the purpose of controlling the worker's professional performance". In these terms, *"I. The installation of video surveillance systems in the workplace involves the restriction of the right to privacy and can only prove to be justified when it is necessary to pursue legitimate interests and within the limits defined by the principle of proportionality. II. The employer can use means of remote surveillance whenever it has the purpose of protecting and securing people and property, but it must be understood that this possibility is limited to places open to the public or spaces of access to people outside the company, where there is a reasonable risk of crimes against persons or property. III. On the other hand, such use should translate into a form of generic surveillance, aimed at detecting incidental facts, situations or events, and not in* a *surveillance specifically directed at the jobs or the field of action of the workers. IV. The same principles apply even if the basis for authorising the collection of recorded images lays on a potential risk to public health, which may arise from the deviation of medicines from inside the premises of an entity engaged in pharmaceutical activity. V. Under the terms of the preceding proposals, it is illegal, due to violation of the right of privacy, to capture images through video cameras installed in the*

[27] Translated by the authors from the original text: *"[...] é enquadrável no crime de ofensa da vida privada, do artigo 179º, n.º 1, do Código Penal, o acto de, contra o consentimento do visado, e sem qualquer causa que possa ou deva ser considerada justa, fotografar alguém no seu local de trabalho, com desinserção de qualquer enquadramento ou paisagem públicas, isolado de outras pessoas", In* judgment of the Lisbon Court of Appeal / TRL AC 02/15/1989, R. 24.114, Col. de Jur., 1989, 1, 154.

workplace and aimed at workers, in such a way that the work activity is found subject to continuous and permanent observation"[28] (judgment of the Portuguese Supreme Court of Justice of 2/8/2006, R. 3139/2005, Acs. Doc. do STA, 535, 1256).

Instead, *"I. Although the literal wording of par. 1 of article 20.º of the Portuguese Labour Code does not allow restricting the scope of this rule's provision to video surveillance, the fact is that the expression adopted by the law - «means of remote surveillance in the workplace, by the usage of technological equipment, with the purpose of controlling the working performance of the worker» -, for systematic and teleological considerations, refers to means of capturing remote image, sound or image and sound that allow to identify people and detect what they do, when and for how long, in a tendentially uninterrupted way, which can affect fundamental personal rights, such as the right to privacy and the right to image. II. The GPS device installed in the vehicle assigned to a sales technician cannot be qualified as a means of remote surveillance at the workplace, as this system does not allow the capture of the circumstances, the time length and the results of the meetings with customers nor to identify the respective participants."*[29] (judgment of the Portuguese Supreme Court of Justice of 05/22/2007, R. 54/2007, Acs. STA Doc., 553, 207).

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[28] Translated by the authors from the original text: *"I. A instalação de sistemas de videovigilância nos locais de trabalho envolve a restrição do direito de reserva da vida privada e apenas poderá mostrar-se justificada quando for necessária à prossecução de interesses legítimos e dentro dos limites definidos pelo princípio da proporcionalidade. II. O empregador pode utilizar meios de vigilância à distância sempre que tenha por finalidade a protecção e segurança de pessoas e bens, devendo entender-se, contudo, que essa possibilidade se circunscreve a locais abertos ao público ou a espaços de acesso a pessoas estranhas à empresa, em que exista um razoável risco de ocorrência de delitos contra as pessoas ou contra o património. III. Por outro lado, essa utilização deverá traduzir-se numa forma de vigilância genérica, destinada a detectar factos, situações ou acontecimentos incidentais, e não numa vigilância directamente dirigida aos postos de trabalho ou ao campo de acção dos trabalhadores. IV. Os mesmos princípios têm aplicação mesmo que o fundamento da autorização para a recolha de gravação de imagens seja constituído por um potencial risco para a saúde pública, que possa advir do desvio de medicamentos do interior de instalações de entidade que se dedica à actividade farmacêutica. V. Nos termos das precedentes proposições, é ilícita, por violação do direito de reserva da vida privada, a captação de imagem através de câmaras de vídeo instaladas no local de trabalho e direccionadas para os trabalhadores, de tal modo que a actividade laboral se encontre sujeita a uma contínua e permanente observação"*, In judgment of the Portuguese Supreme Court of Justice / STJ AC 2/8/2006, R. 3139/2005, Acs. Doc. do STA, 535, 1256

[29] Translated by the authors from the original text: *"I. Embora a formulação literal do n.º 1 do artigo 20º do Código do Trabalho não permita restringir o âmbito da previsão daquela norma à videovigilância, a verdade é que a expressão adoptada pela lei, «meios de vigilância a distância no local de trabalho, mediante o emprego de equipamento tecnológico, com a finalidade de controlar o desempenho profissional do trabalhador», por considerações sistemáticas e teleológicas, remete para formas de captação à distância de imagem, som ou imagem e som que permitam identificar pessoas e detectar o que fazem, quando e durante quanto tempo, de forma tendencialmente ininterrupta, que podem afectar direitos fundamentais pessoais, tais como o direito à reserva da vida privada e o direito à imagem. II. Não se pode qualificar o dispositivo de GPS instalado no veículo automóvel atribuído a um técnico de vendas como meio de vigilância a distância no local de trabalho, já que esse sistema não permite captar as circunstâncias, a duração e os resultados das visitas efectuadas aos seus clientes, nem*

§ 4. Therefore, the right to privacy and the protection of personal data encompasses any type of data, analogical and digital, with *jusconstitutional* reception, in art. 26.º par. 1 and par. 2 and art. 35.º, both CPR[30]. Thus, under the article 35.º of the CPR, the protection of data processing refers to all data collection, archiving and individualization operations[31], including its automation, connection, transmission and usage[32]. The person's right to the access, knowledge, update and rectification of all personal data related to her/him, the right to know the purpose for which they are intended (art. 35.º, par. 1, CPR), the right to secrecy and the right to non-interconnection of computerised personal data (art. 35.º, par. 4, CPR), the right to non-computer processing of certain personal data and the right to its deletion (other than the exceptions provided for in art. 35.º, par. 3, CPR) and the prohibition on the allocation of a single national number to each person (article 35.º, par. 5, CPR) reveals the existence of a *jusconstitutional* dimension of defence related to the computerised processing of personal data[33]. For the authors Gomes Canotilho and Vital Moreira, the right to know personal data contained in computer records also includes the "[…] *(a) right of access […]; (b) the right to know the identity of those responsible, as well as the right to clarify the purpose of the data; (c) the right to rebut […];* (d) the right to update [...]; *(e) […] the right to delete* data whose registration is prohibited […]."[34]. On the other hand, the authors point out that the operability of this cast of rights will depend on the observance of certain principles by the computerised processing of personal data such as *"[…] (a) publicity […]; (b) social justification […]; (c) transparency [...]; (d) the specification of purposes [...]; (e) the limitation of collection [...] (principles of necessity, adequacy and proportionality); (f) principle of fidelity [...]; (g) the*

identificar os respectivos intervenientes", In judgment of the Portuguese Supreme Court of Justice STJ AC 05/22/2007, R. 54/2007, Acs. STA Doc., 553, 207.

[30] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*. 4.ª ed. rev. Coimbra: Coimbra editora. P. 556-557. Vide par. 7, art. 35.º CPR and par. 2, art. 6.º from the draft law n.º 1217/XII /4th .

[31] The expression 'data' is understood in the *jusconstitutional* scope as a "[…] conventional representation of information, in analogical or digital form, enabling its automatic processing […].", translated by the authors from the original text: " […] representação convencional de informação, sob a forma analógica ou digital, possibilitadora do seu tratamento automático […]." In CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I.* 4.ª ed. rev. Coimbra: Coimbra editora. P. 550.

[32] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*…., p. 550 ss.

[33] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*…, p. 550 ss.

[34] CANOTILHO, J.J. Gomes ; MOREIRA, Vital (2014) - Constituição da República Portuguesa anotada, vol. I…, original text graphical highlights, translated by the authors from the original text: *"[…] (a) direito de acesso […]; (b) direito ao conhecimento da identidade dos responsáveis bem como o direito ao esclarecimento sobre a finalidade dos dados; (c) direito de contestação […];* (d) direito de actualização […]; *(e) […] direito à eliminação dos dados cujo registo é interdito […]."*, p. 551-552.

limitation of usage […]; (h) security guarantees […]; (i) responsibility [...]; (j) principle of openness policy [...]; (l) principle of time limitation […].”[35], highlighting, in particular, the principle of proportionality that limits the collection of data to what is strictly necessary, appropriate and proportional to its purposes[36]. Thus, the right to know the purpose of the data subject to computerised processing, provided for in article 35.º par. 1 of the CPR, constitutes itself as the "[…] *right to informative self-determination* […]"[37] that justifies the "[…] Legal-constitutional requirements regarding the purposes of the information: *(1) legitimacy; (2) determinability; (3) explanation; (4) adequacy and proportionality; (5) accuracy and timeliness; (6) time limitation.”*[38]. Despite the imminently personal nature, the right provided for in par. 1, article 35.º of the CPR also allows the extension of the processing data protection scope to legal persons, *mutatis mutandis*[39]. Pursuant to article 35.º, par. 2 in fine of the CPR and article 3.º of the Law n.º 58/2019, of 8 th August, the National Data Protection Commission will be responsible for the protection of personal data and the right to privacy, invocable before public and private entities (art. 18.º, par. 1 of the CPR) and the State has the duty to protect the "[…] *right to informative self-determination* […]"[40] of people, in particular, before multimedia companies with global action[41]. Within this scope lays the framing of the right to online privacy (e.g. the use of cryptography and anonymity, in observance of the law), the guarantee of security and confidentiality of internet users in their online communications (except for the cases provided for in the criminal procedural scope and with the authorisation of a judge) as well as

[35] CANOTILHO, J.J. Gomes ; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*…, original text graphical highlights, translated by the authors from the original text: " *"[…] (a) a publicidade […]; (b) justificação social […]; (c) a transparência […]; (d) a especificação de finalidades […]; (e) a limitação da recolha […] (princípios da necessidade, da adequação e da proporcionalidade); (f) princípio da fidelidade […]; (g) a limitação da utilização […]; (h) as garantias de segurança […]; (i) a responsabilidade […]; (j) princípio da política de abertura […]; (l) princípio de limitação no tempo […].”*, p. 552-553.

[36] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*…, p. 552 ss. P. 552-553.

[37] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*…, original text graphical highlights, translated by the authors from the original text: *"[…] direito à autodeterminação informativa […]"*, p. 554.

[38] CANOTILHO, J.J. Gomes ; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*…, original text graphical highlights, translated by the authors from the original text: "[…] exigências jurídico-constitucionais relativas às finalidades das informações: *(1) legitimidade; (2) determinabilidade; (3) explicitação; (4) adequação e proporcionalidade; (5) exactidão e actualidade; (6) limitação temporal.”*, p. 553.

[39] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*…, p. 558.

[40] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*…, original text graphical highlights, translated by the authors from the original text: "[…] direito à autodeterminação informativa […]", p. 554.

[41] PORTUGAL. Assembleia da República. LEI n.º 58/2019. D.R I Série. 151 (2019-08-08) 3-40 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: . CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*…, p. 553 ss.

the prohibition and legal punishment of manipulation, in any way, of software, computer, network or website[42]. In fact, in view of the countless possibilities for the processing of personal data, by public and private entities, in terms of access, collection, storage and information traffic, it is urgent to protect this data by removing illegitimate intrusions in the sphere of individuals' private lives[43]. In this sense, the extravagant hypothesis that, for example, a machine with deep learning could autonomously decide on the creation of a single national number for each person, would simply not be acceptable. In fact, the use of artificial intelligence (AI)[44] cannot escape the observance of the scope of protection of the right to privacy and the right to personal data computer processing, provided[45], v.g., *at national level*, in article 26.º, article 35.º and article 18.º of the CPR[46] and in Law n.º 58/2019, of 8th August[47], nor can it fail to observe the list of principles that result from them[48]; *at EU law level*[49], e.g., in Articles 7.º, 8.º, 11.º and 52.º par. 1 of the European Union Charter of Fundamental Rights (henceforth EUCFD), and in Regulation (EU) 2016/679, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data[50], in Directive 2002/58/EC, of 12 June 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic

[42] Accordingly, vide, v.g., n.º 1 e 3, art. 6.º of the former draft law n.º 1217/XII /4th.
[43] MEDEIROS, Rui; MIRANDA, Jorge (2005) – *Constituição Portuguesa Anotada, tomo I*. Coimbra: Coimbra editora. Art.º 35.º, note III, p. 379-380.
[44] GONZÁLEZ, José A.R.L. (2020) – Responsabilidade por danos e Inteligência Artificial (IA). *Revista de Direito Comercial* [Online]. 4 (2020) 29-30. [Consult. 5 Feb. 2020]. Available at WWW:< https://www.revistadedireitocomercial.com/responsabilidade-por-danos-e-inteligncia-artificial-ia>. ISSN 2183-9824. "AI is closer to human intelligence than that of which animals are endowed.", translated by the authors from the original text: "A IA encontra-se mais próxima da inteligência humana do que daquela de que os animais são dotados.", p. 29-30
[45] And just highlighting, in this context, some of the main legal instruments. *Vide*, in this regard, E.C.H.R. HUDOC (2018) – E.C.H.R. *judgment case Big Brother Watch and Others v. the United Kingdom, Applications n.º 58170/13, 62322/14 and 24960/15, 13th September 2018, President Linos-Alexandre Sicilianos* [Online]. Strasbourg: E.C.H.R. .[Consult. 17 Jan. 2020]. Available at WWW: . §§ 202-223.
[46] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*…, notes to art.º 18.º, 26.º e 35.º.
[47] PORTUGAL. Assembleia da República. LEI n.º 58/2019. D.R I Série. 151 (2019-08-08) 3-40 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: .
[48] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I*…, p. 552-553. CASTRO, Catarina Sarmento e (2006) – Protecção de dados pessoais na internet. *Sub judice / ideias*. Coimbra. ISSN 0872-2137. 35 (2006) 11-29. The author stresses the principles of purpose, transparency, data quality, lawful and fair processing of data, data accuracy and updating and confidentiality, p. 18-20
[49] For a historical-legal framework, we also refer to Directive 95/46/EC and Directive 2006/24/EC, of 15 March 2006, despite not being in force. E.U. European Parliament and Council. Directive 95/46/CE. OJ L. 281 (1995-11-23) 31-50 [Online]. [Consult. 19 Jan. 2020]. Available at WWW: . E.U. European Parliament and Council. Directive 2006/24/CE. OJ L. 105 (13-4-2006) 54-63 [Online]. [Consult. 18 Jan. 2020]. Available at WWW: .
[50] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: .

communications)[51] and Directive 2000/31/EC, of 8 June 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce")[52]. Also at international law level, within the scope of the Council of Europe, e.g., in Article 8.º of the European Convention on Human Rights (henceforth ECHR), in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (N.º 108, 1981)[53], in the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows[54], in the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data[55] and in the Recommendation N.º R (99) 5 of the Committee of Ministers of the Council of Europe on the protection of privacy on the internet[56]. And finally, within the U.N. *scope, e.g.*, in article 12.º of the Universal Declaration of Human Rights and in article 17.º of the International Covenant on Civil and Political Rights[57], in the General Assembly Resolution from the UN 68/167 on the Right to Privacy in the Digital Age, of 18 December 2013[58] and in Resolution 28/16 of the Human Rights Council[59]. However, and taking up our extravagant hypothesis, Article 22 (1) of Regulation (EU) 2016/679 establishes the right of the data subject "[…] not to

[51] E.U. European Parliament and Council. Directive 2002/58/CE. OJ L. 201 (2002-07-31) 37-47 [Online]. [Consult. 19 Jan. 2020]. Available at WWW: .
[52] E.U. European Parliament and Council. Directive 2000/31/CE. OJ L. 178 (2000-07-17) 1-16 [Online]. [Consult. 19 Jan. 2020]. Available at WWW: .
[53] C.O.E. (1981) - Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS n.º 108, 28/01/1981 [Online]. [Consult. 18 Jan. 2020]. Available at WWW: . Vide preâmbulo, art.º 1.º, 2.º, 8.º, 9.º e 10.º.
[54] C.O.E. (2001) - Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, ETS n.º 181, 08/1/2001 [Online]. [Consult. 18 Jan. 2020]. Available at WWW: . Vide art.º 1.º, 2.º.
[55] C.O.E. (2018) - Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS n.º 223, 10/10/2018 [Online]. [Consult. 18 Jan. 2020]. Available at WWW: . Signed but not ratified by the Portuguese Republic.
[56] C.O.E. (1999) – *Recommendation N.º R (99) 5 of the Committee of Ministers to member states for the protection of privacy on the internet* [Online]. [Consult. 18 Jan. 2020]. Available at WWW: .
[57] MARTINS, Ana Guerra (2018) – *Direito internacional dos direitos humanos.* Coimbra : Almedina. For the author and considering communication N.º 453/1991 of the Human Rights Committee, "[…] the right to privacy covers: - the right to personal private life; - the right to social private life.", translated by the authors from the original text: "[…] o direito ao respeito da vida privada abrange: - o direito à vida privada pessoal; - o direito à vida privada social.", p. 165, footnote 284. In this sense, see also U.N. Office of the U.N. High Commissioner for human rights (2005) – *International Covenant on Civil and Political Rights: selected decisions of the Human Rights Committee under the Optional Protocol, volume 5 (Forty-seventh to fifty-fifth sessions)* [Online]. [Consult. 19 Jan. 2020]. Available at WWW: . P. 72-78.
[58] U.N. General Assembly (2013) – *Resolution A/RES/68/167, 18 December* 2013 [Online]. [Consult. 18 Jan. 2020]. Available at WWW: .
[59] U.N. General Assembly (2015) - *Human Rights Council Resolution 28/16, A/HRC/28/L.27, 24 March 2015* [Online. [Consult. 18 Jan. 2020]. Available at WWW: , which decided to appoint a special rapporteur on the right to privacy, for a period of three years.

be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her."[60]. In fact, the choice of the expression "solely" paves the way for decision-making based on automated processing, including the definition of profiles, as long as the decision-making is not solely automated and admits a human component that allows an effective safeguarding of rights, freedoms and legitimate interests of the data subject[61]. However, if the solely automated processing does not mean an individualization of data such as, v.g., for processing statistical data, then, in this case, it seems that nonindividualizable data loses the essence of personal data, similarly to the provisions of art. 35.º, par. 3 in fine of the CPR[62]. However, the construction of "[…] a system of lip reading applied to people in crowds or in public spaces"[63], is completely ruled out, or even other extravagant situations, such as those portrayed in the film Anon, for constituting a severe violation of the right to privacy[64].

Nevertheless, how to articulate the protection provided by current legislation and the use of AI?[65] This question takes on the complexity of those issues that require multidisciplinary contributions[66]. Thus, this study is not a search for the panacea for the innumerable challenges that emerge from the use of AI in the context of protecting the right to privacy. Hence, this

[60] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: . Article (71) from Preamble, art.º 22.º, n.º 1.
[61] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88…, art.º 22.º. Also, SANTOS, Lourenço Noronha (2020) - §12. Inteligência artificial e privacidade. In PEREIRA, Rui Soares; ROCHA, Manuel Lopes, coord. e TRIGO, Ana Coimbra, colab. - Inteligência artificial & Direito. Coimbra: Almedina. P. 147-159. Em, p. 154-157.
[62] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I.* 4.ª ed. rev. Coimbra: Coimbra Editora. P. 556. SANTOS, Lourenço Noronha (2020) - §12. Inteligência artificial e privacidade. In PEREIRA, Rui Soares; ROCHA, Manuel Lopes, coord. e TRIGO, Ana Coimbra, colab. - *Inteligência artificial & Direito*…, p. 154-155.
[63] SANTOS, Lourenço Noronha (2020) - §12. Inteligência artificial e privacidade. In PEREIRA, Rui Soares; ROCHA, Manuel Lopes, coord. e TRIGO, Ana Coimbra, colab. - *Inteligência artificial & Direito*…, translated by the authors from the original text: "[…] um sistema de leitura de lábios aplicado a pessoas em multidões ou em espaços públicos." p. 157.
[64] Anon [filme]. Realização de Andrew Niccol. Germany, USA, Canada: K5 Film, K5 International, K5 Media Group, 2018. 1 filme em DVD : color., son. The plot of the film takes place in the near future where privacy and anonymity are seen as true threats to collective security and, thus, the absence of privacy is mandatory and total, allowing immediate access to all personal information through scanning and downloading memories into a system called "*The Ether*".
[65] Similarly, BUCHHOLTZ, Gabriele (2020) – Artificial Intelligence and Legal Tech: Challenges to the Rule of Law. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*. Springer: Switzerland. P. 175-198. ISBN 978-3-030-32361-5 (eBook), for whom: "The question is not whether the legal tech should be regulated, but whether the existing legal framework needs to be adjusted or refined. Lawmakers today bear an enormous responsibility; they shape the initial regulatory conditions.", p. 176.
[66] VILLARONGA, Eduard Fosch ; KIESEBERG, Peter ; LI, Tiffany (2018) – Humans forget, machines remember: Artificial intelligence and the Right to Be Forgotten. *Computer Law & Security Review* [Online]. 34:2 (2018) 304-313. [Consult. 10 Dec. 2019]. Available at WWW: . ISSN 0267-3649

study aims the development of a pondering over the main challenges that, in this scope, arise from the use of AI, and to contribute to a necessary and urgent scientific debate. In fact, machine learning essentially translates into the possibility of predicting and anticipating events[67], which is why P. Domingos warns that "When a new technology is so comprehensive and has an intervention capacity as large as machine learning, it is not wise to let it remain a black box. Opacity opens the door to error and misuse."[68]. Thus, one of the challenges to the right to privacy arises, right away, from the real possibility of forgetting by AI, due to the conceptual difference between the notions of memory and forgetting, between humans and AI[69]. In this sense, Article 17.º of Regulation (EU) 2016/679, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data[70], clarifies that the right to erase data or the right to be forgotten is within the protection scope of the right to privacy and not "[…] eliminating past circumstances or limiting press freedom."[71]. Nevertheless, some of the doctrine considers that Regulation (EU) 2016/679 should have considered the technical aspects inherent to the functioning of AI, promoting the articulation with the legislation in force[72].

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[67] BUCHHOLTZ, Gabriele (2020) – Artificial Intelligence and Legal Tech: Challenges to the Rule of Law. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*. Springer: Switzerland. P. 175-198. ISBN 978-3-030-32361-5 (eBook). P. 178.

[68] DOMINGOS, Pedro (2017) – *A revolução do algoritmo mestre: como a aprendizagem automática está a mudar o mundo.* Trad. Francisco Silva Pereira. 5.ª ed. Barcarena: Manuscrito. P.18. Translated by the authors from the original text: "Quando uma nova tecnologia é tão abrangente e tem uma capacidade interventiva tão grande como a aprendizagem automática, não é sensato deixar que a mesma continue a ser uma caixa negra. A opacidade abre a porta ao erro e ao uso indevido.", p. 18. As it was previously referred, see also M. Reid about the metaphorical scenario of a robot police officer activity *Joe Roboto*, In REID, Melanie (2017) - Rethinking the Fourth Amendment in the Age of Supercomputers, Artificial Intelligence, and Robots. *W. Va. L. Rev.* [Online]. 119:3 (2017) 863-889. [Consult. 10 Dec. 2019]. Available at WWW: . P. 873-874.

[69] VILLARONGA, Eduard Fosch ; KIESEBERG, Peter ; LI, Tiffany (2018) – *Humans forget, machines remember: Artificial intelligence and the Right to Be Forgotten*. Computer Law & Security Review [Online]. 34:2 (2018) 304-313. [Consult. 10 Dec. 2019]. Available at WWW: . ISSN 0267-3649. P. 304-310.

[70] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: .

[71] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: . Art.º 17.º. "A "right to be forgotten": When an individual no longer wants her/his data to be processed, and provided that there are no legitimate grounds for retaining it, the data will be deleted. This is about protecting the privacy of individuals, not about erasing past events or restricting freedom of the press.". In EU. European Commission (2015) – *Memo: Questions and Answers - Data protection reform* [Online]. Brussels : EU. [Consult. 15 Jan. 2020]. Available at WWW: . Law n.º 46/2012, of 29/08, articles 6.º, par. 1 and 3 and art. 7.º, par. 3 addresses the right to be forgotten when enshrining the right to delete or anonymize electronic communications traffic data and location data, by companies providing electronic communications network and or services, In PORTUGAL. Assembleia da República. LEI n.º 46/2012. D.R I Série. 167 (2012-08-29) 4813-4826. [Consult. 19 Jan. 2020]. Available at WWW: .

[72] VILLARONGA, Eduard Fosch ; KIESEBERG, Peter ; LI, Tiffany (2018) – Humans forget, machines remember: Artificial intelligence and the Right to Be Forgotten. *Computer Law & Security Review…,* p. 310-313. Also, BUCHHOLTZ, Gabriele (2020) – Artificial Intelligence and Legal Tech: Challenges to the Rule of Law. In

Thus, the provisions of art. 5.º (Principles relating to processing of personal data) and art. 6.º (Lawfulness of processing), of Regulation (EU) 2016/679 (encompassed in art. 35.º, par. 1 of the CPR), pose several challenges to the use of AI and withdraw it owing to the principle of limitation of the purposes for which the collection of personal data is intended, which, still, allow some exceptions provided for in art. 89.º, par. 1 of Regulation (EU) 2016/679, on the "Safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes"[73]. In the scope of Regulation (EU) 2016/679, in addition to the principle of purpose limitation (art. 5.º, par. 1b), art. 13.º and art. 14.º), the processing of personal data also receives the protection of the principle of proportionality (art. 5.º, par. 1c), understood as minimising data), the requirement for information transparency and access to personal data (art. 13.º - art. 15.º) as well as the right to rectify and erase data (art. 16.º - 17.º)[74]. Although article 21.º establishes the data subject's right to object, par. 6, article 21.º also provides for an exception regarding the safeguarding of the public interest[75]. On the other hand, Article 22.º (1) enshrines the right of the data subject "[…]

WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*. Springer: Switzerland. P. 175-198. ISBN 978-3-030-32361-5 (eBook). P. 179 ss. MARSCH, Nikolaus (2020) – Artificial Intelligence and the Fundamental Right to Data Protection: Opening the Door for Technological Innovation and Innovative Protection. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence.* Springer: Switzerland. P. 33-52. ISBN 978-3-030-32361- 5 (eBook). P. 35-38.

[73] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: . Art. 5.º, 6.º and other exceptions provided for in art. 89.º, par. 1: "Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, shall be subject to appropriate safeguards, in accordance with this Regulation, for the rights and freedoms of the data subject. Those safeguards shall ensure that technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation. Those measures may include pseudonymisation provided that those purposes can be fulfilled in that manner. Where those purposes can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner.". Also, MARSCH, Nikolaus (2020) – Artificial Intelligence and the Fundamental Right to Data Protection: Opening the Door for Technological Innovation and Innovative Protection. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*. Springer: Switzerland. P. 33-52. ISBN 978-3-030-32361-5 (eBook). P. 35 ss. BUCHHOLTZ, Gabriele (2020) – Artificial Intelligence and Legal Tech: Challenges to the Rule of Law. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*. Springer: Switzerland. P. 175- 198. ISBN 978-3-030-32361-5 (eBook). Passim.

[74] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: . MARSCH, Nikolaus (2020) – Artificial Intelligence and the Fundamental Right to Data Protection: Opening the Door for Technological Innovation and Innovative Protection. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*…, p. 35 ss. BUCHHOLTZ, Gabriele (2020) – Artificial Intelligence and Legal Tech: Challenges to the Rule of Law. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*…, *passim*. Para O. Lynskey, In LYNSKEY, O. (2020) – Delivering data protection: the next chapter. *German Law Journal* [Online]. 21:1 (2020) 80-84. [Consult. 18 Jan. 2020]. Available at WWW: . "[…] the core principles of data protection law set out in Article 5 GDPR offer an opportunity to shape the data processing environment, and to shift away from the individual-centric approach crystalized in other parts of the GDPR.", p. 83

[75] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: . Art.º 21.º, n.º 6: "Where personal data are processed for scientific

not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her."[76]. Although par. 2, article 22.º allows exceptions to par. 1, still the special categories of data enshrined in article 9.º, par. 1 are protected from these exceptions. In fact, the special categories of data provided by art. 9.º, par. 1 cannot be subject to decisions taken solely based on automated processing, pursuant to par. 4 of article 22[77]. That is, "[…] personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation […]"[78] (Article 9 (1)), are not subject to "[…] a decision based solely on automated processing, including profiling […]."[79] (Article 22, paragraph 1, paragraph 4). However, Article 22.º (4) further admits the hypothesis of automated processing of special categories of personal data, within the scope of the decisions provided for in Article 22 (2), if the cases of the article 9.º, par. 2, a) or g) are applicable (referring to the explicit consent, by the data subject, for the processing of those data and the observance of the necessity requirement based on relevant public interest reasons[80]) and, cumulatively, that suitable measures are

or historical research purposes or statistical purposes pursuant to Article 89 (1), the data subject, on grounds relating to his or her particular situation, shall have the right to object to processing of personal data concerning him or her, unless the processing is necessary for the performance of a task carried out for reasons of public interest.". BUCHHOLTZ, Gabriele (2020) – Artificial Intelligence and Legal Tech: Challenges to the Rule of Law. In WISCHMEYER, Thomas ; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*…, p. 188- 189.

[76] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: . Art. 22.º, par. 1.

[77] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: . Art. 9.º and art. 22.º. BUCHHOLTZ, Gabriele (2020) – Artificial Intelligence and Legal Tech: Challenges to the Rule of Law. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*. Springer: Switzerland. P. 175-198. ISBN 978-3-030-32361-5 (eBook). P. 188-189.

[78] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: . Art. 9.º, par. 1.

[79] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: . Art. 22.º, par. 1.

[80] E.U. European Parliament and Council. Regulation (EU) 2016/679. OJ L. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: . Art. 9.º, n.º 2, al a) e al. g): "2. Paragraph 1 shall not apply if one of the following applies: (a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject; […] (g) processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject; […]."

applied to safeguard the rights and freedoms and legitimate interests of the data subject[81]. In the same sense, as we have previously referred, also in the Portuguese legal, article 35.º par.

3 of the CPR safeguards the computer processing of certain categories of personal data as well as the right to informative self-determination[82].

On the other hand, but similarly, the provisions of articles 7.º and 8.º of the EUCFD raise several issues regarding the use of AI. First of all, the right of the data owner to the protection of her/his personal data through fair processing, limited to specific purposes and with her/his the consent or a legitimate ground provided for by law[83]. N. Marsch suggests that the interpretation of Articles 7.º, 52.º (1) (restrictions on the exercise of rights limited to the provision by law and to the observance of the essential content of those rights and freedoms and the principle of proportionality, in all its dimensions) and, particularly, the interpretation of article 8.º, par. 1 of the EUCFD as a "[…] mandate to the legislator to regulate the processing of personal data so that the fundamental rights and interests of the citizens are adequately protected."[84], it will be able to guarantee an effective protection of the right to privacy and the protection of personal data and, simultaneously, lead to a solution of greater openness to the use of AI[85]. However, from the outset, article 8.º of the EUCFD constitutes a "[…] recognition

[81] E.U. European Parliament and Council. Regulation (EU) 2016/679. *OJ L*. 119 (2016-05-04) 1–88 [Online]. [Consult. 15 Jan. 2020]. Available at WWW: . Art.º 22.º, n.º 4: "[…] 4. Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place."

[82] CANOTILHO, J.J. Gomes; MOREIRA, Vital (2014) - *Constituição da República Portuguesa anotada, vol. I.* 4.ª ed. rev. Coimbra: Coimbra editora. P. 551, p. 555-556.

[83] RODRIGUES, L. Barbosa (2018) – *Direito internacional dos direitos humanos: textos normativos.* Lisboa: Quid Juris. P. 319.

[84] MARSCH, Nikolaus (2020) – Artificial Intelligence and the Fundamental Right to Data Protection: Opening the Door for Technological Innovation and Innovative Protection. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*. Springer: Switzerland. P. 33-52. ISBN 978-3-030-32361-5 (eBook). P. 45.

[85] MARSCH, Nikolaus (2020) – Artificial Intelligence and the Fundamental Right to Data Protection: Opening the Door for Technological Innovation and Innovative Protection. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*…, p. 43 ss. With an approximate thought, vide BUCHHOLTZ, Gabriele (2020) – Artificial Intelligence and Legal Tech: Challenges to the Rule of Law. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – Regulating Artificial Intelligence. Springer: Switzerland. P. 175-198. ISBN 978-3-030-32361-5 (eBook), to whom "[…] Article 8 of the EU Charter of Fundamental Rights (CFR) - which is decisive for the use of AI - does not stipulate a right to informational self-determination per se, but rather serves as a modern fundamental right to data protection.", p. 188. With a list of potential risks to the right to informational self-determination arising from the use of AI, vide ERNST, Christian (2020) – Artificial Intelligence and Autonomy: SelfDetermination in the Age of Automated Systems. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*. Springer: Switzerland. P. 53-73. ISBN 978-3-030-32361-5 (eBook). P. 57-62.

of the autonomy of safeguarding personal data subject to automated processing, in view of the protection generally granted by the right provided for in article 7.º of the Charter, about the respect for private life."[86]. On the other hand, article 8.º of the EUCFD, ex vii article 52.º, par. 3 of the same text, must comply with the provisions of article 8.º of the ECHR (not excluding a higher protection level conferred by the EUCFD), as well as the case law of the ECtHR[87]. In fact, for G. Martins, the "[…] protection of personal data and the interconnection of files or their use for purposes other than those provided for, when collected, are covered by Article 8.º of the ECHR."[88], whose primary objective is to "[…] safeguard the individual from arbitrary interference by public authorities."[89]. The author adds that the "[…] positive measures required of States, although under the control of the Strasbourg Court, are, in general, subject to the discretion of the State itself, and it is necessary to seek a fair balance between the general interest and the individual interest."[90]. The exceptions to Article 8.º (2) of the ECHR relating to restrictions must be provided for in the law "[…] meaning the written and unwritten right. The law must be clear, precise and compatible with the rule of law."[91]. Hence, in the Rotaru v. Romania case, the ECtHR found that there was a violation of Article 8.º (1) of the ECHR regarding the respect for privacy arising from the collection and storage of personal data in archives by the security services[92], with similar decisions by the case law of the Court of Justice

[86] CASTRO, Catarina Sarmento e (2013) – Artigo 8.º Protecção de dados pessoais (comentário). In CANOTILHO, Mariana; SILVEIRA, Alessandra, coord. – *Carta dos direitos fundamentais da União Europeia Comentada*. Coimbra: Almedina. P. 120-128. P. 121. Translated by the authors from the original text: "[…] reconhecimento da autonomia da salvaguarda dos dados de carácter pessoal objecto de tratamento automatizado, face à protecção genericamente concedida pelo direito previsto no art.º 7.º da Carta, acerca do respeito pela vida privada."

[87] MARSCH, Nikolaus (2020) – Artificial Intelligence and the Fundamental Right to Data Protection: Opening the Door for Technological Innovation and Innovative Protection. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*…, p. 45-46.

[88] MARTINS, Ana Guerra (2018) – *Direito internacional dos direitos humanos*. Coimbra: Almedina. P. 236. Translated by the authors from the original text: "[…] protecção de dados pessoais e a interligação de ficheiros ou a sua utilização para fins diversos dos previstos, aquando da sua recolha, estão abrangido pelo art.º 8.º da CEDH.", p. 236.

[89] MARTINS, Ana Guerra (2018) – *Direito internacional dos direitos humanos*…, p. 234. Translated by the authors from the original text: "[…] salvaguarda[r] [d]o indivíduo das ingerências arbitrárias dos poderes públicos.", p. 234.

[90] MARTINS, Ana Guerra (2018) – *Direito internacional dos direitos humanos*…, p. 234. Translated by the authors from the original text: "[…] medidas positivas exigidas aos Estados, embora sob o controlo do Tribunal de Estrasburgo, estão, em geral, sujeitas à margem de apreciação do próprio Estado, sendo necessário procurar um justo equilíbrio entre o interesse geral e o interesse do indivíduo.", p. 234.

[91] MARTINS, Ana Guerra (2018) – *Direito internacional dos direitos humanos*…, p. 239. Translated by the authors from the original text: "[…] entendendo-se por tal o direito escrito e não escrito. A lei deve ser clara, precisa e compatível como Estado de Direito.", p. 239.

[92] *E.C.H.R. HUDOC (2000) – E.C.H.R. judgment case Rotaru v. Romania [GC], Application n.º 28341/95, 4 th May 2000, President L. Wildhaber* [Online]. Strasbourg: E.C.H.R. .[Consult. 16 Jan. 2020]. Available at WWW: . Vide Information note on the Court's caselaw 18: "Article 8 of the Convention - The Court noted that the RIS's letter of 19 December 1990 contained various pieces of information about the applicant's life, in particular his

of the European Union (henceforth CJEU)[93]. Very recently, in Beizaras and Levickas v. Lithuania the ECtHR considered that there was a violation of Article 14.º, jointly interpreted with Article 8.º of the ECHR, resulting from discriminatory statements made on the social network Facebook[94]. This judgment ultimately reinforced the broad understanding of the ECtHR regarding the concept "private life", formulated in such a way as to protect the person's physical and psychological integrity in the event of a severe attack that seriously impairs the exercise of the right to privacy[95]. In fact, in the case of Big Brother Watch and Others v. the United Kingdom, the ECtHR considered that the interception and access to digital communications traffic data constitutes an interference in the private life dimension[96]. Also in this judgment, but regarding the acquisition of previously stored communication data, the ECtHR determined the observance obligation of certain parameters, in accordance with Article 8.º of the ECHR, such as: the existence of a regime in accordance with the law; the pursuit of legitimate purposes; the observance of the requirements of necessity in a democratic society, taking the appropriate measures to remove arbitrariness; restricting access to data to fulfil the purpose of combating serious crime; and, finally, the limitation of access itself to prior review by a Court or an independent administrative body[97]. Following the *Roman Zakharov v. Russia*[98] case, the ECtHR also stated that after the termination of the surveillance, it should be notified to the surveyed subjects or to any person whose data has been collected unlawfully, who will thus be able to go to the Courts to question, retrospectively, the legality of the surveillance measures, allowing an effective safeguard against the abuse of the powers of surveillance and

studies, his political activities and his criminal record, some of which had been gathered more than fifty years earlier. In the Court's opinion, such information, when systematically collected and stored in a file held by agents of the State, fell within the scope of "private life" for the purposes of Article 8 §1 of the Convention. Article 8 consequently applied.", p. 2.

[93] C.J.E.U. (2013) - *Michael Schwarz v. Stadt Bochum, case C-291/12, 17 Oct. 2013*. ECLI:EU:C:2013:670 [Online]. Luxembourg: C.J.E.U. [Consult. 16 Jan. 2020]. Available at WWW: .

[94] E.C.H.R. HUDOC (2000) – *E.C.H.R. judgment case Beizaras and Levickas v. Lituânia, Application n.º 41288/15, 14th January 2000, President Robert Spano* [Online]. Strasbourg: E.C.H.R. .[Consult. 16 Jan. 2020]. Available at WWW: . Par. 109-116.

[95] E.C.H.R. HUDOC (2000) – *E.C.H.R. judgment case Beizaras and Levickas v. Lituânia, Application n.º 41288/15, 14th January 2000, President Robert Spano*…, Par. 109-116.

[96] E.C.H.R. HUDOC (2018) – *E.C.H.R. judgment case Big Brother Watch and Others v. the United Kingdom, Applications n.º 58170/13, 62322/14 and 24960/15, 13th September 2018, President LinosAlexandre Sicilianos* [Online]. Strasbourg: E.C.H.R. .[Consult. 17 Jan. 2020]. Available at WWW: . §§171, 269-468, 303-310.

[97] E.C.H.R. HUDOC (2018) – *E.C.H.R. judgment case Big Brother Watch and Others v. the United Kingdom, Applications n.º 58170/13, 62322/14 and 24960/15, 13th September 2018, President LinosAlexandre Sicilianos…*, §§171, 460-468, particularly, §464 e §467.

[98] E.C.H.R. HUDOC (2018) – *E.C.H.R. judgment case Roman Zakharov v. Russia, application n.º 47143/06, 4th December 2015, President Dean Spielmann* [Online]. Strasbourg : E.C.H.R. .[Consult. 17 Jan. 2020]. Available at WWW: . §§170-179.

interference in private life[99]. On the other hand, the CJEU case law in *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources et al.* and Kärntner Landesregierung et al. declared the Data Retention Directive 2006/24/EC[100] invalid as it considered that this Directive represented a serious interference with the right to privacy, provided for in Articles 7.º and 8.º of the EUCFD; in fact, this Directive provided for the obligation to retain all traffic and location data of network users, for periods between six months to two years, by the providers of public communication networks and the providers of publicly available electronic communication services, seeking to ensure, thus, the availability of data to fulfil the purposes of investigation, detection and investigation of serious crimes cases[101]. However, more recently, in *Tele2 Sverige AB (C-203/15) v. Post-och telestyrelsen, and Secretary of State for the Home Department (C-698/15) v. Tom Watson*, the CJEU considered that "[…] Article 15(1) of Directive 2002/58, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter [EUCFD], must be interpreted as precluding national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a Court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union."[102]. This judgment also stressed that "[…] under Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and must respect the essence of those rights and freedoms. With due regard to the principle of proportionality, limitations may be imposed on the exercise of those rights and freedoms only

[99] E.C.H.R. HUDOC (2018) – *E.C.H.R. judgment case Big Brother Watch and Others v. the United Kingdom, Applications n.º 58170/13, 62322/14 and 24960/15, 13th September 2018, President Linos- Alexandre Sicilianos* [Online]. Strasbourg: E.C.H.R. .[Consult. 17 Jan. 2020]. Available at WWW: . §§309-310, 451-455.
[100] E.U. European Parliament and Council. Directive 2006/24/CE. OJ L. 105 (13-4-2006) 54-63 [Online]. [Consult. 18 Jan. 2020]. Available at WWW:
[101] C.J.E.U. (2014) - *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and o. and Kärntner Landesregierung and o., cases C-293/12 e C-594/12, 8th April 2014, ECLI:EU:C:2014:238* [Online]. Luxembourg: C.J.E.U. [Consult. 17 Jan. 2020]. Available at WWW: . Also, *E.C.H.R. HUDOC (2018) – E.C.H.R. judgment case Big Brother Watch and Others v. the United Kingdom, Applications n.º 58170/13, 62322/14 and 24960/15, 13th September 2018, President Linos-Alexandre Sicilianos* [Online]. Strasbourg: E.C.H.R. .[Consult. 17 Jan. 2020]. Available at WWW: . §224-228.
[102] C.J.E.U. (2016) - *Tele2 Sverige AB (C-203/15) v. Post-och telestyrelsen, and Secretary of State for the Home Department (C-698/15) v. Tom Watson, 21st December 2016, ECLI:EU:C:2016:970* [Online]. Luxembourg : C.J.E.U. [Consult. 18 Jan. 2020]. Available at WWW: . §125. Also, E.C.H.R. HUDOC (2018) – *E.C.H.R. judgment case Big Brother Watch and Others v. the United Kingdom, Applications n.º 58170/13, 62322/14 and 24960/15, 13th September 2018, President Linos-Alexandre Sicilianos* [Online]. Strasbourg: E.C.H.R. .[Consult. 17 Jan. 2020]. Available at WWW: . §229-234.

if they are necessary and if they genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others [...].”[103]. At the national level, the provisions of article 52.º, par. 1 of the EUCFD are encompassed under article 18.º, par. 2 and 3 of the CPR. Thus, the Portuguese Constitutional Court (TC) judgment n.º 464/2019 declares the unconstitutionality, with general mandatory force, of article 4.º of the Organic Law n.º 4/2017, of 25 August[104], “[…] in the part that allows the access of the information officers of the Security Information Service (SIS) and the Defence and Strategic Information Service (SIED) to basic data and equipment location, when they are not giving support to a concrete communication, for the purpose of producing the information necessary to safeguard the national defence and internal security, because it violates articles 26.º, par. 1, article 35.º, paragraphs 1 and 4, together with article 18.º, par. 2, of the Constitution of the Portuguese Republic;[…].”[105]. Apart from the interpretation of legal rules, Hoffmann-Riem[106] also stresses the relevance of the approach to the use of AI from the perspective of the standards of good governance in AI, namely, the ethical principles and democratic prerequisites developed by the European Group on ethics in science and new technologies, organized by the European Commission, in its “Statement on Ethics of Artificial Intelligence, Robotics and 'Autonomous Systems”. This principles and democratic prerequisite translate, essentially, into the observance of human dignity, autonomy, responsibility, justice, equity and solidarity, democracy, rule of law and accountability, security, protection and physical and metal integrity, data protection and privacy, sustainability[107]. The author Moura Vicente also argues that it should be the Law and its values that condition the technique and not the other way around, so the pondering

[103] C.J.E.U. (2016) - *Tele2 Sverige AB (C-203/15) v. Post-och telestyrelsen, and Secretary of State for the Home Department (C-698/15) v. Tom Watson, 21st December 2016, ECLI:EU:C:2016:970…,* §94.
[104] PORTUGAL. Assembleia da República. LEI ORGÂNICA n.º 4/2017. *D.R. I Série*. 164 (2017-08-25) 5047-5050 [Online]. Lisboa: A.R. [Consult. 20 Jan. 2020]. Available at WWW: .
[105] PORTUGAL. T.C. (2019) – *Ac. 464/2019* [Online]. Lisboa: T.C. [Consult. 17 Jan. 2020]. Available at WWW: . P. 48. Translated by the authors from the original text: “[…] na parte em que admite o acesso dos oficiais de informações do Serviço de Informações de Segurança (SIS) e do Serviço de Informações Estratégicas e de Defesa (SIED), relativamente a dados de base e de localização de equipamento, quando não dão suporte a uma concreta comunicação, para efeitos de produção de informações necessárias à salvaguarda da defesa nacional e da segurança interna, por violação dos artigos 26.º, n.º 1, e 35.º, n.ºs 1 e 4, em conjugação com o artigo 18.º, n.º 2, da Constituição da República Portuguesa; […].”, p. 48.
[106] HOFFMANN-RIEM, Wolfgang (2020) – Artificial Intelligence as a Challenge for Lawn and Regulation. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*. Springer: Switzerland. P. 1-29. ISBN 978-3-030-32361-5 (eBook). P. 6 ss.
[107] HOFFMANN-RIEM, Wolfgang (2020) – Artificial Intelligence as a Challenge for Lawn and Regulation. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence*…, p. 6-7. EU. European Group on Ethics in Science and New Technologies (2018) - *Statement on artificial intelligence*, robotics and ‘Autonomous’ systems. [Online]. Brussels: EU. [Consult. 16 Jan. 2020]. Available at WWW:URL:http://ec.europa.eu/research/ege/pdf/ege_ai_statement_2018.pdf>

should develop over the "[…] best way to frame technological developments in the fundamental values that shape our legal order […]."[108]. On the other hand, as Sarmento e Castro points out, "[…] protection of privacy will also involve raising the awareness of the Internet user himself, who must start by being aware of its dangers, but also of his rights and reaction mechanisms in case of rights violation."[109]. In this sense, it seems that only through the diverse contributions coming from multidisciplinary approaches[110] and the joint effort between experts from the legal and technological fields, may possible solutions be pondered, allowing a glimpse on a true balance between the use of AI and an actual protection of the right to privacy in the digital age[111]. Finally, we agree with J. Lewis when he says that the human being "[…] can achieve much more, and with much less effort, as a group than any isolated individual. […] The need to be part of a group goes much deeper than the construction of cities and political institutions, inventing new forms of art or mastering the elements."[112]. And, in fact, not even the Pandora's box ran out of hope[113].

[108] VICENTE, Dário Moura (2020) - §6. Inteligência artificial e iniciativas internacionais. In PEREIRA, Rui Soares ; ROCHA, Manuel Lopes, coord. e TRIGO, Ana Coimbra, colab. - *Inteligência artificial & Direito*. Coimbra : Almedina. P.93-105. P. 105. Translated by the authors from the original text: "[…] melhor forma de enquadrar os desenvolvimentos tecnológicos nos valores fundamentais que enformam a nossa ordem jurídica […].", p. 105.

[109] CASTRO, Catarina Sarmento e (2006) – Protecção de dados pessoais na internet. *Sub judice / ideias*. Coimbra. ISSN 0872-2137. 35 (2006) 11-29. P. 29. Translated by the authors from the original text: "[…] protecção da privacidade passará também pela sensibilização do próprio utilizador da Internet, que deve começar por estar consciente dos seus perigos, mas também dos seus direitos e mecanismos de reacção em caso de violação destes.", p. 29.

[110] For instance, through contributions from human rights organizations in the information society such as, v.g., EDRi (https://edri.org/)

[111] REID, Melanie (2017) - Rethinking the Fourth Amendment in the Age of Supercomputers, Artificial Intelligence, and Robots. *W. Va. L. Rev*. [Online]. 119:3 (2017) 863-889. [Consult. 10 Dec. 2019]. Available at WWW: . P. 888-889. 109 HOFFMANNRIEM, Wolfgang (2020) – Artificial Intelligence as a Challenge for Lawn and Regulation. In WISCHMEYER, Thomas; RADEMACHER, Timo, eds. – *Regulating Artificial Intelligence…, passim.*

[112] 0 LEWIS, Jack (2019) – *A ciência do pecado: porque escolhemos fazer o que não devemos.* Trad. Ana Mendes Lopes. 1.ª ed. Porto Salvo: Desassossego. P. 27. Translated by the authors from the original text: "[…] é capaz de alcançar bastante mais, e com muito menor esforço, enquanto conjunto do que qualquer indivíduo isolado. […] a necessidade de fazer parte de um grupo é muito mais profundo do que a construção de cidades e instituições políticas, inventar novas formas de arte ou dominar os elementos.", p. 27.

[113] GRIMAL, Pierre (1999) – *Dicionário da mitologia grega e romana*. Coord. ed. portuguesa Victor Jabouille. 3.ª ed. Algés : Difel. ISBN 972-29-0049-8. P. 354.

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E.C.H.R. HUDOC (2018) – E.C.H.R. *judgment case Roman Zakharov v. Russia, application n.º 47143/06, 4 th December 2015, President Dean Spielmann* [Online]. Strasbourg: E.C.H.R..[Consult. 17 Jan. 2020]. Available at WWW: .

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