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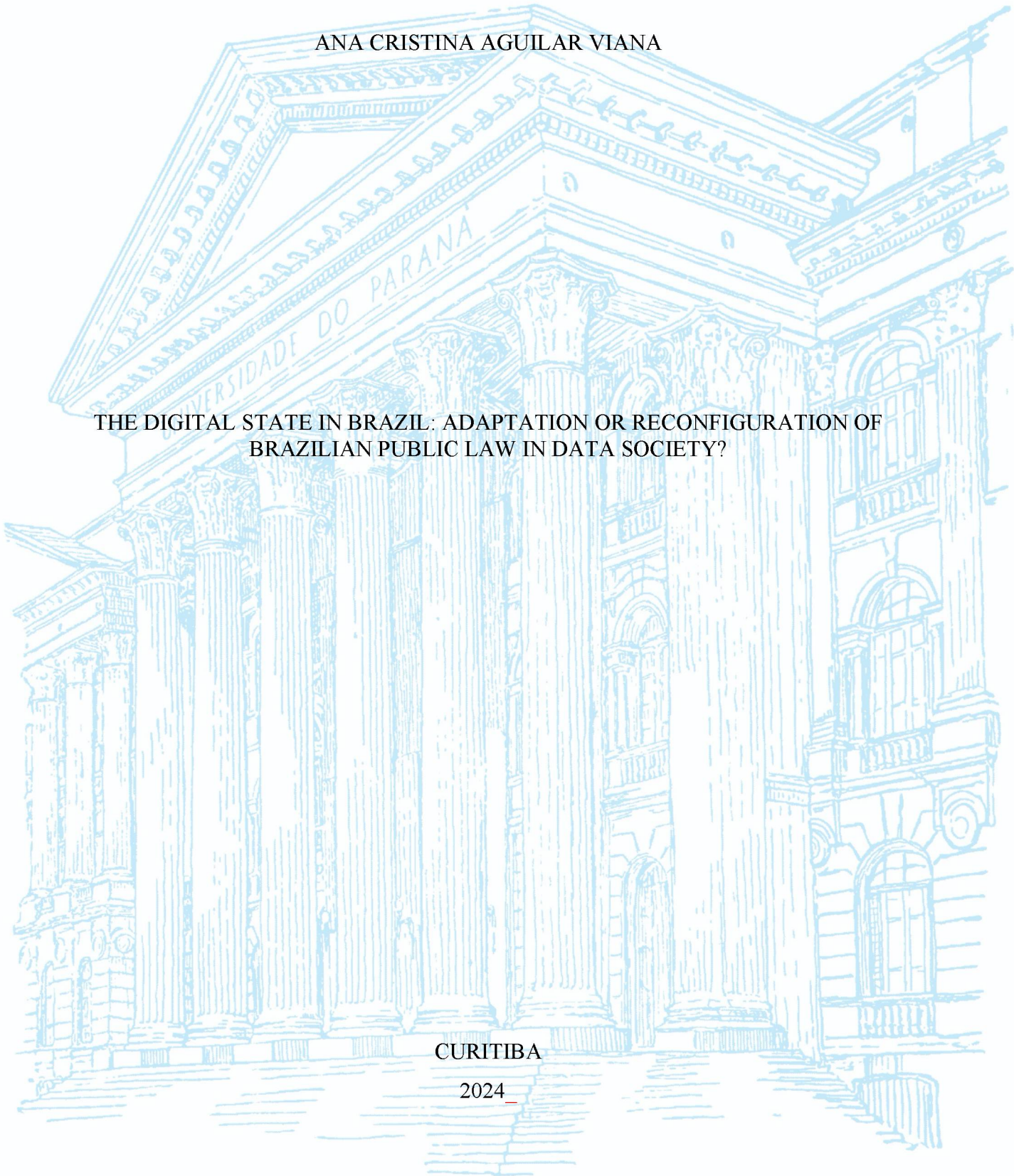

THE DIGITAL STATE IN BRAZIL: ADAPTATION OR RECONFIGURATION OF BRAZILIAN PUBLIC LAW IN DATA SOCIETY?

CURITIBA

2024

ANA CRISTINA AGUILAR VIANA

THE DIGITAL STATE IN BRAZIL: ADAPTATION OR RECONFIGURATION OF BRAZILIAN PUBLIC LAW IN DATA SOCIETY?

Tese apresentada ao curso de Pós-Graduação em Direito, Setor de ciências jurídicas, Universidade Federal do Paraná, em regime de cotutela firmado entre a UFPR e a Universidade Paris 1 Panthéon-Sorbonne (França) como requisito parcial à obtenção do título de Doutor em Direito.

Orientadora: Profa. Dra. Eneida Desiree Salgado

Coorientador: Prof. Dr. William Gilles

CURITIBA

2024

UNIVERSITÉ PARIS 1
PANTHÉON SORBONNE

UNIVERSITE PARIS I PANTHÉON SORBONNE
École Doctorale de Droit de la Sorbonne (ED 565)
Laboratoire de rattachement : IRJS

In cotutelle with

UFPR

UNIVERSIDADE FEDERAL DO PARANÁ
PROGRAMA DE PÓS-GRADUAÇÃO EM DIREITO (PPGD-UFPR)

THESIS
for the title of Doctor of public law

Ana Cristina AGUILAR VIANA

The Digital State in Brazil: adaptation or reconfiguration of Brazilian public law in data society?

Under the supervision of M. William GILLES
Tenured Associate Professor of Digital law and open government at Université Paris 1 Panthéon-Sorbonne

et Mme. Eneida Desiree SALGADO

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defended at Université Paris 1 Panthéon-Sorbonne on 21 May 2024.

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ATA Nº469

ATA DE SESSÃO PÚBLICA DE DEFESA DE DOUTORADO PARA A OBTENÇÃO DO GRAU DE DOUTORA EM DIREITO

No dia vinte e um de maio de dois mil e vinte e quatro às 11:00 horas, na sala Sala de seminários, Escola de Direito da Sorbonne, foram instaladas as atividades pertinentes ao rito de defesa de tese da doutoranda **ANA CRISTINA AGUILAR VIANA**, intitulada: **The Digital State in Brazil: adaptation or reconfiguration of Brazilian public law in data society?**, sob orientação da Profa. Dra. ENEIDA DESIREE SALGADO. A Banca Examinadora, designada pelo Colegiado do Programa de Pós-Graduação DIREITO da Universidade Federal do Paraná, foi constituída pelos seguintes Membros: ENEIDA DESIREE SALGADO (UNIVERSIDADE FEDERAL DO PARANÁ), WILLIAM GILLES (UNIVERSITÉ PARIS I), EDUARDO TUMA (UNIVERSIDADE NOVE DE JULHO), DANIEL WUNDER HACHEM (UNIVERSIDADE FEDERAL DO PARANÁ), LUISA FERNANDA GARCÍA LÓPEZ (UNIVERSIDAD DEL ROSARIO- BOGOTÁ), JACQUELINE MORAND-DEVILLER (UNIVERSITÉ PARIS I), EMERSON GABARDO (UNIVERSIDADE FEDERAL DO PARANÁ). A presidência iniciou os ritos definidos pelo Colegiado do Programa e, após exarados os pareceres dos membros do comitê examinador e da respectiva contra argumentação, ocorreu a leitura do parecer final da banca examinadora, que decidiu pela APROVAÇÃO. Este resultado deverá ser homologado pelo Colegiado do programa, mediante o atendimento de todas as indicações e correções solicitadas pela banca dentro dos prazos regimentais definidos pelo programa. A outorga de título de doutora está condicionada ao atendimento de todos os requisitos e prazos determinados no regimento do Programa de Pós-Graduação. Nada mais havendo a tratar a presidência deu por encerrada a sessão, da qual eu, ENEIDA DESIREE SALGADO, lavrei a presente ata, que vai assinada por mim e pelos demais membros da Comissão Examinadora.

CURITIBA, 21 de Maio de 2024.

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ENEIDA DESIREE SALGADO
Presidente da Banca Examinadora

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WILLIAM GILLES
Avaliador Externo (UNIVERSITÉ PARIS I)

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TERMO DE APROVAÇÃO

Os membros da Banca Examinadora designada pelo Colegiado do Programa de Pós-Graduação DIREITO da Universidade Federal do Paraná foram convocados para realizar a arguição da tese de Doutorado de **ANA CRISTINA AGUILAR VIANA** intitulada: **The Digital State in Brazil: adaptation or reconfiguration of Brazilian public law in data society?**, sob orientação da Profa. Dra. ENEIDA DESIREE SALGADO, que após terem inquirido a aluna e realizada a avaliação do trabalho, são de parecer pela sua APROVAÇÃO no rito de defesa.

A outorga do título de doutora está sujeita à homologação pelo colegiado, ao atendimento de todas as indicações e correções solicitadas pela banca e ao pleno atendimento das demandas regimentais do Programa de Pós-Graduação.

CURITIBA, 21 de Maio de 2024.

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ATTESTATION DE REUSSITE AU DIPLOME

La Présidente atteste que

le doctorat en Droit public

a été décerné à

Madame ANA CRISTINA AGUILAR VIANA

date de naissance le 13 mai 1983 à PARANAGUA (BRESIL)

au titre de l'année universitaire 2023/2024

Discipline	: SCIENCES JURIDIQUES
Titre des travaux	: L'état numérique au Brésil : adaptation au reconfiguration du droit public brésilien à l'ère de la société des données ?
Date de soutenance	: 21 mai 2024
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Notice

The Sorbonne Law School, Université Paris 1 Panthéon-Sorbonne, and Universidade Federal do Paraná, does not intend to give any approval or disapproval of the opinions expressed in this thesis. These opinions be considered as the author's own.

RESUMO

A presente tese busca delimitar o Estado Digital como um tipo ideal de ação política, correlacionado a sociedade de dados, cujo arranjo exige uma adaptação do direito público brasileiro a tais particularidades. Partindo do problema da carência de pesquisas no direito público sob a perspectiva das ações estatais e seus deveres, a tese visa a preencher essa lacuna. Para tanto, o direito público é compreendido a partir e pelos modelos de ação estatal (*político e público*). Esses são examinados em atenção à uma racionalidade, bem como à sociedade com a qual se relacionam. Em um primeiro momento, a pesquisa realça que o modelo de Estado soberano estava ligado a uma sociedade individualista e a um direito subjetivista. Em seguida, analisando o direito público como resultado dos arranjos entre os modelos de ações estatais e a sociedade, a pesquisa desenvolve a hipótese de que o direito e as ações estatais devem se basear em critérios relacionais em vez de requisitos autônomos. Propõe-se, assim, enquanto uma alternativa à opção dicotômica do direito público da autoridade ou da lógica da boa governança, estudando as condições sob as quais isso pode ser possível. A tese, então, define o Estado Digital como o modelo de ação política de *governança de rede,* que porta as características de ser *plural* e *relacional*, codificado a partir da ideia de uma sociedade interdependente. Já a ação pública implicará em uma responsabilidade primária sobre os direitos na esfera jurídica. Com base nesse raciocínio, os direitos de dados são examinados na *governança em rede* por meio da ação estatal. Isso implica uma ideia de *responsabilidade informacional*, seguida pela investigação do regime jurídico público do *devido processo informacional*. Ao considerar o direito público como funcional, reposiciona-se o interesse público como um critério de legitimidade e valor fundamental. Assim, o direito público do Estado Digital mantém o regime jurídico do interesse público, bem como o critério material no interesse geral da coletividade.

Palavras-chave: Governança em rede; Ações estatais; Valor Público; Bem Comum; Bom governo; regime jurídico público da responsabilidade, regime público do devido processo informacional.

ABSTRACT

This thesis proposes defining the *digital state* as an ideal type of political action, correlated to the data society, the arrangement of which requires an adaptation of Brazilian public law to such particularities. Starting from the problem of the lack of research in public law from the perspective of state actions and their duties, the thesis aims to fill this gap. To this end, public law is understood from and by the state action models (*political and public*). These are examined with attention to their rationality, as well as the society they relate to. In a first moment, the research highlights that the sovereign state model was linked to an individualistic society and a subjectivist law. Further, by analyzing public law as a result of the arrangements between state actions models and society, the research developpes the hypotheses that law and state actions should be based on relational criteria rather than autonomous requirements. It proposes as an alternative to both the dichotomous model public law of authority and the logic of *good governance*, studying the conditions under which this can be feasible. The thesis defines the digital state as the political action model of *network governance*, that bears the characteristics of plurality and relationality, coded by an interdependent society. Public action will imply a primary responsibility over the rights at legal realm. Based on this reasoning, data rights are examined in *network governance* through state action. This implies an idea of *informational responsibility*, followed by the investigation of the public legal regime on the right of informational due process. By considering public law as functional, it repositions the public interest as a criterion of legitimacy and fundamental value. Thus, the public law of the digital state maintains the legal regime of the public interest, as well as the material criterion in the general interest of the community.

Key-words: Network governance; state actions; public value; Common Good; Good government; responsibility public legal regime, public informational due process regime.

RESUME

La thèse prétend délimiter l'État numérique comme un type idéal d'action politique, lié à la société des données, qui exige l'adaptation du droit public brésilien à ces particularités. A partir du constat de lacunes en matière de recherche sur le droit public du point de vue de l'action de l'État et de ses devoirs, la thèse vise à y répondre. Pour ce faire, le droit public est compris à partir et à travers des modèles des actions étatiques (politiques et publiques). Ceux-ci sont examinés en tenant compte leur rationalité, ainsi que de la société avec laquelle elles sont en relation. La recherche souligne que le modèle de l'État souverain était lié à une société individualiste et à un droit subjectif. En analysant le droit public comme résultat d'arrangements entre les modèles d'action de l'État et la société, la recherche développe l'hypothèse que le droit et les actions étatiques devraient être fondés sur des critères relationnels plutôt que sur des critères autonomes. La thèse propose une alternative à l'option dichotomique du droit public de l'autorité ou de la logique de la bonne gouvernance, en étudiant les conditions dans lesquelles cela peut être possible. La thèse définit l'État numérique comme le modèle d'action politique de la gouvernance en réseau, présentant les caractéristiques de la pluralité et de la relation, et codifié par une société interdépendante. L'action publique impliquera la responsabilité première des droits dans la sphère juridique. Sur la base de ce raisonnement, les droits relatifs aux données sont examinés dans le cadre de la gouvernance en réseau à travers les actions de l'État. Celui-ci implique une idée de responsabilité informationnelle, suivie d'une étude du régime juridique public sur le droit à une procédure régulière en matière d'information. En considérant le droit public comme fonctionnel, cela permet de repositionner l'intérêt public en tant que critère de légitimité et de valeur fondamentale. Ainsi, le droit public de l'État numérique maintient le régime juridique de l'intérêt public, et le critère matériel de l'intérêt général de la collectivité.

Mots-clés : Gouvernance en réseau ; Actions étatiques ; Valeur Publique ; Bien Commun ; Bon gouvernement ; régime juridique public de la responsabilité ; régime publique de procédure légale informationnelle.

Table of abbreviations

ANPD	Autoridade Nacional de Proteção de Dados
CCGD	Central Data Governance Comitee
CITDigital	Interministerial Committee for Digital Transformation
CRFB	Constituição da República Federativa do Brasil
CGU	Controladoria Geral da União
DEG	Digital Era Governance
DGL	Digital Government Law
DPGF	National digital public governance framework
EFD	Federal Development Strategy
E-Digital	The Brazilian Strategy for Digital Transformation (Estratégia Brasileira de Transformação Digital
EGD	Digital Governance Strategy (Estratégia de Governança Digital)
E-gov	Electronic government
EGTI	General Information Technology Strategy
GaaD	Government as a Platform
GDPR	General Data Protection Law
GTMI	GovTech Maturity Index
Gov.br	Governo
ICT	Information Communication Technology
LAVITS	The Latin American Network of Surveillance, Technology and Society Studies
LAI	Access to Information Law - Lei de Acesso a informação
LGD	Lei da Governança de dados
LGPD	Lei Geral de Proteção de Dados
LINDB	Lei de Introdução às normas do Direito Brasileiro
LPAF	Lei do Processo Administrativo no âmbito Federal

MEC	Ministry of Education
NPM	New Public Management
NRI	The Network Readiness Index
OECD	Organisation for Economic Co-operation and Development
OgD	open government Data
PDGF	Public Digital Governance Framework in Brazil
PV	public value
RNGD	Rede Nacional de Governo Digital
TCU	Federal Court of Auditors (Tribunal de Contas da União)
EGD	Estratégia de Governança Digital
OGP	Open government Partnership
STF	Supreme Federal Court (Supremo Tribunal Federal)

SUMMARY

"I would rather be a cyborg than a goddess".

- Donna HARAWAY[1]

[1] D. HARAWAY, *Manifeste Cyborg : Science, technologie et féminisme socialiste à la fin du XXe siècle [1]* | *Cairn.info*, https://www.cairn.info/revue-mouvements-2006-3-page-15.htm, consulté le 19 octobre 2023, p.21.

Acknowledgements

After five years, it's both a relief and joy to assert that this research has reached its initial formatted embodiment. To the researcher's eyes, it will always be incomplete and imperfect.
In the feminist manifesto, Donna Haraway defines the "*cyborg*" as the amalgamation of the organic with the inorganic, of a nature that is inconstant and mutable.
Like a cyborg, inconsistent and incomplete, this research, however, would never have been feasible without the various interactions that impacted and shaped its *performance*. Therefore, it's not just necessary, but a duty to thank those people, spaces, places, and things that somehow formed the fabric of this work.
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The Federal University of Paraná, my homeland. It's the space I traversed since my master's degree, whose corridors and rooms were venues for various manifestations of the interdisciplinary journey itself. I can say that ***the heart*** of this research lies within this university, and the people surrounding it, notably Professor Eneida Desiree Salgado, my advisor since the master's degree and on many other projects. Being a "*desirrete*" is a privilege and safe harbor.
If the research began in Brazil and pulsates from there, its vector is strongly marked by the "*spirit*" absorbed not only at the University of Paris Panthéon-Sorbonne but also living in France. Then, the ***active mind*** of the cyborg should be endorsed to this space and notably to my French advisor, Professor William Gilles. I am confident that I would never have achieved this search result without all the access that I had in Paris. Certainly, without my advisors guidance, trust and patience, this project would not have materialized.
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Introduction

"Just as living beings go through certain periods in which the organism, while continuing to follow the general law of its life, nevertheless undergoes a particularly profound and active transformation, so in the history of peoples there are certain periods in which ideas and institutions, while remaining subject to their r general law of evolution, also undergo a particular transformation.

(...) Whether we like it or not, everything seems to show that the fundamental notions that once underpinned legal institutions are disintegrating to make way for others.

(...) is this progress or retrogression? We don't know".

- Léon DUGUIT[2].

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The passage above, from "*Transformations du droit public*", was originally written in 1913 by the French jurist Léon Duguit, whose writings had a major influence on the development of

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[2] Original: « *De même que les êtres vivants traversent certaines périodes où l'organisme, tout en continuant de suivre la loi générale de sa vie, subit cependant une transformation particulièrement profonde et active, de même dans l'histoire des peuples, il est certaines périodes où les idées et les institutions, tout en restant soumises à leur loi générale d'évolution, subissent-elles aussi une transformation particulière. (...) Qu'on veuille ou non, tout nous parait démontrer que les notions fondamentales, qui étaient naguère encore à la base des institutions juridiques, se désagrègent pour faire place à d'autres. (...) Est-ce un progrès ou un recul ? Nous n'en savons rien*". L. DUGUIT, *Les transformations du droit public*, Bibliothèque Léon Duguit, Paris, la Mémoire du droit, 1999, disponible sur https://books.google.fr/books?id=xWpADwAAQBAJ. (consulté le 31 octobre 2023)

Brazilian public law[3]. Duguit's time was determined by the impact of the second technological revolution, as well as the transformation of the state's function from a *"vigilant"* entity to a service provider. Considered one of the "*founding fathers*"[4] of public service theory, the author argued state activities should not be based on the power of authority (*la puissance publique*), but instead on the state's obligations and responsibilities, thereby examining the instrumental dimension of its activities[5].

Allied to sociological schools of thought, hereby holding an interdisciplinary and general perception of public law, Duguit was critical of the legal system itself, labeling it as metaphysical and subjectivist. The author described the legal construction resulting from the French Revolution, which culminated in the Declaration of the Rights of Man and of the Citizen and brought the rule of law, as a *dichotomous arrangement* between the *individual rights* and *state sovereignty*[6].

The system of public law, he said, is based on principles that jurists *"claim"* was acquired through science, forging a system of rules, based on the idea of the sovereignty of the state personified as the holder of an original nation, and natural, inalienable and imprescriptible rights of the individual[7] *that oppose* the state's sovereignty. It is a system that gives the nation a *distinct personality* separates from the individuals that constitute it. This recognition of individual rights determines and limits public activity, therefore, the state is subject to objective

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[3]Arthur Barrêtto de Almeida Costa reports, in a biometric survey on the subject, that when the first Brazilian books were published in the 1860s, French writers were cited in almost 80% of the works on public law. The author mentions that Brazilians were bringing European law to South American field with a perception that the core of administrative law came first from France. Nevertheless, the author highlights that Brazilian scholarship had the ability to not only search for references beyond national borders, but also mixing with Brazilian traditions, building bridges. By this, he suggests that "*the potentials and flaws of this past scientific community, (...) can be an interesting source of inspiration and reflection*". A. BARRETTO DE ALMEIDA COSTA, « The Tropical Fado that Wanted to Become a European Samba: The Cosmopolitan Structure of Brazilian Administrative Law Investigated with Bibliometric Data (1859-1930) », 2021, disponible sur https://forhistiur.net/landingpage/375/ (Consulté le 3 février 2024).

[4] C. BARTHET, « Leon Duguit (1859-1928) - », *Encyclopædia Universalis*, s.d. [https://www.universalis.fr/encyclopedie/leon-duguit/].(consulté le 11 janvier 2024)

[5]The author : « *If we recognize the power of rulers, it is no longer by virtue of a primary right of public authority, but by virtue of the duties incumbent upon them* ».
Original : « *Si l'on reconnait un pouvoir aux gouvernants, ce n'est plus en vertu d'un droit primaire de puissance publique, mais à raison des devoirs qui leur incombent* » L. DUGUIT, *Les transformations du droit public*, *op. cit.*

[6] *Ibid.*

[7] Article 2: « *The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression* ».

law based on the subjective rights of the individual. Hence, sovereign power is limited by the rights of individuals, obliged to organize itself to protect these individual rights[8].

Grounded on this understanding, he proposed a rationality of public law grounded on a *material criterion*[9]. This rationality was based on the functions and responsibilities of the state in providing its services (rather than its sovereignty), as well as on the code of *interdependence* applied to solidary collective actions[10].

Interdependence, solidarity, and instrumentality as juridical criteriums reveal a particular trajectory of the author's theory, aiming to overcome the fragilities of the metaphysical origin of such an antagonistic and individualistic law. Those ideas were relevant for the development of a *doctrine* of *objective rights*[11], that substituted *legal rights* for *social rights*[12].

Nevertheless, a century later, it can be stated that the internal fractures highlighted by the author concerning the legal system have intensified and become more overt. Still, the trunk of the tree, even though lifeless, continues to be watered, even though it ***no longer*** bears its fruits.

Presently, one bears witness to a stage in this development that goes beyond the transformation experienced by Duguit. The transition from the industrial revolution to the so-called information revolution marks a significant shift[13]. Some draw comparisons of its impact to the

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[8] L. DUGUIT, *Les transformations du droit public*, *op. cit.*

[9] C. BARTHET, *Leon Duguit (1859-1928) -*, *op. cit.* consulté le 11 janvier 2024.

[10] According to Duguit, the "*state of consciousness*" of the mass of individuals who make up a given social group is "*the creative source of law*": it is at this precise moment that the simple social norm, based on solidarity and interdependence, is transformed into a legal norm. L. DUGUIT, *Les transformations du droit public*, *op. cit.*

[11] J. CHEVALLIER, « La fin des écoles ? », *Revue du droit public et de la science politique en France et à l'étranger*, 1997, n° 3/1997, pp. 679-700, disponible sur https://hal.science/hal-01722258 (Consulté le 13 janvier 2024).

[12] In Brazilian law, this turning point, as will be seen later in this thesis, follows a unique path, transitioning from a perspective *of legality* to a perception *of juridicity*, with the Federal Constitution of 1988 serving as its fundamental benchmark. As Luis Roberto Barroso points out : « *The principle of legality is thus transmuted into the principle (...) of juridicity, including its subordination to the Constitution and the law, in that order* ». Original : « *O princípio da legalidade transmuda-se, assim, em (...) princípio da juridicidade, compreendendo sua subordinação à Constituição e à lei, nessa ordem* ». L.R. BARROSO, « A constitucionalização do direito e suas repercussões no âmbito administrativo », *Direito administrativo e seus novos paradigmas. Belo Horizonte: Fórum*, 2008, pp. 31-63.

[13] In the field of economics, the *innovation school* posits that socio-economic evolutions occur through technological changes. Moreover, revolutions occur when there is a generalized transformation and interconnection of systems and their participation in the market. Techno-economic paradigms are articulated through the deployment of new technologies while they are disseminated, amplifying their impact across the network and, at times, possessing the capacity to modify then-organized socio-institutional structures. Three long-term meta-paradigms are distinguished. The first is centered on material transformation. The second pertains to industrial revolutions. Finally, the most recent concerns the transformation of information. About: C. PEREZ, « Technological revolutions and techno-economic paradigms », *Cambridge journal of economics*, 2010, vol. 34, n° 1, pp. 185-202, disponible sur https://academic.oup.com/cje/article-abstract/34/1/185/1699623 (Consulté le 30 octobre 2023) ; M. HILBERT, « Digital technology and social change: the digital transformation of society from a historical perspective », *Dialogues in Clinical Neuroscience*, juin 2020, vol. 22, n° 2, pp. 189-194, disponible sur https://www.tandfonline.com/doi/full/10.31887/DCNS.2020.22.2/mhilbert (Consulté le 24 octobre 2023).

invention of the printing press[14], others to the first industrial revolution. It is beyond doubt, that this transformation encompasses how information exchange, knowledge dissemination, cultural interactions, and skill development are conducted[15]. Society is evolving into a realm of heightened connectivity and interaction; services have become dematerialized, and activities are increasingly platform-based. Businesses are harnessing the benefits of emerging technologies, while individuals are increasingly integrating these technologies into their lives[16]. Characterized by acceleration and profound depth, the digital revolution ***is reshaping state*** organizations and activities. Gradually, emerging technologies are redefining state-provided services, posing challenges to public administration, and necessitating adjustments to bring them in line with their unique attributes[17].

On the positive spectrum, digital tools and information usage by governments can enhance democratic processes. Likewise, the digital revolution offers states the opportunity to augment their operational procedures. The concept of openness introduces dynamics that reinforce the notion of *"open governance*". Consequently, the dematerialization of procedures aligns with the evolving needs and expectations of citizens in an increasingly digitalized administrative landscape[18].

In the context of the digital transition, Brazil emerged as the second global leader in digital government, as evidenced by the World Bank's GovTech Maturity Index ranking, disclosed in

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[14]Marshal McLuhan, a theorist in the field of communication, discusses the impact that the movable press had on Western civilization. The intellectual formation of Western man begins to be conducted through the printed medium, distinctly different from the oral education method. The press bestows the ownership of knowledge, liberates from the tribe, transforming into vast, solitary crowds of large individual conglomerates. With the press, therefore, the Gutenberg Galaxy is reached, consolidating the foundational characteristics of the Modern era, namely rationalism, individualism, positivism. According to McLuhan, the medium is the message, in that the inauguration of a new communication model cannot merely be considered a vehicle for message transmission but constitutes a determining element in the fabric of social relations. Thus, from the observation that the advent of electronic technologies would shorten distances, McLuhan heralds new times, of an electronic era that would supplant the mechanical one. M. MCLUHAN, *The Gutenberg galaxy : the making of typography*, Canadian university paperbook, n° 39, Toronto, University of Toronto press, 1964.

[15] M. CASTELLS, R.V. MAJER et F.H. CARDOSO, *A sociedade em rede*, A era da informação: economia, sociedade e cultura, n° 1, Rio de Janeiro, Paz e Terra, 2021.

[16] A. MCAFEE et E. BRYNJOLFSSON, *Machine, Platform, Crowd*, s.l., WW Norton, 2017, disponible sur https://books.google.fr/books?id=kuRJvgAACAAJ. (consulté le 11 janvier 2024)

[17] J. CHEVALLIER, « Vers l'État-plateforme ? », *Revue française d'administration publique*, 2018, vol. 167, n° 3, pp. 627-637, disponible sur https://www.cairn.info/revue-francaise-d-administration-publique-2018-3-page-627.htm.(consulté le 11 janvier 2024).

[18] I. BOUHADANA et W. GILLES, « De l'esprit des gouvernements ouverts », *Revue Internationale des Gouvernements Ouverts Disponível em: http://ojs. imodev. org/index. php/RIGO/article/view/187/308. Acesso em*, 2020, vol. 19, disponible sur https://core.ac.uk/download/pdf/235040245.pdf (Consulté le 26 octobre 2023).

2022[19]. Despite its commendable standing in certain indicators, the actuality of digital transformation within the nation diverges significantly from numerical representations. The deployment tools and regulatory frameworks have not been paralleled by a corresponding development of policies[20].

In fact, the digital transition is accompanied by a myriad of challenges. Despite approximately three decades of digital transformation policies in government, the services rendered remain disjointed and are perceived as inefficient[21]. In addition, the opportunities presented by the digital and informational technologies are utilized in an asymmetric manner[22]. Thus, while Brazil's policy on digital transformation propounds macro-strategic propositions, the absence of sufficient budgetary allocations and a robust infrastructure obstructs the fruition of authentic digital transformation[23]. Finally, the process of government digitalization and the public sector's use of technology are viewed with skepticism by the Brazilian population[24], thereby constraining its evolutionary potential.

As individuals become increasingly reliant on information technologies, governments are facing challenges in managing this transformation. A factor exemplifying this misalignment is

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[19] W. BANK, « GovTech Maturity Index, 2022 Update: Trends in Public Sector Digital Transformation », décembre 2022, disponible sur http://hdl.handle.net/10986/38499 (Consulté le 18 octobre 2023).

[20] F. FILGUEIRAS et L. LUI, « Designing data governance in Brazil: an institutional analysis », *Policy Design and Practice*, janvier 2023, vol. 6, n° 1, pp. 41-56, disponible sur https://www.tandfonline.com/doi/full/10.1080/25741292.2022.2065065 (Consulté le 18 octobre 2023) ; D.A.N. JUNIOR, « Governo eletrónico Brasil e Portugal as limitações na aplicabilidade da comunicação interativa cidadã. », *Prisma.com*, 2022, disponible sur https://api.semanticscholar.org/CorpusID:254210313. (consulté le 11 janvier 2024)

[21] D.A. NOGUEIRA JUNIOR, « Governo eletrónico Brasil e Portugal as limitações na aplicabilidade da comunicação interativa cidadã. », *Prisma.com*, 2022, vol. 47, pp. 3-18, disponible sur https://ojs.letras.up.pt/index.php/prismacom/article/view/11665/11723 (Consulté le 3 mai 2024) ; F. FILGUEIRAS, « Indo além do gerencial: a agenda da governança democrática e a mudança silenciada no Brasil », *Revista de Administração Pública*, février 2018, vol. 52, pp. 71-88, disponible sur https://www.scielo.br/j/rap/a/PryL9JzmYhyVBTrdG3GGxsr/?lang=pt (Consulté le 18 octobre 2023).

[22] E. GABARDO, O.L.C. DE FREITAS FIRKOWSKI et A.C.A. VIANA, « The digital divide in Brazil and the accessibility as a fundamental right », *Revista chilena de derecho y tecnología*, 2022, vol. 11, n° 2, pp. 1-26, disponible sur https://scholar.archive.org/work/xqf4f4yltnhv7ps5ximdlujr3m/access/wayback/https://rchdt.uchile.cl/index.php/RCHDT/article/download/60730/72149 (Consulté le 28 octobre 2023).

[23] V.R.L. do VALLE, *Governo digital e a busca por inovação na Administração Pública: A Lei 14.129, de 29 de março de 2021*, Belo Horizonte, MG, Editora Fórum, 28 septembre 2021.

[24] A report published in 2023 by Ernst & Young revealed that only 42% of Brazilians feel confident sharing their data with the government for service access, with the number dropping to 36% regarding data sharing. A. YOUNG ERNEST, « Brasil melhora na digitalização do governo, mas confiança da população ainda é baixa », *Ernest Young*, s.d., disponible sur https://www.ey.com/pt_br/agencia-ey/noticias/brasil-melhora-digitalizacao-governo-mas-confianca-populacao-baixa (Consulté le 7 novembre 2023).

that, despite the presence of digital policy programs, the administration retains the structure of a bureaucratic organization[25].

Nevertheless, the digital transformation masks deeper conceptual and structural complexities. The effects of digitalization extend beyond the modernization of the state or the dematerialization of its services. It represents a novel approach to political action, public good, and the general interest[26]. The changes are not limited to the enhancement of service efficiency or agility.

The cyber environment introduces ***new dimensions*** of social relations, value creation, and power dynamics[27] and hence represents a novel rationality[28].

Firstly, the digital revolution and the paradigm of information technologies *have revived* the ***interactive nature*** of social relations and their arrangements[29]. As Duguit indicated, public law was constructed on the foundations of modern rationality, characterized by metaphysical, and antagonist approaches, by isolated *forms*, steeped in the belief in scientific truths. The i*nformation* paradigm, however, possesses distinct attributes[30]. Its exponential velocity, the contraction of space and time, networked spaces, hybrid relationships, its conception of the individual as both actor and receiver and its understanding of data as malleable significantly influence social relations. In this virtual environment, the relationship between the state and

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[25] L.B. de CARVALHO, « Governo digital e direito administrativo: entre a burocracia, a confiança e a inovação », *Revista de Direito Administrativo*, décembre 2020, vol. 279, n° 3, pp. 115-148, disponible sur https://periodicos.fgv.br/rda/article/view/82959 (Consulté le 17 octobre 2023) ; V.R.L. do VALLE, *Governo digital e a busca por inovação na Administração Pública*, *op. cit.*

[26] J.-B. AUBY, «Le droit administratif face aux défis du numérique », *L'actualité juridique droit administratif*, 2018, vol. 15, pp. 835-844, disponible sur https://scholar.google.com/scholar?cluster=14060461951675578754&hl=en&oi=scholarr (Consulté le 9 février 2024).

[27] B. THIEULIN, « Gouverner à l'heure de la révolution des pouvoirs », *Pouvoirs*, 2018, vol. 164, pp. 19-30, disponible sur https://api.semanticscholar.org/CorpusID:148913676.

[28]The digital revolution is identified as a phenomenon that implies the transformation of power. After having resorted to the force of weapons, the seizure of lands, and industrial capacity, the ability to be passing into the hands of information stewards regarding all manifestations of knowledge, invention, and everyday education—where knowledge can be acquired legally or illegally—allows for the reconstruction of a digital duplicate of each, where control can be exercised over the real person for purposes of business, religion, politics, or organized crime—is now possible P. BELLANGER, « Souveraineté numérique et ordre public », *Archives de philosophie du droit*, 2015, vol. 58, n° 1, pp. 285-296, disponible sur https://www.cairn.info/revue-archives-de-philosophie-du-droit-2015-1-page-285.htm.

[29] J. CHEVALLIER, « Vers l'État-plateforme ? », *op. cit.*

[30] Manuel Castells explains, in what he calls *network society,* that this refers to a new *social structure* that is based on networks operationalized by communication and information technologies that process and distribute knowledge arising from this process. These are computers, disruptive technologies, robotics, M. CASTELLS, R.V. MAJER et F.H. CARDOSO, *A sociedade em rede*, *op. cit.*

society evolves within a networked space, fueled by both human and non-human elements[31]. ***Secondly,*** the ***state's perimeter*** is also undergoing a transformation[32]. Duguit analyzed state sovereignty, the power of authority, and novel services to be delivered all within the paradigm of a government within a set territory.

Presently, however, multiple actors emerge as institutions with distinct functions and powers in a globalized and network sphere. The construct of the nation-state and sovereignty coexist with numerous models of governance in a "*global village*"[33].

In turn, public law evolves as the state transforms. During the era of the Second Industrial Revolution, legality and authority were coupled with the concept of public service provision, leading to the conceptualization of the state as a service provider[34]. Further, the introduction of *governance* has transitioned the state into a regulatory role, impacting concepts of public law.

However, the political, economic, social, and legal mutations of this *brave new world* reveal that, on one hand, the modern juridical system established on *antagonistic foundations* (state versus society, state actions for the protection of individual's rights) remain unchanged. While on the other hand, the domain of individual inalienable rights has expanded to encompass a wider range of rights across multiple dimensions, ***hypertrophying rights, and relegating duties***. Likewise, the manifest *sovereignty state crisis*[35] *is* being addressed by amplifying freedom and

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[31] J. van DIJCK, T. POELL et M. de WAAL, *The platform society : public values in a connective world*, New York, NY, Oxford university press, 2018.

[32] J. CHEVALLIER, « Vers l'État-plateforme ? », *op. cit.*

[33] M. MCLUHAN, *The Gutenberg galaxy*, *op. cit.*

[34] J. CHEVALLIER, « La fin des écoles ? », *op. cit.*

[35] As Monique Chemillier-Gendreau ponders. *« the permanence of sovereignty as a central notion of internal law, and as a pivotal notion in the relationship between internal law and international law, can be compared to the presence of a wreck obstructing the exit from a harbor and preventing any escape to the open sea. From that point onwards, any movement towards democratization of global society is a hindrance".* Original : *« La permanence de la souveraineté comme notion centrale des droits internes et comme notion pivot des rapports entre ces droits interne et le droit international, peut être comparée à la présence d'une épave qui obstruerait la sortie d'un port et ferait obstacle à toute échappée vers le large. À partir de là, tout mouvement de démocratisation de la société mondiale est entrave".* M CHEMILLIER-GENDREAU, « L'épuisement du principe de souveraineté ? », *in: Démocratiser l'espace-monde,* Colloque organisé par le Centre de recherche sur les droits de l'homme et le droit humanitaire (CRDH – Université Panthéon-Assas) et l'Institut des Sciences juridique et philosophique de la Sorbonne (ISJPS – CNRS / Université Paris 1 Panthéon-Sorbonne), Paris, septembre 2022.

the legal rights as juridical concepts (individual and/or collective). Furthermore, by procedures such as democracy, emancipation, and social control of the state.

In brief, the *era of rights*[36] has diminished the deliberation on political and public actions to a subsidiary role vis-à-vis the private sphere[37].

Consequently, in the world of governance of cyberspace, data rights are primally governed by private law[38]. In a hybrid public-private universe, public law's substance is gradually being replaced by concepts of individual rights and guarantees, whether they be fundamental rights and human dignity in values or efficient and outcome-oriented action[39]. Thus, as the *shape* of the state transitions from a centralizing government model to governance, *the content* of this form is filled with values dictated by the private sphere[40].

This camouflaging of public law analysis *by state actions* themselves ***is problematic***, as it not only permits the weakening of its substance but also contributes to the intensification of the

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[36] N. BOBBIO, M.A. NOGUEIRA et C. LAFER, *Estado, governo, sociedade: Fragmentos de um dicionario politico*, Rio de Janeiro, Paz e Terra, 2021.

[37] Sabino Cassese explains that: "*National governments make increasing use of private law. Contracts between the state and private persons, once almost unknown (as they challenged the very idea of state sovereignty), are now a common feature of state activity*". S. CASSESE, « New paths for administrative law: A manifesto », *International Journal of Constitutional Law*, juillet 2012, vol. 10, n° 3, pp. 603-613, disponible sur https://academic.oup.com/icon/article-lookup/doi/10.1093/icon/mos038 (Consulté le 22 octobre 2023).

[38] Concerning public data Valerie Varnerot observes : « *D'autre part, la distinction entre données publiques et privées n'est ni exclusive ni même principale en droit des données. Le clivage essentiel semble désormais s'ordonner autour de la distinction entre données personnelles (...) et données non personnelles. (...). L'opposition entre données privées et publiques apparaît alors comme une sous-distinction complémentaire à celle de données non personnelles »* V. VARNEROT, « La distinction droit privé/droit public en droit des données », *in* A. BAILLEUX, D. BERNARD et J. VAN MEERBEECK (éds.), *Distinction (droit) public / (droit) privé*, s.l., Presses de l'Université Saint-Louis, 2022, pp. 217-246, disponible sur http://books.openedition.org/pusl/27626 (Consulté le 25 octobre 2023)..

[39] Julie Cohen, when regarding information power states that "*arrangements that exist to facilitate global flows of extractive activity and that tend to treat protective regulation as network damage"*.J. COHEN, « Internet utopianism and the practical inevitability of law », *Duke law & technology review*, 2018, pp. 85-96.

[40] Lorenzo Casini – analysing the crisis at modern public law as a general realm, pointed for the possibility of the situation in an analogy with Alice in Wonderland and the rabbit hole: «*Like in Carroll's "Rabbit-Hole", there is no guarantee that, when the values and legal mechanisms behind them are moved from one level to another, they will remain the same* » « "Down the rabbit-hole": The projection of the public/private distinction beyond the state | International Journal of Constitutional Law | Oxford Academic », s.d., disponible sur https://academic.oup.com/icon/article/12/2/402/710350 (Consulté le 12 novembre 2023).

fractures highlighted by Duguit in *"transformations of public law"* which are not only metaphysical but *also antagonistic* and *individualistic* in their *code.*

In 1946, Michel Villey emphasized the tendency of modern society, to be an individualistic civilization, inclined to conceive law in terms of the individual, focusing on rights, means, and actions, thereby shaping the responses of the legal sciences[41].

Within this scenario, it is crucial to identify and analyze key aspects of state structure and public law in a society navigating the informational paradigm and the data revolution ***from a distinct*** analytical perspective. Concurrently, the legal researcher, engaged in the scientific enterprise, possesses the privilege of theoretical exploration, testing hypotheses that can be reliant on specific delineations.

Typically, state and power institutions are viewed through the lens of rights (fundamental, human) and the duties stemming from these rights (*management and control*)[42]. The digital constitutionalism approach[43], for instance, seeks to analyze power structures beyond the nation-state through democratic procedures and fundamental rights.

Still, in the realm of public law, where the focus is not on extra-state power models but ***on the core of public law*** concerning the state itself, the path should start ***from state action itself*** This does not mean abandoning democratic procedures, nor does it imply interpreting public law solely through the lens of democracy. Hence such a reading might limit the procedural nature of law to democratic instruments or exacerbate the expansion of the civil sphere at the expense of the political and public sphere. There is also a noticeable gap in digital literature,

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[41] M. VILLEY et M. VILLET, « l'idée du droit subjectif et les systèmes juridiques romains », *Revue historique de droit français et étranger (1922-)*, 1946, vol. 24, pp. 201-228, disponible sur http://www.jstor.org/stable/43844228 (Consulté le 13 janvier 2024).

[42] In this sense, Jurgen Habermas states that "*human rights and the principle of popular sovereignty are not by chance the only ideas in whose light modern law can be justified. For these are the two ideas in which we end up condensing those contents which, so to speak, are the only ones left when the normative substance of an ethos anchored in religious and metaphysical traditions is forced to pass through the filter of post-traditional foundations*". J. HABERMAS, *Facticidad y validez: sobre el derecho y el Estado democrático de derecho en términos de teoría del discurso*, s.l., Trotta, 2023, p. 164,.

[43] This can be observed in the proposals of "*digital constitutionalism*". Without taking away the fundamental relevance of the trend, what is emphasized here is that its vision starts from the defense of the fundamental rights of individuals, in national, regional, and global aspects, to limit the powers of large digital conglomerates. In this sense is the definition of Giovanni de Gregorio "*What is being examined is the protection of rights and the exercise of power across traditional territorial boundaries in a digital ecosystem that is increasingly fragmented, polarized, and subject to hybrid powers.* G. DE GREGORIO et R. RADU, « Digital constitutionalism in the new era of Internet governance », *International Journal of Law and Information Technology*, avril 2022, vol. 30, n° 1, pp. 68-87, disponible sur https://academic.oup.com/ijlit/article/30/1/68/6550367 (Consulté le 21 octobre 2023).

especially in the legal field. This gap focuses on procedural and functional aspects based on the theory of state power, which this research aims to address.

Therefore, to propose revised arrangements public law is viewed ***from the perspective*** of *its actions,* studying their origins and legitimizations. Public law is understood not as a separate entity (administrative and/or constitutional) but in the context of the interdependent nature of state action models and how governance types demand its validity through public action. In other words, the aim is to trace ***an alternative path***[44] to the traditional examination of the digital transformation of the state.

To conduct this proposal, the work follows a path that necessitates ***a deconstructive exercise***[45] of select political theories and law canons[46], including in Brazil[47]. This is followed ***by a reconstructive exercise***[48] of public law in light of the governance model. Within this scheme, public law will be highlighted by a renewed perception of state actions and law's ontology

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[44] This path – already opened by literature– traverses through perspectives that question the established structures of modern institutions, which can be examined by the French critical theory, such as the deconstructive approach of Jacques Derrida. The author summarizes that deconstruction is about going deep and questioning: "What is *"a certain element? Deconstruction, is a thinking about the origin and limits of the question "what is?" The question "What is?" has been commanded in* Western *history and philosophy* J. DERRIDA, « Qu'est-ce que la déconstruction ? », *Commentaire*, 2004, n° 4, pp. 1099-1100, disponible sur https://www.cairn.info/revue-commentaire-2004-4-page-1099.htm (Consulté le 21 octobre 2023).

[45]Deconstructing is not a matter of destroying, but of questioning labels, especially ethnocentric assumptions, which have contributed a large amount to the world, but have also taken a considerable amount away from it. E. NASCIMENTO, « Introduction : Derrida au Brésil. Actes de mémoire et le pardon », in *La Solidarité des vivants et le pardon*, Le Bel Aujourd'hui, Paris, Hermann, 2016, pp. 9-57, disponible sur https://www.cairn.info/la-solidarite-des-vivants-et-le-pardon--9782705692070-p-9.htm.

[46]Emmanuel Jeuland, when studying law relations theory, made a connection within the French critical theory. Jeuland uses French theory as a basis, especially its characteristics, such as the deconstruction and critique of the state of law and society. These elements are used to highlight the legal bond as a distance between two parties, involving a process of symbolization. For him, the French theory has a contribution to the field of law as critical, forcing the jurist to reflect. It builds a representation of the world that implies the law while criticizing the law, and highlights the institutionalized human relationship. Jeuland then proposes that the French theory can contribute to uncovering a cosmology of law based on the central notion of the legal relationship. By this, law was not just one of the domains, but of elaboration. It includes a theory of law that can be described as relationalist-processualist. E. JEULAND, *Théorie relationiste [sic] du droit : de la French theory à une pensée européenne des rapports de droit*, Issy-les-Moulineaux, LGDJ-Lextenso éditions, 2016.

[47]The importance of Derrida's texts for Brazil academia, for instance, was explored in a book that recounts the author's series of conferences in Rio de Janeiro. Indeed, from an earlier stage, Brazil drew particular attention to his works, especially in the light of the distinctive nature of Brazilian colonialism, where his thinking led to reflection on Brazil's colonial heritage, without, however, negating it. About: J. DERRIDA, *La Solidarité des vivants et le pardon*, Paris, Hermann, 2016

[48]That is the suggestion of Lorenzo Casini, that is, a reconstruction by « an integrated view of public law », since « public law have progressively lost their unity: for instance, constitutional law is increasingly dominated by the institution and practice of judicial review; most administrative lawyers have been overwhelmed by the fragmentation of legal orders ». About: L. CASINI, « "Down the rabbit-hole": The projection of the public/private distinction beyond the state », International Journal of Constitutional Law, avril 2014, vol. 12, n° 2, pp. 402-428, disponible sur https://academic.oup.com/icon/article-lookup/doi/10.1093/icon/mou015 (Consulté le 12 novembre 2023).

(***1.1***). That will lead to the proposition of a "*digital state*" political action model and a public law adapted to this framework (***1.2***).

1.1 The methodology of a deconstructive path through the eyes of state actions

The thesis adopts an approach based on political and public actions, within a particular path (***a formula***), in which the concepts of "***state***", "***society***" and "***public law***" are used as *categories,* the latter being corollary to the arrangements established between the former. Hence, the research follows a specific path: it begins perceiving institutions as reflections of ***imaginaries,*** progresses to employing concepts as analytical ***categories*** observed within certain ***rationalities,*** views these categories from a ***particular perspective***, and finally, establishes them as ***ideal types*** to ***correlate*** them and declare their ***corollaries.***

Thus, the ***initial remark*** is that institutions and their concepts are envisaged as reflections ***of imaginaries***. State and Law are human constructions - *fictions* - and as such, subject to formation[49]. They rest on general ideas that mold a "*spirit*"[50], the comprehension of which is essential to understand how institutions operate[51]. *Concepts,* in turn, "*have a social existence*"[52]. They are created, designed, and employed according to their utility in each epoch, and are

[49]Not only can they undergo shaping, but, as per Simone Goyard-Fabre, they warrant comprehensive reconstruction. S. GOYARD-FABRE, « Les craquements de l'édifice étatique », *Archives de philosophie du droit*, 2015, vol. 58, n° 1, pp. 339-354, disponible sur https://www.cairn.info/revue-archives-de-philosophie-du-droit-2015-1-page-339.htm (Consulté le 19 octobre 2023).

[50] The concept of "*spirit*" is articulated in myriad works as a symbolic delineation. For example, Montesquieu delineates the imaginary essence of what he terms the "*Spirit of the Laws*" encapsulating an era dominated by the predominance of Legislative Power. Conversely, the Roman spirit epitomizes an epoch where the notion of subjective right remained elusive, addressing public law through the lens of collective utility. In French, '*esprit*' embodies both the semantic meanings of "*spirit*" and "*mind.*" Conversely, in John Perry Barlow's 1996 declaration of cyberspace, he posited cyberspace as the "*new home of the mind,*" signifying a novel realm where intellect and digital essence converge. J.P. BARLOW, *A Declaration of the Independence of Cyberspace*, https://www.eff.org/fr/cyberspace-independence, consulté le 19 octobre 2023.

[51] J. PRIBAN, « European Constitutional Imaginaries: On Pluralism, Calculemus, Imperium and Communitas », *SSRN Electronic Journal*, 2020, disponible sur https://www.ssrn.com/abstract=3807101 (Consulté le 20 octobre 2023)..

[52] *Ibid.*

replaced by new semantic forces, including meanings that evolve. These concepts - stemming from the *imaginaries* – escort the passage of time, societies and institutions[53].

As articulated by Alain Supiot, akin to technique, religion, or arts, Law manifests as a cultural entity, encapsulating the predominant worldviews of a specific epoch[54]. Consequently, comprehending this base is essential for elucidating the legal interaction between the state and a networked ecosystem, as institutions transform parallel to the advancement of civilization and social milieu[55].

A second observation entails employing concepts as categories, for the examination of their correlations[56]. This investigation engages three analytical categories: the state (modern/digital), the society (individualistic/data-driven), and public law.

The objective is to illustrate the interrelations of these terms when viewed as categories. For instance, the modern state establishes a correlation with a society that is both individualistic and industrial, whereas the digital state is poised to align with a society driven by data[57]. The purpose is to show how categories, within a *theoretical schema*, have developed under particular rationalities and how certain models are interconnected, with the modern state, public authority law, civil society, and subjective law as examples[58].

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[53] *Ibid.*

[54] A. SUPIOT, *La gouvernance par les nombres : cours au Collège de France, 2012-2014*, Poids et mesures du monde, Nantes] [Paris, Institut d'études avancées de Nantes Fayard, 2015.

[55]Gaston Jèze states that "*Law is, in truth, temporary, transitory, and will necessarily be modified by the transformations of its environment. In other words, economic, sociological and political studies must underlie legal studies. Law is alive".* G. JEZE, *Les principes généraux du droit administratif, [1] : La technique juridique du droit public français*, Les principes généraux du droit administratif, Paris, M. Giard, 1925.

[56]As Antoine Bailleux points out, private, public, private law, public law are conceptual categories. Concepts work as magnets, attracting institutions, places, and practices into a more or less narrow orbit, whose meaning is only revealed when associated with nouns. A. BAILLEUX, « Tensions autour du public et du privé – les enjeux d'un chiasme », *in* D. BERNARD et J. VAN MEERBEECK (éds.), *Distinction (droit) public / (droit) privé : Brouillages, innovations et influences croisées*, Collection générale, Bruxelles, Presses de l'Université Saint-Louis, septembre 2022, pp. 421-446, disponible sur http://books.openedition.org/pusl/27706 (Consulté le 17 octobre 2023)., p. IV.

[57] In this reading, it is possible to identify the current of digital constitutionalism, which highlights that it should be seen as "*the reaction of European constitutionalism against the challenges to human dignity coming from new technologies in the algorithmic society*". G. DE GREGORIO, « The Rise of Digital Constitutionalism in the European Union », 2019, disponible sur https://papers.ssrn.com/abstract=3506692 (Consulté le 20 octobre 2023).

[58]This discourse does not seek to supersede elements of modernity or intrinsic legal frameworks. The objective is to delineate the intricate correlations between existing schemas and elucidate how they were ascended as a form of legislation that resonated with contextual coherence and relevance. This is not an endeavor to instantiate a tabula rasa, nor does it aspire to abrogate the Brazilian juridical system or the doctrines of public law, particularly the Brazilian Federal Constitution. Contrarily, it is perceived that it is plausible to invoke its emancipatory pluralistic precepts to authenticate actions—both political and public—that transpire within a networked milieu.

To comprehend these *correlations,* one situates them within ***two distinct rationalities***[59], illustrated through the metaphors of the ***modern machine*** and ***informational cybernetics***[60]. From these rationalities, treated as paradigms[61], categories are identified, in their imaginaries, concepts, and correlations.

Establishing a specific epoch as a paradigm is of substantial relevance as this leads to more profound transformational impacts and deeper restructuring impacts[62], especially for theoretical purposes in which *paradigms*[63] are presented for examination in certain *categories* and their *correlations*.

For instance, the endeavor is to demonstrate that modern Western public law is a corollary of the modern state model of political action, in the form of the modern machine. Conversely, the public law of the digital state could be conceived within the rationality of informational cybernetics[64]. From this perspective, the vocabulary of this imaginary, with its concepts, will condition the forms of state action.

These rationalities support the examination of a ***specific object***, the state models, and their corollaries. As elucidated, it concentrates on the perspective of political and public action. Rather than conducting an analysis grounded in individuals and their fundamental rights, with freedoms preserved by the rule of law through a universal legal order, the intention is to trace

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[59] As Michel Villey explains, rationalities depend on the mentalities and discourses of an era. M. VILLEY, *La Formation de la pensée juridique moderne, cours d'histoire de la philosophie du droit, 1961-1966*, Paris, Montchrestien, 1968.

[60]The excerpt from John Perry Barlow's declaration of cyberspace summarizes this distinction, which will be further explored throughout the thesis. In his terms: "*Governments of the industrial world, weary giant lords of flesh and steel, I come from cyberspace, the new home of the mind".* J.P. BARLOW, « A Declaration of the Independence of Cyberspace », *op. cit.*

[61] The theory of paradigm shifts can be a useful analytical tool to account for changes, using paradigms as ideal types that schematize a reality but do not correspond to a reality in all its potency. That is, realities are examined only through the filters of concepts, theories, and values. T.S. KUHN, *The structure of scientific revolutions*, International encyclopedia of unified science. Foundations of the unity of science, v. 2, no. 2, Chicago, University of Chicago Press, 1970.

[62]By paradigm, says Thomas Kuhn, "*represents the whole constellation of beliefs, values, techniques, etc., shared by the members of a given community*". A. BIRD, « Thomas Kuhn », *in* E.N. ZALTA (éd.), *The Stanford Encyclopedia of Philosophy*, s.l., Metaphysics Research Lab, Stanford University, 2022, disponible sur https://plato.stanford.edu/archives/spr2022/entrieshomas-kuhn/ (Consulté le 21 octobre 2023).

[63] According to Kuhn's framework of scientific revolutions, "*A scientific revolution is the rejection of a paradigm and the adoption of a new paradigm*".

[64] Norbert Wiener, in 1948 founded what is known today as the science of cybernetics. Cybernetics understands information as the content of the exchanges one makes with the outside world. In Norbert Wiener's terms, cybernetics deals with the "*scientific study of control and communication in the animal and machine*. Herein, "*Cybernetics*" denotes a unique imaginary, distinct from the machine's imagery, as will be demarcated throughout the thesis. N. WIENER, *Cybernetics or Control and Communication in the Animal and the Machine*, s.l., The MIT Press, octobre 2019, disponible sur https://direct.mit.edu/books/book/4581/Cybernetics-or-Control-and-Communication-in-the (Consulté le 19 octobre 2023).

an alternative route. According to André-Jean Arnaud, accepting a unitary vision or a plural perspective of what law is, has different effects on legal analysis and interpretation[65]. Following this reasoning, starting from the study of other areas of knowledge, one can reach conclusions different from those promoted by a given political/legal scheme through the definitions studied in them[66].

In other words, the examination does not focus on fundamental rights, liberties, social rights, or the principles of freedom and democracy. Instead, the analysis ***is framed through*** the lens of the *state's political action*, allowing for an exploration of both its origins and its subsequent ramifications.

This focus could lead the reader to question the lack of emphasis on rights or even data law. But, as has been pointed out, the path of the research ***is conducted not by rights, but from state actions.***

The perspective of considering public law through *political action values* finds limited representation. Charles Taylor, for instance, notes that classical political and moral theories primarily anchor their discourse within freedom being the "*ultimate good"* and the free agent taking center stage in actions concerning oneself. From this perspective, political action should enable individuals to transition from a state of mutual dominance, where their ability to act is constrained, to a condition of freedom, epitomized by their effective autonomy[67].

Hence, one understands that the intricate interplay between *political* and *public actions* in the realm of public law definition is noteworthy, especially in their central role of assessing legitimization and actor engagements within public spaces. Thus, starting the investigation at the state's role as a political action ideal type and structuring research from that vantage point

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[65] In this context, the differentiation posed by Emmanuelle Bernheim is relevant. According to this legal scholar, law serves as the focal point of contemplation. The jurist delineates its boundaries with precision and clarity, articulating what constitutes justice. Depending on the theoretical framework adopted, a jurist might confine their perspective to statutory law. Conversely, a sociologist perceives law as a subject for contemplation, examining it in its most expansive and intricate dimensions, thereby expanding the concept to encompass emerging forms of normativity. E. BERNHEIM, « Le "pluralisme normatif" : un nouveau paradigme pour appréhender les mutations sociales et juridiques ? », *Revue interdisciplinaire d'études juridiques*, 2011, vol. 67, n° 2, pp. 1-41, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2011-2-page-1.htm.

[66]The researcher starts from "*paradigms whose adoption leads to the discovery of radically different solutions to the problem of the possible clash between law and social practices".* A.-J. ARNAUD, « Droit et Société. Un carrefour interdisciplinaire », *Revue interdisciplinaire d'études juridiques*, 1988, vol. 21, n° 2, pp. 7-32, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-1988-2-page-7.htm.

[67]C. TAYLOR, « Résonance et théorie critique », *Réseaux*, 2022, vol. 235, n° 5, pp. 47-71, disponible sur https://www.cairn.info/revue-reseaux-2022-5-page-47.htm (Consulté le 25 octobre 2023).

offers a renewed perspective on the principles and values of public law, derived from political action correlations rather than interpretations that come from the private realm.

In addition, ***public law*** is studied here as a ***framework of political and public actions***[68]. Thus, political actions, their origins, legitimacy, values, and purpose dictate the tone of the research, which will demand an interdisciplinary approach, not only concerning state theories, but also economics, political science, and public management. Consequently, it is within this dialogue between transversal concepts amidst disciplines that a public law of the digital state will be significant.

It is posited that changes in institutional schemes, societies, and social relations interconnect, demanding legal observation of such developments. Relevant to this interpretation are, for instance, the remarks of German jurist George Jellinek. When shaping his general theory of public law, he highlighted the need to examine the law under social changes[69]. Furthermore, Bertrand Cassar, analyzing the alterations of the digital revolution, suggests a legal transformation, a phenomenon transfiguring social interactions into the realm of legal norms by dexterously adapting the law to emerging practices and conventions[70].

Therefore, *social changes* could serve as a catalyst[71] for theoretical advances in the human and social sciences[72]. To be understood, one must acknowledge such modifications.

Moreover, both the chosen subject matter, the digital era and a data-centric society, and the legal focus, (Brazilian public law), demands an interdisciplinary approach. It is a consensus that the digital revolution has profound effects on society. Despite this, non-unusual law scholarship

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[68]For Lorenzo Casini, its joint examination justifies a more unified vision of public law itself. Within that, he proposes that « *The time has come to re-establish a unitary and systematic perspective on public law in general. Such an approach, however, should not be purely legal* ». L. CASINI, « Down the rabbit-hole », *op. cit.*

[69] His significance within this dissertation is further underscored by his seminal role in articulating the contours of the general theory of the state. This pivotal contribution paved the way for the evolution of a subjectivist interpretation of public law, a transformation that will be explored in greater depth in subsequent sections of this study. on. G. JELLINEK, *La déclaration des droits de l'homme et du citoyen : contribution à l'étude du droit constitutionnel moderne*, *Country: FRin-8°. Le texte se trouve dans la collection intitulée : « Staats- und völkerrechtliche Abhandlungen », I. 3.*, trad. par Georges FARDIS, Paris, A. Fontemoing, 1902

[70] B. CASSAR, *La transformation numérique du monde du droit*, PhD Thesis, Université de Strasbourg, 4 décembre 2020, disponible sur https://theses.hal.science/tel-03121576 (Consulté le 20 octobre 2023).

[71] One explanation is that the theoretical foundations of various fields of knowledge often include assumptions that are considered to be unquestionable about how the world works, and that are even accepted as logical truths. These assumptions can become anachronistic, which leads to the realization that some fundamental postulates need to be revised. This is the case, for instance, of the connection between the public interest and public law to the figure of the State. P. DUMOUCHEL et R. GOTOH (éds.), « Frontmatter », *in* P. DUMOUCHEL et R. GOTOH (éds.), *Revisiting the Dichotomy of the Universal and the Particular*, New York, Oxford, Berghahn Books, 2015, p. I-IV, disponible sur https://doi.org/10.1515/9781782386940-fm (Consulté le 20 octobre 2023).

[72] J. CHEVALLIER, « Vers un droit postmoderne ? Les transformations de la régulation juridique », *Revue du droit public et de la science politique en France et à l'étranger*, 1998.

insists on dealing with the digital era in the same way as the physical universe, which conduces inevitable gaps and regulatory inadequacies.

As Marcel Leonardi points out[73], a jurist who works with airspace does not necessarily, needs to discern how an airplane works. The same cannot be said with the digital era. How to regulate people's protection and security when considering digits in a reticular environment? How to regulate open data, its access, and ownership without understanding how value production works in cyberspace? Is it made by *data*, by *information*, by *knowledge*? Are these words synonymous? Do they have the same effect?

A closed analysis of law[74] does not coincide with the object of study itself, a digital state in a data society. As legal scholar Julie Cohen identified in cyberspace analysis, its isolated study may lead to research failures[75]. Thus, the lack of interdisciplinary investigation isolates the discipline and impoverishes the research. Moreover, as stated by Sabino Cassese, public law must reestablish its position within the social sciences (not only economics but also politics) and reconnect with its historical roots. As public law is characterized by path dependence and institutional layeredness, history is a crucial analytical tool. So, "*In a plural and open world, in which legal orders communicate, methodological nationalism, exceptionalism, and limited contextualism become obsolete*" [76]. Thus, André-Jean Arnaud states that in the face of the verification of law as a historical and cultural phenomenon, it is necessary to incorporate the

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[73] M. LEONARDI, *Fundamentos de direito digital*, São Paulo, SP, Brasil, Thomson Reuters, Revista dos Tribunais, 2019.

[74]According to Eros Roberto Grau: "*The view of law as a "closed" science turns the dogmatist into a poor technologist or technocrat, nothing more than a mere leaguer*".
Original: "*A visão do Direito como ciência "fechada" transforma o dogmático em um pobre tecnológo ou tecnocrata, nada mais do que um mero leguleio*". E.R. GRAU, « O Estado, a liberdade e o direito administrativo », *Revista da Faculdade de Direito, Universidade de São Paulo*, janvier 2002, vol. 97, pp. 255-266, disponible sur https://www.revistas.usp.br/rfdusp/article/view/67545 (Consulté le 29 octobre 2023).

[75]Julie Cohen points out that the literature on cyberlaw has developed in almost complete isolation from the literature on the digital. According to the author, due to this isolation, cyberlaw analysis of the network is poorer, which leads to a misreading of cyberspace and causes anachronistic legal protections J. COHEN, « Studying Law Studying Surveillance », *Surveillance & Society*, juillet 2014, vol. 13, n° 1, pp. 91-101, disponible sur https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/law (Consulté le 9 février 2024).

[76]S. CASSESE, « New paths for administrative law », *op. cit.*

phenomena of society, to merge various fields of knowledge[77], taking care not to transpose concepts suitable from one discipline, to another without careful consideration[78].

A further relevant consideration is that the thesis examines specific segments, ***employing ideal types***[79] as its methodological framework. It does not aim to replace existing models but to identify them and their accompanying concepts within a unique interpretative background[80].

Henri Boullion, when exploring the ramifications of governance in administrative law, asserts that *government,* as an ideal type, epitomizes the conventional model of *modern political action*. Conversely, the era of governance symbolizes, still within the framework of the ideal type, a transition to a *novel political epoch*, which he denominates the *postmodern political model*. For him, this is characterized by the dissolution of the collective interest, the ascendancy of authoritative power, and hyper-individualism. Correspondingly, Jacques Chevallier, while conceptualizing, also in terms of the ideal type, a model of postmodern political action, characterizes governance as a form of political action inherent to the postmodern state and utilizes it as a lens for analysis[81]. Concurrently, there emerges a need to scrutinize public action and the underpinnings of public law, in light of the political action model.

Within this rationale, three *state political action models* are delineated, each represented as an ideal type[82].

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[77]. G. JELLINEK, *La déclaration des droits de l'homme et du citoyen : contribution à l'étude du droit constitutionnel moderne, Country: FRin-8°. Le texte se trouve dans la collection intitulée : « Staats- und völkerrechtliche Abhandlungen », I. 3.*, trad. par Georges FARDIS, Paris, A. Fontemoing, 1902

[78] This is a mention made during the preface of the Journal of Law and Society, in which the objective application of law, imposed in the first edition of the journal by Hans Kelsen and Leon Duguit, was denounced. "*There are some of us who have struggled, in one way or another, with often very similar arguments, with the scientific explanation proposed by these authors. We denounce the approach of our predecessors, which tended to purify the object, and we group, precisely on behalf of its impurity, not so much out of a spirit of contradiction, but because our research has taught us that law is a historical, cultural and social phenomenon, but a logical one, which allows us not to reject the hypothesis that there is room for the study of the types of rationality that animate it; and to invite to collaboration all those who claim to have an aptitude and a propensity for the study of social phenomena*". A.-J. ARNAUD, « Droit et Société. Un carrefour interdisciplinaire », *op. cit.*

[79]The definitions of Max Weber's ideal type are used here, which is "*neither historical reality nor authentic reality ... and has no other meaning than that* of *a purely ideal limiting concept in which we measure reality and with which we compare it*". M. WEBER, *Essais sur la théorie de la science*, Recherches en sciences humaines, n° 19, Paris, Plon, 1965.

[80]Ideal types are useful to employ as schematic support for model analysis, without claiming to describe real or precise situations, but representations. H. BOUILLON, *Le droit administratif à l'ère de la gouvernance*, *op. cit.*

[81] About, H. BOUILLON, *ibid.* ; J. CHEVALLIER, *L'Etat postmoderne*, 5e éd., Paris, France, LGDJ, 2017

[82]By ideal type, Max Weber wanted to highlight an interpretation of the sense of the concepts employed in social sciences. E. UNIVERSALIS, « Idéaltype, idéal type ou type idéal », *Encyclopædia Universalis*, s.d., disponible sur https://www.universalis.fr/encyclopedie/idealtype-ideal-type-type-ideal/ (Consulté le 21 octobre 2023).

The first model is that of the *sovereign government*, construed as a category that embodies the model of political action of the modern state[83], related to modern society (individualistic and industrial). It is the driver of modern law and *summa divisio* (*dichotomy*), based on the imaginary of the rational subject[84].

The second model corresponds to the postmodern[85] *political action* of *governance*[86], marked by the autonomy of society, the resurgence of hybrids, the publicization of the private[87], and the privatization of the public. It is within this model that the implementation of information technologies in the public sector is identified (initially as accessories).

The third, in terms of the ideal type, - corresponding to the ***propositional bias*** of the present research - resides in the conjecture of a model of political action of *network governance,* attentive to relations in a *data-dependent society* and the necessity to conceive public law attentive to these schemes.

In this way, the state, as an analytical category, is understood and described as a mode of *political action*. Its *actions* and *legitimacy* are shaped by the dynamics between institutional models and social relations, set within a *distinct imaginary*.

These models will subsequently guide the trajectory of the thesis, ensuring a comprehensive and academic examination. In summary, the thesis begins with a correlation analysis along three categories: state, society, and law.

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[83] This thesis posits that the Modern State's political action model emerged from the modernity paradigm tailored to the Western society of the rational subject.

[84] About: R.M. FONSECA, « COSTA; Pietro. Soberania, representação e democracia: ensaios de história do Pensamento Jurídico. Curitiba: Juruá, 2010. 297 p. », *Revista de Políticas Públicas*, 15; M. VILLEY, *La Formation de la pensée juridique moderne, cours d'histoire de la philosophie du droit, 1961-1966*, *op. cit.* ; A. SUPIOT, « Aux origines des États : la souveraineté de la limite. (La geste gaullienne à la lumière de l'histoire des institutions) », *Revue Défense Nationale*, 847; S. GOYARD-FABRE, « L'ordre juridique et la question de son fondement dans la philosophie du droit contemporaine en France », *L'Évolution de la philosophie du droit en Allemagne et en France depuis la fin de la Seconde Guerre mondiale*, Paris cedex 14, Presses Universitaires de France, 1991

[85] Regarding postmodernity, the possibility of its identification through "*structural vectors*" should be clarified. This approach allows a dynamic understanding of the changes, defining them through vectors and not by historical milestones. Among the vectors are, the end of the collective belief in "*meta-reports*"; the end of the belief in and legitimization of great universalizing concepts; the breaking down of binary oppositions such as "*public and private*". Thus, post-modernity is used to identify, in a preliminary way, the social form that emerges from the second half of the twentieth century onwards under the ballast of electronic means of communication. One does not intend to discuss its theoretical pertinence or accuracy. E. TRIVINHO, *A Democracia Cibercultural: Lógica Da Vida Humana Na Civilização Midiática Avançada.*, São Paulo, Paulus Editora, 28 septembre 2022.

[86] J. CHEVALLIER, « La gouvernance, un nouveau paradigme étatique? », *Revue française d'administration publique*, 105-106

[87] S. CASSESE, « New paths for administrative law », *op. cit.*

Thus, this perspective is embraced to scrutinize, in terms of ideal type, the models of political action that underpin the modern state, the postmodern state, and by extension, the core proposition of the thesis, which relates to the model of political action of the digital state, correspondent in *network governance* and its concurrent public law.

1.2 From the reconstruction of political action by the digital state model to a public law of responsibility

The thesis proposes to establish, based in the identification of correlations, a deconstructive and reconstructive investigation. **Firstly,** by highlighting the existing gaps in public law (in the pyramidal and dichotomous aspect), which blend public purposes and legitimations. Is by this deconstruction that an original ideal type of political action adapted to a networked society, and therefore naturally relational, will be proposed. **The second point**, thus, lies in adapting public law to this type, which is done from the concept *of responsibility*.

The **First Chapter** of the thesis examines the origin and legitimization of modern and pre-modern state actions, to expose the incompatibility of public law with a network society. That incompatibility is related to the ontological structure itself, the autonomous vision, which corresponds to an *imaginary* and guides both the model of political action and its relationship with society, as well as the corollaries of this arrangement, including modern law, conceived as an autonomous right.

First Chapter, then, discriminate the *imaginaries* within their ontologies (*machine/autonomous, cybernetic/interactive*) and their relevance at shaping institutions and social relations. **Chapter 2**, in turn, highlights how the digital transformation of the state is occurring in Brazil, with the emergence of a postmodern political action model governance is considered here as a category that defines the type of political action and conditions the interpretation of public law itself, as posited. ***Two models*** of governance are exposed.

The **democratic governance**, considered as an ideal type linked to the Brazilian constitutional design, bringing fundamental rights, democratic participation and judicial review.

Further, the **good governance** will refer to a type attached to the individualism and the managerial logic into the public sector[88].

Based on this analysis, the **Second title** of the **First Part** investigates the *reconstructive bias* of political action, defining the digital state from the correlations between state and society.

If the modern state (*sovereignty*) was correlated with and used as its code an individualistic society, the digital state uses a data-dependent society as its code.

Chapter 3 and **Chapter 4** of the thesis propose delimitating the digital state as an ideal type of political action, that of the **network governance**, which uses a data-driven society as *its code* (oriented), and plural manners as forms. Within this scenario, **Chapter 3** reposits the material criterium of public law into the Brazilian public law regime. Aiming to move from the subjectivist form of public law, suggesting a reposition of public law within the digital state. Which instrumentalizes the data-driven society by its material criterium, justified by the good government approach, defending both a law of the *res publica* (the common good) and relational (cybernetics). **Chapter 4**, then, debates public value as a management concept and how it can be translated into the legal discipline.

The **Second part** of the thesis deals with the application of the "*reconstructed*" elements, particularly in the realm of digital government. This arrangement will be examined and presented through a unique model and ideal type of the "Digital State". In this model, the vocabulary of public law is not constructed anew but adapted to the environment in which it operates using existing concepts, repositioning its core, and legitimization. Thus, ***firstly,*** governance as a type of political action will employ responsibility as a type of public action, and the legitimacy of both these concepts will be based on the well-being of the community (common good or public interest, respectively). ***Secondly,*** these state actions will be examined in light of their imaginaries and the society they interact with, in this case, cybernetics and the data society.

Chapter 5 will address the organization of political action, whose regulatory function (by the nature of governance), coupled with the networked environment, gives rise to a distinctive form of regulation, a techno-regulation introduced from the design stage. This techno-regulation is

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[88] H. BOUILLON, *Le droit administratif à l'ère de la gouvernance : les idées politiques du droit administratif, Country: FR24 cm. Bibliogr. p. 185-197. Index.*, Paris, Mare & Martin, 2021 ; J. CHEVALLIER, *L'Etat postmoderne*, *op. cit.* ; F. FILGUEIRAS, « Indo além do gerencial: a agenda da governança democrática e a mudança silenciada no Brasil », *Revista de Administração Pública*, 52

developed from the logic proposed in previous chapters, namely, the digital state as an ideal type and within a specific approach to network governance.

In this sense, while criticizing and pointing to the conundrums of digital transformation focused on user experience, an approach centered on data-driven government is advocated, equally demanding a design attentive to the values that underpin political action, i.e., the common good. Based on this, and from the perspective of data flow (and not an autonomous view of law), there is a pursuit of a decentralized organizational architecture, in other words, government as a platform and orchestrated governance, which can present an alternative in a federative state model such as Brazil.

Chapter 5 will address the perspective of political action, and its materialization in governance – including juristically– from the standpoint of ***concrete validation*** of public action.

Thus, as the modern type had authority and legality as its principal figure, *network governance* will utilize ***responsibility*** as the preeminent category of public law **(Chapter 6)**, especially as it can encompass the broad employment of the concept, involving procedural and evaluative criteria. While the investigation of this principle in the legal system requires verification of transversal concepts, it is conceivable to consider its disposition through notions that suit the studied environment.

Consequently, **Chapter 7 and Chapter 8** of the research deal with the concept of responsibility regarding the pillar concepts of contemporary law, *freedom,* and *equality*. If freedom is the concept that confers the right of data flow in the networked environment, its functional nature justifies a specific legal regime of the digital state stemming from the concept of a public regime of informational due process (**Chapter 7**).

Thus, employing the perception of the instrumental dimension of data rights, and analyzing from political and public actions, responsibility is examined as a condition to be investigated as a starting point for the establishment of a legal regime within the digital state. If network governance allows for the exercise of a relational perception of law, it implies and enables conceiving a functional definition of responsibility from a given context.

Furthermore, the network aspect will relate to various types of responsibility, as well as to the idea of an informational separation of powers (**Chapter 8**). By determining that the ecosystem and accountability have multiple facets, it is possible to examine its dimensions and respective conformities. Finally, the reading of information governance places a multiple duty of

responsibility, which occurs according to levels of action and manages responsibility for a broad scheme.

In sum, the fundamental shift from the network governance model does not lie in creating new concepts, but in repositioning legitimizations and values, within concepts of governance and accountability that are established in public law and digital law.

Alongside this backdrop, **the hypothesis** to be explored in the present work is that "*Brazilian public law, when applied to the digital state and a data-dependent society*", ***requires adaptation***[89] to address the dilemmas of a data-dependent society not responded to by traditional public law.

The objective is to consider the adaptation of public law ***from the*** perspective of political and public actions of the state, defining the digital state as a proper category, connected to a data-dependent society.

Thus, this objective will be pursued by:

i) exploring alternatives to the dichotomous conception of law, establishing a structure adapted to the characteristics of a data society while being attentive to the Brazilian social state, achieved through the perception of political and public actions, not through subjective criteria or fundamental rights (***First part***);

ii) examining the implications of public law conceived for a political action model of the digital state on the structure of government. As well as, the issues of responsibility in a data society, based on the standards of governance adequacy, in the context of freedoms, equalities, and their challenges (***Second part***).

In doing so, this research aims to contribute to the vision of public law adapted to an ideal type of digital state, linked to a data-dependent society, by projecting a functional and theoretical political and legal structure for the digital state in Brazil. The thesis argues that the establishment of law and state actions should be based on functional/relational criteria rather than autonomous requirements. It presents itself as an alternative to the dichotomous option of classical public law of state power or good governance, studying the conditions under which this might be feasible.

state power or good governance, studying the conditions under which this might be feasible.

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[89] Etymologically, adaptation stems from the Latin *accessus,* which means "*approach, arrival*", and *accedere,* which means "*to arrive in*". In turn, the origin of reconfiguration refers to a construction, a new mold, "*to give shape*", and "*to give a complete form*". While one approaches, in a perspective, therefore, reactive, the other has a more active side.

PART ONE

THE DATA-DRIVEN SOCIETY, A VECTOR FOR THE DEVELOPMENT OF PUBLIC LAW FOR A DIGITAL STATE IN BRAZIL

Title 1. The Digital State, an emerging reality within insufficient legal framework

> *"Whether one thinks of the State as a purely normative order or as a Leviathan (...) these are only products of the mind"* [90].

First Part of the thesis aims to *think* about the definition of the *digital state,* as an *ideal type* of *political action*, correlated to a *data society*, requiring Brazilian public law adaptation to such specificities. **Title 1** examines the incompatibilities between the public law of authority and the informational society, as well as the inadequacy of corporate governance for digital transformation. **Title 2** proposes the model of political action of the digital state, that of "*network governance*", attentive to *data society*. The **Title** also investigates the notions of public value and digital government. It also delimits the legal perception of public interest in Brazilian law as a concept of public law adapted to the Digital State model.

[90] M. STOLLEIS, « Image et réalité de l'état en Allemagne de l'ouest (1945-1960)* », *Droits*, 2009, vol. 49, n° 1, pp. 135-158, disponible sur https://www.cairn.info/revue-droits-2009-1-page-135.htm.

Chapter 1. The incompatibility of "*public power*" public law for a networked ecosystem

> *"They became impoverished without having lost anything, simply because everything around them changed and they didn't change"*[91].

The **First Chapter** ambitions to demonstrate that *public law* of *public power of authority* is a corollary of the modern state's model of *political action*, which was designed in consideration to a structure of a modern and industrial society, by the code of the *individual's autonomy*, in the spirit of the metaphor of the *contemporary subject machine*. At the same time, the networked society correlates to the metaphor of *cybernetics* and encompasses a contrasting and unique imaginary. Hence, a public law designed for the machine cannot align with structures attuned to the cybernetics' imaginary. **Section 1** delves into the organization of the values intrinsic to the imaginary of the machine and distinguishes them from the cardinal elements of society that surface in the imaginary of cybernetics, while **Section 2** aspires to explore the genesis and legitimacy of public law, emanating from the essence of modern political enactments.

Section 1: Network society emergency as a vector for the state political action transformation

In the convergence between legal structuring and state power in modern political philosophy, Law, in an expansive sense, encompasses both *private* and *public* realms[92]. As a phenomenon of modernity, public law is intrinsically connected to modern rationality, portrayed by a specific

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[91] This initial chapter invokes the reference to Rousseau to illustrate how the incompatibility of public law with the power of authority arises because it was instituted for a model of political action of a Modern State for a Western industrial modern society, thus, it is inherently incompatible with a networked society. J.-J. ROUSSEAU, « ATHENA - Discours sur l'Origine et les Fondements de l'Inégalité parmi les Hommes. »

[92] Modern law great division. N. BOBBIO *et al.*, *Dicionario de politica*, Brasília, UNB, 2010., p.350.

and autonomous characteristic[93]. Accordingly, the contemporary designation of Brazilian public law[94] has roots in Western modernity[95].

Hence, any thorough exploration of public law, even when focusing on data society and the digital state, requires a comprehensive analysis of the modern state and its theoretical foundations[96].

Public law can be described as a normative order connected to the state—as the institution with power —consisting of ***two dimensions***: a political one, which means a mode of ***political action***, and a public one, representing a mode of ***public action***[97]. Political action and public action are interdependent and their relationship changes in response to the ideal type of the state model[98]. Both political and public actions (with their characteristics), as well as their foundation, origin, and legitimation, are linked to arrangements between institutions and society, and are also tied to a given rationality.

Michel Stolleis highlights the intertwined nature of the general theory of the state and public law, acknowledging them as offspring of a common ancestor – *general public law*[99].

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[93] J. VAN MEERBEECK et T. LEONARD, « Le droit subjectif : nœud gordien de la distinction entre droit public et droit privé ? », *in* A. BAILLEUX, D. BERNARD et J. VAN MEERBEECK (éds.), *Distinction (droit) public / (droit) privé*, s.l., Presses de l'Université Saint-Louis, 2022, pp. 321-365, disponible sur http://books.openedition.org/pusl/27671 (Consulté le 29 octobre 2023).

[94] E. GABARDO et D.W. HACHEM, « O suposto caráter autoritário da supremacia do interesse público e das origens do direito administrativo: uma crítica da crítica », *Direito administrativo e interesse público: estudos em homenagem ao Professor Celso Antônio Bandeira de Mello. Belo Horizonte: Fórum*, 2010, pp. 155-201..

[95] The concept of *modernity* refers to a specific socio-historical context, which allows the understanding of the Western mode of construction, delimiting at this point the criteria posed by Anthony Giddens (industrial society, nation-state, legitimate force). A. GIDDENS, *Capitalism and modern social theory : an analysis of the writings of Marx, Durkheim and Weber*, Cambridge New York Melbourne [etc.], Cambridge university press, 1991.

[96] In this first part of the thesis, it is not intended to proceed to a deepening of legal notions, but to examine the terms as categories and their relations within the constructions of the Modern State and Western modernity. The idea is to deal with the models of political and public action, as categories, and their correlations with models in ideal types of State. The research is done in an interdisciplinary way.

[97] While the former (*political action*) is traditionally listed in the constitutional law department (the area that will deal with rights, structures), public action will be the *constitution in action*, that is, the public aspect of the political dimension of the state (*the government*), being, therefore, the public a consequence of the model designed with attention to the political action model. This division is little explored in the doctrine, but it is understood to be fundamental, because it is from this division that one identifies the correlation between political and public, and how the latter depends on the former. Furthermore, it is from this correlation that one can identify the gaps in the mutation of contemporary law.

[98] J. COMMAILLE, « Sociologie de l'action publique », in *Dictionnaire des politiques publiques*, 5e éd., Références, Paris, Presses de Sciences Po, 2019, pp. 576-584, disponible sur https://www.cairn.info/dictionnaire-des-politiques-publiques--9782724625110-p-576.htm.

[99] M. STOLLEIS, « Droit naturel et théorie générale de l'État dans l'Allemagne du XIXe siècle », *Le Débat*, 1993, vol. 74, n° 2, p. 63, disponible sur http://www.cairn.info/revue-le-debat-1993-2-page-63.htm (Consulté le 24 octobre 2023).

This connection underscores the importance of grasping ***the origins*** and ***legitimacy o***f the modern state. Although these elements are distinct, they are interconnected and influence the entire system. Accordingly, it becomes imperative to reassess the *presuppositions legitimizing* the aforementioned models of state political and public action. The alleged incompatibility, therefore, originates from the very imaginary from which public law is formed[100].

That is, if the political action model of the modern state was shaped within the paradigm of modernity for Western society of the rational subject, the political action model of a digital state must contend with elements such as virtual space and the existence of various actors in active/passive interactions, requiring a foundational mold of a structure that is compatible with these peculiarities[101]. Thus, public law stems from the process of codifying and protecting the *autonomy of the individual*, while the public law for the digital state will have to deal with a *data-dependent society.*

A clarification is necessary, specifying that: ***i)*** the modern state, in this context, interpreted as a model of political action under sovereign government, shaped the framework of public law and the paradigm of public action, encompassing its architectural and internal organization, ***ii)*** this modern state found its conceptual genesis within a unique code (***the individual***) and a distinct structural design (***pyramidal)***. This conceptualization experienced further refinement with the establishment of the rule of law, drawing a demarcation between the state and Society, and separating political power from economic dominion through the institution of ***dichotomies.***

Consequently, the traditional categories of political and public action (*government and authority*[102]), along with their foundational premises and legitimizations, converge to form the authoritative fabric of public law.

To comprehend this premise thoroughly, it is imperative to contextualize the inception of data-driven society, thereby accentuating the disparities between the respective imaginaries—herein represented by *the machine* **(§1)** and that of *cybernetics* **(§2)**.

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[100] B. BARRAUD, *Le droit postmoderne: une introduction, Country: FRill. 22 cm. Bibliogr. p. 291-311.*, Paris, l'Harmattan, 2017

[101] J. HABERMAS et R. de AGAPITO SERRANO, *Tiempo de transiciones*, Colección estructuras y procesos. Serie Filosofía, Madrid, Trotta, 2004.

[102] It refers, therefore, to the search for the origin of the modes of legitimation of state political and public actions.

§1 Modern state model imaginary, the machine

In establishing the state as an ideal type of political entity, it is essential to delineate the social relationships, collective beliefs, and the normative codes that constitute its framework. Georg Jellinek delimits the notion of the modern state. The concept, though not univocal, deals with the correlation of the ***unity of power*** and ***the individual***[103].

Consequently, it is imperative to scrutinize the model as an ideal type, acknowledging its distinctive features and the relationships it fosters **(A)**, while concurrently considering the conceptualization of the individual subject **(B)** inherent within it. This examination extends to the construction of the modern state's conceptual framework **(C)**, as it shapes and is shaped by the prevailing socio-political imaginaries.

A. Modern political action correlations

In terms of an ideal type, the modern state embodies a form of rationality that is circumstantial[104]. It comprises distinct elements and represents the institution embodying *political power* in the context of Western modernity, having established its *sovereignty* through a contractual will, though not without certain nuances[105]. Characteristically, as a *political action* ideal type, it manifests as a *centralized government*, vested with the *authority* to create and enforce laws, maintaining a monopoly over the legitimate use of force within a specified territory. This framework can be identified as part of the *"statist paradigm"* in accordance with

[103]Which relates the modern state to the values of modernity, reason and the individual. G. JELLINEK, *La déclaration des droits de l'homme et du citoyen : contribution à l'étude du droit constitutionnel moderne*, Bibliothèque de l'histoire du droit et des institutions, n° 15, Paris, A. Fontemoing, 1902, disponible sur http://gallica.bnf.fr/ark:/12148/bpt6k68603t (Consulté le 20 octobre 2023).
[104] M. VILLEY, *Formação Do Pensamento Juridico Moderno, A*, s.l., Editora WMF Martins Fontes, 23 juin 2022.
[105] S. GOYARD-FABRE, « Les craquements de l'édifice étatique », *Archives de philosophie du droit*, 2015, vol. 58, n° 1, pp. 339-354, disponible sur https://www.cairn.info/revue-archives-de-philosophie-du-droit-2015-1-page-339.htm (Consulté le 19 octobre 2023).

Antônio Manuel Hespanha's terminology[106]. This systematized scheme, which has significantly shaped the development of public law, notament the french model[107].

Within the Brazilian legal context, Hely Lopes Meirelles[108] articulates that the rule of law in Brazil encompasses three fundamental and indissoluble elements: the population, the territory, and a sovereign government[109]. In parallel, Paulo Bonavides underscores that the essence of the modern state is firmly grounded in the *legitimacy of power*. In the context of public law, authority emerges as a mode of public action intrinsically tied to the *sovereign government* model, both of which find their core legitimation in the public interest. As a concrete form of state legitimation, *public action* emanates from the model of *political action*, designed with regard to its structure.

In the traditional French doctrine, Maurice Hauriou[110] differentiates political and public realms. In the modern state[111], the classical model of political action is the *sovereign government*, while public action manifests as the *power of authority*, materializing in *legality* and the assurance and ownership of *public interest* by the state entity. Therefore, this definition of the power of

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[106]Which has the following basic characteristics: ***i)*** Modernity has as its fundamental premise the values of ***reason and*** the ***individual,*** in a perspective of the subject, with the substratum of a subjectivist vision of society and its ordering from this perspective. It is a system shaped by and for the individual in a modern, capitalist, democratic, and industrial society; ***ii)*** The Modern State is founded and justified by ***sovereignty,*** which is the result of the secularization of state power, whose notion constitutes a delimiting element of a contractualist conception of *will,* from which emerge the great distinctions of the modern State, among them, sovereignty/submission and sovereign government ***iiii)*** With the rule of law, the State becomes the political power holder through the power-state-law triad. The State is opposed to society. It is in this stage that the *dichotomy* between authority/liberty is built in the importance of the private; ***iv)*** To guarantee the referred scheme, the rationalization of the State's functions is performed through the state bureaucratic apparatus, developed in the logic of the development of industrial and disciplinary structures, in a mass model; ***v)*** It is from bureaucracy and authority that the legitimacy of the State derives a *general interest*, translated in the Brazilian legal system as "*public interest*"; as well as the principle of legality in the publicistic legal system; ***vi)*** In parallel, modern society is accompanied by the evolution of technology, of scientism, and of the economic sphere in the modes of production. A.M. HESPANHA, *Pluralismo jurídico e direito democrático: prospetivas do direito no século XXI*, História e filosofia do direito, Coimbra, Almedina, 2019.

[107] J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., Paris, France, LGDJ, 2017.

[108] H.L. MEIRELLES, J.E. BURLE FILHO et C.R. BURLE, *Direito administrativo brasileiro*, São Paulo, Malheiros, 2016.

[109] People refers to the human whole; territory, the physical space (in a Euclidean perspective); and sovereign government is the conducting artifact, which "*holds and exercises the absolute power of self-determination and self-organization emanating from the People Ibid.*

[110] M. HAURIOU et A. HAURIOU, *Précis élémentaire de droit administratif, par Maurice Hauriou,... 5e édition entièrement refondue et mise à jour par André Hauriou,...*, *Country: FR*, Paris, Librairie du Recueil Sirey (Toulouse, impr. de F. Boisseau), 1943

[111]Pierangelo Schiera summarizes that the Modern State can be historically demarcated as a precise type of power organization, which distinguishes and particularizes it, whose central element resides in the centralization of power. P. SCHIERA. Modern State. In: .N. BOBBIO, N. MATTEUCCI, G. PASQUINO, C.C. VARRIALE, G. LO MONACO, L.G.P. CACAIS, R. DINI et J. FERREIRA, *Dicionario de politica*, 13. ed., 4. reimpr., Brasília, UNB, 2010, p.427.

authority is applicable to public law, particularly as employed in Brazilian legal matters. It is utilized as a classical model, especially when establishing the public law regime[112].

In a classical interpretation, the *public interest*, therefore, alludes to the fundamental core of public authority in the realm of public law, delineating a legal regime —a concept intertwined with models of political and public action (*government-authority),* which, in turn, delve into questions of legitimacy and the nature of state actions. In this vein, the traditional perspective of Brazilian public authority law revolves around the legitimation of public action within the sphere of governmental command, materialized through the prism of the public interest, an interest inherently derived from the political action model of *government*[113]. Subsequently, the political and public dimensions of modern state actions are products of a formula culminating in the construction of public law as a discipline of modernity, intricately linked to the state institution, all constructed within and around it.

The modern state, as a conceptualization reflecting the *sovereign government* model, undertook scrutiny by Maurice Hauriou[114], taking into account *social relations*, with the constitution of modern industrial society serving as an indicative blueprint for the design of the modern state. According to the author, the state's "*regime*" is considered the quality given to social relations by the state, inherently connected to the quality of its constituents[115]. Similarly, George Jellinek, when defining the characteristics of what he perceived as the modern state, paid heed to the examination of institutions in light of *social changes*[116].

Thus, ***modern society*** emerges as a decisive factor in the formation of the modern state. The emergence of a society within a networked ecosystem will necessitate a reevaluation of the institutional and legal frameworks devised for a nation-state and for the protection of the rights of the modern subject. Consequently, a reconsideration of the assumptions legitimizing the aforementioned models of state-driven political and public action will also become imperative.

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[112] H.L. MEIRELLES, J.E. BURLE FILHO et C.R. BURLE, *Direito administrativo brasileiro*, *op. cit.*
[113] *Ibid.*
[114] Hauriou's theory highlights that the state designates a certain way of being in social relations, because state relations are not the same as feudal or patriarchal relations. For him, state is both the *organization of public affairs* and *political organism*. As a political organism, it deals with the sovereign state; as the organization of public affairs, "*it is undoubtedly what we conceive as the quality imprinted on social relations. Public power is at the service of the common good, differences are used to achieve equality.*"M. HAURIOU et A. HAURIOU, *Précis élémentaire de droit constitutionnel , par Maurice Hauriou,... 4e édition, revue et mise au courant par André Hauriou,...*, Mayenne, impr. Floch Paris, Librairie du « Recueil Sirey », 1938.
[115] M. HAURIOU et A. HAURIOU, *Précis élémentaire de droit administratif , par Maurice Hauriou,... 5e édition entièrement refondue et mise à jour par André Hauriou,..., op. cit.*
[116] G. JELLINEK, *La déclaration des droits de l'homme et du citoyen*, *op. cit.*

In Weberian terms[117], one might assert that ***the disenchantment of the world*** characterizes *Western modern society*, unfolding through a process of rationalization and comprising distinct elements. Scientific progress manifests in the technical realm; concentration of production modes dominates the economic field; the establishment of the state defines the political sphere; and bureaucratic architecture structures the administrative domain. This "*imaginary*" embodies the fundamental values of Western modernity. Accordingly, the state formulates its elements, paying attention to the other components in the process of disenchantment, indicative of a statist paradigm. In sum, correlations between the state, society, and law are manifest and interlinked[118].

By contrast, in a networked environment, social relations diverge from the above model, given that they exhibit a particularly reticular nature, which will prove incompatible with fundamentally vertical categories[119]. The emergence of a society within a networked ecosystem will demand a reevaluation of institutional and juridical frameworks, which were initially conceived for a nation-state[120] and safeguarding the rights of the modern subject.

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[117] In Max Weber's terms: "*Modernly, however, the West has developed, in addition to this, a very different form of capitalism, which had never appeared before: the rational capitalist organization of free labor (at least formally)...(...) Among the factors of indisputable importance are the rational structures of laws and administration, for modern rational capitalism needs not only the technical means of production, but also a calculable legal system and an administration based on formal rules*". M. WEBER, *Charisma and disenchantment: the vocation lectures*, New York Review Books classics, New York, New York Review Books, 2020.

[118] A.M. HESPANHA et R. CABRAL, « Os juristas como couteiros. A ordem na Europa ocidental dos inícios da idade moderna », *Análise Social*, 2002, vol. 36, n° 161, pp. 1183-1208, disponible sur http://www.jstor.org/stable/41011532 (Consulté le 24 octobre 2023) ; S. GOYARD-FABRE, « Les craquements de l'édifice étatique », *op. cit.* ; J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., *op. cit.*

[119] McLuhan announced the global village, and Henry Jenkins adds that it refers to the end of mass culture the beginning of the age of participation and interaction. The active-passive system of the traditional, passive receiver no longer exists. The then individual/citizen viewer interacts and is part of a new change in culture, social and communicative relations. M. MCLUHAN, *The Gutenberg galaxy : the making of typography*, Canadian university paperbook, n° 39, Toronto, University of Toronto press, 1964 ; H. JENKINS et S.L. de ALEXANDRIA, *Cultura da convergência*, São Paulo, Aleph, 2017.

[120] One example is the digital constitutionalism model that aims to establish a constitutionalism suitable for a networked society. N. SUZOR, « Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms », *Social Media + Society*, juillet 2018, vol. 4, n° 3, p. 2056305118787812, disponible sur https://doi.org/10.1177/2056305118787812 (Consulté le 24 octobre 2023).

B. Modern political action values

This scheme can be examined in details from the perspective of the state's ***institutional structure***. Simone Goyard-Fabre[121]

warns that without the inherent rational conjectures that underpin them, one cannot decode its foundational elements. In this regard, the *machine* metaphor becomes helpful, shedding light on the *dual values* that boost the representations of modern institutions and society—*reason and the individual* —which collectively mold the mechanical rationality of Modern's state paradigm.

Despite the various factors that gave rise to the emergence of the modern[122] and its different characteristics, there is no doubt that the fundamental issue revolves around the "***individual***"[123]. The rationalization of Western society is about the emergence of the *rational subject* as a primordial value, concerning the search for natural/individual rights. Individuals are consciousness, will and spirit. The "*I*" does not belong to a group because "*I*" precedes "*we*". Conversely, individualism epitomizes the essence of the modern[124], contrasting medieval, classical doctrines[125] and equal postmodern imaginaries that underscore the intricate nature of interdependent, communicative systems situated within an informational paradigm.

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[121] S. GOYARD-FABRE, « Les craquements de l'édifice étatique », *Archives de philosophie du droit*, 2015, vol. 58, n° 1, pp. 339-354, disponible sur https://www.cairn.info/revue-archives-de-philosophie-du-droit-2015-1-page-339.htm (Consulté le 19 octobre 2023).

[122] Modernity, along with its antecedents in the Italian and European Renaissance, is widely recognized. It exhausted its momentum more swiftly than the feudal model. The discovery of America signified the broadening of the universe. The Reformation elevated the importance of a direct connection with God and differentiated the terrestrial political society from the autonomy of the celestial city. The exact sciences dismantled the supernatural and geocentric perspectives of the universe. J. VAN MEERBEECK, « Relation et confiance légitime ou la face cachée du contrat », *Revue interdisciplinaire d'études juridiques*, 2016, vol. 76, n° 1, pp. 97-118, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2016-1-page-97.htm (Consulté le 24 octobre 2023).

[123] First the man, and then the human.

[124] M. VILLEY, *Formação Do Pensamento Juridico Moderno, A*, *op. cit.*

[125] As Pietro Costa explains, *Communitarianism* is a fundamental element for understanding medieval structuring. It is related to the idea of the perfection of a community. There was no such thing as the *I,* the *individual,* the subject as itself. The subject was only a subject in community, in its community, with its own divinely defined function, and, therefore, unquestionability. Hence, communitarianism relates to the *perfection of* the community. A cosmological order is fulfilled. The world is thought of based on the whole and not on the individual. It is from the whole that each individual places himself in this cosmological unity. R.M. FONSECA, « COSTA; Pietro. Soberania, representação e democracia: ensaios de história do Pensamento Jurídico. Curitiba: Juruá, 2010. 297 p. », *Revista de Políticas Públicas*, 2011, vol. 15, n° 2, pp. 301-303, disponible sur https://www.redalyc.org/articulo.oa?id=321129113011 (Consulté le 21 octobre 2023).

As Manuel Hespanha[126] explains, pre-modernity is a world that takes *order* from an objective point of view. The modern, on the other hand, reasons through the *subject*[127]. In communion with *reason*, *individualism* led to the *separation of* the person from his social universe, which also represents the "*loosening of the bonds of communal loyalty through a process of subjectivation*"[128]. In a synthesis articulated by Friedrich Nietzsche, the modern subject embodies the human belief in a unity that underlies all facets of reality, insomuch as "*we believe in our belief to such an extent that, on its basis, we imagine 'truth,' 'actuality,' and 'substantiality' in general*"[129].

This singular aspect—*subjectivity*—stands as the definitive signature of modern Western society, coding itself through the individual and, thereby, erecting a realm where a vision *of isolation* struggles to sustain in an inherently networked domain. It is not coincidental that the inadequacy of an anthropocentric interpretation is emphasized herein[130]. Whereas modernity anchors itself in the subjective, postmodernity brings forth the manifestation of eclectic entities, illuminating the presence of various actors and mechanisms surpassing the *individualistic* scope[131]. It is the concept of unity that will reveal itself as incompatible with a multifaceted and plural imaginary.

From the realm of reason emerges the essence of ***scientific inquiry***[132]—a transformative paradigm shift wielding substantial influence over the rational frameworks constructing the imaginaries of institutions and their conceptual correlations[133]. Consequently, the demarcation between subject and object gains paramount significance. Analysis proceeds by *isolating*

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[126] A.M. HESPANHA et R. CABRAL, « Os juristas como couteiros. A ordem na Europa ocidental dos inícios da idade moderna », *op. cit.*

[127] R.M. FONSECA, *Modernidade e Contrato de Trabalho: do sujeito de direito a sujeicao Juridica*, São Paulo, Ltr, 2001.

[128] J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., *op. cit.*

[129] F. NIETZSCHE, « Le gai savoir », Paris, Société du Mercure de France, Paris, 1901, Aphorisme 125.

[130] J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., *op. cit.*

[131] For Tony Watson, Descartes, by establishing the thinking mind as the essence of the human individual ("I think, therefore I am"), places the individual as separate from relations with the outside world and "*encourages a view of human beings as separate from their social world and their culture: a view of isolated entities*", which also impacts the view over the organizations, taken as autonomous entities. T.J. WATSON, « Organization and work in transition: from the "systems-control" logic to the "process-relational" one », *RAE - Revista de Administracao de Empresas*, janvier 2005, vol. 45, n° 1, pp. 14-23, disponible sur https://periodicos.fgv.br/rae/article/view/37078.,p.18.

[132] J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., *op. cit.*

[133] This paradigm operates on a mechanical dissection of nature, grounded in absolutes, utilizing Cartesian methodology to challenge the Aristotelian dialectic. The Cartesian paradigm witnessed a turning point so important in Western thought that it was called the "***Scientific Revolution***". J. VAN MEERBEECK, « Relation et confiance légitime ou la face cachée du contrat », *Revue interdisciplinaire d'études juridiques*, 2016, vol. 76, n° 1, pp. 97-118, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2016-1-page-97.htm.

objects, disregarding the interconnectedness and relations between them[134]. This static, mechanistic worldview becomes the distinguishing feature of modern Western society, and, by extension, of the state—as a manifestation of political action under sovereignty [135]. The legal frameworks, also, adopt this configuration in the form of *natural law*, delineating subject from object[136], leaving a once practical model for a perspective based in immutable natural rights, which align with a structured, pyramidal, and dichotomous model of the state[137]. This represents the construction, initially ***pyramidal***, of a rational subject.

C. The machine imaginary

> *"The metaphor of the pyramid symbolizes the first phase of modernity (...) This hierarchical space, ordered from the single perspective of the ruler, functions according to a deductive logic. It is this logic that ensures and protects the arborescent (linear and hierarchical) order of the pyramid"* [138].

Thomas Kuhn propounds that, regarding paradigms, elucidating the presence of a revolutionary shift can be accomplished by scrutinizing the interrelations between disparate eras and their associated *aesthetic* expressions[139]. Consequently, it can be postulated that the digital state model of political action will synchronize with an aesthetic that diverges from the one that shaped the Modern state. Concerning the modern state, attentive of the subject's viewpoint, the aesthetic depiction is connected to the epoch embodied in the subject's vision[140]. The pursuit

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[134] E. JEULAND, « L'école relationnaliste du droit : la nouaison? », *Archives de Philosophie du Droit*, 2011, vol. 54, pp. 373-387.
[135] *Ibid.*
[136]Traditionally, autonomous law is characterized by focusing on general rules and abstract principles, rather than concrete relationships and particular circumstances. Through its conception of separation of powers, it outlines a neutrality of the judiciary, with precise lines of the functions of the three branches. Evoking the Weberian *ethos of* rational legality, it emphasizes the importance of fidelity to formal rules as the model of legal authority. L. VAN DEN BERGE, « The Relational Turn in Dutch Administrative Law », *Utrecht Law Review*, février 2017, vol. 13, n° 1, p. 99, disponible sur https://www.utrechtlawreview.org/article/10.18352/ulr.374/ (Consulté le 24 octobre 2023).
[137] E. JEULAND, « L'école relationnaliste du droit : la nouaison? », *op. cit.*
[138] M. VOGLIOTTI, « L'érosion de la pyramide pénale moderne et l'hypothèse du réseau », *Revue interdisciplinaire d'études juridiques*, 2005, vol. 55, n° 2, pp. 1-16, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2005-2-page-1.htm (Consulté le 24 octobre 2023).
[139]On the relation between aesthetics specifically in the realm of law, see: M. VAN DE KERCHOVE et F. OST, *De la pyramide au réseau ? : pour une théorie dialectique du droit*, Publications des Facultés universitaires Saint-Louis, n° 94, Bruxelles, Facultés universitaires Saint-Louis, 2010.
[140] M. VOGLIOTTI, « L'érosion de la pyramide pénale moderne et l'hypothèse du réseau », *op. cit.*

of truth and reason, and the employment of Cartesian concepts, along with their methodologies, integrate this assembly of modernity and characterize the structuring of the modern state with a personified element[141].

A figure personifying this viewpoint is illustrated by Hobbes's Leviathan, the artificial man. Thus, the institutional architecture of the state mirrors developments in other knowledge domains[142].

Within this framework, akin to the mold of the sovereign state, modern law is conceptualized in a *pyramidal custom*, conditioning the entire system to exhibit a centralized, monolithic, and unified nature[143]. Initially, the metaphor of the machine conceptualizes the notion of an institution as an artificial construct. This rationality demarcates institutions, their categorizations, and philosophical concepts. In formalizing structures of power[144], the state secures its legitimacy through the centralization of government, perceiving the sovereign entity as a "*machine*"[145].

Figure 1 Birth of venus[146]

Figure 2 The Léviathan[147]

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[141] In this sense Tony Watson explains that the company seen as a living organism has the advantage of being understood in a more didactic way. The systemic controller model of the company will treat the company not as a living organism, but as a mechanical system. The organization may be an entity, but it is endowed with subsystems, with control mechanisms. Organizations are defined as large machines "designed, controlled and maintained by managers. (...) *In the popular orthodox style of "motivations-driven" people management, the individual is treated as a small mechanized system whose "motives" function as a motor that "drives" the human entity to behave in a particular way*.T.J. WATSON, « Organization and work in transition: from the "systems-control" logic to the "process-relational" one », *op. cit.*

[142]In these terms Massimo Voglioti: *I believe, in fact, that the legal modernization process can also be interpreted as a gigantic construction work of solid bodies, of which the pyramid image represents the paradigmatic synthesis".* M. VOGLIOTTI, « L'érosion de la pyramide pénale moderne et l'hypothèse du réseau », *op. cit.*

[143] M. VAN DE KERCHOVE et F. OST, *De la pyramide au réseau ?*, *op. cit.*

[144] J. CHEVALLIER, « Vers un droit post-moderne ? Les transformations de la régulation juridique », *Revue du droit public et de la science politique en France et à l'étranger*, 1998, pp. 659-714, disponible sur https://hal.science/hal-01728684 (Consulté le 24 octobre 2023).

[145] A. SUPIOT, *La gouvernance par les nombres : cours au Collège de France, 2012-2014*, Poids et mesures du monde, Nantes] [Paris, Institut d'études avancées de Nantes Fayard, 2015.

[146] BOTTICELLI, *The birth of Venus by Botticelli* |, s.d., Galeria Uffizi, disponible sur https://www.uffizi.it/en/artworks/birth-of-venus (Consulté le 4 novembre 2023).. https://creativecommons.org/licenses/by-nc-nd/3.0/

[147] A. BOSSE, *Fronstpice du « Léviathan » de Thomas Hobbes*, s.d., disponible sur https://histoire-image.org/etudes/leviathan-thomas-hobbes (Consulté le 4 novembre 2023).. https://creativecommons.org/licenses/by-sa/3.0/

Thus, the prism through which one interprets scientific rationale is intricately linked with a modern paradigm, encompassing elements of language, spatial relations, and communicative processes. Marshal McLuhan aligns this conceptual perspective with the inception of a "*visual space*". Within these confines, the state demarcates the geographical boundaries of its sovereignty. In such a conceptualization, space and time manifest as the elemental constituents of the corporeal world. Analogous to the individual entity, they are *distinct* yet pivotal categories in the architecture of knowledge[148]. They conform to the same structural archetype of the modern machine and, subsequently, undergo scrutiny independently (space vs. time)[149].

Social relations, envisaged in a mechanical and isolated manner, also impact upon the realm of law[150]. That is, this logic extended to law and was pivotal for its consolidation as a science in modernity.

The momentum of natural sciences influences the social sciences. Scientism and statism intricately interweave to sculpt the structural and conceptual frameworks of law modernity. Scientism and statism shape law[151]. Modern law becomes a tool that rationalizes social life, being itself a constitutive of scientism[152]. That is, "*the new conception of law, with its jusnaturalistic rationalism*[153]*, axiomaticism, secularism and subjectivism*", *is congruent with all the transformations that will mark the entry of Western societies into the age of* modernity"[154]. Among the fundamental characteristics of the paradigm[155], Massimo Vogliotti

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[148]This conception of time and space stems from the Cartesian geographical and geometrical perspective, in a correlation between a properly demarcated space, possible to be objectively observed. E. CASSIRER, *Écrits sur l'art*, Oeuvres / Ernst Cassirer. , 12; Passages , 0298-9972, Paris, les Éd. du Cerf, 1995., p.101.

[149] SILVA FRANCE, *La Méthode Silva : la gazette Silva*, Paris Autheuil-Authouillet, Silva mind control, 1990.

[150]Emmanuel Jeuland explores this question: "*In the Hobbesian state of nature, every man* ***is possessed of a natural right****, which consists in the freedom to use his power as he sees fit for his own preservation. However, as long as this right persists, there can be no security for anyone".* E. JEULAND, « L'école relationnaliste du droit : la nouaison? », *op. cit.*

[151]What is evident through observation is "*an overvaluation of scientific epistemology over the other forms of knowledge, resulting in a logic of conservation of order, of a stable, rationalist, mechanistic world.* D.W. HACHEM, « O Estado moderno, a construção cientificista do direito e o princípio da legalidade no constitucionalismo liberal oitocentista », octobre 2011, disponible sur https://bdjur.stj.jus.br/jspui/handle/2011/43059 (Consulté le 2 janvier 2024).

[152] By equating 'jus' and 'liberty', Hobbes eliminates any reciprocity between the notions of right and obligation, so that an individual 'can have rights without inducing obligations in others', the requirement of reciprocity being shifted to the notion of natural law. J. VAN MEERBEECK, « Relation et confiance légitime ou la face cachée du contrat », *op. cit.*

[153]According to Alf Ross, natural law is transcendental or magical, that is, it is already defined in advance and must be fitted into a norm (description and prescription, as something separate). A. ROSS, *Lógica de las normas*, Estructura y función : El porvenir actual de la Ciencia, n° 34, Madrid, Editorial Tecnos, 1971., p.67.

[154] J. CHEVALLIER, « Vers un droit post-moderne ? », *op. cit.*

[155]Massimo Vogliotti states as essential points, the adoption of the descriptive, verifying and objectifying method of the sciences that Aristotle called "theoretical", which is at the base of the dichotomous landscape of modernity

underscores a transformative shift in *legal ontology*, suggesting that law should no longer find interpretation *sub specie relationis*, known as the "*relation of law*"[156]. Hence, in modernity, Law becomes a substance, "*a 'thing' created ex nihilo by the auctoritas of the legislator, applied mechanically by judges, and described objectively by science*"[157]. The architecture of this paradigm is fundamentally individualistic and decomposes into isolated elements—a characteristic evident of modernity itself.

Essentially, the conceptual frame of the *modern machine* encapsulates notions of mechanism, a bifurcation between objects and subjects, and a shift from relational to institutional law, with the rational subject sculpting institutions and focusing social relations on the emergence and protection of the individual, crystallized in the doctrine of individual autonomy. Such structuration will inevitably be rendered nonoperational with the advent of *liquid modernity*[158].

In summary, modernity and rule of law takes shape in a syllogistic scheme of correlating elements: reason and the individual form the base of the tree, sovereignty legitimates state power, political action in the government model intertwines with public action in the power of authority, aiming to ensure public interest through order and control, democracy through democratic representation, and bureaucratic administration to guarantee society's control. Society, in turn, constitutes a self-regulating civil society, industrializing and orienting itself towards the primacy of the individual.

With industrialization, society came to be seen as a "*machine*," driven by and for the individual in a self-regulating system[159], whose development boosts the evolution of the mass society. This process, followed by the end of the Second World War, state interventionism, and the

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and is responsible for the reduction *of law to a singularity*. The goal of legal knowledge is no longer, for the modern jurist, "*eupraxia*", *correct action*, which is the end of the practical sciences, *but truth*, conceived as the combination between the propositions of science and the judgments of jurisprudence to the law. Also, the end of political and religious universalism, the ideal synthesis of a plural and fragmented legal space, gives way in favor of a new organization of power. Finally, the decline of the feudal system of production takes place. M. VOGLIOTTI, « La science juridique entre « grand style » et nihilisme. Un essai de « droit et littérature » en hommage à François Ost », *in* Y. CARTUYVELS *et al.* (éds.), *Le droit malgré tout*, s.l., Presses de l'Université Saint-Louis, 2018, pp. 587-616, disponible sur http://books.openedition.org/pusl/23739 (Consulté le 24 octobre 2023).

[156] *Ibid.*

[157] *Ibid.*

[158] The comparison between solid modernity and liquid modernity was made by Maximo Vogliotti, who, in turn, refers to Zygmunt Bauman's concept of liquid modernity. M. VOGLIOTTI, « De la pureté à l'hybridation : pour un dépassement de la modernité juridique », *Revue interdisciplinaire d'études juridiques*, 2009, vol. 62, n° 1, pp. 107-124, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2009-1-page-107.htm (Consulté le 24 octobre 2023).

[159] For Karl Polanyi, it represents an economic system controlled, regulated, and directed by markets, aiming to promote order in the production and distribution of goods. K. POLANYI, *The Great transformation*, New York, Octagon books, 1980.

emergence of globalization, brings profound impacts. The dogmas of the "*promises of modernity*" became subjects of questioning[160]. Society exponentially began to migrate from a disciplinary society to a global and control civilization. The figure of the individual and people themselves came under scrutiny. The subject became questioned both for a *"centrism"*, as well as for the increasing abstraction emerging from an environment[161] "*of risks*". Thus, the modern state framework contrasts sharply with the *cybernetic* paradigm, which embodies characteristics incompatible with a static conceptualization such as that represented by the machine.

§2 The imaginary of the postmodern model, cybernetics

The economic current of innovation understands that *socioeconomic* evolutions occur employing technological changes[162]. In the economic field, the mode of production particular to the networked environment - *cyberspace* - is promoted based on new technologies. These elements lead to a *networked* universe. In invoking Thomas Kuhn's paradigm theory, an initial aesthetic consideration harmoniously aligns with postmodernist frameworks, effectively destabilizing the static and linear premises of modernity. François Ost and Michel Van De Kerchove craft an analogy, which likens this transition to a metamorphosis: one that shifts from the two-dimensional realm, quintessential to machine-man, into a spatial configuration that echoes the multidimensional intricacy found in the works of Maurits Cornelis Escher[163]. The ensuing ontological transformation transitions from aspects of will to realms of relation, causality, and relativity[164].

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[160] M. AUGUSTO PEREZ, « O mundo que Hely não viu:: governança democrática e fragmentação do Direito Administrativo. Diálogo entre a teoria sistêmica de Hely e os paradigmas atuais do Direito Administrativo », in *O direito administrativo na atualidade. Estudos em homenagem ao centenário de Hely Meirelles (1917-2017).*, s.l., Editora Malheiros, 21 juillet 2017, pp. 851-869.

[161] For Beck, " *the risk category represents the principle of public space*". U. BECK, « Le risque comme principe d'espace public », *Commentaire*, 2002, n° 4, pp. 893-897, disponible sur https://www.cairn.info/revue-commentaire-2002-4-page-893.htm (Consulté le 24 octobre 2023).

[162] M. HILBERT, « Digital technology and social change: the digital transformation of society from a historical perspective », *Dialogues in Clinical Neuroscience*, juin 2020, vol. 22, n° 2, pp. 189-194, disponible sur https://www.tandfonline.com/doi/full/10.31887/DCNS.2020.22.2/mhilbert (Consulté le 24 octobre 2023).

[163] M. VAN DE KERCHOVE et F. OST, *De la pyramide au réseau ?*, *op. cit.*

[164] *Ibid.*

For this thesis, the initial focus will be on the allegory proposed by Alain Supiot[165], derived from the theories of mathematician Nobert Wiener. Supiot, when discussing the transition to a governance political action model, delineates the shifts in epochs through allegories portraying the evolution from the representation of man in a machine, to the conception of cybernetics created by Wiener[166].

Cybernetics, originates from the Greek word for "***to govern***" or "***to command***", and signifies not merely a direction, but associates itself with a dialogic character, a symbiotic interdependency realized within a community owing to the exigencies of a communicative society. That is, the pivotal point of the term's inception is *grounded in dialogue*[167]. These are points where a comparison must be made to examine how categories, constructed, as ideal types, are linked to a certain rationality. According to Alain Supiot, cybernetics is the allusion of a renewed state model, which enters the scene after the reign of metaphysical man. In other words, while the modern has the machine, cybernetics proposes decentralized, horizontal and dialogical systems. To justify this passage, Supiot refers to an excerpt from Wiener's work that synthesizes cybernetics[168], a system of performances, of feedbacks, exchange of information,

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[165] As Alain Supiot elucidates, although the current of the "economic analysis of law" has brought this allegory to the legal world, the perception of the cybernetic era is quite previous, resulting notably from Wiener's works, and does not immediately correlate with an economistic and quantitative perspective of law, although there are compatibilities, the idea of cybernetics means, above all, an overcoming of the mechanistic view of the machine, for a dialogic and interactive perspective of a system. A. SUPIOT, *La gouvernance par les nombres*, *op. cit.*

[166] Stéphane Bernatchez even compares Wiener's theory to other paradigmatic moments of civilization such as Darwin and Copernicus: "*After his cosmological moment (Copernicus: the human being is not the center of the universe), biological (Darwin: the human being is an animal like any other) and psychological moment (Freud: the human being is not master of his acts), the human being was about to suffer, if he had not already done so, a fourth paradigmatic moment , namely, a cybernetic one with transhumanism, cyborgs, artificial intelligence, biotechnologies* (Wiener: the human being is just a machine and the machine is like a human being)" S. BERNATCHEZ, « De la démocratie par le droit à la dictature des algorithmes ? La théorie juridique à l'ère cybernétique », *Lex Electronica*, 2020, vol. 25, n° 3, p. 10, disponible sur https://www.canlii.org/fr/doctrine/doc/2020CanLIIDocs3361#!fragment//BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoByCgSgBpltTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA (Consulté le 24 octobre 2023).

[167] M. BROCHADO, « Prolegômenos a uma filosofia algorítmica futura que possa apresentar-se como fundamento para um cyberdireito », *Direito Público*, 2021, vol. 18, n° 100, disponible sur https://www.portaldeperiodicos.idp.edu.br/direitopublico/article/view/5977 (Consulté le 24 octobre 2023).

[168] The excerpt from Wiener, which is also quoted by Alain Supiot, which deserves highlighting is the following: *My thesis is that the physical functioning of the living individual and the operations of some of the newer communication machines are exactly parallel in their identical efforts to control entropy through feedback. In both cases, there are sensory receptors forming a step in their cycle of operation: that is, in both cases, there is a special apparatus for collecting information from the outside world at low energy levels, and making it valid in the operation of the individual or machine. In both cases, these external messages are not collected in their raw state, but, through the internal transforming forces of the apparatus (whether living or inert), are then transformed into a new form that is valid for later stages of functioning. In the animal, as in the machine, this functioning becomes effective in the external world, and not just for virtual action, through a central regulating mechanism. This complex of functioning is ignored by the common man and does not play the role it should play in our usual analysis of society, for just as individual physical responses can be considered according to this conception, so*

applied to humans and machines. For them, *cybernetics* is the ***new era***, which replaces the mold of man-machine, a pyramidal model. This allegorical exposition, for Supiot, refers to a new state institution model, which changes the artificial and isolated perspective to a dialogical scheme.

Concerning correlations among categories conceptualized as ideal types, a specific arrangement can be discerned. The model of the machine serves as an allegory, illustrating a paradigm of political action devised for a society framed by the concept of "*the artificial man*", whereas the cybernetic model introduces a paradigm of political action distinguished by elements of information and dialogue. The machine, inherently isolated and static, exists within a mechanical regime that distinguishes subject from object, perpetually aspiring towards purification and individualization, manifesting through an ontology of will and reason, oriented towards the pursuit of truth and scientificity. The machine, constructed as a pyramidal, artificial, and verticalized entity, propagates a notion of control, utilizing a systematic organization of control. Conversely, cybernetics revitalize the essence of relationality, adopting a standpoint of interactivity and communication, surpassing the verticalized, unilateral, and mandatory notions of representation and control, fostering a dialogic and procedural organism realized through interactions.

Gilles Deleuze discerns this allegory, referencing what he terms *control society,* in contrast to disciplinary society. He interprets this regime as one populated by simple, isolated, dichotomous machines, from which institutional and legal frameworks emanate. Recognizing a transformative shift, he accentuates the necessity to confront this evolving regime—his so-called society of control—with new methodologies and frameworks[169]. It implies the critical evaluation of this transformation through the lens of its newfound paradigms and the depiction of institutions with their concomitant concepts.

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can the organic responses of society itself This is not to say that the sociologist is unaware of the existence and complexity of communications in society, but until recently he has tended to forget how they are the glue that holds the social edifice together. N. WIENER, *The human use of human beings : cybernetics and society*, The Da Capo series in science, New York, Da Capo Press, 1988.

[169] According to Deleuze, "*the old sovereign societies dealt with simple machines, levers, pulleys, clocks; but recent disciplinary societies were equipped with energy machines, with the passive danger of entropy, and the active danger of sabotage; control societies operate with machines of a third kind, computer machines and computers whose passive danger is interference, and whose active danger is hacking and the introduction of viruse*". G. DELEUZE, « Les sociétés de contrôle », *EcoRev'*, 46

At the same time, Tony Watson[170], drawing parallels between *management models*, denotes the control model as a product of modernity and proposes a pivotal transition. He suggests a shift from a paradigm that centers on the individual, conceptualized as a machine, to a model that is relational-processual and dialogic in nature[171]. The allegory of cybernetics, as observed, sets itself in contrast to the allegory of the machine, not solely in the aesthetic domain, but it also unveils a distinct imaginary embedded with unique peculiarities. The transformation permeates beyond mere terminologies to overcome an entire rational framework. Indeed, the modern machine epitomizes the artificial, pyramidal third entity, a paradigm vividly represented in Renaissance aesthetics, among others. Conversely, cybernetics emerges as an artifact that is programmable, performative, and communicational, transcending a mere moment of action to become a realm of interaction[172].

If the machine introduced elements of verticality, imposition, and control, a model of the digital state, anchored in cybernetic paradigms, will necessitate the integration of vocabulary inherent to its nature; it requires the adoption of decentralized, horizontal systems immersed in dialogic and interdependent information exchanges[173]. Herein, one can already discern the incompatibility of structures conceived for a model steeped in authority and pyramidality. As highlighted, the modern machine's individualism isolates, whereas cybernetics engages in dialogue. Thus, institutional structures and concepts must align with this cybernetic nature. Beyond the aesthetic manifestations in allegories, additional disciplines corroborate in demarcating the characteristics of a burgeoning paradigm and in substantiating its rationale.

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[170] T.J. WATSON, « Organization and work in transition: from the “systems-control” logic to the “process-relational” one », *op. cit.*

[171] The author explains that the "*metaphor of the big machine implies that the organization is a 'thing'. The metaphor of the small individual machine correspondingly implies that the human being is an entity with predetermined needs and "possesses" a personality, and a series of "motivations"*. G. DELEUZE, « Les sociétés de contrôle », *EcoRev'*, 2018, vol. 46, n° 1, pp. 5-12, disponible sur https://www.cairn.info/revue-ecorev-2018-1-page-5.htm.

[172] *Ibid.*

[173] It is important to mention, at the outset, that the author is critical of this mutation, highlighting, the danger of replacing law with calculation. In his terms, the law is "in itself an object of calculation, a legislative product that competes in a global market of norms.A. SUPIOT, *La gouvernance par les nombres : cours au Collège de France, 2012-2014*, Paris, Pluriel, 2020.

A. The network, metrics and nature of the postmodern

From a historical perspective[174], three significant epochs of technological development outline human progress. Firstly, the agricultural with the inception of structured agrarian production, establishing the foundation for societal labor divisions. Following this, the Industrial Revolution, or the Epoch of Production, emerged from intensified industrial activities, catalyzing the utilization of machinery. Lastly, the cybernetic epoch signaled the emergence of revolutionary information technologies, facilitating the evolution towards automated systems[175]. The consensus within academia posits that such technological revolutions embody profound transformations in wealth creation capabilities, presenting a plethora of innovation and opportunities of associated technological advancements, infrastructural innovations, and organizational principles[176].

Lucio Levi[177] articulates that the evolution of state paradigms align with transformative milestones in societal and technological advancement. During the agricultural era, conceptual frameworks of the state remained inherently tethered to the notion of the city-state. However, the emergence of modern, industrial societies precipitated the nuanced evolution of the modern state. This contemporary society emerges symbiotically with advancements in technology, innovations in scientific thought, and the reconfiguration of economic modalities and production methodologies. Notably, the modern industrial society embodies the amalgamation of scientific advancements in the realm of goods production. The "*machine society*"[178] was

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[174] Alvin Toffler proposed three wave stages. The first wave started when the human species moved away from nomadism and started to farm the land. The Agricultural Age's foundation was land ownership as a source of wealth and authority. The second wave started during the Industrial Revolution, when property, labor, and capital were combined to create riches. When the Second World War broke out, the mass production model reached its zenith: massive amounts of mortality were brought on by the industrial strength of the participating countries. Like every transition, the beginning of the Third Wave, or the Information Age, began to manifest itself long before the Second Wave's peak. A. TOFFLER, *The Third wave*, New York, N.Y, W. Morrow, 1980.

[175]Innovation theorists name *long-term paradigms* when identifying a dominant technological *set* . This is a practice borrowed from historians, who subdivide the archaeological periodization of early civilizations. The economic theory of innovation investigation reveals a coherent description of the technological paradigm and its characteristics. M. HILBERT, « Digital technology and social change », *op. cit.*

[176] C. PEREZ, « Technological revolutions and techno-economic paradigms », *Cambridge Journal of Economics*, janvier 2010, vol. 34, n° 1, pp. 185-202, disponible sur https://academic.oup.com/cje/article-lookup/doi/10.1093/cje/bep051 (Consulté le 24 octobre 2023).

[177] L. LEVI, « Les conditions épistémologiques et politiques de l'émergence et de la formalisation du droit de participer aux affaires publiques au niveau international », in *univ-droit.fr : Portail Universitaire du droit*, Paris, 21 octobre 2022, disponible sur https://univ-droit.fr/recherche/actualites-de-la-recherche/manifestations/45728-democratiser-l-espace-monde (Consulté le 24 octobre 2023).

[178]According to Karl Polanyi, it is an economic system that is controlled, regulated, and directed by markets, in the quest to promote order in the production and distribution of goods. K. POLANYI, *La mentalité de marché est obsolète ! : la civilisation doit réinventer sa façon de penser*, Paris, Éditions Allia, 2021.

individualistic and had the production of consumer goods in a mass form[179] as its engine. On *the other* hand, information society refers to a conception of society where Information Technologies play a central role in all areas of society[180]. It succeeds the industrial society that emerged from the industrial revolution[181].

While divergent interpretations may exist regarding the exact onset of the prevailing transformation[182], as well as its implications and pivotal role in social evolution, a substantial body of literature categorically identifies this phase as a distinct era, here termed the Information Paradigm[183]. The machine model finds its foundation in industrial society, whereas

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[179] The capitalist mode of production requires an individual who must adjust to the new economic demands, with universal norms of consumption. In modernity, the individual is the consumer. A. LEMOS, *Cibercultura: tecnologia e vida social na cultura contemporânea*, Cibercultura, Porto Alegre, Sulina, 2010.

[180] Innovation theorists focus on the impacts on the capitalist economy in the face of technological mutations. They explain that in capitalism the succession of technological-paradigms occurs through long cycles of waves of *creative destruction* that emerge in a restructuring process. A vital feature is its perverse effect, which not only leads to the emergence of new products, services, systems, and industries but directly and indirectly affects all areas. This evolution has specific patterns, which depend on the relationships between technological innovations, social structures, economic development, institutional architecture, and cultural patterns. The theorist Joseph Schumpeter explains that the creative process is both destructive and interconnected. This means that it is a standard cycle. For Schumpeter, the "*process of creative destruction is basic to understanding capitalism. It is what constitutes capitalism and what every capitalist enterprise must adapt to survive*". According to the Schumpeterian perspective, creative destruction deals with the indefinite number of undulatory fluctuations that simultaneously interfere with processes in an overlapping manner. These high-level cycles or surges modernize the modus operandi of society, including its economic, social, cultural, and political organization. C. FREEMAN, « Innovation, Changes of Techno-Economic Paradigm and Biological Analogies in Economics », *Revue économique*, mars 1991, vol. 42, n° 2, p. 211, disponible sur https://www.jstor.org/stable/3502005?origin=crossref (Consulté le 11 février 2024) ; J.A. SCHUMPETER, *Capitalism, socialism and democracy*, 4e éd., London, routledge, 2013, disponible sur https://books.google.com/books?hl=en&lr=&id=MRg5crpAOBIC&oi=fnd&pg=PR2&dq=info:c3CX87S9REcJ:scholar.google.com&ots=oLVw-ehoqX&sig=pM-SfIuK8onlnqsdaCSbygBTxvY (Consulté le 11 février 2024) ; C. PEREZ, « Structural change and assimilation of new technologies in the economic and social systems », *Futures*, 1983, vol. 15, n° 5, pp. 357-375, disponible sur https://www.sciencedirect.com/science/article/pii/0016328783900502 (Consulté le 30 octobre 2023) ; C. PEREZ, « Technological revolutions, paradigm shifts and socio-institutional change », *Globalization, economic development and inequality: An alternative perspective*, 2004, pp. 217-242, disponible sur https://books.google.com/books?hl=en&lr=&id=bWjUf040CJ0C&oi=fnd&pg=PA217&dq=info:C5xlBWXujnAJ:scholar.google.com&ots=XmvfbpLdbJ&sig=W1SpRwjfxOdb0XvjSjf9JdJd5ng (Consulté le 30 octobre 2023).

[181] B. BARRAUD, *Repenser la pyramide des normes à l'ère des réseaux : pour une conception pragmatique du droit*, Logiques juridiques, Paris, l'Harmattan, 2012.

[182] Adopting a reading through the current that works with the cybernetic age, it is pointed out that its beginning occurred in the 1950s. Most innovation economists, however, adopt the 1970s as the beginning of the so-called information age. M. HILBERT, « Digital technology and social change », *op. cit.* ; C. PEREZ, « Technological revolutions and techno-economic paradigms », *op. cit.* ; M. CASTELLS, R.V. MAJER et F.H. CARDOSO, *A sociedade em rede*, A era da informação: economia, sociedade e cultura, n° 1, Rio de Janeiro, Paz e Terra, 2021 ; A. TOFFLER, *The Third wave*, *op. cit.*

[183] It is essential to clarify that there are scholars who are against the thesis of information as a paradigm, especially as a rupture with modernity. In this case, information would be a characteristic and fundamental element of modernity. In the field of sociology, authors allude to postmodernity but also to hyper-modernity. In "*Information, a historical companion*", the authors trace a historical journey and demonstrate that information was an essential factor in the development of industry and communications in the 19th century and the 15th century itself. Employing a historical study on the term, they do not affiliate themselves to the set and theoretical primer of researchers in various fields of knowledge who speak of the information age and emphasize the distinction between

cybernetics firmly embeds itself in the information society. Therefore, if the modern state's political action model—a sovereign government—emanates from and integrates into the conceptual framework of the machine, correlating with a particular social structure (individualistic and industrial), the convergence of cybernetics and the information society demands a synchronous renovation in political actions. These modifications in the models of political and public action are concurrently reflected in the devised legal frameworks.

Within the information paradigm, the crux is not solely the individual (refraining from an anthropocentric-subjective stance), but rather it pivots around the network metric, alluding to a networked society and the inherent concept of the network[184]. Even though the conceptualization of a networked system insinuates greater intricacy compared to the binary system—where there is a clear demarcation between yes/no, public/private, individual/society, emblematic of Cartesian thought—it remains imperative (and feasible) to traverse beyond the perceived "chaos" encountered by the modern rationalist researcher and to discern the presence of multifaceted interdependent systems. Such a paradigm inherently rejects centralizing and hierarchical institutional or normative frameworks, given its reticular essence[185]. It is, hence, crucial to acknowledge that a mechanistic model stands in discordance with a domain that evolves within the premises of network perspectives[186]. As elucidated by Pierre Musso, the network[187] aesthetically signifies an abstract phase and, predominantly, the lack of a perspective

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information age and knowledge without, however, delving into the latter. These scholars affiliate with Anthony Oettinger, who, in 1980, argued that every society is an information society. R. McColl, « Information: A Historical Companion. Ann Blair, Paul Duguid, Anja-Silvia Goeing, and Anthony Grafton, eds. Princeton, NJ: Princeton University Press, 2021. 904p. Hardcover, $65.00 (ISBN 978-0-6911-7954-4). », *College & Research Libraries*, 2022, vol. 83, n° 2, disponible sur https://crl.acrl.org/index.php/crl/article/view/25353 (Consulté le 24 octobre 2023).

[184] C. Perez, « Technological revolutions and techno-economic paradigms », *Cambridge Journal of Economics*, janvier 2010, vol. 34, n° 1, pp. 185-202, disponible sur https://academic.oup.com/cje/article-lookup/doi/10.1093/cje/bep051 (Consulté le 24 octobre 2023).

[185] This is, for instance, what François Ost invites us to do, by pictorially mentioning the distinction between the absolutist world of the Leviathan, with the networked universe, well-illustrated in Escher's M. Van de Kerchove et F. Ost, *De la pyramide au réseau ?*, *op. cit.*

[186] Zygmund Bauman, in turn, is critical with regard to the network paradigm, according to him: "Unlike the "structures" of old, whose raison d'être was to tie knots that were difficult to untie, networks are as much about disconnection as they are about connection". Z. Bauman et X. De La Vega, « Vivre dans la « modernité liquide » »:, in *L'Individu contemporain*, s.l., Éditions Sciences Humaines, 23 janvier 2014, pp. 100-107, disponible sur https://cairn.info/l-individu-contemporain-2014--9782361060480-page-100.htm?ref=doi (Consulté le 24 octobre 2023).

[187] Leading researchers in the social sciences are convinced that network analysis offers a true paradigm. But, according to the author, "*while talking about a "hierarchical network," the network is sometimes seen as allowing the greatest amount of freedom within a social whole with ill-defined boundaries, no stability over time, and being the antithesis of any organized structure*"., P. Musso, « II. Imaginaire et rationalité des réseaux », in *Écologie politique de l'eau*, Colloque de Cerisy, Paris, Hermann, 2017, pp. 127-141, disponible sur https://www.cairn.info/ecologie-politique-de-l-eau--9782705694142-p-127.htm.

oriented towards the subject[188]. Such attributes find reflection in the artworks of postmodern artist Jackson Pollock[189], illustrating a departure from the subjective lens and embodying abstract moments within his pieces.

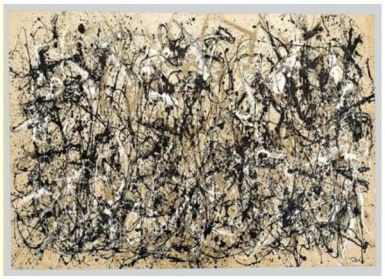

Figure 3 Autunm Rhythm[190]

Figure 4 The Léviathan[191]

The juxtaposition of allegories underscores divergent rationalities. Jackson Pollock's creations render the network - an emblem of the new paradigm—as a structured entity, a system of interlinked "*nodes*"[192], analogous to a woven fabric. Gilles Deleuze and Felix Guattari delineate societal control structures in terms of a rhizome[193]. Within the rhizome, there is no beginning or conclusion; it embodies multiplicity. Essentially, *informational* is a paradigm in which essence is reticular, thus standing in contradiction to a model grounded in the individual, with its segregated and verticalized conception within the mechanistic pyramid. The visual

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[188] J.-P. PIERRON et C. HARPET (éds.), *Écologie politique de l'eau: rationalités, usages et imaginaires*, Colloque de Cerisy, Paris, Hermann, 2017.

[189] In "*The end of the individual*," Gaspar Koenig alludes to Jackson Pollock to correlate the algorithmic era in the artistic sphere. In this sense, the author mentions, "*If the world is an algorithm, abstraction is the closest thing to nature* (...) *Dripping is the man-made thing, the paint made randomly, chaos before artificial intelligence*". G. KOENIG. *La fin d'individu*. Éditions de l'Observatoire/Humensis 2019, p. 195.

[190] J. POLLOCK, *Autumn Rhythm (Number 30)*, s.d., disponible sur https://www.metmuseum.org/art/collection/search/488978 (Consulté le 4 novembre 2023)., https://creativecommons.org/licenses/by-nc/3.0/

[191] A. BOSSE, « "Léviathan" de Thomas Hobbes - Histoire analysée en images et œuvres d'art | https », *op. cit.* https://creativecommons.org/licenses/by-sa/3.0/

[192] "*Nodes*" are the points where the curve connects to itself. Networks are open arrangements that develop by adding or removing nodes in accordance with the transformations of programs that achieve the network's performative scopes. Programs are defined outside the network, which organizes and structures until a new program restructures. M. CASTELLS, R.V. MAJER et F.H. CARDOSO, *A sociedade em rede*, *op. cit.*

[193] *"The first approximation is that the tree is vertical and the rhizome is horizontal, it has no beginning and no end (...) Every rhizome comprises lines of segmentarity (...) but it also comprises lines of deterritorialization through which it runs without stopping (...) These lines do not stop referring to each other. This is why we cannot count on a dualism or a dichotomy, not even under the rudimentary form of good and bad".* G. DELEUZE, *Mil platôs: capitalismo e esquizofrenia*, São Paulo, Editora 34, 2000.

representation of the network's allegory juxtaposed with Hobbes's conceptualization of the artificial man manifests the "*aesthetic incongruence"* between them.

As observed, the modern interpretation emanates from *isolated entities*, but cybernetics underscores the necessity—given the intricate nature of performance and information—to refocus on relations (*processes*) instead of objects (*institutions*) crystallized in the form of the modern machine. While the machine operates through objectively delineated systems, cybernetics navigates *"through relations within an interdependent communicational paradigm"*[194]. This shift has ramifications across all institutions, conditioning both institutional frameworks and their inherent concepts and categories. In essence, the transition is from institutions conceived in a static imaginary, which resulted in a centralized artificial format, to models imbued with relational and intersubjective dynamics. Hence, the network introduces significant implications in a system transitioning from a control-organizational model to one that is relational and relative.

The dichotomy between machine and cybernetic paradigms, and the discernment of their inherent natures, receives profound exploration by Tony Watson within the domain of public management. He exposes that, contrasting with the machine, the cybernetic dimension is cultivated through relational processes by the unit of analysis, exploring them as mediums through which "*people and culture are produced and reproduced.*" Within this framework, Tony Watson advocates for a paradigmatic shift from machine-control to dialogic-emergent, pertaining to the structural organization of state administration. It implies perceiving an organization, in this instance, the government, "*as an emergent process, not a stable phenomenon*"[195]. Consequently, the entity is not acknowledged as a static *"thing*", but is perceived as an organizer of relations.

Contrasting the rationalities of modernism, the network's inherent reticular nature is incompatible with a rationality that isolates and dichotomizes, as exhibited by pyramidal structures. Yet, it is through this networked lattice that globalization materializes, exerting cultural, social, economic, and political impacts. It is this networked milieu with which the model of the digital state must engage, and within which networked society evolves[196]. Indeed, Pierre Bellanger posits that the networked effect fundamentally *"restructures society:*

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[194] E. JEULAND, « L'école relationnaliste du droit : la nouaison? », *op. cit.*
[195] T.J. WATSON, « Organization and work in transition: from the "systems-control" logic to the "process-relational" one », *op. cit.*
[196] M. CASTELLS, R.V. MAJER et F.H. CARDOSO, *A sociedade em rede*, *op. cit.*

computing machines integrate into the network; networks of machines interlink through a superior network, the Internet; documents interconnect, forming the web; individuals unite within the network, creating social networks." Ultimately, both objects and entities interconnect within this network[197]. Therefore, contemplating this environment is unfeasible without adopting the methodology and rationality intrinsic to the network.

B. Cyberspace, the territory of the digital state, a networked environment

The network has several effects on society and the relationships waged in such an ecosystem. First, if the modern industrial world faced an ***individual-mass***, with the advent of what Gilles Deleuze calls the control society[198], individuals are divisible and become samples[199]. In the digital universe, the individual and the *networked* system he inhabits ***is hybrid***—a *blend of* his physical/biological version, with his bit/dated version[200]. The emergence of a networked ecosystem reshapes communicative relations[201], giving rise to a culture of convergence. This shift disrupts the modern conceptualizations of time and space, previously regarded in isolation, which were pivotal in the formulation of modernity and the model of sovereign governmental action. This is attributed to the role of territory as a foundational element of the sovereign government model[202].

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[197] P. BELLANGER, « Souveraineté numérique et ordre public », *Archives de philosophie du droit*, 2015, vol. 58, n° 1, pp. 285-296, disponible sur https://www.cairn.info/revue-archives-de-philosophie-du-droit-2015-1-page-285.htm.

[198]For Deleuze, money expresses well the distinction between societies. While one had coins minted in gold - which served as a standard measure - the societies of control refer to floating exchanges, modulations that make a percentage of different samples of currency intervene as a cipher. Thus, while the man of discipline was a discontinuous producer of energy, the man of control is undulatory, functioning in orbit, in a continuous beam· G. DELEUZE, « Les sociétés de contrôle », *op. cit.*

[199] *Ibid.*

[200]The question of ***representation*** in the online world is also a particular one. One does not know if the person one connects is actually her. It is the advent of a world of remote relationships, where many of the connections do not involve directly related people and it is not necessary to see the faces of those in contact. H. KOSKELA, « Webcams, TV Shows and Mobile phones: Empowering Exhibitionism », *Surveillance & Society*, septembre 2002, vol. 2, n° 2/3, disponible sur https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/3374 (Consulté le 24 octobre 2023).

[201]In communication theory, the advent of the printing press by Gutenberg is treated as a founding element of modernity, because it provided the diffusion of knowledge, the development of writing, and harmonized with the static structure ordered by the modern subject. By observing the impact that new technologies would have on the emerging society, Marshal McLuhan stated that "*the medium is the message*", and thus, not only the way of communicating would change, but also language itself. M. MCLUHAN et Q. FIORE, *Medium is the massage: an inventory of effects*, New York, Bantam, 1967.

[202]The convergence era means that the individual, who used to be passive in his relationships, becomes an actor (whether in communication or even in surveillance - his own and that of others). Communication moves out of the passive-receptor mode of information. From cold and passive modes, people can ***interact***. They are not only

Conversely, the virtual realm gives birth to a nebulous zone where even wealth changes into a distinct entity grounded in infinitely replicable information, transcending the traditional limitations of time and space[203]. Therefore, the once-dominant Euclidean model gives way to relative perspectives. Hence, "*the vision of relative space proposes that it be understood as a relationship between objects that exists only because the objects exist and relate to* each other"[204]. The relative character of space/time manifests discernibly within the communicative practices of the networked ecosystem. Space is contextualized and relative, a social product, where each society will build its own space[205], each with ***its social relations*** and *reproduction*[206].

In the domain of cyberlaw, Julie Cohen clarifies that cyberspace is neither abstract nor Cartesian; instead, it materializes human cognition. It is, hence, relative, mutable, and is shaped by practice. Cyberspace is thus perceived as a domain formulated through the interplays among practice, conceptualization, and representation. A heightened focus is devoted to three transitions: the surfacing of networked space, the interweaving of embodied spaces once circumscribed by networked domains, and the ways these advancements reshape, materialize, and disrupt the geographies of power[207].

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receivers of information, but senders. They are transmitters and reproduce information through digital networks, which are mostly privately owned, but whose discussion goes far beyond the private scheme. This gives rise to many comforts and possibilities for people, but also to many problems. *Ibid.*

[203] P.P. PINHEIRO et M. BASSO, *Direito digital*, São Paulo, Saraiva, 2016.

[204] A time that is both eternal and ephemeral aligns with this cultural paradigm, surpassing any specific sequence. Timeless time occurs "*when the characteristics of a given context, namely the informational paradigm and the network society, cause systematic confusion in the sequential order of the phenomena that take place in that context*" D. HARVEY, *Condição pós-moderna: uma pesquisa sobre as origens da mudança cultural*, Temas de atualidade, n° v. 2, São Paulo, Loyola, 2013.

[205] In the "*postmodern condition*," David Harvey alludes to a *temporal and spatial* understanding which stems from the conception of space and time formulated by Henry Lefevre, who starts from the premise that space/time are social products. According to Lefevre, space and time are not only facts of nature but also products, essential aspects of second nature. The fact that space is a social product causes each society to construct its own space; each social space contains its social relations and reproduction. Thus, for Lefevre, space has a triple figure: ***i)*** a spatial practice, which encompasses production and reproduction, specific places and spaces specific to each social formation that ensures continuity in cohesion; ***ii)*** the representations of space are linked to production relations, the order that is imposed on knowledge, signs, and ***iii)*** the spaces of representations that present the complex symbolisms, linked to the underground side and the arts. David Harvey employs Lefevre's concepts and develops the conception of space in the postmodern environment, which can be applied to cyberspace. Space transmutes into a global village of telecommunication and a "*spaceship* "of economic and ecological interdependencies, and as time horizons shorten, the point where the present is all that exists". Given that reality and present are what exist, Harvey points out that the view of relative space proposes that it be understood as a relationship between objects that only exists because objects exist and relate to each other. He suggests the concept of *relational* space, which exists only insofar as it is part of the process that defines it. p123 D. HARVEY, *Paris, capitale de la modernité*, Singulières modernités, Paris, les Prairies ordinaires, 2012..

[206] H. LEFEBVRE, *La Production de l'espace*, Paris, Anthropos, 1986.

[207] J. COHEN, « Cyberspace As/And Space », *Georgetown Law Faculty Publications and Other Works*, janvier 2007, disponible sur https://scholarship.law.georgetown.edu/facpub/807 (Consulté le 24 octobre 2023).

In the legal context, identifying a paradigm that is reticular aligns with Alain Supiot's proposition of the *refeudalization* of law[208]. Supiot highlights that networks, embodying their interactive and relational perspectives, are not uncharted territories but had existed during the feudal era and were obscured by modern rationality[209].

Alain Supiot articulates that recognizing the existence of networks in the pre-modern era enables one to infer that "*their legal character isn't confined to the array of contracts formulated for their contemporary activation, and that network society doesn't symbolize the pinnacle of individual freedom, but rather the re-emergence of feudalism*". This re-emergence is indicated by a dual shift: from sovereign to suzerain and from legislation *to bond*. In this regard, the concept of a *"refeudalization of law" doesn't imply a regression to the Medieval era but the revival of a legal framework that the advent of the nation-state had rendered obsolete* »[210]. Ultimately, it is about revising - through the lens of cybernetics - a structure *erased* in the mold of the modern state, constructed in accordance with the machine's imaginary, which established the subject in the foreground, in an artificial way, using opposing figures, scientificizing law, which had been previously relational and practical. Cybernetics, therefore, marks, in the present research, the imaginary of a return to relational interactivity.

Section Considerations

From the foregoing ponderings, it is manifest that the *network ecosystem* embodies characteristics *markedly divergent* from the parcel of modern rational Western thought. Primarily, it functions within a reticular framework where forms of interactivity are

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[208]Robert van Krieken disposes the relevance of the topic at legal realm. For him. "*The refeudalization process has significant legal dimensions"* demanding an adequate understanding from law, politics and sociology. That is *"Topics covered include the changing relationship between public and private law; the privatization of public authority and responsibilities; the territorial unbundling of sovereignty and the tendency toward multiple, overlapping authorities and jurisdictions; the contractualization of groups and political units as well as individuals; and the changing relationship between sovereignty and political representation*". R. VAN KRIEKEN, « Refeudalization and Law: From the Rule of Law to Ties of Allegiance », *Annual Review of Law and Social Science*, octobre 2023, vol. 19, n° 1, pp. 337-355, disponible sur https://doi.org/10.1146/annurev-lawsocsci-111522-075848 (Consulté le 12 février 2024).

[209] A. SUPIOT, « The public–private relation in the context of today's refeudalization », *International Journal of Constitutional Law*, janvier 2013, vol. 11, n° 1, pp. 129-145, disponible sur https://doi.org/10.1093/icon/mos050 (Consulté le 18 octobre 2023).

[210] *Ibid.*

multifaceted. While the modern individual manifests traits of opposition, isolation, and separation—each in its singular and universalized form—the network ecosystem thrives on interaction. This trait is constitutive of a significant alteration in social relations. The discussion is no longer about the individual; in a networked space, it pivots on interaction. Hence, cybernetics epitomizes the metaphor most apt for elucidating the dynamics of a networked ecosystem due to its inherently performative and dialogic nature. Through the lens of the cybernetic metaphor[211], spaces transcending the subjectivist vision become conceivable. In essence, these viewpoints unify in acknowledging the pivotal role of technological progression in altering human perceptions and experiences of space and time, as well as their interrelations. The escalating pace facilitated by technological advancements call for the reformation of spatial and temporal coordinates and the incorporation of innovative conceptual frameworks and categorizations capable of comprehending this new spatiotemporal reality[212].

The aesthetic structure of modernity, intrinsically associated with the autonomous subject, proved crucial for the construction of pyramidal and dichotomous edifices underpinning modern institutions and normative frameworks. Pertaining to ideal types, the modern state's political action model anchored itself on two distinct values: the individual and rationality. Thus, this model, with its code rooted in the subject and the pyramidal form, conceptualized in the likeness of Man, embraces an individualistic outlook. Given its shape-driven outcome, the consequence is that the mutation of an *"era"* and the inception of an online domain, revolving around a cybernetic paradigm and, hence, relational, will demonstrate the inadequacy of the individualistic base in navigating the performative and dialogic mechanisms of a networked model. As can be discerned, there is an incongruence in terms of the sustaining values, and ontology. Moreover, it's vital to explore the trajectory that informed the creation of sovereign government and authority models, as categories legitimizing state political and public action, and to understand how these, emanating from these structures, are incompatible with a digital state model, which is molded by cybernetics.

The digital revolution and the advent of an information society illustrate their emergence within a paradigm containing the individual among other elements. Consequently, the dualistic frameworks conceived for constructing modern designs appear inadequate and are, indeed,

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[211] J. COHEN, « Cyberspace As/And Space », *op. cit.*

[212] E.M. ENTSCHEW, « Acceleration through Digital Communication: Theorizing on a Perceived Lack of Time », *Humanistic Management Journal*, juillet 2021, vol. 6, n° 2, pp. 273-287, disponible sur https://link.springer.com/10.1007/s41463-020-00103-9 (Consulté le 24 octobre 2023).

unsuitable, having been formulated for a modern scheme—an individualistic machine. Within this modern framework, the model for state political action, that of sovereign government, was also erected, proving equally incompatible with a digital state. These considerations will undergo more detailed scrutiny in **Section 2.**

Section 2. The public law of "public power" as a corollary of modern political action

The preceding section highlighted the modern state's role as the sovereign government's political action category, correlating with an economic, individualistic society within a unique imaginary framework. While the initial segment underscored the distinct rationalities of machinery and cybernetics, revealing an inherent incompatibility in category relationships, the current section delves into the corollaries of these categories. It aims to pinpoint the origins and legitimations of political and public action, established following a specific code that also shaped modern law, thus influencing Brazilian public law and its legal regime.

In the context of Brazilian law, the state is traditionally perceived as *"the legal personification of public interests"*[213]. The state adheres strictly to the rule of law, emerging as a "*legitimate progeny*[214]," and gains recognition solely through the rule of law, which itself is regarded as a revolutionary transition from the sovereign monarchies[215]. The ideological foundations of public interest are constructed upon the rule of law, crystallizing into a binomial of administrative prerogatives and the rights of the administered. It is from this duality that state

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[213] C.A.B. de MELLO, *Curso de direito administrativo*, São Paulo, Malheiros, 2015., p.47.

[214] *Ibid.*

[215] Although a minority, there is another range of authors who disagree with this narrative. Gustavo Binenbojm says that the institutionalization of such model and its identity with absolute monarchy show that administrative law was alien to any purpose of guaranteeing. *from the supremacy of the public interest to the duty of proportionality: a new paradigm for administrative law.* Thus, for the author, the "miraculous origin" of Administrative Law would be nothing more than a myth, since categories such as the supremacy of the public interest and prerogatives, served only to continue the reproduction of the practices of the *ancien regime.* Although at the moment the purpose is not to deal with the legal notion itself of *public interest,* but to demonstrate that its construction stems from the formation of modern sovereign government, strengthened in a dichotomous way with freedom in the rule of law. It should be noted that, although it can be agreed with the jurist regarding the maintenance of a sovereign government structure, it is understood that the practices were not aimed at maintaining the old regime, but rather the protection of individual liberal premises. G. BINENBOJM, *Uma teoria do direito administrativo: direitos fundamentais, democracia e constitucionalização*, Rio de Janeiro São Paulo, Renovar, 2006.

powers emanate, whereby those invested in public functions operate with the sovereign legitimacy intrinsic to public interest. Within the Brazilian legal framework, this schema is embodied through two fundamental principles: the supremacy of public interest and its unavailability.

To summarize, this framework reflects the predominant[216] and classical interpretation of the Brazilian public law's legal regime[217], positioning public interest as the validating force behind the state's public function, directly stemming from the rule of law. This state's emergence is also attributed to "*the universalization of legality*"[218]. From a traditional standpoint[219], public law evolves in juxtaposition to private law, marking a distinction characterized by the dominance of public power over citizens, stemming from the prioritization of collective interests over individual ones. This imbalanced interplay between the administration and individuals brings privileges and prerogatives exclusive to the public authority[220]. This relationship is unmistakably vertical, anchored in state sovereignty and a hierarchical structure, synonymous with the foundational elements of the modern rule of law. Following this rationale, the state, due to its authority, stands as the legitimate guardian of public interest, orchestrating a *top-down* (vertical) relationship with its administrators in a unilateral manner.

It is acknowledged, nevertheless, that such a conception regarding the origin and formation of public interest, sanctioned by authority, emanates from the construction of the modern figure of political action tethered to the state figure, encapsulated in the sovereign government category[221].

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[216]In this sense, Emerson Gabardo and Daniel Wunder Hachem state: "*The predominant doctrine during the period of redemocratization (...) ended up being that* of *valuing the public interest, whether as a counterweight to the excesses of the Public Administration (...) or as a legal means of balance between liberties, individual rights and the common good.* E. GABARDO et D.W. HACHEM, « O suposto caráter autoritário da supremacia do interesse público e das origens do direito administrativo: uma crítica da crítica », *Direito administrativo e interesse público: estudos em homenagem ao Professor Celso Antônio Bandeira de Mello. Belo Horizonte: Fórum*, 2010, pp. 155-201.

[217] G. BINENBOJM, *Uma teoria do direito administrativo*, *op. cit.*

[218] F.P. de A. MARQUES NETO, « A bipolaridade do direito administrativo e sua superação », *Contratos públicos e direito administrativo*, 2015.

[219] The initial claim is to narrate the traditional conception. The specific path of the dichotomy between public and private law will be explored in chapter XX.

[220] H.L. MEIRELLES, J.E. BURLE FILHO et C.R. BURLE, *Direito administrativo brasileiro*, São Paulo, Malheiros, 2016.

[221]The research adopts the indications of Alain Supiot, who points out that in the face of the transformations brought about by globalization, the concepts of modernity, rather than being examined in terms of their notions, correspond to categories to be examined, hence the route linked to the general theory of the State.
In these terms he announces. A. SUPIOT, *La gouvernance par les nombres : cours au Collège de France, 2012-2014*, Poids et mesures du monde, Nantes] [Paris, Institut d'études avancées de Nantes Fayard, 2015.

Indeed, the emergence of rule of law entailed significant mutations, conditioning the elaboration of the bipolarity that forged the very discipline of administrative law, for instance, and the subsequent development of the authority category in juxtaposition to freedom. However, the legitimacy of state action in public interest is not a progeny of rule of law —perhaps a descendant— since it is a product of the *formula between* the *dichotomous* models[222], liberal with the *sovereign* government of the modern state. Precisely for this reason, the concept of a public interest, grounded in authority, is unrelated to the schematic of a digital state. To comprehend this relationship, the trajectory of the research is purposefully navigated through the lens of the general theory of the state (in its broad sense), rather than the structure of the legal notion and its concepts[223].

§1 Legitimacy and origins of state political action

Sovereignty, together with ***subjectivity,*** performs the role of a foundational pillar of the modern state. Recognizing it as a crucial category of both modern political power and the state's public action is imperative. These elements form the foundational bedrock upon which the legitimation of state public action is structured. However, they clash fundamentally with the interconnected essence inherent in the paradigm that underpins the rise of a digital state model.

A. Legitimation of political and public actions

Sovereignty constitutes the fundamental *category of* the modern state and, regardless of the regime, it provides its *unity*, *authority*, and *coherence*. Modern sovereignty[224], however, has its particularities. The axis around this artifact encompasses the correlative ideas of sovereignty

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[222] The detailed exposition of the word "dichotomy" with its nuances will be better explained throughout the research.

[223] This means that one studies the development of modern state political models, their origin, their relationship to structure, which conditions the model of public action, translated, therefore, into the modern conception of public law.

[224] It is worth pointing out that the first to deal with sovereignty as an absolute order was Jean Bodin, systematizing a sovereign order, in the words of a republic, and of domination and command. The author linked sovereignty with republic and his perception of state order would not exist without the category sovereignty, "sovereignty *is the absolute and perpetual power of a republic*". J. BODIN, *Methodus ad facilem historiarum cognitionem*, 1566, disponible sur https://gallica.bnf.fr/ark:/12148/bpt6k111605f (Consulté le 29 octobre 2023).

and citizenship. According to Simone Goyard-Fabre[225], it is the principle of union that, by assembling all its *'parts and members,'* serves as *'the pivot upon which the state of a city revolves.'* It is the state that will rationalize political organization, enabling the creation of the covenant between individual and collectivity[226]. In the field of political theory, it is possible to identify a model of sovereignty linked to an absolutist regime, as a model connected to the rule of law. This sovereignty will have its own particularities of legitimation, both in form and purpose.

1- An extrinsically legitimacy validation

In its *forms,* it is built on the purpose of the defense of the community, through a *third party* in a single and central figure; externally, its absolutist form signifies the unity of protection, it is the *art of war;* internally, it emerges as a centralizing government that constitutes a unity of will to establish *order* and *social cohesion*. In other words, the founding characteristic resides in its *artificial* stature and in its exercise of power in a unitary and hierarchical manner. Until then, a *monolithic* power was not conceived, so that authority and power would not always be equivalent[227], a phenomenon that will be observed in the context of a *postmodern state* model. As observed, the emergence of the network society occurs in what is employed as the *cybernetic* age. Conversely, the conceptualization of the machine significantly diverges from the conceptual realm of cybernetics, illustrating the contrasting paradigms inherent in legal and institutional frameworks.

In the construction of absolute power, sovereignty is thus crafted artificially, utilizing their command for the defense of the community within a relationship of dominance and subordination. From it , the perspective of an authority (public action) emanates, as well as a separation between two realms: on one side, *power,* and on the other, *submission* within a figure. Here, the sovereign model resembles a ***pyramidal structure***[228], whose vertical nature

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[225] S. GOYARD-FABRE, « Les craquements de l'édifice étatique », *Archives de philosophie du droit*, 2015, vol. 58, n° 1, pp. 339-354, disponible sur https://www.cairn.info/revue-archives-de-philosophie-du-droit-2015-1-page-339.htm (Consulté le 19 octobre 2023).

[226] Natural persons, whose words are their own, are distinguished from artificial persons "considered as representing the words and actions of another" T. HOBBES, *Leviathan , by Thomas Hobbes*, London, J.M. Dent and sons; New York, E.P. Dutton, s.d.

[227] A. SUPIOT, « Aux origines des États : la souveraineté de la limite. (La geste gaullienne à la lumière de l'histoire des institutions) », *Revue Défense Nationale*, 2022, vol. 847, n° 2, pp. 30-38, disponible sur https://www.cairn.info/revue-defense-nationale-2022-2-page-30.htm.

[228] M. VAN DE KERCHOVE et F. OST, *De la pyramide au réseau ? : pour une théorie dialectique du droit*, Publications des Facultés universitaires Saint-Louis, n° 94, Bruxelles, Facultés universitaires Saint-Louis, 2010.

prohibits the incorporation of categories that are not disparate in those elements since the intention encompasses submission and protection through the transcendental figure, positioned in the Leviathan[229]. And as seen, there is a distinction between spaces of submission and control, in a heteronomous manner, but there is no distinction with economic/political power, for it is absolute[230].

The idea of sovereignty, conceived as a centralized and artificial power, unveils the legitimacy of this authority and its institutional actions, whether political or public, as stemming from an external, fabricated act. Hence, within the framework of the modern state's political action, sovereignty epitomizes an act of external will, an *external validation*, influencing all its endeavors. On one hand, modern sovereignty is characterized by extrinsic legitimation; on the other, the emergence of solid modernity redefines the source of this validation. In an absolute monarchy, it is the monarch who holds this power; in a constitutional democracy, it shifts to the people.

2- A legitimacy validated by the authority

The consecration of modern rationality arises with the rule of law. In 1789, with the Declaration of the Rights of Man and of the Citizen, the legal system founded the basic assumptions of

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[229]The idea of contract, according to Michael Stolleis, has undergone different developments throughout the history of modern natural law. The first is linked to the scholasticism of the Middle Ages and the Reformation; the second corresponds to the classical systems of classical law, already separated from moral theology; the third deals with the Enlightenment at its height, when normative systems established natural rights as a criterion for assessment and the basis for codification. Finally, the liberal and individualist systems of natural law after the Kantian critique, which emerged after the revolutions. M. STOLLEIS, « Droit naturel et théorie générale de l'État dans l'Allemagne du XIXe siècle », *Le Débat*, 1993, vol. 74, n° 2, p. 63, disponible sur http://www.cairn.info/revue-le-debat-1993-2-page-63.htm (Consulté le 24 octobre 2023).

[230]The absolutist State is thus characterized by the incorporation of powers into the transcendental figure. This sovereignty—with the hallmark of the artificial figure and holder of centralizing power—constitutes the modern conception of government. The government—*the machine*—is the sovereign that binds the authority of the State. The sovereign government confers to authority the power, in a hierarchical, vertical, and unitary manner to provide defense and maintain order. On one side is power, and within it is the absolute. It is an artificial animal, materialized in the figure of the sovereign government for the common good, as aptly illustrated in Abraham Bosse's drawing of the Leviathan. This structure also occurs in the internal environment. With the modern State, administration develops, and a 'right' specific for royal officials (ancestors of the public function), with the Crown's inalienable domain, is intensified by Jean Bodin's theorization of sovereignty. J. VAN MEERBEECK *et al.*, *La distinction entre droit public et droit privé. Pertinence, influences croisées et questions transversales*, 2019, disponible sur https://dial.uclouvain.be/pr/boreal/object/boreal:214626 (Consulté le 18 octobre 2023).

"*solid modernity*", designating its philosophical, *political* and *legal* principles[231], within a rational subjectivist reading. Sovereignty, which before was absolutist, now becomes that of *the people*. Political action proceeds by means of representation, which allows the principles of rationality and general will to be conceptually combined[232]. The rational apparatus and institutions were precisely drawn by Max Weber in the demonstration of the *spirit of modern capitalism,* the *rational* state *machine,* of a bureaucratic structure and with legitimacy of the power of coercion. Finally, law, according to the prescriptions of nature and the general will, is defined by its formalism and takes the rationality of mathematical discourse as its model, as seen[233].

This system of rationality is the source from which state authority draws its legitimacy. The model of authority's public action and the assurance of the "*general interest*" emanate from the sovereign government. As Pierre Bourdieu recognizes, bureaucrats delineate this category as a universal group, possessing the volition of this interest (in Hegelian terms), or as a rational deliberative body and effective mechanism to realize this general interest (in Durkheimian framework) [234]. Thus, a link forms among *sovereignty-power-government* and *bureaucracy-authority-general interest*[235], a linkage that Brazilian law interprets as the embodiment of "*public interest*".

In the rule of law, the governmental entity is also conceptualized upon the premise of asymmetrical power[236]. The population's will, crystallized in the contract, juxtaposes the endeavors of its representatives against the bureaucracy, steering the mechanism of public action[237]. Here emerges the *public interest,* as the ownership of a modern, sovereign,

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[231]The naturalism of 1789 is considered the temporary mask of the first two mentioned currents its determinants. É. PICARD, « Le principe des communs est-il compatible avec l'ordre juridique français ? », *in* D. BOURCIER *et al.* (éds.), *Dynamiques du commun : Entre État, Marché et Société*, Philosophies pratiques, Paris, Éditions de la Sorbonne, 3 mai 2022, pp. 49-77, disponible sur http://books.openedition.org/psorbonne/99797 (Consulté le 1 novembre 2023).

[232]Despite the aristocratic characteristic, parliament is the place where the sovereignty of the *people* is expressed. Finally, the collective obligation to obey the law is founded on a moral and methodological principle of legislative rationality. J. PITSEYS, « Le concept de gouvernance », *Revue interdisciplinaire d'études juridiques*, 2010, vol. 65, n° 2, pp. 207-228, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2010-2-page-207.htm.

[233] *Ibid.*

[234] *Ibid.*

[235] P. BOURDIEU et B. GUIBERT, « 1 - L'État et la concentration du capital symbolique: », in *L'État, la finance et le social*, s.l., La Découverte, 1 janvier 1995, pp. 71-105, disponible sur https://www.cairn.info/l-etat-la-finance-et-le-social-1995--9782707124296-page-71.htm?ref=doi (Consulté le 29 octobre 2023).

[236] M. FOUCAULT, *La Naissance de la biopolitique. Cours au Collège de France (1978-1979)*, Paris, Hautes Etudes, Galimard, 2004.

[237] The action must be prescriptive, imperative, aimed at the common good, and imposed on all people. In an ideal model, it is an authorization of the government model of imperative and commanding action, whose legitimization

centralizing, authoritarian state. This is why it can be inferred that if the foundational model—the sovereign government—is conceived for a centralist paradigm, its consequent structure adheres to the same pattern. In this context, it becomes evident that authorities, along with emerging public interest, clash with the principles of a networked ecosystem and, as a result, necessitate a transformative approach to accommodate the modalities of a digital state.

In Brazilian legal system, it is possible to identify elements of the link between sovereignty and the exercise of state legitimacy in the first publicists. The jurist Silva Marques, in 1911, established what he understood by *sovereignty,* as the "*right to exercise supreme authority, whatever the form of government adopted, the sovereign rights belong to the people". The* author stresses that the *"sovereign cannot act except in the general interest",* emphasizing that one cannot forget "*its origin and especially its mission, which is to guarantee all liberties and ensure the exercise of all rights. In monarchies, this right is in the hands of the king or the emperor, the people being the true sovereign"*[238].

The public interest results as a corollary of the political action of a sovereign government; therefore, incompatible with a digital state, whose model should encompass a *public interest* linked not to the machine, but to cybernetics. *Authority* as a category materializes through the concept of *legality*[239]. In Brazilian public law (especially *administrative* law), the principle of legality was developed as a true rule of state legitimacy, erected as the foundation of the development of the juspublicist doctrine. Legality, in this sense, would be "*applying the law ex officio"*[240]. This is a formal scheme, linked to the positivist model of law[241] and that originates, as can be seen, from the conception of sovereign government. state prerogatives are conferred,

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justifies the transcendental character and political authority of domination coming from a superior authority that in truth is the collectivity itself. H. BOUILLON, *Le droit administratif à l'ère de la gouvernance : les idées politiques du droit administratif*, Paris, Mare & Martin, 2021.

[238] S. MARQUES: Elementos do direito publico e constitucional. Rio de Janeiro, Benjamin de Aguila 1911, p p. 31

[239]E. B. MOREIRA, Contrato Administrativo como Instrumento de Governo, Malheiro: São Paulo: 2015, p.10.

[240] M.S. FAGUNDES et G. BINENBOJM, *O controle dos atos administrativos pelo poder judiciário*, Rio de Janeiro, Gen Forense, 2010.

[241]As Daniel Hachem explains, at that time the normative force of the Constitution was not recognized, and fundamental rights were considered formal declarations, without much practical applicability. Thus, while the Constitution had a formalistic character, the administration was legalistic, which would be related to the separation of state powers, legacies of the French revolution. D.W. HACHEM, « A noção constitucional de desenvolvimento para além do viés econômico–Reflexos sobre algumas tendências do Direito Público brasileiro », *A&C-Revista de Direito Administrativo & Constitucional*, 2013, vol. 13, n° 53, pp. 133-168, disponible sur http://www.revistaaec.com/index.php/revistaaec/article/view/126 (Consulté le 29 octobre 2023).

which are exorbitant to common law. The objective is to guarantee the "*general interest"*[242], whose term was first changed to public interest.

Consequently, ***the legitimacy*** of the state's public action, in service of the public interest, is inherently linked to the political action model of the sovereign government. The fundamental architecture—***sovereign,*** unified, vertical, centralized, artificial, pyramidal, and commanding—serves as the cornerstone for both the absolutist formulation and the construction emanating from the populace's contractual agreement. This constitutes the framework for the political action of a modern state— a government that mandates vertically legitimized action, symbolized as a pyramid. Within Brazilian law, the resulting structure is perceptible both in the framework addressing state sovereignty and in the conceptualization of legality as a distinct category. It is this very model that stands in contradiction to a state model conceived in the dialogic structure of the informational age.

B. The purpose of state action

As posited by Charles Taylor, the individual has been the crux since the inception of the absolutist modern state model, a consequence of modern rationality itself. In "*Leviathan,*" Thomas Hobbes asserts that the constitution of the republic is the fruit of the rational consensus of men. It is through desacralization that man enters into the covenant. "*Leviathan*" in itself is a construct of man, an artificial entity borne of natural man[243]. This exact facet stands in opposition to the reticular nature of an ecosystem wherein diverse actors participate—moreover, within realms that are the conglomerate of humans and machines. These elements illuminate the inadequacy of the individual construct to serve as the foundation—that is, as a code—in the orchestration of normative regulations within the virtual sphere.

A second relevant question, lies in the fact that in the absolutist Leviathan[244], the *sovereignty of* the *artificial man* has a specific purpose, the defense, command and control of the *res publica.* Absolute authority is directed toward the ***interest of the collectivity***[245]**.** In the idea of

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[242] The first publicists referred to the term general interest, which changed with the French influence in the legal system.
[243] T. HOBBES, *Leviathan , by Thomas Hobbes*, *op. cit.*
[244] *Ibid.*
[245] J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., Paris, France, LGDJ, 2017 ; H. BOUILLON, *Le droit administratif à l'ère de la gouvernance*, *op. cit.*

the modern state's model of political action, the sovereign's perceived protection of the collectivity results in his unconditional authority for the "*common good*" [246].

This logic suffers a relevant impact with the Enlightenment revolution and the advent of the rule of law. If absolutist authority is transcendental and cherishes the common good, with the rule of law it acquires its *dichotomous* clothing with freedom, leading to the political-normative primacy of the latter. Michael Stolleis points out that, if with the absolutist state there was the notion of a homogeneous *res publica*, from 1750 on the elements of individual freedom began to multiply in the concept of state purpose. The theory of the role of the state becomes increasingly inspired by the process in which the bourgeoisie emancipates itself from the absolutism of the state, resisting economic tutelage and against the deprivation of the right to political intervention. According to him, the more security is placed as a role and task of the state, the more individuals conceive their public liberties in opposition to the state and the more "*happiness*" loses its value[247].

Thus, with the advent of the rule of law and the emergence of the search for the rights of the individual, the initial logic of authority as legitimated for the collectivity is inverted, leading to a relevant distinction, which constitutes the structuring of institutions having the *individual* and his future *freedom* as objects[248]. Hence, the positivism of the legal rights, listing the state figure as a necessary evil to guarantee no longer the common good, but the freedom of the individual[249]. Indeed, subsequently, Airton Seerlander demonstrates that the advent of liberalism in the West in countries such as the United states, for instance, resulted in a phenomenon of a society in which public interference should be restrained for the natural path

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[246] O. GODECHOT et N. WOLOSZKO, « Villes globales et inégalités : mondialisation ou financiarisation ? »:, *Cités*, février 2022, n° 1, pp. 67-86, disponible sur https://www.cairn.info/revue-cites-2022-1-page-67.htm?ref=doi (Consulté le 29 octobre 2023).

[247] Term used by the author to refer to the purpose of the prince or commander within his power of command, whose digression for now is not important for the development of the thesis. In any case, the engravings of a good government, explained by Lorenzenti, show that the medieval conception of a good government corresponds to the harmony of the community. More on M. STOLLEIS, « Droit naturel et théorie générale de l'État dans l'Allemagne du XIXe siècle », *op. cit.*

[248] In this sense, Van Meerbeeck explains that if in 17th century France it was accepted that rules applied to the State were more due to the prerogatives of the sovereign in Bodin's absolutist conception. After the Revolution, the primary duty of the State becomes to protect individual rights. According to the author, unlike common law systems, Rousseau's notion of generality gives the State a unique legitimacy that dominates the paradigm of the *general will.* J. VAN MEERBEECK *et al.*, *La distinction entre droit public et droit privé. Pertinence, influences croisées et questions transversales*, *op. cit.*

[249] M. STOLLEIS, « Droit naturel et théorie générale de l'État dans l'Allemagne du XIXe siècle », *op. cit.*

of human freedom[250]. Thus, in the rule of law, *authority,* as a category, cannot be examined without first identifying its opposite pole, *freedom.*

§2 The autonomy of the individual, the world of dichotomies

If the power of the *absolutist* sovereign arises as an *artificial man* by *natural man* for the defense of the collectivity, the emergence of modern society that drives to be *democratic* will remain in constant indetermination, because, as Chantal Mouffe points out, the democratic revolution *"led to the disappearance of a power that was incarnated in the person of the prince and linked to a transcendental authority"*[251]. Moreover, modern man differs from his ancestors in that he can "*choose how to live his own* life"[252]. It is no longer a matter of social position, which will lead society to search for its individual "*rights*"[253]. Thus, the emergence of man - as a free individual - is the mark of modernity[254], and its rationalization process involves precisely the development of the guarantee of his *freedom*[255], in its most varied nuances[256].

The promises of modernity find in the *legal* world a legal order aimed at establishing and guaranteeing *rights*, which will become *subjective*[257]. The resulting institutions will all be formulated based on the conception of this modern individual[258], which will thus imply the

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[250] On a Virginia or Georgia slave farm the problem might seem more complex. It is important to realize, however, that the legal and political discourse of the Southern elites, maintaining the basic structure of liberal argumentation, tended to present the slave master as a standard individual who was free and equal to others, and therefore worthy, as a concrete citizen, of being protected against all state oppression. A. C. SEELAENDER. *O direito administrativo e a expansão do estado. na primeira república: notas preliminares a uma história da doutrina administrativista no brasil r.* IHGB, Rio de Janeiro, a. 182 (485): 165-202, jan./apr. 2021.

[251] C. MOUFFE, *The democratic paradox*, Phronesis, London, Verso, 2000.

[252] C. TAYLOR, « Résonance et théorie critique », *Réseaux*, 2022, vol. 235, n° 5, pp. 47-71, disponible sur https://www.cairn.info/revue-reseaux-2022-5-page-47.htm (Consulté le 25 octobre 2023).

[253] *Ibid.*

[254] It is imperative to acknowledge that the prevailing debate surrounding the state and public spheres still defends this form of freedom, requiring an examination of its origins. The objective here is not to constrain the rights to freedom of individuals. Instead, the focus is to elucidate the persistent emphasis placed on structuring discourses on public law around the concept of freedoms, in a domain originally constructed for the pursuit of the common good. Thus, this particular manifestation of freedom, which catalyzes the emergence of bipolarities, is also a foundational element of a system that finds itself at odds with a state model envisioned not as a mechanistic construct but as a cybernetic entity.

[255] « Individu et modernité », in *Identité(s)*, Synthèse, Auxerre, Éditions Sciences Humaines, 2016, pp. 89-99, disponible sur https://www.cairn.info/identites--9782361063283-p-89.htm (Consulté le 25 octobre 2023).

[256] especially the values of individualism and the market.

[257] Indeed "*between Villey and Donahue, many authors seem to agree that classical Roman law should not be understood in terms of a structure of individual rights*". J. VAN MEERBEECK et T. LEONARD, « Le droit subjectif : nœud gordien de la distinction entre droit public et droit privé ? », *in* A. BAILLEUX, D. BERNARD et J. VAN MEERBEECK (éds.), *Distinction (droit) public / (droit) privé*, s.l., Presses de l'Université Saint-Louis, 2022, pp. 321-365, disponible sur http://books.openedition.org/pusl/27671 (Consulté le 29 octobre 2023).

[258] C. TAYLOR, *op. cit., Réseaux*, 235

construction of the modern conception of *freedom*. Modern freedom, which resonates with Benjamin Constant's thought,[259] refers precisely to the private autonomy of the individual[260].

Hence, *modern institutions* are built to guarantee the *autonomy* and the rights of the rational man. This autonomy, in turn, linked to individual inalienable rights, finds support in John Locke[261], who relates modern freedom and *property, and* has a fundamental contribution in solidifying the modern theory of the primacy of the individual and, therefore, of the private over the public. Besides Locke, Adam Smith significantly influenced political philosophy in the economic aspect, playing a decisive role in the constitution of a *self-regulating* market[262] and in the development of a *growth paradigm,* linked to economic prosperity[263].

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[259] Benjamin Constant's text is considered a landmark in understanding the distinction between the freedom of the moderns and the freedom of the ancients. According to him "*The goal of the ancients was the sharing of social power among all citizens of the same homeland. That is what they called freedom. The object of the moderns is the security of private privileges; and they call liberty the guarantees granted by institutions to these privileges.*" Hence, he states that "*Individual liberty, I repeat, is the true modern liberty. Political freedom is its guarantee, and therefore indispensable. But to ask the people of today to sacrifice, as in the past, the totality of their individual liberty to political liberty, is the surest way to keep them away from the former, with the consequence that, having done this, the latter will soon be snatched away from them.* B. CONSTANT, *De la liberté chez les modernes : écrits politiques*, Pluriel, n° 8532, Paris, Hachette, 1989.

[260]Hobbes, who attributes to the sovereign an uncontrolled power over the subjects' private sphere, recognizes, however, that subjects are free to do whatever the sovereign has not forbidden, and the first example that comes to mind is "*the freedom to buy, to sell, and to make other contracts with each other*" [1651, ch. XXI]. N. BOBBIO, M.A. NOGUEIRA et C. LAFER, *Estado, governo, sociedade: Fragmentos de um dicionario politico*, Rio de Janeiro, Paz e Terra, 2021.

[261]In the words of Norberto Bobbio "*Through Locke, the inviolability of property, which comprises all the other natural individual rights, such as liberty and life, and which indicates the existence of a sphere of the singular individual autonomous with respect to the sphere over which public power extends, becomes one of the axes of the liberal conception of the State, which in this context can then be redefined as the most conscious, coherent, and historically relevant theory of the primacy of the private over the public.*

Also, "*Locke's ideas influenced the Declaration of Independence of 1776 and the Declaration of the Rights of Man and Citizen of 1789. Article 2 states that "the object of all political association is the preservation of natural and imprescriptible human rights," which are "liberty, property, security, and resistance to oppression." Both declarations state that governments protect inalienable human rights. Beyond anodin, this conceptual shift is positive. Indeed, it was Bodin's absolutist conception of the prerogatives of the sovereign that led seventeenth-century France to accept that specific rules should apply to the state. Since the French Revolution, it has been generally accepted that the state exists to protect individual rights. Ibid.*

[262]According to Karl Polanyi free-market economy is a socio-historical condition and is not a natural condition. It is a phenomenon that began in 1830 as an economical market, a single and separate entity. K. POLANYI, *The Great transformation*, New York, Octagon books, 1980.

[263] According to Antoine Bailleux and François Ost, Smithian anthropology has the power to universalize economics, presenting it as self-evident, which leads to conceiving *growth* not only as a good in itself, but as the natural way of humanity. The authors point out, however, that Smith considers economic growth as "*a necessary but not sufficient condition for the happiness of individuals, and of nations.* In any case, it is pondered that his doctrine was fundamental for the development of its own paradigm, that of *growth,* whose influence goes beyond the discipline of economics arriving even in the field of law through the doctrine of economic analysis of law. A. BAILLEUX et F. OST, « Six hypothèses à l'épreuve du paradigme croissanciel », *Revue interdisciplinaire d'études juridiques*, 2016, vol. 77, n° 2, pp. 27-53, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2016-2-page-27.htm (Consulté le 29 octobre 2023).

These ideals will have definitive scope in the construction of the categories of modern legal institutions, which will be packaged through ***oppositions***. This is an era of ***dichotomies***, a word which, as Norberto Bobbio teaches, refers to opposing fields, in which one prevails over the other[264]. With the rule of law, the primacy will be that of the ***individual***. Herein lies the identification of a second fundamental element of modernity, in direct opposition to the constructs inherent to a network society. A network society, with diverse actors, cannot be regulated through a political and juridical institutional formatting that is based on dichotomies.

A. The primary dichotomy, Society and the State

The fundamental dichotomy inherent to the rational modern social paradigm is the separation of Society and the state. Jacques Chevallier articulates this as being paramount and intrinsically intertwined with the Western evolution of the modern state. It serves as the prism through which social and political structures are interpreted and understood, albeit with conceivable distortions[265]. Rooted in the ideological frameworks of liberalism, this conceptualization gives rise to civil society[266]. This entity is conceptualized as a structure born from the association of individuals, existing independently of the state, and tasked with counterbalancing public authority. Consequently, within this liberal paradigm, society is construed through a direct interaction between a civil society[267]—purged of intermediary layers that segregate individuals, such as religious institutions or corporations—and a state that executes its mandate "*protected from the hidden powers that act*"[268].

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[264] N. BOBBIO, M.A. NOGUEIRA et C. LAFER, *Estado, governo, sociedade*, *op. cit.*

[265]This differentiation has degrees depending on the country. Europe differentiates more than Anglo-Saxon countries. J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., *op. cit.*, p. 85.

[266]As Leonardo Avritzer explains, the concept emerges around 1820, as a *dualistic* dimension capable of expressing two changes in Western modernity: the separation of the economic and family spheres with the abolition of slavery, and the separation of the State and society caused by the systemic specialization of the modern State. The author himself, however, mentions that in Brazil the path taken regarding the concept is exceedingly distinct, which will be better identified throughout the thesis. L. AVRITZER, « Sociedade civil e Estado no Brasil: da autonomia à interdependência política », *Opinião Pública*, novembre 2012, vol. 18, n° 2, pp. 383-398, disponible sur http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0104-62762012000200006&lng=pt&tlng=pt (Consulté le 25 octobre 2023).

[267] It is, in fact, a new construction, because, as Max Weber rightly points out, under absolutism there was no knowledge of the bourgeois or the citizen, categories constructed by bourgeois society. This indeed constitutes the pivotal element anticipated for exchange, serving as the foundational code instituting processes of dichotomy. It is this precise element that is identified as the crux of the purported incompatibility herein discussed.

[268] J. PITSEYS, « Le concept de gouvernance », *op. cit.*

To guarantee the autonomy of the individual, *freedom* is designed as a category that preserves autonomy and, for such, needs a contract[269]. From here the dichotomy between Society and state is built. Firstly, is freedom, which, in the terms of Jurgen Habermas, is "*the individual's charter of freedom*"[270]. While this framework safeguards autonomy, a counterbalance within the structure becomes imperative. Furthermore, sustaining the prevailing order of domination necessitates a substantive justification. In the void left by the absence of a transcendental entity—be it the cosmos or the monarch—the process of subjectivation mandates the incorporation of a dichotomous framework. Without this structure, the pyramid "*would collapse*"[271]. As Michel Stolleis points out, there was no way to return to the previous *status.* There was no way to *resacralize. that is,* With the emergence of a new society[272], "*there was no way out of the return of rationalist disenchantment that in the creation of a prosaic contract justifies domination*"[273].

1- The dichotomy as a purification process

Therefore, in alignment with the Society/state dichotomy, a corresponding separation manifests between Man and Citizen, extending subsequently to distinctions between private and public and between private property and public attribution. Bruno Latour identifies this systematic separation inherent to modernity as a '*process of purification,*' categorizing it as an intrinsic

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[269]Law has elaborated a concept loaded with strong intentionality, oriented to determined goals: *freedom,* formal equality of abstract rights, private property. The general objective is to guarantee liberty and all other rights within a normatively organized world: liberty as right and right as freedom, equal formal liberty for all, equality as condition and limit liberty, that equal liberty that becomes the most extreme synthesis of what constitutes, in the legal plane, the whole Revolution of 1789. To establish *liberty* as the first imperative given, it was necessary to think of society as the result of a contract concluded between natural men, that is, free because not yet subject to a social state. Here arises the principle of duality, which is the dichotomy, the duality between *Society and State.* É. PICARD, « Le principe des communs est-il compatible avec l'ordre juridique français ? », *op. cit.*

[270] "*The charter of freedom to do what one wants and does not want lies in private autonomy. citizens are attributed autonomy in the sense of a rational formation of will, even if it cannot be legally required. They must bind their will to those laws that they give themselves as a consequence of a common will, obtained* through discourse, for the idea of self. legislation, establishes an internal nexus between reason and will". J. HABERMAS et R. de AGAPITO SERRANO, *Tiempo de transiciones*, Colección estructuras y procesos. Serie Filosofía, Madrid, Trotta, 2004.

[271] M. VOGLIOTTI, « De la pureté à l'hybridation : pour un dépassement de la modernité juridique », *Revue interdisciplinaire d'études juridiques*, 2009, vol. 62, n° 1, pp. 107-124, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2009-1-page-107.htm (Consulté le 24 octobre 2023).

[272] On the other hand, the networked universe does not function by means of opposing and separating elements, which will make this contract that justified domination - and that has been lost with liquid modernity - leave the space of authority, which is responsible for the public interest, unprotected, open, what Alain Supiot calls total quantification of the machine.

[273] M. STOLLEIS, « Droit naturel et théorie générale de l'État dans l'Allemagne du XIXe siècle », *op. cit.*

attribute of modernity itself[274]. To put it differently, it's a series of interrelated dichotomies with the individual reigning supreme.

To interpret this structure accurately, initial elucidation of the nature of a dichotomy, as per Norberto Bobbio's explanation: "*a) division of a universe into two spheres that are jointly exhaustive and mutually exclusive (a being understood in the first sphere cannot be understood in the second); b) the division is total (all entities must have a place in it) and mutually exclusive (a being in the first sphere cannot be understood in the second)*"[275].

Pursuing the *dichotomous* paradigm, elements like *white and black* not only stand as distinct entities but every component within white is categorically attributed to white and is unequivocally *excluded from* black. The depiction of a zebra aptly symbolizes this notion. Hence, it's not merely a matter of distinction but of *staunch opposition*, where the presence in one element inherently counters and omits the other. Within this paradigm, a conceptual entity *like grey* would never materialize. Moreover, in dichotomy, one of the poles—either black or white—asserts *dominance,* constructing itself in a manner that enables the other to exist as its absolute antithesis.

This *dichotomy,* as something constitutive of a modernity, has its purification -through the process of purification of hybridization- in what Bruno Latour calls by a process composed of two stages, that of *translation* and *purification*, which refer to two "*sets of entirely different practices that, to remain effective, must remain distinct*"[276].

In his terms: "*The first set of practices creates, by "translation," mixtures between entirely new beings, hybrids of nature and culture. The second, by "purification," creates two previously discouraged ontological zones, that of humans on the one hand and that of non-humans on the other. Without the first set, purification practices would be empty or idle. Without the second, the work of translation would be delayed, limited, or even forbidden*" [277].

The ***purification of hybrids***, therefore, is a process employed from hybrid elements such as subject/object, culture/nature that become purified in this process and compose a same *nucleus,* opposed to each other. Thus, from one side subject and culture would emerge, and from the

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[274]The author explains his hypothesis: *the word modern denotes two entirely different sets of practices which, to remain effective, must remain distinct, but which have recently ceased to be so.* B. LATOUR, *Nous n'avons jamais été modernes: Essai d'anthropologie symétrique*, s.l., La Découverte, 1 mars 2006, disponible sur https://cairn.info/nous-n-avons-jamais-ete-modernes-2006--9782707148490.htm (Consulté le 29 octobre 2023).
[275] N. BOBBIO, M.A. NOGUEIRA et C. LAFER, *Estado, governo, sociedade*, *op. cit.*
[276] B. LATOUR, *Nous n'avons jamais été modernes*, *op. cit.*
[277] *Ibid.*

other the object and nature. Moreover, it would be a *pure* universe, in which *no intermediary* is admitted. It is not difficult to identify that a purification process will not sustain itself in an environment that is naturally hybrid. In other words, this purification scheme, which is the hallmark of *solid modernity* and which results in dichotomies, is clearly incompatible with a networked ecosystem, simply because the reticular nature dilutes any dichotomy. Cyberspace, for example[278], is treated as a "*bioelectronic environment that is literally universal: it exists wherever there are telephone wires, coaxial cables, fiber optic lines, or electromagnetic waves*"[279]. It differs firstly from the modern machine, clock and artificial man that represent modern aesthetics, which are limited within their representations. But in addition, it has a ubiquitous nature that precludes an "artificial" scheme set up to oppose elements. Not only does its nature, like the other elements of the digital vocabulary, fit into the *performative* nature of the *cyber* age, but it is also opposed to a dichotomous code, which as seen from Latour, is constitutive of the "*chimera of modernity*"[280].

2- The dichotomy on the legal codification

It happens that, according to Massimo Vogliotti this device is also responsible for the dichotomies of legal modernity[281]. It is from this process of purification of hybrids that the categories opposing each other are built, created for the institution of *rights,* which will later be considered as *subjective.* It is worth remembering, as Charles Taylor points out, that it is precisely at the moment of transition in modernity *that the categories and notions of law that* one has until today are *constructed.* Many of the legal concepts are categories that were consolidated in this transition, including the very notion of *law* and *freedom*[282]. This path

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[278]The matrix is an abstract representation of the relationships between data systems. Legitimate programmers (sic) plug into their employer's sector in the matrix to find themselves surrounded by shiny geometric structures representative of the company's data. Their towers and fields would line up in the colorless non-space of the simulation matrix. This electronic consensus hallucination facilitates the manipulation and exchange of massive data. W. GIBSON, *Neuromancien*, Fictions, Paris, la Découverte, 1985.

[279] A. TOFFLER, *The Third wave*, New York, N.Y, W. Morrow, 1980.

[280] B. LATOUR, *Nous n'avons jamais été modernes*, *op. cit.*

[281] M. VOGLIOTTI, « L'érosion de la pyramide pénale moderne et l'hypothèse du réseau », *Revue interdisciplinaire d'études juridiques*, 2005, vol. 55, n° 2, pp. 1-16, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2005-2-page-1.htm (Consulté le 24 octobre 2023).

[282]What is peculiar to the modern West among these higher civilizations is that their favorite formulation of this principle of respect was in terms of rights. This has become central to our legal systems - and, in this form, has spread throughout the world. But beyond this, something analogous has become central in our moral thinking. The notion of a right, also called a "subjective right," as developed in the legal tradition of the West, is of a legal

explains why a system in opposition is ruined for a society in networks. This is because, while constructed and built within a rationality of ***oppositions***, it will be illogical to use it within a space that is naturally hybrid and does not support this "*purification process*". A networked society of hybrid nature cannot sustain such a process, as its essence is reticular, meaning that its own ontology is "*impure*", that is, alien to the purified determinations that achieve a dichotomous separation between things and substances.

Moreover, the end point in the *dichotomy-purification* scheme lies in one prevailing pole, which will therefore drive the shape of the whole process of purifying hybrids. In the case of modernity, this is the figure of the individual. As Jacques Chevallier well exposes, the notion that individuals have rights in relation to power is fundamental to legal modernity, for "*it leads to the belief in the benefit of a right perceived as a protective device, a means of liberation, and an instrument of Justice and Progress*"[283]. In summary, the whole range of categories of institutions are built on this basis, that is, *dichotomous*, *purified* in the primacy of the individual. Thus, it is evident that the whole dichotomous scheme will be incompatible with a networked ecosystem, particularly as they stem from the same code (dichotomous, tailored towards the individual and based on the individual).

In the legal field, Jacques Chevallier refers to this process as the process of *subjectivation of law*.

According to the author, it originates from the school of natural law and, starting with "*Man*", the revolutionaries will define the rights that they possess as such, prior to any social life, and to which they cannot renounce upon entering society[284]. The Declaration of the Rights of Man and of Citizens, therefore, demonstrates the right between public/private, in the dichotomy of the primacy of the private. If on one side of the contract *freedom* is guaranteed, on the other, the artificial power becomes that of the citizens. In this sense, Etienne Picard clarifies that as legal characters, the individuality regulated in freedom is guaranteed by the notion of the subject

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privilege seen as a quasi-possession of the agent to whom it is conferred. [The revolution in natural law theory in the 17th century consisted in part in using this language of rights to express universal moral norms. We began to speak of "natural" rights, applied now to things like life and liberty, which everyone is supposed to have. C. TAYLOR, *La liberté des modernes*, Philosophie morale, Paris, Presses universitaires de France, 1997.

[283] J. CHEVALLIER, « Vers un droit post-moderne ? Les transformations de la régulation juridique », *Revue du droit public et de la science politique en France et à l'étranger*, 1998, pp. 659-714, disponible sur https://hal.science/hal-01728684 (Consulté le 24 octobre 2023).

[284] *Ibid.*

of private law[285], prevailing the mantle of private autonomy, the subjective interests of the individual. On the other hand, it has the citizen as an *actor of* other rights (civil, political or citizenship)[286]. The citizen's rights, however, are seen as facets of the *public function*, which consists in exercising power, requiring recognition in relation to these specific rights. The citizen is the virtuous man in the city, the public man, of the civic virtues, who gives himself to democratic deliberation having then, in mind and heart, only the concern for the cited, supreme public interest. Therefore, while the subjective right is of the rights of man, the rights of the citizen are *functional* because they are linked to the exercise of the public function that citizenship implies, that is, to participate in the government of the city[287].

In essence, the architectural framework of the legal system within the rule of law has catalyzed the discernment between man and citizen and, subsequently, the bifurcation of the rights of the former and the deeds of the latter, in *dichotomies.* It is emphasized that within the dichotomous system, intermediaries find no representation; two domains are distinctly demarcated. Within the conceptualization of the liberal model, these domains are characterized as the civil and political poles, man and citizen, and state and individual/market, emanating a sense of purity due to the absence of alternate elements or actors. From this perspective, social relations are forged in opposition, a necessary construct to preserve individual freedoms, establishing a bipolar code realized in the realm of rational rule of law where the state occupies one and civil society the other. This dichotomy further depicts political power and authority on one side and individual freedom on the opposite, articulating command and submission within the public domain— the state— and horizontal relations on individual autonomy. This distinct separation is both radical and dichotomous, illustrating the liberal differentiation between the public sphere—embodied by sovereign political power—and the private sphere—represented by civil society, the economy, and private interests[288].

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[285] The origins of the modern concept of subjectivity are generally associated with Savigny's theories, and are thus of private law, and of the modern rationalist and subjectivist perspective J. VAN MEERBEECK et T. LEONARD, « Le droit subjectif », *op. cit.*

[286] É. PICARD, « Le principe des communs est-il compatible avec l'ordre juridique français ? », *op. cit.*

[287] *Ibid.*

[288] H. BOUILLON, *Le droit administratif à l'ère de la gouvernance*, *op. cit.*

B. The great dichotomy of modern law: private and public

The opposition state/civil society then arises as the alternative in the face of the disappearance of transcendental political power[289]. In governmental practices, this impact is treated by Michel Foucault. According to him, at the end of the 18th century with classical economic liberalism, the market becomes the key instance in the "*art of governing*"[290], giving *public action* its place of legitimation and limits[291]. The pretension of distinguishing state and market made it oppose these two elements. For the state remains a sovereign figure, in a territory, by a government legitimized in its public action of the power of authority, which must achieve the "*public interest*", legally tutored, organized in a bureaucratic structuring that accompanies the development of industrial society, just like a machine. It is the ***functional logic*** described by Etienne Picard, in the field of power, within the public sphere, justified for the maintenance of order. On the other side, that is, in the prevailing dichotomy, freedom, is left to the *invisible hand of* the market, which maintains itself in a *self-regulating* system[292]. Consequently, this mechanism represents the crystallization of the paramount dichotomies inherent to modernity.

Alterations in power dynamics, or more precisely, the intrinsic establishment of power relations within a networked environment, undeniably illustrate that this paradigm of sovereignty, culminating in this public law framework, has become anachronistic.

The universe of meta-power in the networked realm, along with the emergence of platform society and platform states, unequivocally underscores the role of an "*actor*" amidst various others in the networked milieu[293]. In other words, not only does the nation-state and sovereign government, along with its dichotomies, prove itself unsustainable, but it also lacks the necessary capacity to safeguard individuals within this digital environment.

However, within the spectrum of dichotomies, the public/private manifests as a foundational opposition, emerging as the "*grand dichotomy*". This necessitates examination, not solely by the actors—whom the purification process will regard as "*holders*" in their respective domains

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[289] C. MOUFFE, *The democratic paradox*, *op. cit.*
[290] F. MEUNIER, « Le néolibéralisme et l'art de gouverner: À propos de Naissance de la biopolitique de Michel Foucault », *Esprit*, mai 2021, n° 5, pp. 83-93, disponible sur https://www.cairn.info/revue-esprit-2021-5-page-83.htm?ref=doi (Consulté le 29 octobre 2023).
[291] M. FOUCAULT, *La Naissance de la biopolitique. Cours au Collège de France (1978-1979)*, *op. cit.*
[292] K. POLANYI, *The Great transformation*, *op. cit.*
[293] N. SUZOR, « A constitutional moment: How we might reimagine platform governance », *Computer Law & Security Review*, avril 2020, vol. 36, p. 105381, disponible sur https://linkinghub.elsevier.com/retrieve/pii/S0267364919303929 (Consulté le 18 octobre 2023).

and thereby inhibit their entry into the other—but also by the inherent nature within each domain, designated as either public or private. Consequently, this involves diverse natures and positions within each of these poles. Rationality is not merely subjective; the relationships within these poles also bear distinct elements.

In modern frameworks, public and private realms represent distinct types of social relations, one involving relationships between equals and the other between unequals[294]. The public sphere, reflecting jusnaturalists notions of natural society, harbors relationships where rulers command and the ruled submit. Meanwhile, the private sphere houses relationships characterized by coordination among equals[295]. The liberal interpretation, emphasizing the dominance of the private sphere over the public, brings a distinctive perspective to this dichotomy. Alain Supiot has highlighted, as previously mentioned, that the prioritization of the private over the public emanates from the socio-political constructs of the Enlightenment. From then on, prohibitions based on "*obvious truths*" that are the source of "*inalienable and sacred rights*" were relegated to "*religious sentiment*", leaving a purely instrumental conception of law[296].

Indeed, the rise of political economy plays a pivotal role in this domain, introducing a delineation between the realm of economic relations, where equality holds precedence, and the realm of political relations, marked by inherent inequality [297].

The dichotomy[298] between public and private facilitates the delineation and segregation of economic and political societies. Herein, economic society incorporates the spheres of the state of nature, the economic realm, and civil society, while the political sphere consolidates the civil state, the political realm, and the political state[299]. It is upon this rational foundation that the primary bifurcation of law, into public and private law, is constructed.

In Latour's conception of the purification process, entities such as public, private, state, and individual are purified to form the public law of the state and the private law of the individual[300].

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[294] It is worth pointing out, however, and as will be better seen in Title 2, that this is not the prevailing conception in history; for the Greeks and Romans, for example, the public prevailed over the private.
[295] N. BOBBIO, M.A. NOGUEIRA et C. LAFER, *Estado, governo, sociedade*, *op. cit.*
[296] A. SUPIOT, « The public–private relation in the context of today's refeudalization », *International Journal of Constitutional Law*, janvier 2013, vol. 11, n° 1, pp. 129-145, disponible sur https://doi.org/10.1093/icon/mos050 (Consulté le 18 octobre 2023).
[297] N. BOBBIO, M.A. NOGUEIRA et C. LAFER, *Estado, governo, sociedade*, *op. cit.*
[298] As Jacques Chevallier states, the rule of law of the liberal eighteenth-century French revolution employs and consolidates the jusnaturalist ideals. J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., *op. cit.*
[299] N. BOBBIO, M.A. NOGUEIRA et C. LAFER, *Estado, governo, sociedade*, *op. cit.*
[300] Although many of the dichotomies are questioned today, the summa divisio seems unassailable, despite being one more among the great dichotomies of modernity.

Another perspective considers public and private on one side and state and society/market on the other, which, post-purification, transform into modern categories: the public law of the state and the private law of Society/market. Jacques Chevallier effectively synthesizes the spectrum of arising dualities, where this dualism may manifest in the delineation of public or private based on their intent (public or private interest), by the involved entities, or by the nature of the legal relationship. In the context of public action, the relationship is unilateral and operates under the imperative of command, contrasting with private relationships which are synallagmatic[301].

This dichotomous logic renders the state its legitimacy, grounded in authority, thus positioning it as the bearer of public interest. Henceforth, the sphere of private law encompasses the ensemble of rules among individuals, regulating their relationships in a reciprocal mode, while the public sphere, the sphere of command, remains heteronomous, superior, and coercive, establishing a relationship of inequality[302]. This intricate construction of public and private law, emerging from the purification process, has been incorporated into Brazilian law, constituting Brazilian public law as the law of the state. From this origination, the dichotomies are constructed which, as observed, are once again incompatible with the networked universe.

It is crucial to note that this dichotomous form has not only purified the model of the individual but has also ingrained itself in the scientistic perspective, establishing the subjectivist rationality of law as codified legal science. Through this assemblage— of dichotomous social relations, the normative system has treated citizens in isolation within its functional perspective and individual subjective rights. As highlighted by Emmanuel Jeuland, positive law, coupled with the modern state model, has dispatched the perspective of interdependence, overshadowing *"legal relations"*[303]. Consequently, modern Western public law has been designed as "*positive, compelling, and structured individualistically*"[304], i.e., static and focused on the protection of

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[301] In the words of Jacques Chevallier: "*The dichotomy took on a new dimension with the construction of the modern state: on the one hand, the private sphere, the seat of private interests, based on individual free enterprise and structured around the interactive relationships that develop between individuals and groups; on the other hand, the public sphere, the bearer of the general interest, responsible for managing collective functions and condensing the relationships of authority and constraint. The dualism of applicable legal rules seems to be the translation of this demarcation of the public and the private: the emphasis being placed sometimes on the purpose pursued (general interest/private interests), sometimes on the subjects in presence (public/private persons), sometimes on the nature of the legal relationship (unilateral/bilateral)"* J. CHEVALLIER, « À quoi sert la distinction droit public/droit privé ? », *in* A. BAILLEUX, D. BERNARD et J. VAN MEERBEECK (éds.), *Distinction (droit) public / (droit) privé*, s.l., Presses de l'Université Saint-Louis, 2022, pp. 9-25, disponible sur http://books.openedition.org/pusl/27556 (Consulté le 29 octobre 2023).

[302] N. BOBBIO, M.A. NOGUEIRA et C. LAFER, *Estado, governo, sociedade*, *op. cit.*

[303] E. JEULAND, « L'école relationnaliste du droit : la nouaison? », *Archives de Philosophie du Droit*, 2011, vol. 54, pp. 373-387.

[304] J. HABERMAS et R. de AGAPITO SERRANO, *Tiempo de transiciones*, *op. cit.*

individuals, constructing legal relations from purified social relations without intermediaries, centered on the autonomy of the individual and the protection of their freedom (their subjective rights).

Thus, the pole of individual autonomy is characterized by horizontal legal relations for equal physical/legal entities, while the public pole bears authority, established as a static counterpoint to the pole of freedom. Consequently, the foundation of legitimacy, authority, and its general interest have been molded to align with this nature. If the social relations in the citizenship/political pole are unequal, government actions must adopt an aspect of inequality in the imperative realm. As such, unequal legal relations are tailored to the public sphere, manifesting in action, the essential aspect of the public right of authority. The model of public law of authority thus manifests in a vertical and imposing legal relation through the figure of authority. Additionally, beyond the legitimacy of the general interest, public power also possesses a unilateral and imposing power through the figure of action, leading to a unilateral legal relationship.

This legitimacy stems from the formula of political action combined with public action, i.e., the sovereign government and authority, materialized in public interest and in unilateral acts, shaped by a pyramidal, dichotomous right of autonomy. This depicts why this unilateral, imposing act, taken as the source of legitimacy of an authority bearing a public interest, is incompatible with a networked ecosystem[305]. This is because the unilateral nature in this arrangement not only stems from the hierarchical, dichotomous framework but is also shaped with regard to the perspective of an ontological legal relationship of the substance, autonomous, contrasting the ontology inherent in the cybernetic imaginary, intrinsically networked.

In this process, the state remains the modern institution of political power, a condition derived from secularization. This artificiality is tainted in the hybrid universe. Nonetheless, it is from this schema that public law emerges, becoming codified to legally guarantee the sovereignty of the state, i.e., the state/legalistic political power. Access to political power would occur through a democratic process of representation, with the creation of laws by the legislative power. Finally, the modern disposition of Brazilian rule of law, which resulted in the construction of the category of "public interest" as a legal notion of legality of public action with a legitimization of state

[305] E. JEULAND, « L'école relationnaliste du droit : la nouaison? », *op. cit.*

authority, constituted the intrinsic allocation of the public with the state, i.e., one cannot conceive of modern public law without considering the state (modern public law is the ***law of*** the state).

And it is precisely to guarantee a dichotomous scheme, ***absent of intermediaries,*** that the state acquires its titularity as guarantor of the ***public interest.*** That is, to preserve the command-authority that the public authority is the holder of a *general interest* by a right that is imperative and by coercion[306]. In summary, the subjectivist reading means not only the formatting for the individual, but also the autonomous scientistic rationality of right, the positivist right is subjective static and focused on the autonomy of the individual in all forms, legally materialized in the figure of freedom. The public law of a digital state will have to deal with the process of autonomy *of society* by a law that is adapted to a *networked* environment.

§3 The public law of the modern state, *summa divisio*

Summa divisio means in Latin "*highest distinction*". The highest distinction in modern Western law is between private and public law. As a result, it is essentially untouched, sitting at the very top of the shelf of the legal system. Even the transformations, reforms and crises that have blurred the dichotomy between public and private law, and led to the elaboration of new conceptual models have not been able to reach the top of the great - modern - division of law. In Brazil, as in other Western countries of Roman-Germanic tradition, it was nicknamed the "*great dichotomy"* of modern law, a locution that automatically refers to one side of the coin, in a legal *yin/yang*[307]. As Tércio Ferraz Junior explains, it is considered a "*broad classification*" within the dogmatic scope of the law[308]. Therefore, next to private law, public law is treated as one of the two entry doors into the universe of law, and has been reduced to this introductory artifice[309]. However, beyond this initiation rite, it constitutes a fundamental element that consolidates a legal order, making the other differentiations its corollary.

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[306] H. BOUILLON, *Le droit administratif à l'ère de la gouvernance*, *op. cit.*

[307] Expression by Michel Tropper. M. TROPER, « Chapitre XII. La distinction droit public-droit privé et la structure de l'ordre juridique: », in *Pour une théorie juridique de l'État*, s.l., Presses Universitaires de France, 1 octobre 1994, pp. 183-198, disponible sur https://www.cairn.info/pour-une-theorie-juridique-de-l-etat-1994--9782130462033-page-183.htm?ref=doi (Consulté le 29 octobre 2023).

[308] According to the author, these are *classification systems or organizing criteria of classificatory criteria (...) which make use of (...) broad distinctions, historically developed in the dogmatic treatment of law. These are the so-called great dichotomies: public law and private law, objective law and subjective law*.T.S. FERRAZ JUNIOR, *Introdução ao estudo do direito: técnica, decisão, dominação*, São Paulo, Atlas, 2023, p. 133.

[309] Almost all Brazilian works on "public law" are manuals or books for introductory courses on law in undergraduate courses.

In Brazil, an examination of the term reveals that it is determinant in applying a given ***legal regime***[310]. Like its "*father*"[311] - the rule of law -, public law is traditionally described as an order in which the *"public interest"* prevails, distinguished from private law, where the principle of freedom, of *private autonomy*, prevails[312]. In this respect, a legal regime's implication in practice conditions its rationality. Considered as a public activity, the legal regime of public law applies, with prerogatives and subjections, special legal positions[313]. Alternatively, if it is a legal regime based on private law, the autonomy of individuals will prevail (albeit with some limitations). As this construction is a modern Western phenomenon, its basic assumptions are similar in other legal systems. Michel Tropper explains this classic construction, about two branches that divides all law, one of equal positions and the other of unequal positions, the first of autonomy and the individual, and the second of authority and the state[314].

Beyond that, as a manifestation of the modern legal dichotomy, it will be accompanied by the rationality of the purification process. Furthermore, it will determine the exclusion of elements from each side of the hybrid purification. Thus, ***two elements*** mark the constitution of modern positive public law, the ***state***, **(B)** and the primacy of the ***individual/subject*** **(A)**, which will be incompatible with the network schema already illustrated.

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[310] A.L. FREIRE, « Direito público e direito privado », *Enciclopédia jurídica da PUC-SP. Celso Fernandes Campilongo, Alvaro de Azevedo Gonzaga e André Luiz Freire (coords.). Tomo: Teoria Geral e Filosofia do Direito. Celso Fernandes Campilongo, Alvaro de Azevedo Gonzaga, André Luiz Freire (coord. de tomo)*, 2017, vol. 1, disponible sur https://scholar.google.com/scholar?cluster=19725006288861625 63&hl=en&oi=scholarr (Consulté le 29 octobre 2023).

[311] Contrary to Celso Antônio Bandeira de Mello, who, as seen, understands that the public interest is the child of the rule of law, it is understood that the child of the rule of law is the positivized public law, this one constituting the great dichotomy of modern law, which conditions the legitimacy of the State in the authority to guarantee the public interest, thus conditioning an entire legal regime linked not to the public interest, but to public law.

[312] A.L. FREIRE, « Direito público e direito privado », *op. cit.*

[313]This is the opinion of Carlos Ari Sundfeld, who has a work entitled "Fundamentals of public law", which, although it explains this issue, limits itself to placing the public as an activity of the State. On the other hand, legislative changes have been promoted within the scope of "public law", which is argued to be "of results" and consequentialist. The discussion about the public and private dichotomy remains in the scope of overcoming the supremacy of the public interest and using the constitution in its "individual" fundamental rights bias. The content of the public is not questioned, but the individual right is sought to be placed in the midst of the public, replacing it, moving one of the structures of the bones, without examining its relations. In this regard, the doctrine does not have much divergence, once it is considered as a legal regime of public law, even stronger provisions are thought, because they are bound to the authority. C.A. SUNDFELD et G. ATALIBA, *Fundamentos de direito público*, São Paulo, Malheiros, 2010.

[314]This division is presented at the beginning of most books as the fundamental division of law, even if some authors, anxious to temper the indispensable pedagogical clarity with the need for scientific rigor, state it only with some reservations. M. TROPER, « Chapitre XII. La distinction droit public-droit privé et la structure de l'ordre juridique », *op. cit.*

A. A subjectivist model

The initial characterization of Brazilian public law, which it seeks to distance itself from, is founded on the subjectivist[315] viewpoint of the discipline. In fact, both Brazilian legal academia and its legal framework perceive "*public law*" as the "*law of the State*", typically considered a domain of law addressing the interactions between the state and individuals[316]. This perception prevails even when incorporating other traditional criteria to distinguish public law from private law, such as interest[317]. A scrutiny of predominant academic views illuminates this standpoint, exemplified by Celso Antônio Bandeira de Mello[318]. In his seminal work on administrative law, he categorizes law into two principal branches, each governed by distinct legal methodologies: public and private law. He asserts that public law serves societal interests, centering on the state's legitimacy. Consequently, it establishes a criterion of legitimation, confining the discipline to the subject's perspective while associating it with the collective's interests.

Carlos Ari Sundfeld[319], aligns the field of public law *with power* and *the State*. He contends that public law aims to regulate the state, specifying that public activities are what determine the application of a particular legal framework[320]. Similarly, Tércio Sampaio argues that public law is intrinsically linked to the state due to its role as the central power in authority and

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[315]Subjectivist reading is not to be confused with subjective public right (a supposed subjective public right would not prevail in face of the instrumental character of public right). On the inexistence of subjective public right. D.W. HACHEM, « Tutela administrativa efetiva dos direitos fundamentais sociais: por uma implementação espontânea, integral e igualitária », *Espaço Jurídico Journal of Law [EJJL]*, 2014, vol. 15, n° 1, pp. 253-256, disponible sur https://portalperiodicos.unoesc.edu.br/espacojuridico/article/view/4958 (Consulté le 29 octobre 2023).

[316]Doctrinal misunderstandings can be identified regarding the understanding of its origin. For instance, Andre Freire: *The interest of the subjects is perhaps the oldest and best known criterion. One can find this distinction in Ulpian. While public law concerns the state, private law refers to the utility of individuals.* In truth, however, it is about what concerns the "*state of things in Rome,*" that is, the common good. A.L. FREIRE, « Direito público e direito privado », *op. cit.*

[317]The doctrine of "interest", however, is not to be confused with the concept of "subject". Maurice Hauriou, for example, lists that the power of authority serves to fulfill the purpose of protecting or achieving the *common good,* it is thus a conditioned power, which could well be translated into the Brazilian perception of a regime focused on the *duty-power,* in the terms of Celso Antônio Bandeira de Mello. C.A.B. de MELLO, *Curso de direito administrativo*, *op. cit.*

[318] C.A. SUNDFELD et G. ATALIBA, *Fundamentos de direito público*, *op. cit.*

[319]In his explanation, public law is political power, which is the power of the State. It was already clear to him that the idea of public law is linked to the figure of the State and the fact that it exercises power. But what he later realized is that the very idea of legal norms both those of the box of public law and those of private law could also be linked to the State and its power. "*So in Brazil there is a general power, which subjects all the inhabitants of the country. It is from this power that, in the last degree, legal norms come. This power is called political power (...) When jurists speak of public law, they are referring to the rules that regulate the exercise of political power*". « (PDF) A Descoberta do Direito Público | Carlos Ari Sundfeld - Academia.edu », s.d., disponible sur https://www.academia.edu/49241070/A_Descoberta_do_Direito_P%C3%BAblico (Consulté le 29 octobre 2023).

[320]Carlos Ari Sundfeld, for example, in his work "Fundamentos do Direito Público" (Foundations of public law), relates public law to the State: "*public law is formed by the set of rules that regulate the relations between the State and individuals.* C.A. SUNDFELD et G. ATALIBA, *Fundamentos de direito público*, *op. cit.*

command relationships. In this context, public law becomes inherently connected to these dynamics[321]. This illustrates not only an association with the state but also the binding of public law to political power and the state's unilateral and vertical legal relationships. Given that the state is the institution embodying political power in modern times, public law inherently pertains to it.

The automatic linkage of Brazilian public law with the state, branding it as state law, represents an "*essential flaw*"[322], according to Eros Roberto Grau. This critical flaw also has roots in the adaptation of modern Western positive public law into the Brazilian legal framework.

In his analysis of the discipline's development within German doctrine, and its subsequent influence on Roman-Germanic law[323], Michel Tropper pinpoints the 19th century as the time when public law was defined as state law, and private law as individual law. Tropper[324] highlights frequent interchangeability between terms for public law and state law by German scholars of that period. The distinction eventually rested on understanding the state as both a legal concept and a historical manifestation of political power expressed through legal means. Therefore, there is an intricate intertwining of political power, public law, and the state. The resulting state-power-law triad, characterizing the legalistic framework of the rule of law, assigns public law as its "special" law. Hence, public law emerges as a product of modern legal

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[321] Legally, the State, a true (bureaucratic) organism of functions, an abstract entity, product of political action transformed into doing, keeps a relation of supreme command before individuals: sovereignty. Law, explained by sovereignty, becomes command, a relation of authority in the sense of power. The distinction between sovereign power and its sphere and the power of individuals in their relations thus marks the distinction between the public and private sphere and, consequently, between public and private law.T.S. FERRAZ JUNIOR, *Introdução ao estudo do direito*, *op. cit.*

[322] The author states: "*The possessive individualism that has taken hold of us allows us to see only what belongs to each individual, and the so-called public goods are so called because they are snatched up by the state, the enemy of each individual, conceived as an institution that is strictly separate from society. This is the essential flaw that vitiates the thinking of our jurists, who lack the vocation to criticize social reality and who are exclusively dedicated to opposing or supporting the rulers without limits, from the narrow perspective of the individual*".
Original: "*O individualismo possessivo que toma conta de nós permite visualizarmos exclusivamente o que pertence a cada um e os bens que são ditos públicos assim são chamados porque arrebatados pelo Estado, este inimigo de cada um, concebido como instituição rigorosamente separada da sociedade. Esse, o defeito essencial que vicia o pensamento de nossos juristas, carentes de vocação para a crítica da realidade social, dedicados exclusivamente à oposição ou ao apoio sem limites aos governantes, desde a perspectiva estreita do individual*".
E.R. GRAU, « O Estado, a liberdade e o direito administrativo », *Revista da Faculdade de Direito, Universidade de São Paulo*, janvier 2002, vol. 97, pp. 255-266, disponible sur https://www.revistas.usp.br/rfdusp/article/view/67545 (Consulté le 29 octobre 2023).

[323] This is what Boris Barraud observed when dealing with the division in French doctrine. B. BARRAUD, « Droit public-droit privé : de la summa divisio à la ratio divisio ? », *Revue de la Recherche Juridique - Droit prospectif*, 2015, n° 152, p. 1101 s., disponible sur https://amu.hal.science/hal-01367507 (Consulté le 29 octobre 2023).

[324] M. TROPER, « Chapitre XII. La distinction droit public-droit privé et la structure de l'ordre juridique », *op. cit.*

institution[325]. This "*summa divisio*" is inherently structured within this framework, embedding public law as the state's law, an outcome of a dichotomy grounded in the paradigm of the individual, which, as seen, is incompatible with network spaces.

B. The primacy of private over public

As pinpointed, two crucial themes in constructing the structures of rule of law, which hold central significance in both public and private law, are *individualism* and *the market*. The modern disenchantment fosters an ever-increasing and progressive search for the subject's individuality. This implies that, in the legal realm as well, a new cycle commences, juxtaposing the state and the individual, as well as the state and the market. This leads to the dichotomy between public and private, and consequently, through the process of hybrid purification, to the opposition between state/public and market/private. Samantha Besson elaborates that, utilizing this opposition, power control is executed through the great dichotomy. In this framework, horizontal relationships fall under the domain of autonomy, while in the realm of power, the political intertwines with the legal, crystallizing in the rule of law[326]. Besson notes that the rule of law correlates with the principle of legality, underscoring its public nature.

The challenge, however, is that this perspective stems from a liberal and anthropomorphic theory. In its modern and liberal inception, private law takes precedence over public law[327]. Public law is crafted to prioritize the private sector, endowing it with technical superiority. Private law stands paramount and can be practiced and conceptualized even in the absence of public law. Given that natural rights precede, public law cannot exist independently of private law. This stems from the individual's pursuit of affirming their individuality. Consequently, the

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[325] A definitive characteristic of public law as State law results from the hybrid purification process of solid modernity, which "glues" the public to the State while *opposing* State/Public to Individual/Private. In French doctrine, Carré de Malberg synthesizes this perspective of the distinction of opposition between the scopes, emphasizing the aspect of domination, and linking public law to the state figure. [The distinction between public and private law is directly related to the duality of legal subjects [...]. One, private law, regulates legal relations concerning individuals; the other includes rules that are specifically applicable to state collectivities or that participate in state power itself. [...] public law may be defined as that which governs collectivities with power of domination. R. CARRE DE MALBERG, *Contribution à la théorie générale de l'État, spécialement d'après les données fournies par le droit constitutionnel français, par R. Carré de Malberg, professeur à l'Université de Strasbourg*, Paris, libr. de la Société du Recueil Sirey, Léon Tenin directeur, 1922.

[326] S. BESSON, « Democratic Representation within International Organizations: From International Good Governance to International Good Government », *International Organizations Law Review*, décembre 2022, vol. 19, n° 3, pp. 489-527, disponible sur https://hal.science/hal-03559955 (Consulté le 25 octobre 2023).

[327] S. BESSON. Le *droit international face à la distinction public/privé*. Leçon d'ouverture. Cours au College de France. 2021-2022. https://www.college-de-france.fr/sites/default/files/documents/samantha-besson/UPL4883524991174199192_Besson_PP_1_220222.pdf.

legal duality is inherently unequal, rooted in dissimilarity and imbalanced dissociation. public law becomes "*another law*" in relation to private law[328].

The shift signifies a movement from an authority aimed at collective ends (**1**) to the conception of public law established to safeguard individual rights (**2**).

1- From collective purpose to the primacy of the individual

In the legal realm, Immanuel Kant is attributed with reinforcing this dichotomy, delineating a parameter for juxtaposing private and public law with natural and positive law[329]. In this schema, private/natural law pertains to the state of nature, encompassing fundamental institutions in property and contract. Conversely, public/positive law initially serves to abolish the state of nature, manifesting as a legally binding force wielded coercively by the sovereign. For Kant, private law not only precedes public law but also holds greater relevance. Jürgen Habermas elucidates that although elements of individualism have been traceable since Thomas Hobbes, it is in the post-Kantian era that law becomes systematically structured around the individual[330].

As seen, in Hobbes's framework, the sovereign purpose still centers on the collective, on the *res publica*[331]. However, following Kant[332], the rule of law shifts its focus towards safeguarding individuals and ensuring their liberties. In fact, as Benoît Plessix elucidates, the Kantian logic originates from recognizing the transcendence of the individual unjust state—not by succumbing to the Hobbesian Leviathan, but by establishing a legal norm ensuring respect for freedom through a collectively empowered will. This embodies "*the feasibility of a universal and mutual constraint, harmonizing with each individual's freedom in accordance with*

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[328] B. PLESSIX, *Le droit public*, Que sais-je ?, n° n° 4167, Paris, Que sais-je ?, 2022.

[329] J. HABERMAS et R. de AGAPITO SERRANO, *Tiempo de transiciones*, *op. cit.* ; N. BOBBIO, M.A. NOGUEIRA et C. LAFER, *Estado, governo, sociedade*, *op. cit.*

[330] J. HABERMAS et R. de AGAPITO SERRANO, *Tiempo de transiciones*, *op. cit.*

[331] *Ibid.*

[332] In the work "*Metaphysics of Morals*", Kant distinguishes public and private law, stating that "*natural*" private law precedes "*positive public law*". Natural law is private because it lacks the necessary safeguards to ensure that "the will of each individual [can] coexist with the will of others following a universal law of freedom." Considering that human being is an animal of *autonomous* "*will*" and "*free reason*", with a moral sense that derives from his *subjectivity*, he is endowed with innate fundamental rights linked to the very essence of his personality, "*possessing a dignity that obeys no other law than his own*". According to the categorical moral imperative revealed by the use of *practical reason*, the individual gains access to the knowledge of natural law, universal and necessary laws, that is, *private law*, whose understanding leads him to the supreme ethical value: *freedom*, thanks to the "*Enlightenment*" that enables him to enlighten himself about what he should know. B. PLESSIX, *Le droit public*, *op. cit.*

universal laws" [333]. Once positivized, law attains the status of public law. Although private law predates public law, it remains incomplete without it, necessitating public law as a guarantor for its realization. Here, there is a subtle attempt to break absolute ties, aiming to ensure that consolidated *rights* prioritize individual interests over state interests, which ought to be secondary.

2- Public law as a realm for individual's protection

Consequently, modern public law emerges as a domain crafted to safeguard the individual's fundamental freedoms and rights[334]. This encapsulates the essence of the dichotomy, where each element relies on the other for realization and protection. Public law will not be able to escape this formatting, so that the crisis of the sovereign government model, embodied in the political action of sovereignty, will not result in a reconfiguration towards the common good. Instead, it will lead to a deepening of values on the side of society, whether it be the individuality and freedom, or democracy. This clarification is crucial as it highlights that Western public law was not originally *designed* for *the res publica*[335]. Instead, its enduring aim has been to safeguard the realm of personal freedom. Beyond of its *individual-centric* inception, it is pivotal to acknowledge that in this dichotomy, the individual's autonomy and freedom hold supremacy over public considerations. Thus, public law has been positivized and shaped based on this mechanical conceptualization, further enhanced by the *solid modernity* of *dichotomies*, all with the intent of protecting individual autonomy.

Within the legal domain, the primacy of private law finds its vindication through the dissemination of Roman law. The tenets of Roman law transmuted into natural law, *re-embodied* within *positive legal codes*, most notably in the 1804 Napoleonic Code. This transformation unfolded against the backdrop of the *scientific rationality* characterizing the modern epoch. As a result, the foundational elements of code system and rule-based structures predominantly emanate from this juridical trajectory. Jürgen Habermas consolidates this perspective, emphasizing that modern law fundamentally aligns with a subjectivist orientation, privileging the individual[336].

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[333] *Ibid.*
[334] In the same vein as modern political action, as seen before.C. TAYLOR, « Résonance et théorie critique », *op. cit.*
[335] B. PLESSIX, *Le droit public*, *op. cit.*
[336] J. HABERMAS et R. de AGAPITO SERRANO, *Tiempo de transiciones*, *op. cit.*

Given the supremacy of private facets in the evolution of modern public law, specific characteristics have come to define its nature. Initially, it embraced and refined the established concepts of private Roman law. Furthermore, it adopted an individualistic approach, aiming to assimilate and fortify the principle of subjectivity. This approach consequently gave rise to a form of "*conflict*", marked by both antagonism and utilitarianism. In this context, Alain Supiot delineates that, while Kant introduced the dichotomous distinction prevalent in German doctrine between public and private realms, the Western legal framework predominantly adhered to the individualistic and utilitarian articulation of law[337].

This perspective aligns closely with the philosophies of Adam Smith and Jeremy Bentham. Notably, one of the most influential figures in the realm of positive law, Jhering[338], conceptualized law through the lens of interests, postulating that rights are essentially legally protected interests. This stance exemplifies the liberal individualistic influence. These considerations substantiate the theoretical mark of private law and reveal the individualist vision of the interest, arising from the very historical moment of its formation, in which private law had the spotlight[339] .

When introduced in Brazil, the dominance of private law over public law was embraced and justified by legal academia. José Cretella[340], as early as 1966, highlighted that due to the long-standing tradition of private law—a branch developed over centuries— is predominant. Brazilian academia exhibits a profound conviction in the protection of individual rights, to the extent that even within public law, discussions frequently prioritize safeguarding individual rights and freedoms[341] attained after the European liberal revolution, as opposed to revitalizing the concept of *res publica*. It is not uncommon to encounter arguments advocating for the transcendence of public aspects to uphold fundamental rights, subtly implying that in today's

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[337] A. SUPIOT, « The public–private relation in the context of today's refeudalization », *op. cit.*

[338] Jhering states: "*If I am interested in a person, an object, a situation, it is because I feel that I depend on it, from the point of view of my existence or my well-being, my satisfaction or my happiness. Intereses are, therefore, the conditions of life in its broad sense. The sense in which we take here the notion of the condition of life is completely relative; what for one constitutes part of life in its fullness, i.e., well-being, is devoid of all value for another*". R. von JHERING, *L'Esprit du droit romain dans les diverses phases de son développement, par R. von Jhering,... Traduit sur la 3e édition... par O. de Meulenaere,... 2e édition*, Paris, A. Marescq aîné, 1880, p. 437.

[339]In legal dogmatics the relationship between rights and interests is discussed; utilitarianism being observed as a common political-philosophical basis. About: F.Q. PEDRON, « Direitos e interesses: (re)pensando a relação além de uma compreensão semântica », *Prisma Jurídico*, s.d., vol. 6.

[340] J. CRETELLA JUNIOR, *Tratado de direito administrativo*, Rio de Janeiro, Forense, 2002.

[341] "*A new public-private relationship is advocated, in which a* ***mix of autonomy*** *and heteronomy is necessary to meet contemporary contractual demands*". V.C.L.L. VALLE, *Contratos administrativos e um novo regime jurídico de prerrogativas contratuais na Administração Pública contemporânea. 2017. 265 f*, PhD Thesis, Tese (Doutorado em Direito do Estado)–Universidade Federal do Paraná, Paraná ..., 2021.

context, the dichotomy between public and private is obsolete. This stance establishes a direct link between public law and the state, particularly in terms of authority. Currently, a significant movement within contemporary legal scholarship argues for a reevaluation of the state's authoritative role, advocating for a more robust protection of individual liberties[342]. This trend underscores the extent to which Brazilian public law is entrenched in individualism and utilitarianism.

Indeed, as elucidated by Jérémie Van Meerbeeck and Thierry Léonard, the prevailing view since the French Revolution posits the state's primary function as the protector of *individual rights*[343]. This anthropocentric perspective on institutions has profoundly influenced the development of legal doctrines, prioritizing the safeguarding of individual freedoms, as seen. The search to guarantee the rights of freedom - *of the self* - makes one ignore the existence of other perceptions besides the modern version that pursues to protect the *individual's autonomy*[344]. It is *man* and his individuality first that will drive the creation of the rights of "*freedom*", the notion of the right, among others. Collectivity comes later.

C. The dichotomy in Brazil: the primacy of the private potentiated

In scrutinizing Brazilian public law, Eros Roberto Grau highlighted that "*the republican virtues are intrinsic to the social fabric, yet they remain unrealized among us due to the prevalent privatization of this order*"[345]. This insightful observation can be dissected from two distinct perspectives. Initially, one can perceive this as a manifestation of the conventional integration of public law within the legal framework, characteristic of Western societies, inherently tied to prioritizing individual interests. However, Grau delves deeper, arguing that, in Brazil, the concept of the public sphere has been distorted into a state-centric view, rendering the *ius commune* virtually invisible[346]. Eros Roberto Grau explains that the individual, rather than

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[342] Floriano Marques de Azevedo on the rationalization of a consensual administration: "*In the functional approach, the subject is repositioned as the addressee of administrative law, since it focuses on freedom and not on the structural prerogatives of the regime.* F.P. de A. MARQUES NETO, « A bipolaridade do direito administrativo e sua superação », *op. cit.*

[343] J. VAN MEERBEECK et T. LEONARD, « Le droit subjectif », *op. cit.*

[344] J. NEDELSKY, *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, s.l., Oxford University Press, 1 janvier 2012, disponible sur https://doi.org/10.1093/acprof:oso/9780195147964.001.0001 (Consulté le 18 octobre 2023).

[345] E.R. GRAU, « O Estado, a liberdade e o direito administrativo », *op. cit.*

[346] *Ibid.*

being separated, is intrinsically merged into the state, shaping and defining public interest in all its facets. Moreover, he contends that the Brazilian interpretation of the common good is skewed towards the state, sidelining the population. In Walter Guandalini Junior's reading, administrative law, a discipline built in Europe in attention to the general interest in order to meet economic and military objects in a context of international competition, was incorporated into Brazilian culture as an element of legitimization of a "*newly created*" state[347].

In Iberian America, the colonial elite was umbilically linked to European culture. This conception that distinguished nations by time (present/past) and place (center/periphery) had repercussions on the definition of their national identities, in the form of an *inferiority* complex[348]. The Brazilian novel Macunaíma provides a representation of this scenario. The author refers to the context of rupture with the traditional political order and highlights the need to design a new foundation for governing the nation. If France has Jean Valjean[349] as an emblematic figure in describing the revolutions experienced in his country, Brazil has Macunaíma. The character is known as the portrait of the "*Brazilian people*". Treated in popular culture as the "*hero of our people*"[350] he is popularly known for being lazy, and a rascal. He is the true antithesis of the traditional figure of the modern man (rational, hard-working, universal, white, focused on order and progress).

As an allegory, the novel illustrates how Brazil deviates from Eurocentric modern frameworks and has a ruling class that is ashamed of its natural diversity. In the context of Iberian America, Brazilian political culture has unique themes. Based on the negative value judgment about the national reality, Brazilian political actors extracted the imperative to modernize the country to

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[347] W. GUANDALINI JR, *Gênese do Direito Administrativo Brasileiro: formação, conteúdo e função da ciência do direito administrativo durante a construção do Estado no Brasil imperial*, PhD Thesis, Tese (Doutorado em Direito). Programa de pós-graduação em Direito …, 2011, disponible sur https://scholar.google.com/scholar?cluster=15012456055678206307&hl=en&oi=scholarr (Consulté le 29 octobre 2023).

[348] C.E.C. LYNCH, « Cartografia do pensamento político brasileiro: conceito, história, abordagens », *Revista Brasileira de Ciência Política*, 2016, pp. 75-119, disponible sur https://www.scielo.br/j/rbcpol/a/Dkz6m46wRKBXXw94ZhGVH8y/ (Consulté le 29 octobre 2023).

[349] Main character in Victor Hugo's work, considered to be one of the main French novels, which portrays the period of misery resulting from the industrial revolution process.

[350]In popular culture, Macunaíma represents the "average Brazilian" and his lifestyle, emphasizing laziness, inconstancy, libertinism, cowardice and unreliability. Recent critics disagree. By claiming the diversity and miscegenation that marked the formation of the country, normalizing the unpredictable and incorporating freedom, imagination, poetry and everyday life, he has often been understood by researchers as an "anti-hero", a symbol of resistance to colonialism, massification, ethnic and cultural homogenization and sanitization, prejudice and hegemonic discourses; a counterpoint to cold and dehumanizing rationalism, critics say, Macunaíma best expresses the Brazilianness of Mario de Andrade from ethnographic studies. It shows the diversity and contradictions of Brazil. Modern-archic, north-south, regional-national-international, Catholicism versus religiosity, sacred-prophane, people-elite, erudite-popular. S. SILVEIRA, « A brasilidade Marioandradina », s.d.

reduce the gap between their society and that of the central countries, seen by them - as the standard of normality. For the central countries, institutions should reflect and accompany the development of society. For the backward countries, not so much. Here, the welfare state would consecrate the "*tupiniquim backwardness*"[351]. The peripheral institutions would act upon the welfare state to improve it. Thus, political and juridical institutions should be more advanced than the welfare state[352], even in the constitutional design.

The lack of republican culture is highlighted by Nelson Saldanha, who, for example, explores the persistence of privatism in the country, and the "*life of engenho*" an increase in the prestige of the street, as something gradual, but that still privileges the house over the street, in all its senses[353]. The remnants of the "*house*", shading the entire course of Brazilian history, is well registered by Airton Seelaender[354]. The predominance of the private view in Brazil is sometimes attributed to the dominance of patrimonialism, arising from the feudal structures of Brazilian history[355]. According to Saldanha, personalism would have expanded to party affiliations and other public institutions[356]. Eros Roberto Grau, in turn, when examining the first texts of administrative law, points out that the *raison d'être* of this realm was based on the defense of the individual in face of the state, and that this opposition "*is without any discussion assumed by our scholarship, it is installed, as an assumption of it, the belief in a split between State and* society"[357] .

Hence, one can conclude that when the author suggests replacing administrative law from the defense of the individual to the examination of state organization given in society, he is questioning the liberal dichotomy of public and private and suggesting the examination of the public as a common good, and being so, as a sphere that is dedicated to discipline it and not the

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[351] T.L. BREUS, « O governo por contrato(s) e a concretização de políticas públicas horizontais como mecanismo de justiça distributiva », 2015, disponible sur https://acervodigital.ufpr.br/handle/1884/40312 (Consulté le 29 octobre 2023).
[352] C.E.C. LYNCH, « Cartografia do pensamento político brasileiro », *op. cit.*
[353] N. SALDANHA, « O jardim e a praça: ensaio sobre o lado "privado" e o lado "público" da vida social e histórica », *Ciência & Trópico*, 1983, vol. 11, disponible sur https://periodicos.fundaj.gov.br/CIC/article/view/326 (Consulté le 29 octobre 2023).
[354] A. SEELAENDER, « A longa sombra da casa. Poder doméstico, conceitos tradicionais e imaginário jurídico na transição brasileira do antigo regime à modernidade », *R. IHGB*, mars 2017, vol. 473, pp. 326-424.
[355] C.E.C. LYNCH et J.V.S. de MENDONÇA, « Por uma história constitucional brasileira: uma crítica pontual à doutrina da efetividade », *Revista Direito e Práxis*, 2017, vol. 8, pp. 974-1007, disponible sur https://www.scielo.br/j/rdp/a/RjQvwKxRZQN9PWDsr7mvJ4q/ (Consulté le 29 octobre 2023).
[356] N. SALDANHA, « O jardim e a praça », *op. cit.*
[357]One must replace the Administrative Law/defense of the individual by another, an Administrative Law/State organization, that not only protects the individual, but, moreover, is at the service of the satisfaction of the social Grau, E. R. (2002) "O Estado, a liberdade e o direito administrativo", E.R. GRAU, « O Estado, a liberdade e o direito administrativo », *op. cit.*

"*state*"[358]. A significant portion of contemporary publicist scholarship focuses on individual liberties and their protection through the original opposition of the state/society. Public law, therefore, is considered the discipline of the state, aimed at protecting the rights of freedom of individuals and citizens, based on their fundamental rights and human dignity, whose rights are opposed against the state, which must guarantee them, admitting a horizontal application of fundamental rights, which, do not have the same strength when compared with the state. The changes in power relations observable in cyberspace have led to normative propositions that aim to broaden the application of fundamental rights and human dignity, seeking protection in the face of these actors. Such construction remains based on oppositions, in particular here, that between state and individual/market. Nevertheless, in a networked universe, it becomes unfeasible to propose a law that places the individual as the center of the legal system. In a networked ecosystem, the individual cannot be considered a metric or center of this universe, especially when facing the public sector.

Chapter Conclusions

The narrative above demonstrates that the modern dichotomy between public law and private law stems from the opposing poles between society and the state, with private being listed to the former and public to the latter. This classic packaging of the rule of law and the consequent construction of public law shows two issues that are often ignored or disregarded.

The first refers to the fact that the *dichotomous* model of the *state/civil society* played oppositely in a situation where private interest prevails over the collective can be considered a *code*[359], which drives the modern legalistic *architecture of* institutions, be them public or private. As Laurence Lessig explains, "*the code is never found; it is only made, and only made by us*"[360]. Therefore, the modern private/public dichotomy is a code created by the individuals. It is an imaginary, and

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[358]In his terms: *"the Administrative Law constituted by our doctrine, cradled by the individualism that, with such deep marks, characterizes it, is a product of the economic liberalism gestated in the 19th century, even if under the mask of political liberalism" Ibid.*

[359] L. LESSIG, *Code: And other laws of cyberspace*, s.l., ReadHowYouWant. com, 2009, p. 6, disponible sur https://books.google.com/books?hl=en&lr=&id=tmE-pvNIX38C&oi=fnd&pg=PR2&dq=info:45fl71S8FGgJ:scholar.google.com&ots=Gc8zmIoCH4&sig=VO-M8hYTQWsfHflUZAPpD0huziE (Consulté le 29 octobre 2023).

[360] *Ibid.*

as such, it is made. This code leads to the legitimacy of the state of the public interest, its holder, by a political action of authority, that is, *pyramidal*. This separation in opposition between state and society also derive from classical economic liberalism, which opposes economic power and political power[361], and constitutes the framework for the construction of dichotomies and consequently for the development of state legitimations. Therefore, modern positivized public law does not exist without this provision, which gave it shape and conferred its architecture.

A second issue relates specifically to the disposition of political power in this sphere, the complexities of which intensify. That is, state ownership takes place through the structure of the *sovereign state* of a *government* model of centralist power and authority, appropriately structured in a bureaucratic organization, which confers the power of command, control in a verticalized space to guarantee the public interest (the relationship of submission and inequality). The state body is still sovereign, authoritarian and unitary (even if this authoritarianism refers only to political power, but if it is this way it is because it is an election).

The consequence of these two points is that the rule of law categories of authority, legality and public interest are built *under two very particular* schemes that cannot be disregarded. **The first one** corresponds, as seen and, like the whole modern model that seeks to systematize order, in the process of ***depuration of hybridization***, to the systematization and construction of opposing categories, made so that the individual's interest and autonomy prevails. As seen, differing types are created, which serve as a counterpoint, made in such a way as to privilege the individual. Jurgen Habermas synthesizes the *bipolarity* in the legal field when studying the public sphere. As he explains, it is from the opposition of private law, from individual private autonomy, from the market, that the ***guarantee of freedom*** was instituted. Therefore, for the state, the public law that would emerge there would have to assure this guarantee negatively, granting public power the prerogative of ***authority.***

In this logic, the legal notions of legality and public interest are constructed. Authority, in this sense, would be *the opposite* of freedom. Freedom would be the right to preserve, which led to the construction of a private legal system. This structuring brings the content of power within the framework of the ***modern, legalistic state.*** Take legality, for instance. Legality, within this legal model, is within the hierarchical order as a subordinate, of that which emerges as the creator of laws, the legislative power. But legality is a direct result of the power of command, of the sovereignty of the state, of its authority. As Massimo Vogliotti rightly points out, *mythologies of*

[361] F. MEUNIER, « Le néolibéralisme et l'art de gouverner », *op. cit.*

legality often prevent one from seeing the very facets of pure legality, which not only reside in the embodiment of liberal values, but are also the manifestation of the absolutist root that animates it, that is, the paradigm of the *modern pyramid*[362]. What can be observed in the fresco (an aesthetic angle, therefore) of "*The freedom guiding the people*"[363], which, also receives its shape in the mold of a pyramid (anthropocentric).

And it is precisely from here that ***the second point*** of relevance derives, which lies in the form of incorporation into political power, and *purified* into public law as an order of the state. As a *counterpoint to freedom*, the structure was developed in a perspective of *sovereign authority*. That is, the exact form of the sovereign government of the absolutist state was employed, modifying, however, its legitimacy (*from the sovereign to the people*) and its ultimate purpose (*from the common good to the guarantee of individual freedom*). Thus, the disposition of political power in the state of authority power, structured in a bureaucratic organization derives from the very construct of the secularization of power, based on the structure of the sovereign government model, on the artificial machine, but with the dichotomous rationality of the importance of the subject. Accordingly, the second point of the nature of the structure of state public action for the legitimacy of the public interest is ***pyramidal.***

Therefore, in summary, it can be stated that: **1-** The authority of the state and its ownership as guarantor of the public interest is a legitimacy of the conception of *political action of government*. **2-** In the rule of law, authority was formulated for dichotomous relations, resulting from the bipolar construction separating authority/liberty, prioritizing the latter. In short, it is a ***dichotomous*** structure (of the primary opposition Society/state) and ***pyramidal*** (of the government model). And because the public interest held by the state has a *pyramidal* and *dichotomous* nature, it is incompatible with the digital world, which emerges in a network paradigm. Additionally, that legitimation was constructed in such a way that the individual prevails, doing so through oppositions, having as its architecture ***coded the dichotomy*** between state and Society, which conditions the legitimations and interactions in the public and private spheres. It is from the dichotomy that allocates the public to the state that the public interest is granted. Therefore, the pure modern construction of the separation between state and Society and their opposition, and that which has conditioned authority and the public interest, cannot serve as a mold for examining the several nuances of the digital world, a networked space (cyberspace)

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[362] M. VOGLIOTTI, « L'érosion de la pyramide pénale moderne et l'hypothèse du réseau », *op. cit.*
[363] From Eugène Delacroix.

with multiple actors, with intermediaries, and with a new element, that is, data, which has specific characteristics. The networked ecosystem needs norms aimed at its structure. It is, in fact, about the incompatibility of *pyramidal* and *bipolar* - basic - systems in a networked ecosystem world.

Chapter 2. The inadequacy of "*good governance*" public law to Digital State's transformation

Chapter 1 displayed how the political action model of the modern state ideal type was assembled in response to modern disenchantment. Grounded in the values of reason and the individual, and embedded in the imagination of the "machine", it established the grand dichotomies of the rule of law. These dichotomies include public and private law, authority/freedom, and Society and state. In this interpretation, modern Western public law, which encompasses Brazilian law – anchored in the power of authority - was established with the *individual's autonomy* (the prevailing pole of the freedom/authority dichotomy) as its code and shaped in a dichotomous and pyramidal model.

The first hypothesis defended posits that this code (orientation), and its ensuing formats, are incompatible with the categories of the network ecosystem and an information society since these constitute another imaginary, that of cybernetics, which stands in discord to the mechanical, substantialist systems grouped in oppositions. Consequently, a legal structure of cyberspace should not begin with the individual's autonomy as its starting point (the code) but rather with a network society. This forms **the second hypothesis**. That is, while the modern state model, the sovereign government, correlates with individualistic and industrial society under the machine's imaginary, the postmodern state, has emerged as a governance type.

Accordingly, it is asserted that the digital transformation within the public sector correlates with and materializes through the governance model of the postmodern state, a paradigm of political action[364]. The term "*postmodern*"[365] employed here, denotes precisely the antagonism to

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[364] Antônio Manuel Hespanha, when comparing the Modern and the postmodern alludes to Bauman and mentions that there is a polarity between both. He says that the Modern is an ordered totality and is associated with action and orderliness. In turn, the postmodern is an unlimited number of models of order. Each model makes sense only in the practices that validate them. A.M. HESPANHA et R. CABRAL, « Os juristas como couteiros. A ordem na Europa ocidental dos inícios da idade moderna », *Análise Social*, 2002, vol. 36, n° 161, pp. 1183-1208, disponible sur http://www.jstor.org/stable/41011532 (Consulté le 24 octobre 2023).

[365] Jacques Chevallier, in proposing the nuances of a postmodern State, lists the characteristics that distinguish it. The first point resides in the fragmentation of the State in the dilution of the principle of *state sovereignty*. The second deals with the crisis of the model of *representative democracy*, followed by the verification of the modification of state functions, which transmutes a State from acting as a controller to a *regulatory* State. This is also verified in the *reforms in* its organizational structure, and finally in the modifications in the relations between State, society and market that end up questioning the modern *dichotomy of public and private law*. In this aspect, there is also a mutation of the legitimacy model of public state action, which changes from the perception of public interest, linked to authority, to *performance*. All these elements are evidence of a mutation to a *governance model of political action*. In any case, *governance* is used in a *broad* sense as an opposition to the modern conception of

foundational elements of the modern state's political action, particularly the concept of sovereignty, which underpins the legitimation of authority by public interest (public action). Hence, it is critical to examine the mutation, that is, the process of depurification[366] of the static structures of the political action model of the modern rationalist universe. A particular focus should be placed on how this transformation was accomplished in Brazil.

Section 1 aims to explore these modifications, while **Section 2** investigates the digital transition of the public sector and the unsuitability of the prevailing governance model, emphasizing the evolution of this structure within Brazil's legal and institutional frameworks.

Section 1: The autonomy of society as a vector for the emergence of political action of the postmodern state

Various factors contribute to what is recognized as the fragmentation of modern state sovereignty and the loss of its unified vision. The thesis subscribes to Bertrand Badie's[367] assertion that this unitary perception has been significantly impacted by three phenomena: globalization, multipolarity, and decolonization. Each influencing distinct aspects—technological-economic, political and cultural, respectively. In his analysis, Boaventura de Souza Santos[368] elucidates three dialectical tensions intrinsic to Western modernity, one of

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government, a category linked to the modern perception of *sovereignty*. Thus, although technological globalization has been propagated in conjunction with liberal/financial economic globalization, this does not mean that governance, as a type-ideal, fits only into this format. . J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., Paris, France, LGDJ, 2017.

[366] For Massimo Vogliotti, *"Dans notre époque de modernité tardive ou de postmodernité, la perception de l'omniprésente nature hybride – écrite et orale – du droit est facilitée par la crise des deux facteurs qui étaient à la base du programme de réduction du droit à l'écriture : la souveraineté étatique et la rationalité moderne"*. M. VOGLIOTTI, « De l'auteur au "rhapsode" ou le retour de l'oralité dans le droit contemporain », *Revue interdisciplinaire d'études juridiques*, 2003, vol. 50, n° 1, pp. 81-137, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2003-1-page-81.htm.

[367] B. BADIE, « Conclusions générales. Colloque organisé par le Centre de recherche sur les droits de l'homme et le droit humanitaire (CRDH – Université Panthéon-Assas) et l'Institut des Sciences juridique et philosophique de la Sorbonne (ISJPS – CNRS / Université Paris 1 Panthéon-Sorbonne) », *in: Démocratiser l'espace-monde,* Colloque organisé par le Centre de recherche sur les droits de l'homme et le droit humanitaire (CRDH – Université Panthéon-Assas) et l'Institut des Sciences juridique et philosophique de la Sorbonne (ISJPS – CNRS / Université Paris 1 Panthéon-Sorbonne), Paris, septembre 2022.

[368] Boaventura identifies three dialectical tensions that inform Western modernity. The first is between social regulation and social emancipation, which is present in the positivist division of order and progress, because "*the crisis of social regulation - symbolized by the crisis of the regulatory state and the welfare state - and the crisis of social emancipation - symbolized by the crisis of social revolution and socialism as a paradigm of radical social transformation - are simultaneous and feed off each other.*[368] For Boaventura, human rights are found in this crisis. The second tension is between state and society. Society reproduces itself by laws and regulations that come from

which pertains to the reverberations of globalization upon sovereign entities[369]. Additionally, Adrian Gurza Lavalle[370] articulates that this phenomenon has emerged specifically in Latin American nations, including Brazil. As globalization becomes imperative for deciphering political processes, it can be scrutinized through a neoliberal economic prism[371], or by an alternative contour through transborder connections, engendered by local and national social movements mobilizing in antagonism to social exclusion[372]. In both cases, in contrast to a modern model, a post-statist would embrace ideas of *interdependence* and *plurality*.

In fact, sovereign breaks have their corollaries, marking the culmination of multiple aspects of state evolution and modernity. Not only public/private bodies, but human and non-human actors, machines, data, environment, and a whole digital universe emerge, the communication of which passes through an environment (cyberspace) that is naturally reticular. Between the state and the individual, a whole constellation of intermediary bodies emerges: unions, associations, political parties, etc., which have challenged the monism of the state and the simple dichotomy state/individual, giving rise to "***pluralistic visions***"[373]. These phenomena upset the structure of the *sovereign* model, erected not only under the *pyramidal* mold, but solidified by *dichotomies*.

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the state. Human rights find themselves in this tension, with the first dimension of human rights requiring no state action, while the second and third dimensions presuppose activities on the part of the state. The third tension is between the state and globalization. B.D.S. SANTOS, « Uma concepção multicultural de direitos humanos », *Lua Nova: Revista de Cultura e Política*, 1997, n° 39, pp. 105-124, disponible sur http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-64451997000100007&lng=pt&tlng=pt (Consulté le 18 octobre 2023).

[369] Accordingly, globalization, while proliferating in economic-financial dimensions, concurrently facilitates the ascension of local/social democracies within states. In this vein, André-Jean Arnaud postulates that globalization heralds a paradigmatic transposition, contending that its ramifications encompass a diminution of State intervention, attributable to the privatization of public activities and the emergence of intermediary interlocutors. A.-J. ARNAUD, « Droit et Société. Un carrefour interdisciplinaire », *Revue interdisciplinaire d'études juridiques*, 1988, vol. 21, n° 2, pp. 7-32, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-1988-2-page-7.htm.

[370] A.G. LAVALLE, P.P. HOUTZAGER et G. CASTELLO, « Democracia, pluralização da representação e sociedade civil », *Lua Nova: Revista de Cultura e Política*, 2006, n° 67, pp. 49-103, disponible sur http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-64452006000200004&lng=pt&tlng=pt (Consulté le 18 octobre 2023).

[371] S.A. SILVEIRA, « Responsabilidade algorítmica, personalidade eletrônica e democracia », *Revista Eletrônica Internacional de Economia Política da Informação, da Comunicação e da Cultura (ISSN: 1518-2487)*, 2020, vol. 22, n° 2, pp. 83-96, disponible sur https://seer.ufs.br/index.php/eptic/article/view/12021 (Consulté le 28 octobre 2023).

[372] In a decolonial state, traditional power structures and hierarchies established during colonial eras would theoretically be dismantled and replaced by more egalitarian and inclusive systems.

[373] M. VOGLIOTTI, « De la pureté à l'hybridation : pour un dépassement de la modernité juridique », *Revue interdisciplinaire d'études juridiques*, 2009, vol. 62, n° 1, pp. 107-124, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2009-1-page-107.htm.

As a consequence, the substitution of unity for interdependence necessitates the scrutiny of the modern foundational code, namely the autonomy of the individual, the "freedom of the rational subject". The revival of hybrid and intermediary actors, the multitude of entities in the possession of normative power, and the resurgence of previously marginalized minorities — in diverse forms — compels a rearrangement of values, legitimizations, institutional structures, as well as the roles and functions of institutions. This is, these elements were not only shaped by the code of individual autonomy, but also by a universe in which dichotomy implied the *absence of intermediaries*[374].

Accordingly, the evolution of the postmodern political action model becomes evident through the alterations in the core of the modern state model, namely *sovereignty* and *subject*[375]. These categories, as previously discussed, connect to the notions of *unity* and *individual autonomy*. As seen, the multitude of actors, alongside technological interconnectedness, destabilize the *universalistic* notion of sovereignty[376]. In addition, on the one hand sovereignty in its unity is fragmented, while, *freedom* — as a category, which was already the primacy of law — on the other hand, is fortified.

In this vein, it is crucial to bear in mind that in the process of creating *modern dichotomies*, the state/society, state/market; civil/political, man/citizen; authority/freedom were devised *as oppositions*, in a specifically exclusionary manner.

Thus, in the wake of the process of the autonomy of society, an expansion of the civil sphere was observed, which occurred both in the defense and assurance of even greater individual freedom — resulting in hyper-individualism — and in an expansion through the implementation of social rights. Both propositions seek to enter the political/public sphere, employing values and methods that include concepts that are *sometimes identical*, *sometimes analogous* (human dignity and transparency, for instance). And, while institutional designs are repositioned toward plural formulas in response to the loss of sovereignty's centrality, hyper-

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[374] As Van Meerbeeck well considers, the French Revolution contributes to the opposition between public law and private law, notably because it will abolish "*intermediary bodies and leave only the State and individuals.* J. VAN MEERBEECK *et al.*, *La distinction entre droit public et droit privé. Pertinence, influences croisées et questions transversales*, 2019, disponible sur https://dial.uclouvain.be/pr/boreal/object/boreal:214626 (Consulté le 18 octobre 2023).

[375] G. JELLINEK, *La déclaration des droits de l'homme et du citoyen : contribution à l'étude du droit constitutionnel moderne*, Bibliothèque de l'histoire du droit et des institutions, n° 15, Paris, A. Fontemoing, 1902, disponible sur http://gallica.bnf.fr/ark:/12148/bpt6k68603t (Consulté le 20 octobre 2023).

[376] N. SUZOR, « A constitutional moment: How we might reimagine platform governance », *Computer Law & Security Review*, avril 2020, vol. 36, p. 105381, disponible sur https://linkinghub.elsevier.com/retrieve/pii/S0267364919303929 (Consulté le 18 octobre 2023).

individualism arms itself with autonomous normative production and establishes centers of oligarchic digital power[377]. Furthermore, it also implements its instrumental ideational foundations in the public sector, either through institutional/organizational reforms or by way of legal principles and rules.

This movement repositions the political and public action models, giving rise to a new vocabulary that substitutes the concepts that accompanied the category *sovereignty,* that is, *power-government-sovereignty,* which were linked to *bureaucracy-authority-public interest.* The decay of sovereignty, increase of liberal autonomy and the emergence of a postmodern model modifies the correlations in these elements, changing political and public actions. Which will also require a repositioning of the legitimations of state actions, and of the core of its foundation, considered to be the regime that institutes public law.

Furthermore, as it will be demonstrated, even though the doctrine of Brazilian social public law (which justifies legitimacy by the public interest and its supremacy), is in line with the Brazilian constitutional order, it is the good governance model that dictates Brazil's digital transformation.

Typically, examinations of the digital transformation and its impacts are conducted through the lens of private order, fundamental rights, and the regulation of private activity in the online environment[378], which leads to a marginalized understanding not only of government but also of the public and its significance in this space. As proposed, this thesis intends to pave a distinct path. Thus, the research aims to demonstrate the emergence of governance models in Brazil, elucidating how governance was constructed from a civil/democratic sphere, and how the individualist perspective conditions and sustains institutional structures, political arrangements, and established norms.

Moreover, it seems necessary to demonstrate the transition from sovereignty (government) to interdependence (governance) **(§1)**, especially in conjunction with a thorough analysis of the repercussions of the process of *autonomy of society* upon political and public action **(§2)**.

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[377] S. ZUBOFF, *The age of surveillance capitalism : the fight for a human future at the new frontier of power*, London, Profile books, 2019.

[378] J. COHEN, « Internet utopianism and the practical inevitability of law », *Duke law & technology review*, 2018, pp. 85-96.

§1 A postmodern political action model

A postmodern political action model engages with mutations of private and civil legal spheres, as aforementioned. The process of *autonomy of society* can be translated into two models of the perception of political action, adopted here as: ***democratic governance***, linked to the Brazilian institutional design, inaugurated with the Brazilian Federal Constitution, which employs a core of fundamental rights **(A),** and ***good governance (*B),** linked to hyper-individualism. The thesis employs the terms "democratic governance" and "good governance" with a precise notion, aiming to assist in the identification of two contemporary governance approaches observed in Brazil. Thus, this involves two categories, defined here for the exercise of correlation to be established. If the governance model, as an ideal type of political action, finds support as previously demonstrated, democratic governance also finds support in these terms in Brazilian literature[379].

A. Democratic governance and constitutional pluralism

In Brazil, the *"sense of coherence*," associated with the perception of modern sovereignty and its accompanying structures of governing power, authority, and legitimacy, began to fissure with the enactment of the 1988 Federal Constitution. This document indubitably establishes a paradigm, aligning with what Antônio Manuel Hespanha labels post-statehood. Firstly, it "*revitalizes*"[380] an agenda initiated in the 1950s, which was interrupted by the military coup of 1964, harboring the objectives of expanding social functions and control mechanisms[381].

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[379] H. BOUILLON, *Le droit administratif à l'ère de la gouvernance : les idées politiques du droit administratif, Country: FR24 cm. Bibliogr. p. 185-197. Index.*, Paris, Mare & Martin, 2021 ; J. CHEVALLIER, *L'Etat postmoderne*, *op. cit.* ; F. FILGUEIRAS, « Indo além do gerencial: a agenda da governança democrática e a mudança silenciada no Brasil », *Revista de Administração Pública*, 52

[380] M. AUGUSTO PEREZ, « O mundo que Hely não viu: governança democrática e fragmentação do Direito Administrativo. Diálogo entre a teoria sistêmica de Hely e os paradigmas atuais do Direito Administrativo », *O direito administrativo na atualidade. Estudos em homenagem ao centenário de Hely Meirelles (1917-2017). Defensor do estado de direito*, Editora Malheiros, 2017

[381] The result of this struggle can be seen in the titles dealing with civil and political rights, for example. In the document, civil society is linked to politics, corroborating the construction of a new scenario, dominated not only by the political sphere, but also by *non-state public spaces,* which will compose other spheres of public power, embodied in forums, councils, conferences, networks "*and articulations between civil society and representatives of public power for the management of portions of the public thing that concern the fulfillment of social demands.* The Constitution provides a large menu of participatory instruments, enabling mechanisms of participation, listing itself textually as a Democratic State of Law. A.C. AGUILAR VIANA, *Democracia, representação e participação: uma análise do debate político-partidário sobre a política nacional de participação social.*, Dissertação de

Named "*citizen*" it originated from a distinctive process of re-democratization[382]. Therefore, the document aligns with what scholarship terms "*neo-constitutionalism*"[383] established through the democratization of law[384]. In effect, the Federal Constitution prescribes an array of affirmative actions, introducing programs to be implemented by the government[385]. The doctrine perceives the arrival[386] of a "*constitutional-administrative legal regime*"[387].

From ***a material point*** of view, an impression of the incorporation of values in the constitutional texts can be gained, especially concerning the dignity of the human person. A paradigm was formed, based on the valorization of human dignity and the fundamental rights that emanate from it. The primacy of the "*subject of law*" from the individual perspective, grants protection to the right of the person "*as an end in itself*"[388]. This is deemed a response to the legalistic authoritarian perspective of the model codified during the Brazilian dictatorship.

Nevertheless, Latin American constitutional models are expansive, detailed, and incorporate numerous new rights. However, despite their innovative aspects, they retain static and elitist

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mestrado,Pós-Graduação em Políticas Públicas, Setor de Ciências Sociais Aplicadas, Curitiba, Universidade Federal do Paraná, 2015.

[382]As explains Luis Carlos Bresser Pereira: *"The democratic transition that occurred in Brazil was the fruit of a great democratic and popular political pact. In this great informal agreement two consensuses were formed: that the state should return to guarantee political rights and become democratic, and that this state should promote a better distribution of income because Brazilian society was an unjust society, marked by excessive inequality."* L.C. BRESSER PEREIRA, « Reforma gerencial do Estado, teoria política e ensino da administração pública », *Revista Gestão & Políticas Públicas*, décembre 2011, vol. 1, n° 2, pp. 1-6, disponible sur https://www.revistas.usp.br/rgpp/article/view/97836 (Consulté le 25 octobre 2023).

[383] Within this framework, the idea of constitutional filtering was developed, which took as its axis the normative defense of the Constitution, the need for a principialist constitutional dogmatics, the resumption of the legitimacy and binding nature of the principles, the development of new mechanisms for constitutional concretion, the ethical commitment of law operators to the fundamental law and the ethical and anthropological dimension of the Constitution itself, the constitutionalization of infra-constitutional law, as well as the emancipatory and transformative character of law as a whole. A. da C.R. SCHIER et P.H.B. FLORES, « Estado de Direito, Superação do Positivismo e os Novos Rumos do Constitucionalismo », *Revista Brasileira de Teoria Constitucional*, décembre 2016, vol. 2, n° 2, pp. 1208-1229, disponible sur https://www.indexlaw.org/index.php/teoriaconstitucional/article/view/1556 (Consulté le 25 octobre 2023).

[384] K. HESSE et G.F. MENDES, *Força normativa da constituição*, Porto Alegre, Fabris, 1991.

[385] such as the social function of property, agrarian and urban reforms, environmental conservation, registration and protection of patents, and social rights to education.

[386] R.F. BACELLAR FILHO, *Processo administrativo disciplinar*, São Paulo, Saraiva, 2013, p. 27.

[387] An explanation by José Servulo Correia: *"For long periods throughout the 20th century, administrative law was theorized and applied with almost no interaction with constitutional law. Under authoritarian regimes, this characteristic understandably gained new strength, due to the discretion left to the ordinary legislature to organize the relationship between public authorities and citizens. This did not happen, however, only under non-democratic regimes. This panorama has changed radically thanks to the impact of constitutions with strong axiological and guiding connotations that arose during the second half of the 20th century".* J.M.S. CORREIA, « Os grandes traços do Direito Administrativo no Século XXI », in, 2016, disponible sur https://api.semanticscholar.org/CorpusID:184517906.

[388] A.P. de BARCELLOS, *A eficácia jurídica dos princípios constitucionais: o princípio da dignidade da pessoa humana*, Rio de Janeiro, Renovar, 2002.

institutional structures, which project a pretension of inclusion but may culminate in exclusion. This aspect can reveal a "*contradiction*" between a well-developed dogmatic component and a poorly developed institutional one.

The political model of *governance* - translates into the overt establishment of a democratic state of law[389]representing the "*basic core*" of a new theory. Considered a key concept, *democracy* and *law* are inseparable, as without democracy, there is only legality[390]. These transformations, emanating from the model of a sovereign, centralist government, can be observed preferentially in the scope of political actions. Both in the attribution of a fundamental role to the judiciary, as a locus of decision, and in the redistribution of the modes of state control (by means of the various entities that are anomalous to the classic separation of powers) [391]. In addition, also by way of the insertion of participatory and deliberative models. The Constitution was written to design the Brazilian state as a representative government open to social participation, enabling the participation of citizens in decision-making processes[392].

The document envisions a project focused on two striking aspects, themselves related to the state's model of political action. In effect, citizenship in Brazil has its own meaning, materialized in participatory instruments. These are so-called ***societal*** spaces of direct rearticulation between state and Society[393]. The social bias, alongside the mechanisms of participation[394] (a "***social***" space of the *"citizen"*)[395], represent the mutation of the traditional

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[389]Text of the Constitution's preamble: *We, representatives of the Brazilian people, gathered in a National Constituent Assembly to establish a Democratic State* (...) C.C. REPUBLICA (PR), Constituição da República Federativa do Brasil, 5 octobre 1988.

[390] J.M.S. CORREIA, « Os grandes traços do Direito Administrativo no Século XXI », *op. cit.*

[391] L.R. BARROSO, « A constitucionalização do direito e suas repercussões no âmbito administrativo », in *Direito administrativo e seus novos paradigmas.*, Belo Horizonte, Fórum, 2008, pp. 31-63.

[392] under the terms of its first article *caput* and sole paragraph, which states: "All power emanates from the people, who exercise it through elected representatives or directly, under the terms of this Constitution." This constitutional architecture implies

[393]A.C. AGUILAR VIANA, *Democracia, representação e participação: uma análise do debate político-partidário sobre a política nacional de participação social.*, *op. cit.*

[394] *Thus, it is possible to see the overcoming of the public-private dichotomy as a primordial point, starting from the ascendancy of the social sphere, which is determinant for progress or regress, depending on the meaning adopted for the* ***word social****: when this social sphere represents the junction of the individual and the collective, building common objectives and adopting participative conducts for the concretization of a State necessary to all the collectivity, the intended goal is reached, concretizing the Democratic State of Law. However, if the social that emerges represents a means of domination, then we will be facing a regression. Public and private law, public order and social law.* D.J. da COSTA, « O sistema da posse no direito civil », *Revista de informação legislativa*, juillet 1998, vol. 35, n° 139, pp. 109-117, disponible sur https://www2.senado.gov.br/bdsf/handle/id/391 (Consulté le 25 octobre 2023).

[395] As Evelina Danigno reminds: "*The Constitution expanded the rights and direct involvement of citizens in government. It created spaces for the participation of the State and civil society in the formulation of policies in various fields, such as with the Public Policy Management Councils, changing the political environment in which governments should now act. The pioneering experience Budget Participatif was born in Porto Alegre, replicated in more than 170 Brazilian cities and in several Latin American countries and regions.*" E. DAGNINO et L.

model of sovereign government, referring to the Weberian vision of political representation imbued with legislative power, the political parties and the indirect representation as constitutive elements of the modern machine in the materialized political structure[396]. Participation becomes a mode of effective self-determination and is translated into a legal language[397], a progression that results in an "*ecology of state and society relations*". This includes different types of public policies for the fulfillment of diverse objectives[398], linked to the social dimension, the political sphere. In the writings of Rodriguez-Arana Munoz, the model of the Democratic state of Law has as its foundation in the dignity of the human person, from which participation[399] emerges as the recognition of the social dimension of the citizen, based on the realization that his interests belong to society as a whole[400] .

TATAGIBA, « Mouvements sociaux et participation institutionnelle : répertoires d'action collective et dynamiques culturelles dans la difficile construction de la démocratie brésilienne », *Revue internationale de politique comparée*, 2010, vol. 17, n° 2, pp. 167-185, disponible sur https://www.cairn.info/revue-internationale-de-politique-comparee-2010-2-page-167.htm (Consulté le 25 octobre 2023).

[396] The Constitution inserts - ***several*** - participation mechanisms. Not by chance, Brazil was a pioneer in several participatory projects, besides international recognition in some of them . In the case of participation, participation has infiltrated the exercise of all state functions. The Legislative opened itself to referenda, plebiscites, and popular initiatives for laws, in addition to the collaboration of citizens in the exercise of supervision over the Executive. The Judiciary started to count on several instruments, such as popular actions, collective writs of mandamus, among others. But it was primarily in the scope of Public Administration. Several participatory mechanisms have arisen, such as: committees, *ombudsman*, transparency laws, civil electoral institutions, citizen observatories, watchdog committees, councils, commissions, and conferences, among others. A.G. LAVALLE et C. ARAUJO, « O futuro da representação: nota introdutória », *Lua Nova: Revista de Cultura e Política*, 2006, n° 67, pp. 9-13, disponible sur http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-64452006000200002&lng=pt&tlng=pt (Consulté le 25 octobre 2023) ; A.G. LAVALLE, P.P. HOUTZAGER et G. CASTELLO, « Democracia, pluralização da representação e sociedade civil », *op. cit.* ; A.C. AGUILAR VIANA, *Democracia, representação e participação: uma análise do debate político-partidário sobre a política nacional de participação social.*, *op. cit.*

[397] A.G. LAVALLE, « Após a participação: nota introdutória », *Lua Nova: Revista de Cultura e Política*, 2011, pp. 13-23, disponible sur https://www.scielo.br/j/ln/a/ycYffsZN8gX9pnFdt7TSnZp/?lang=pt (Consulté le 25 octobre 2023) ; A.G. LAVALLE, « Participação: valor, utilidade, efeitos e causa », *Efetividade das instituições participativas no Brasil: estratégias de avaliação. Brasília: Ipea*, 2011, vol. 7, pp. 33-42.

[398] R.R.C. PIRES et A.C.N. VAZ, « Beyond public participation: interfaces in the brazilian federal government », *Lua Nova: Revista de Cultura e Política*, décembre 2014, pp. 61-91, disponible sur https://www.scielo.br/j/ln/a/KxwQFzhhbbWFr9T5gJB3T6p/abstract/?lang=en (Consulté le 25 octobre 2023).

[399] M. da G. GOHN, « Empoderamento e participação da comunidade em políticas sociais », *Saúde e Sociedade*, août 2004, vol. 13, pp. 20-31, disponible sur https://www.scielo.br/j/sausoc/a/dGnqs6Q5RZbKgTNn54RRBNG/abstract/?lang=pt (Consulté le 25 octobre 2023).

[400] J. MUÑOZ, « La participación en el Estado social y democrático de Derecho », *A&C - Revista de Direito Administrativo & Constitucional*, avril 2012, vol. 12, p. 13.

Another pluralist axis resides in *constitutional justice*[401] and the mechanisms of control that delegates an important role to the judiciary[402]. The Constitution emerges as the criterion for normative validity, furthermore, the legitimation of state actions transitions from being based on sovereign will to effectiveness[403]. Subsequently, institutions are established with the objective of control. Consequently, an augmentation in the autonomy of both external and internal oversight agencies occurs. Labeled "*dialogues outside the framework*"[404], these autonomous bodies, albeit fragmented due to their federative structure, exercise political power. This demonstrates that the Brazilian model bears the hallmark of mutation—in an *ideal type*—of the elements that substantiate a form of political action of the pure sovereign government, visible through the diverse kinds of manifestations present in the universe of power, delimitated here as democratic governance model.

B. Hyper-individualism and good governance emergency

If the model of political action of the modern state—embodied by sovereignty—was sculpted in the context of the rational subject and shaped by the autonomy of the individual, the postmodern state model is being delineated by alterations in social relations, particularly the process of the autonomy of society. Boaventura de Souza Santos indicates that transformations

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[401] The constitutional dialogues became the mark of an institutional design that modified the static and centralizing structure of sovereignty, centered in a locus of decision. Therefore, the judiciary appears as a relevant actor in the definition of Brazilian political and public action processes, and evidences that the political action of the sovereign government is not the mark of the most relevant formal document of the Brazilian normative design. For modern "relational" thinkers, judicial review of governmental actions is an established fact. A.G. LAVALLE, « Após a participação: nota introdutória », *Lua Nova: Revista de Cultura e Política*, 2011, pp. 13-23, disponible sur https://www.scielo.br/j/ln/a/ycYffsZN8gX9pnFdt7TSnZp/?lang=pt (Consulté le 25 octobre 2023) ; A.G. LAVALLE, « Participação: valor, utilidade, efeitos e causa », *Efetividade das instituições participativas no Brasil: estratégias de avaliação. Brasília: Ipea*, 2011, vol. 7, pp. 33-42.

[402] By legal effectiveness we mean the theoretical capacity of a constitutional rule to produce legal effects. Effectiveness, on the other hand, means the concrete performance of the social function of law, represents the materialization, in the world of facts, of the legal precepts, and symbolizes the approximation between the normative should-be and the being of social reality. Judges must control and demand compliance with the state's duty to actively intervene in the social sphere. (...) In this vein, an interventionist judiciary is required that actually dares to control the lack of quality in the provision of basic services and demand the implementation of efficient social policies. (...) it becomes necessary, therefore, a paradigm shift in the perception of its own position and function in the modern social state of law. A.J. KRELL, *Direitos sociais e controle judicial no Brasil e na Alemanha: os (des) caminhos de um direito constitucional « comparado »*, Porto Alegre, S.A. Fabris Editor, 2002.

[403] *Ibid.*

[404] The Office of the Comptroller General - CGU, for example, when constituted as an autonomous and external control is the symbol of the idea of giving credibility to public power. F.P. de A. MARQUES NETO et J.B. de PALMA, « Os sete impasses do controle da administração pública no Brasil », *Controle da administração pública*, 2017, pp. 406; 24 cm, disponible sur https://repositorio.usp.br/item/002805013 (Consulté le 25 octobre 2023).

in social relations arise from the advent of a self-producing society[405]. Within the philosophical domain, the emergence of a risk society and discourse interpreted as postmodernity/hypermodernity signals the amplification of an individualistic, increasingly utilitarian, and accelerated society[406].

This juncture is analyzed as a process of hyper-individualism, wherein the modern Western relationship between the individual and collective is scrutinized. If modernity bears the symbol of the rational subject, the *'hyper'* indicates that this third modernity[407] amplifies the individual. Society finds itself under growing pressure to perform. Simone Goyard-Fabre invokes Nietzsche to clarify the words that constitute this imaginary of hyper-individualism and which impact the sovereign state: "*everything is superficial; security reveals the omnipresence of fear;* ***utilitarianism*** *kills beauty;* ***good conscience*** *is the opposite of virtue; uniformity condemns all elitism; and the equality that is sought is a mirage. The original 'will to power' has become an impurity to originality"*[408].

From this excerpt it is possible to note the emphasis of relations on the scheme of the hyper-individual. The notion of autonomy taken to the extreme, seeks to annihilate heteronomous relations, because it no longer needs them[409]. Through an individualistic perspective, and armed with a discourse of "*good*" intentions, *good* practices for *good governance* are inserted[410]. Autonomy, which already had independence in its own regulation, in what Michel

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[405] B. S. SOUSA SANTOS,. A multicultural conception of human rights. Lua Nova, n. 39, p. 105-124, 1997. Available at: Accessed on: 2 Dec. 2015. http://dx.doi.org/10.1590/S0102-64451997000100007.

[406] As Hartmut Rosa states: "*A society is modern when it operates in a mode of dynamic stabilization, i.e., when it systematically requires growth, innovation and acceleration for its structural reproduction and in order to maintain its socio-economic and institutional status quo*". H. ROSA, « Dynamic Stabilization, the Triple A. Approach to the Good Life, and the Resonance Conception », *Questions de communication*, 2017, vol. 31, n° 1, pp. 437-456, disponible sur https://www.cairn.info/revue-questions-de-communication-2017-1-page-437.htm (Consulté le 25 octobre 2023).

[407] Maximo Vogliotti, for example, alludes to Bauman to refer to the third modernity, as the liquid one, the one that emerges after the solid modernity, the universe of dichotomies. M. VOGLIOTTI, « De la pureté à l'hybridation : pour un dépassement de la modernité juridique », *op. cit.*

[408] S. GOYARD-FABRE, « Les craquements de l'édifice étatique », *Archives de philosophie du droit*, 2015, vol. 58, n° 1, pp. 339-354, disponible sur https://www.cairn.info/revue-archives-de-philosophie-du-droit-2015-1-page-339.htm (Consulté le 19 octobre 2023).

[409] A. SUPIOT, *La gouvernance par les nombres : cours au Collège de France, 2012-2014*, Paris, Pluriel, 2020 ; A. SUPIOT, *Grandeur et misère de l'État social*, Leçons inaugurales du Collège de France, n° n° 231, Paris, Collège de France Fayard, 2013.

[410] The privatization of the good, called by Rosa as the fact that "the good life has become the most private matter", and so the, the ethical imperative of the modern subjects is not a definition of the good life, rather the aspiration for getting enough resources. In sum, "*This strategy, which seems thoroughly irrational at first glance, is made rational by the fact that the social allocation of resources is regulated through competition, while the allocation-game itself is increasingly dynamized*". H. ROSA, « Dynamic Stabilization, the Triple A. Approach to the Good Life, and the Resonance Conception », *op. cit.*

Foucault calls governmentality, extends this logic[411]. Society is an instrumentalized society, that is, it exists to guarantee individual rights, hence the individual is central[412]. In the synthesis of the formula indicated by Charles Taylor as characteristics of this phenomenon, it is an individualistic society, in which the *alienation of the political sphere* and the *primacy of instrumental reasoning can be seen*[413].

This rationality - individualistic and instrumental - accompanied by a *philosophical model of political liberalism*, will lead to the insertion of the values of the private sphere - of the autonomy of the individual - in public spaces. As Jacques Chevallier states, hyper-individualism, as the by-product of democratic logic, enters social life and weakens the categorizations that dealt with collective issues (citizenship)[414]. That is, the civil society that sought to compose itself as *social,* in the emancipatory mold, perceives this expression being used to designate the transfer of activities to the private sector that will operate on a *non-profit basis.* Here, the market is separated from the third sector. In Brazil, as demonstrated, civil society emerged due to the social bias of Brazilian democratization and was linked to various minorities in Latin America[415]. However, liberalism changes this perception to engage with a *third sector,* which occupies this space in the political sphere.

On the other hand, while still employing political liberalism, civil society as an order that emerges from the association of individuals - in the space of their autonomy - is independent of the state. The latter is traditionally responsible for counterbalancing public authority with

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[411] "*The rationality that allows governmental reasoning to be self-limiting, even when it is not the law, deals with political economy, more specifically the regime known as liberalism. In the nineteenth century, with liberalism, a new form of governance is implemented, the constitution of the market as a site of truth formation, rather than just a legal domain, is a feature of the art of liberal governance".* M. FOUCAULT, *La Naissance de la biopolitique. Cours au Collège de France (1978-1979)*, Paris, Hautes Etudes, Galimard, 2004, p. 7.

[412] As explains Soshanna Zuboff, "*This is an atomized and isolated individualism-mimetic, doomed to a perpetual life of competition and disconnected from relationships, community, and society*". S. ZUBOFF, *The age of surveillance capitalism*, *op. cit.*

[413] When someone states not interest by politics because they are all corrupt, it means taking away State legitimation. In: C. TAYLOR, *La liberté des modernes*, Philosophie morale, Paris, Presses universitaires de France, 1997 ; « Individu et modernité », in *Identité(s)*, Synthèse, Auxerre, Éditions Sciences Humaines, 2016, pp. 89-99, disponible sur https://www.cairn.info/identites--9782361063283-p-89.htm (Consulté le 25 octobre 2023).

[414] J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., *op. cit.*

[415] As explains Leonardo Avritzer: "Economic impositions, cultural heritages and interests show a civil society - firstly constituted by independent social movements and secondly by professionalized non-governmental organizations - that has shifted activism from citizenship to the autonomy of civil society to its individuality. L. AVRITZER, « Sociedade civil e Estado no Brasil: da autonomia à interdependência política », *Opinião Pública*, novembre 2012, vol. 18, n° 2, pp. 383-398, disponible sur http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0104-62762012000200006&lng=pt&tlng=pt (Consulté le 25 octobre 2023).

freedom[416]. As a result of the process of widening the scope of its own autonomy, this civil society will encompass the conception of autonomy of society clearly distinguishing it from political society, as it moves away from the figure of authority, of coercion, of heteronomy, through the establishment of its own principles[417]. From this standpoint, one can discern not merely external regulation, but also the deployment of inherent norms of conduct[418], illustrating the autonomy of a society that has transcended the necessity for state directives[419]. Civil society "*already guides itself*"[420] and does not need an authority opposed to its freedom[421].

Economic concentration favors the emergence of private economic powers, endowed with a power of command comparable or higher than that of public entities[422]. The transition toward desetatization, privatization, and the delegation of traditionally state-owned activities necessitates a collaborative engagement amongst involved parties.

Herein, the dissolution of the dichotomy between public and private realms becomes most conspicuously discernible. In the face of *blurred* visions of how each can be defined, the non-existence of both is defended, with respect to the guarantee of the autonomy of individuals and the search for efficiency, within the parameters of fundamental rights[423]. Society remains

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[416] J. PITSEYS, « Le concept de gouvernance », *Revue interdisciplinaire d'études juridiques*, 2010, vol. 65, n° 2, pp. 207-228, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2010-2-page-207.htm.

[417]For instance the Environmental, Social and Governance (ESG) practices, of good internal governance, which confer a seal of quality for internal practices, such as integrity and compliance. Nicolas Postel notes that in this sense, are the premises of corporate social responsibility. For him, this approach come from the neoliberalism. The company is "reinvested" as a place where a commitment must be made ... at the very moment it is also powerfully "remarketed" (subject to market injunction) A desire on the part of the company to "de-commodify" in order to build customer loyalty, Build shareholder loyalty, Secure access to resources, Preserve the hearts of workers, and the need for public managers to reinvent regulatory capacities with a normative framework (ISO standards, Global Compact, GRI, guidelines ...). N. POSTEL, « L'action des parties prenantes requiert des Institutions », Intervention, Journées d'Etudes " Contributions de l'approche par les parties prenantes au renouvellement de l'internormativité, Paris 1 Panthéon-Sorbonne, 12 décembre 2022.

[418] A particularly clear example in the digital realm involves regulations formulated by the digital companies themselves, such as Facebook, Meta, exemplified by the Oversight Board. As they define it themselves: "*A global body committed to ensuring respect for free expression through independent expert judgment*". « Oversight Board | Independent Judgment. Transparency. Legitimacy. », s.d., disponible sur https://www.oversightboard.com/ (Consulté le 25 octobre 2023).

[419]Michel Postel declares that the prophet of social responsibility of enterprises is Milton Friedman, highlighting, to this end, the following excerpt: *"il y a une, et une seule responsabilité sociétale de l'entreprise - d'utiliser ses ressources et de s'engager dans des activités conçues pour augmenter ses profits, tant qu'elle respecte les règles du jeu, c'est-à-dire, qu'elle s'engage dans une concurrence ouverte et libre, sans duperie ou fraude*". N. POSTEL, « L'action des parties prenantes requiert des Institutions », *op. cit.*

[420] H. BOUILLON, *Le droit administratif à l'ère de la gouvernance*, *op. cit.*

[421] This scenario also shows the *privatization of the* spaces of power.

[422] V. VARNEROT, « La distinction droit privé/droit public en droit des données », *in* A. BAILLEUX, D. BERNARD et J. VAN MEERBEECK (éds.), *Distinction (droit) public / (droit) privé*, s.l., Presses de l'Université Saint-Louis, 2022, pp. 217-246, disponible sur http://books.openedition.org/pusl/27626 (Consulté le 25 octobre 2023).

[423] M. JUSTEN FILHO, *Curso de Direito Administrativo*, 1, 12e éd., São Paulo, Revista dos Tribunais, 2016.

autonomous the state however, consequently, initiates a ***collaboration*** with society, requiring it to relinquish some of its previous authority.

This adjustment subsequently propels the state to be dependent on collaborative engagements with civil society. Transitioning from a previously sovereign-controller position, the state pivots towards regulating practices implemented by the private sector. Consequently, the very conceptualization of social welfare transmutes into a commercialized activity, characterized by profitability and privatization[424].

To account for these mutations, these developments enter the legal system (including in Brazil,) of the public sector through ***reforms***[425]. Thus, instrumental reasoning impacts not only the production of norms (*political sphere*), but also modifies and substitutes the concepts formulated for the state's political action model. Through the introduction of its own concepts, derived from its inherent quantitative and instrumental structure.

Through the logic of business management, state organization becomes efficient, the law imprints principles of efficiency, and authority is replaced by consensus. The substitution under consideration transpires through the implementation of corporate mechanisms, adhering to a results-oriented logic. Good governance practices, rooted in utilitarian biases, emerge as ideals, guiding subsequent practices and elements. The values and methodologies that bolster this logic become intricately linked with an alternate interpretation of public action, which simultaneously functions as a medium for broadening domains of power.

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[424] B. CASSAR, *La transformation numérique du monde du droit*, PhD Thesis, Université de Strasbourg, 4 décembre 2020, disponible sur https://theses.hal.science/tel-03121576 (Consulté le 20 octobre 2023).
[425] L.C. BRESSER PEREIRA, « Reforma gerencial do Estado, teoria política e ensino da administração pública », *op. cit.*

§2 The postmodern governance public action, the Paradigm of consensually

The process of society's autonomy impacts public action, being a determining factor in the principles of governance **(A)**, towards good governance in Brazil, impacting its legitimization **(B)**, and replacing the guarantee of the public interest with efficiency **(C).**

A. Good governance as a political action model

Concerning the process of the *autonomy of society*, the term governance was revived in the 20th century by Anglo-Saxon economists, political scientists, and some international institutions to define a precise way of acting. Officially taken over by the World Bank and the International Monetary Fund, their ideas became imperatives for of the policy making of dozens of countries (especially the indebted ones) in the name of what was conventionally called *good governance.* A concept that, with its "*unmistakable prescriptive weight*", finds a counterweight in the concept of *bad governance,* used to *evaluate* states in terms of corruption and crime. Advocates of good governance associate the term with the development of new governing techniques and the replacement of unilateral state action with a more consensual mode of rule-making. Governance, per this interpretation designates, "*the art or manner of governing*", however with the inclusion of two additional concerns: on the one hand, it is to be distinguished from governments, and on the other, it is to foster a new method of business management. Thus, a new model for managing public affairs based on the involvement of civil society at all levels is promoted[426].

[426] O. VILLAS BOAS FILHO, « Governança em suas múltiplas formas de expressão: o delineamento conceitual de um fenômeno complexo », *REI - Revista de Estudos Institucionais*, février 2017, vol. 2, n° 2, pp. 670-706, disponible sur https://www.estudosinstitucionais.com/REI/article/view/64 (Consulté le 25 octobre 2023) ; J. PITSEYS, « Le concept de gouvernance », *op. cit.* ; D. MOCKLE, *La gouvernance publique*, 1re éd., Droit et Société, n° droit, Paris, LGDJ-Lextenso, 2022.

Defined as a management technique[427], the principles of corporate governance of *good governance* were initially inspired by the economic theory of agency[428], aimed at implementation in the public space and in the public sector[429]. Its employment is determined not by its position in the hierarchy of norms, but by the "*specific result it is likely to produce*"[430]. Governance has a behavioral (rational) bias, given its inherent nature: to obtain desirable reflexes, to achieve expected regularities, and to incite the "*correct*" behavior. To achieve this, the discourse of *governance* shifts from a dynamic of *representation* to a dynamic of political inclusion. Coercion is replaced by self-directed human interaction[431].

It thus departs from governance that links law to state and power, instead utilizing concepts such as subsidiarity, regulation, accountability, and even transparency[432]. Furthermore, it is asserted that concepts from the domain of business are appropriated for public management, made and formulated based on the logic of business and a systematic-controlling organizational system.

On the realm of public action, the political action model of good governance[433] will have a broad impact, that is, its structure (*from bureaucracy to managerialism)*, legitimacy (from

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[427] Alain Supiot States that the introduction of this new type of governance was accompanied by an extension to the state of the accounting standards in force in private companies. Like work in a company, the work of nations, especially that of poor countries, is subjected by these programs to "*economic governance*" that escapes political debate. A. SUPIOT, « État social et mondialisation : analyse juridique des solidarités », in *Annuaire du College de France - 2017-2018*, Paris- Collège de France, Collège de France, 2018, disponible sur https://www.college-de-france.fr/media/alain-supiot/UPL3727957929094937250_475_490_40_Supiot.pdf (Consulté le 17 octobre 2023).

[428]New compensation techniques for company managers were introduced that tied them to the short-term financial interests of shareholders (bonuses, profit-sharing bonuses, stock options) and placed them in direct opposition to the interests of ordinary employees. *Ibid.*

[429]The abolition of trade borders, and the resulting free movement of capital and goods, has freed corporations from the control of states and allowed them to impose their views. Its manifestation in: i) the assimilation of democracy into a marketplace of ideas; ii) the extension of corporate governance rules to states; iii) the extension to certain corporations of the intangibility reserved to states. *Ibid.*

[430] O. VILLAS BOAS FILHO, « Governança em suas múltiplas formas de expressão: o delineamento conceitual de um fenômeno complexo », *op. cit.*

[431] J. PITSEYS, « Le concept de gouvernance », *op. cit.*

[432] A. SUPIOT, *La gouvernance par les nombres*, *op. cit.*

[433] Samantha Besson explains that "*In relation to good governance, one should mention Weberian (state) functionalism and later the privatization of the state induced first by capitalism and later by neoliberal theories of law. This notably led to the inclusion of "new public management" methods in national and then international public law. These methods included recourse to ready-made and legalized procedural standards of so-called "good administration," but also, in some cases, to non-legal, economic or technoscientific standards or quantitative indicators of how states should be organized. In short, the standard of the "good" state was gradually replaced, within international law, by the standard of an "organized" or "administered" state, or even, more recently, a "developed" or "scientific" state".* S. BESSON, « Democratic Representation within International Organizations: From International Good Governance to International Good Government », *International Organizations Law Review*, décembre 2022, vol. 19, n° 3, pp. 489-527, disponible sur https://hal.science/hal-03559955 (Consulté le 25 octobre 2023).

authority to consensus/contractualization) and purposes (*from public interest to efficiency*). The democratic governance model, stemming from the constitution, in turn, will have an eminently political form. The social term of which materializes in the political and public spheres, but does not alter the organizational structure of the state, nor its purpose. Nevertheless, it changes elements of the conception of *authority* introducing in a dialogic perspective, focused on procedural methods, indispensable to achieve the democratizing process. This occurs as within the social management model, there are no administrative reforms that alter the state apparatus[434].

In the case of good governance, the insertion of public action becomes apparent in the organization of the practices of result management. Here the fundamental legal principle is efficiency. The means are the procedural mechanisms, made by collaborations, formulated by instruments that are the contracts, "overcoming" the authoritarian vision of public administration, which previously, through administrative acts, dictated what was the public interest.

In Brazil, the political-economic model of new liberalism has been politically and legally implementation since the 1990s (with different nuances). In Western countries, the crisis of the welfare state gave shape to a model that sought to limit and cut down on state activities as well as bring state institutions into the celerity of non-existent private enterprise. Based on the studies of the Chicago School and public choice theory[435], this proposal materialized through the management model known as New Public Management (NPM)[436]. According to this model, public service organizations tend to be dominated by the interests of bureaucrats. Unlike private sector organizations, there is no incentive control or compensatory demands. As a result, public organizations are not efficient in terms of saving public money and also do not respond to the needs of consumers. In this sense, the solution lies in fragmenting monopoly structures, as well as developing incentives and tools to influence how they operate. Decentralize and/or dissolve large public agencies, privatize public companies, and implement performance-based metrics.

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[434] M.A.C. CEPIK, D.R. CANABARRO et A.J. POSSAMAI, « Do novo gerencialismo público à era da governança digital », 2010, disponible sur https://lume.ufrgs.br/handle/10183/79095 (Consulté le 30 octobre 2023).

[435] S. SORIANO, *Un avenir pour le service public : un nouvel État face à la vague écologique, numérique, démocratique*, Paris, Odile Jacob, 2020.

[436] It deals with a set of ideas that have evolved and developed different themes. The one most embraced by Western governments rests on a critique of monopolistic forms of service delivery, openness in service delivery, and an entrepreneurial management-driven approach.

The goal, therefore, was to "*efficiently*" combine the public sector with the private sector[437]. The "Washington Consensus" adopted an agenda for Latin America that included institutional reforms requiring the reduction of "*bureaucratic strings*", the reduction of spending on civil service, and the reduction of the promotion of social rights[438].

In Brazil, it was the economist Luiz Carlos Bresser Pereira[439] who consolidated the concept of managerialism[440]. The proposal was "*on the one hand, the consolidation of the Brazilian State's fiscal adjustment and, on the other, the existence of a modern, professional and efficient public service* in *the country, focused on meeting the needs of its citizens*"[441]. The NPM had the clear intention of replacing the Weberian bureaucratic pillar[442], considering it stagnant and inefficient. Thus, concerning the organizational factor, the reform constitutes the managerialist facet of a *good governance* model, originating from the market, which, in turn, derives from the individualist autonomy interpretation of instrumental reason. These actions - *as a whole* - affect the basic concepts of public action, especially authority, which changes in the face of a governance model actors begin to act in.

B. From authority validation to legitimation by consensually

In its traditional understanding within the modern dichotomy, authority was conceived as a in counterpoint to freedom[443]. The development of freedom, as a result of its enlargement, cumulated in the modification of the model of political action that conditions the very

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[437] M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, 1re éd., 1, n° 1, s.l., Harper Business, 2021.
[438] *Ibid.*
[439]The truth is that in the text of the Reform, Bresser Pereira said that the alternative proposed was not a neoliberal model. It was, according to his position, a "social-liberal State", responsible for the protection of social rights, whose guarantee is exercised by other non-state sectors. L.C. BRESSER PEREIRA, « Reforma gerencial do Estado, teoria política e ensino da administração pública », *op. cit.*
[440] On the subject, see: I. P. NOHARA. *Bureaucratic administrative reform: impact of efficiency in the configuration of Brazilian administrative law*. São Paulo: Atlas, 2012.
[441]According to Bresser Pereira, regulation and intervention would be necessary. But the priority areas would be education and health, in an intervention that would seek to enable economic agents to compete. L.C. BRESSER PEREIRA, « Reforma gerencial do Estado, teoria política e ensino da administração pública », *op. cit.*
[442] The idea is that the public sector should not only adopt private sector practices, but should also cede functions previously considered public to the private sector, including public health and transportation. This is done in an effort to avoid the kinds of failures that proponents of *public choice* theory claim have been discovered, such as *bloated bureaucracies* that run inefficient services like public health laboratories or that stifle competition by fixing energy prices.
[443] It is important to emphasize this aspect, because not infrequently the authority of bipolarity is forgotten as a mechanism of opposition in which freedom prevails over authority. It is not uncommon to find doctrine that defends the overcoming of authority by protecting and guaranteeing freedom, which, in the final analysis, is the mark of hyper individualistic discourse.

configuration of public action, thereby resulting in alterations to the modern/dichotomic perception of authority.

In modernity, the state, by its authority, entailed not only the monopoly of editing positive law, but also the power of coercion[444]. In imposing the public interest, the state was endowed with a force of subjection, which stemmed from the ideal type of sovereign government. However, since society self-organizes, the state can no longer impose its wills unilaterally, and this because it "*no longer possesses the commands and coercion to do so*"[445], which is most evident in the digital environment, dominated by private companies. *Authority*, as a power, is devalued and the state ***loses its legitimacy*** to say what the common good is. While in contrast civil society becomes is capable of defining it solely. As a consequence, the public interest is no longer only in the hands of the state and public authority, but they are one among diverse actors determining it[446].

The government, the legitimate bearer of authoritative power, in a derogatory relationship with law, with its "*potency*" and verticality conferred by its sovereignty, gradually loses this force due to the increasing "*horizontality*" of a political governance system that imposes itself. Which establishes the autonomy of markets and civil society that require only "*subsidiary*" state action. Consequently, there is a progressive shift from a heteronomous legal system to an autonomous one, focused on outcomes.

The repercussions of this shift materialize within the realm of public action, its legitimacy, action models, and organization, incorporating corporate ideals into the public sector. The same business practices and quality seals enter the administration and government environments. This is evident, for example, in the concept of good administration, which brings forth the concept of legal control which results in the promotion of policies and acts aimed at achieving concrete results in administrative performance enhancement. For this model, management control focused on outcome takes shape since administration cannot be limited to formal subservience to the law[447].

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[444] M. WEBER, *Charisma and disenchantment: the vocation lectures*, New York Review Books classics, New York, New York Review Books, 2020.
[445] J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., *op. cit.*
[446] H. BOUILLON, *Le droit administratif à l'ère de la gouvernance*, *op. cit.*
[447] B. CUNHA, « A Lei Federal n. 13.019/2014 e o novo regime das parcerias voluntárias da Administração Pública », 2016, disponible sur https://www.lexml.gov.br/urn/urn:lex:br:rede.virtual.bibliotecas:artigo.revista:2016;2001030832 (Consulté le 12 février 2024).

Consequently, governments begin to cede their authority. *Contractualization*[448], in this sense, is understood as an instrument of governance, which constitutes the legal representation of a "*consensual*" *public action*. Wherein legal relations no longer occur unilaterally, but through an "*agreement of wills*", recognizing actors that must cooperate through a process of negotiation[449].

Thiago Marrara explains that, in the Brazilian legal system, at least three groups of pro-consensual instruments can be identified. The procedural, employed punctually in administrative processes to promote dialogue with society. The organic, permanent dialogue channels, wherein consensus prevails through voice and vote. And the contractual mechanisms that impose consensus on formal bilateral instruments[450]. All of them utilize the same method: procedure. That is, they relate to the idea of the *proceduralization* of public activities, a movement initiated as a result of the Constitution of 1988, which additionally found support in the individualistic realm[451].

Thus, it is possible to regard *consensus as* a *dialogical* method, which can be employed either towards the processes of democratization, through social participation, or towards the use of contracts in the area of good governance[452].

C. From public interest legitimation to efficiency

Broadly speaking, public interest corresponds to the *raison d'être* of state action, thereby materializing, within this framework, as a vertical command power wielded by public administration. The state, within this schema – that is, *sovereignty-government and bureaucracy-public interest* – emerges as the bearer of this interest. In Brazil, this rationale has culminated, akin to the majority of Western countries with a Roman-Germanic tradition, in

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[448] Thus, from the idea of a vertical, bipolar, hierarchical, and unidimensional administrative relationship, one move to a more horizontal, multipolar, parity, and circular perspective. Currently, the consensus-negotiation activities between the government and the private sector play an important role, which has led to a decrease in the discretionary and authoritarian nature of administrative decisions. The State turns to the community and seeks to achieve the common good through the collaboration of individuals. O. MEDAUAR. Modern Administrative Law. 11th ed. São Paulo: Revista dos Tribunais, 2007, p.211.

[449] J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., *op. cit.* ; J. PITSEYS, « Le concept de gouvernance », *op. cit.*

[450] T. MARRARA, « Regulação consensual: o papel dos compromissos de cessação de prática no ajustamento de condutas dos regulados », *Revista Digital de Direito Administrativo*, janvier 2017, vol. 4, n° 1, pp. 274-293, disponible sur https://www.revistas.usp.br/rdda/article/view/125810 (Consulté le 25 octobre 2023).

[451] J.M.S. CORREIA, « Os grandes traços do Direito Administrativo no Século XXI », *op. cit.*

[452] T. MARRARA, « Regulação consensual », *op. cit.*

perceiving authority in opposition to freedom, leading to an inherent bipolarity[453] within the discipline of administrative law itself. Consequently, this rationale has been structured under a bipolar legal regime, manifested in Brazil through the principles of supremacy and the non-disposability of the public interest[454]. Through unilateral administrative acts, a plethora of faculties would transcend common law.

With the advent of the Constitution, the democratic state of law was instituted, thereby establishing a roster of fundamental guarantees alongside the primacy of human dignity. In this context, as elucidated by Emerson Gabardo, the principle of the supremacy of public interest over private "*does not address rights, but rather interests, proceeding from an allocation of the public in a position of normative and axiological preference in relation to the particular*" [455].

This assertion substantiates the perpetuation of the public interest as a guarantor of the legitimacy of the state's public actions, which would no longer be founded on an external will, but instead through a complex system. The compass for such as system is inherently situated in the constitutional design, in which respect for the overall constitutional legal order is be paramount. Therefore, it could be argued that this logic, known as social administrative law, seeks to examine the practices of public action under the auspices of a conception of the state as champion of social rights, from whence the public interest still resides as the foundational nucleus of public law.

Nevertheless, the quantitative rationality of the autonomous society, which has spread its values of *good governance* throughout the public sector, consolidates its logic through the substitution of the public interest, which, for the advocates of this perception, is regarded as a myth. In addition to the managerialism of the 1990s[456], public interest was also impacted. As observed, through the theory of public choice, the organization of the state began to be perceived akin to

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[453] F.P. de A. MARQUES NETO, « A bipolaridade do direito administrativo e sua superação », *Contratos públicos e direito administrativo*, 2015.
[454] C.A.B. de MELLO, *Curso de direito administrativo*, São Paulo, Malheiros, 2015.
[455] Original : *O princípio ora em foco trata da supremacia do "interesse" público sobre o "interesse" privado e não do "direito" público sobre o "direito" privado, ou mesmo do "interesse público" sobre o "direito subjetivo privado". Portanto, o princípio não trata de direitos, mas sim de interesses, a partir de uma alocação do público em situação de preferência nor-mativa e axiológica em face ao particular.* E. GABARDO, « O princípio da supremacia do interesse público sobre o interesse privado como fundamento do Direito Administrativo Social », *Revista de Investigações Constitucionais*, juillet 2017, vol. 4, n° 2, p. 95, disponible sur http://revistas.ufpr.br/rinc/article/view/53437 (Consulté le 17 octobre 2023).
[456] The administrative reform of 1998 established the principle of efficiency as one of the foundations of action of the Public Administration. The reform also promoted the system of managerialism, in the idea of publicization, including a management of results and privatization of various services that until then were provided by the state. I.P. NOHARA, *Fundamentos do direito público*, Barueri (SP), Atlas, 2022.

that of a corporation. Thus, the administrator, deemed a parasite[457], was tasked with results-based management, while the innovative character was reserved for the private sector[458].

Furthermore, as government is composed of humans, one must take into account the fact that these possess selfish interests. The public interest is impacted by the argument that man and the manager, when they look in the mirror, see the same person, suggesting that concerns of public interests are merely attempts to dispose of private interests[459]. Therefore, the guarantee of a public interest (distanced from individual interest) must be unrealistic.

Consequently, the administration must seek its results through the practice of efficiency. The aim is not to achieve public interest, but to be efficient. One must observe behavior and seek to implement practices that establish *good behavior,* which will be evaluated, especially under the *quantitative bias,* because one must present *results.* Moreover, in the face of the autonomy of society, authority no longer holds the coercive power to impose a public interest, for it confronts a society that becomes autonomous in its own right.

In light of this, it behooves the government also to seek its instrumental reason. This logic had its first legal materialization in the insertion of article 37 in the Federal Constitution. In the Brazilian legal system, the principle of efficiency[460] was added to the concert of laws that make up the base of the Public Administration. Its incorporation into the legal system represents the initial juridical concept legitimizing the public actions of the managerial logic. The paradox here is significant, as many of the foundational categories of the managerial wave stand in contract to the democratic and social spirit of the then newly enacted constitution.

Consequently, the principle of efficiency, as a juridical category within the ideology of political-administrative reform, signifies a shift in the legal world regarding the modus operandi

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[457] M.C. JENSEN et W.H. MECKLING, « Theory of the firm: Managerial behavior, agency costs and ownership structure », *Journal of Financial Economics*, octobre 1976, vol. 3, n° 4, pp. 305-360, disponible sur https://linkinghub.elsevier.com/retrieve/pii/0304405X7690026X (Consulté le 26 octobre 2023).

[458] M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, 1re éd., *op. cit.*

[459] J.-C. THOENIG, « XXV. Barry Bozeman. L'apport de la publicitude au management public », in *Les grands auteurs en management public*, Grands auteurs, Caen, EMS Editions, 2021, pp. 254-263, disponible sur https://www.cairn.info/les-grands-auteurs-en-management-public--9782376873846-p-254.htm.

[460] It is not the purpose of this part of the thesis to debate the legal notion of the principle of efficiency, nor to deny its relevance, but to highlight that the principle - within the highlighted scheme, as an element of the managerial system - refers to the insertion of a specific model of political action and public action, through its legal standardization. In this sense, what we seek to highlight is efficiency as a category, within a context, corresponding to the "legal stone" that gives legitimacy to a new mode of government action, and not, therefore, efficiency as a concept to be interpreted legally. Anyway, about the social perspective of the term, check E. GABARDO et D.W. HACHEM, « O suposto caráter autoritário da supremacia do interesse público e das origens do direito administrativo: uma crítica da crítica », *Direito administrativo e interesse público: estudos em homenagem ao Professor Celso Antônio Bandeira de Mello. Belo Horizonte: Fórum*, 2010, pp. 155-201.

of the state. This shift diverts focus from ensuring the public interest towards prioritizing efficiency. It is an element within the political action model *of good governance.* It's vital to note that this is not an isolated or uniquely Brazilian perception. It is, for instance, what Jacques Chevallier notes[461], when he mentions that, with the entry of the NPM logic, the public interest was reduced to a "*myth" to* be overcome by the logic of results, transforming the performance of public administration to the logic of business. The prerogatives of a hierarchical and verticalized act do not match those of a horizontal logic. From this perspective, the aim is to promote "*contracts*," and the administration shifts to guarantee concrete results[462]. Similarly, Alain Supiot emphasizes that the state as an enterprise implies a "*revolution in the language of public action, which is now entirely geared toward achieving quantified objectives*"[463].

The rationality of good governance has spread throughout the Brazilian legal system, refining itself towards what is designated as the *pragmatic turn.* It should be emphasized that this is a very particular pragmatist perspective, focused on the practical consequences of a decision. Situated within a results focused instrumental logic (following the managerialist model) supported by the United States model of economic analysis of law, a legal school the framework of which does not include a strict distinction between public and private[464], unlike Brazilian law traditional shape[465]. In general, Brazilian pragmatic scholarship admits that its propositions derive from economic models and seek to overcome the supremacy[466] of the public interest, by

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[461] J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., *op. cit.*

[462] M. MAZZUCATO, *Mission economy: a Moonshot Guide to Changing Capitalism*, 1, *op. cit.*

[463] A. SUPIOT, *La gouvernance par les nombres*, *op. cit.*

[464] Economic analysis of law applies tools from microeconomics, ranging from rational to behavioral analysis, focused on the agent's actions. In the rational case, personal interest is taken into account, while in the behavioral case other preferences are taken into account. Economic analysis conditions the search for economic results, which result in the search for savings and quantitative answers. Nevertheless, as Giorgio Resta points out, "*the choice of the labels is not neutral. By using the notion "Economic Analysis of Law," we convey a specific message as regards the direction of the knowledge-flow: Who analyzes what*".G. RESTA, « Is Law Like Social Sciences? On 'New Private Law Theory' and the Call for Disciplinary Pluralism », *German Law Journal*, 2022, vol. 23, n° 6, pp. 826-837, disponible sur https://www.cambridge.org/core/product/5F2C2E2E9D494B329CDA70697C3455EF ; L. KORNHAUSER, « The Economic Analysis of Law », *in* E.N. ZALTA (éd.), *The Stanford Encyclopedia of Philosophy*, s.l., Metaphysics Research Lab, Stanford University, 2022, disponible sur https://plato.stanford.edu/archives/spr2022/entries/legal-econanalysis/ (Consulté le 13 février 2024)..

[465]José Vicente Mendonça dos Santos, for instance, points out that there are two ways of examining Brazilian public law. The traditional one, which would be *"European"*, systematizing, and centered on law to explain "*economic and social life*", and the American one, inspired at Economic analysis of law. J.V.S. DE MENDONÇA, « A verdadeira mudança de paradigmas do direito administrativo brasileiro: do estilo tradicional ao novo estilo », *Revista de Direito Administrativo*, janvier 2014, vol. 265, pp. 179-198, disponible sur https://periodicos.fgv.br/rda/article/view/18916 (Consulté le 31 octobre 2023).

[466]First questioned by a portion of the doctrine on the content of the word "*supremacy*", that it would only be the practice of the ancien regime. The example in this sense is extensive. Some of the best-known texts criticizing this principle in the legal system are Gustavo Binenbojm and Humberto Ávila. G. BINENBOJM, « Ainda a supremacia do interesse público », *Revista Eletrônica da PGE-RJ*, 2019, vol. 2, n° 2 ; H. ÁVILA, « Repensando o princípio da

focusing on consequences (economic, notably, in face of the *reserve of the possible*[467], since the country has limited budget)[468].

Interpretation by way of consequences[469] can be asserted to be more valid than the adoption of abstract legal principles. Legal principles bring insecurity and are often inefficient. Legal pragmatism, in turn, understands the discipline from a behavioral perspective, "*becoming detached from mere theory or simple concepts. Being pragmatic implies being attentive to the practical consequences*"[470].

Among the characteristics of pragmatism[471], that which was chosen to formally be embedded into the Brazilian legal system, was consequentialism, through Federal Law no. 13,655, of April 25, 2018, with "the *goal of bringing legal certainty and efficiency in the creation and application of public law, through the edition of rules with evident consequentialist connotation"*[472]. Consequentialism is understood as an autonomous theoretical model, which necessitates, in face of its legal matters, the renewal of the environment of public law in Brazil "*by a public governance that highlights the consequence and consequentialism*"[473].

Nevertheless, that which is defined as "*new style"*[474], strengthens managerialist practices through a pragmatic comprehension and maintains the quantitative nature of *good governance,*

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supremacia do interesse público sobre o particular », *Revista trimestral de direito público*, 1999, vol. 24, pp. 159-180, disponible sur https://www.academia.edu/download/61083315/humerto_avila20191031-120102-6ycyzl.pdf (Consulté le 31 octobre 2023).

[467] J.B. DE PALMA, « Segurança jurídica para a inovação pública: a nova Lei de Introdução às Normas do Direito Brasileiro (Lei no 13.655/2018) », *Revista de Direito Administrativo*, 2020, vol. 279, n° 2, pp. 209-249, disponible sur https://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/82012 (Consulté le 31 octobre 2023).

[468] D.W.L. WANG, « Escassez de recursos, custos dos direitos e reserva do possível na jurisprudência do STF », *Revista Direito GV*, décembre 2008, vol. 4, n° 2, pp. 539-568, disponible sur http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1808-24322008000200009&lng=pt&tlng=pt (Consulté le 31 octobre 2023).

[469] L.R. BARROSO, « Constituição, Democracia e Supremacia Judicial: Direito e Política no Brasil Contemporâneo », *RFD- Revista da Faculdade de Direito da UERJ*, juillet 2012, vol. 0, n° 21, disponible sur http://www.e-publicacoes.uerj.br/index.php/rfduerj/article/view/1794 (Consulté le 31 octobre 2023).

[470] G.J. DE OLIVEIRA, « O hiperativismo do controle externo da gestão pública pós-lei federal nº 13.655/18. », *E-disciplinas USP*, 2021.

[471] There are three basic characteristics of legal pragmatism: ***i)*** contextualism: every proposition has to be judged on the basis of human and social needs; ***ii)*** consequentialism: examine every proposition by its results; and ***iii)*** anti-fundationalism: the rejection of metaphysics, abstraction and immutability in law. R.C.R. OLIVEIRA, « A releitura do Direito Administrativo à luz do pragmatismo jurídico », *Periódicos científicos e revistas FGV*, janvier 2011, disponible sur http://bibliotecadigital.fgv.br:80/dspace/handle/10438/26993 (Consulté le 31 octobre 2023).

[472] G.J. DE OLIVEIRA, « O hiperativismo do controle externo da gestão pública pós-lei federal nº 13.655/18. », *op. cit.*

[473] The TCU Resolution no. 315, of April 22, 2020, and the Joint Recommendation PRESI-CN no. 2, of the National Council of the Public Prosecutor's Office -CNMP, of June 19, 2020, are good examples of this necessary change of course in the institutional trajectory of the external control organs.

[474]According to José Vicente Mendonça dos Santos the "*new style*" has four basic characteristics: it is close to American methods, it is pragmatist, unsystematizing and does not believe in "*the centrality of law as a key to the interpretation of economic, political and social life*". The author concludes by stating that *"The new style is, simply,*

adding to efficient public management and its search for *results*. In other words, the rationality of autonomy of the hyper-individualistic society is materialized within the logic of instrumental reason in the public sector.

Therefore, the Brazilian legal system has an apparel that combines the implementation of managerialist mechanisms of efficiency and results with the idea of a *new public governance*[475], materialized through several strategies. *Participation* and *public governance* become two concepts treated as equals, notably focusing on the replacement of the *authoritarian* perspective of the state, which must collaborate with the public sector, and guarantee efficient results, besides respecting the autonomy of the individual[476]. In this sense, the discourse that defends the ***turn to*** administrative participation in conjunction with public governance proposes, among other things, consensus and the use of mechanisms to transferring activities to the private sector[477]. It is precisely this model of public action that drives the state's digital transformation, which is also fulfilled through the political action models of governance.

Paragraph conclusions

Presently, two predominant governance models are emerging within Brazil. One, herein designated as **democratic governance**, harmonizes with the objectives inscribed in the Federal Constitution, championing institutional dialogue amongst governmental powers and promulgating mechanisms for deepening democratic practices. This model engenders a unique conceptualization of citizenship, ***(societal)*** which originated from a civil society that self-identifies as social, aspiring to participate within the political/public sphere as a direct actor.

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the economic analysis of law (...) it is a radical imbrication of disciplinary approaches, coupled with a pragmatic-constructive purpose.
Original: o *"novo estilo" possui quatro características básicas: ele se aproxima aos métodos estadunidenses, ele é pragmatista, assistematizador e não crê "na centralidade do direito como chave de interpretação da vida econômica, política e social" (...) "O novo estilo é, apenas, a análise econômica do direito. (...) é uma imbricação radical de abordagens disciplinares, acoplado a um propósito pragmático-construtivo"*. J.V.S. DE MENDONÇA, « A verdadeira mudança de paradigmas do direito administrativo brasileiro », *op. cit.*

[475] art. 26 of the LINDB, as amended by Federal Law no. 13,665/18. With regard to the Brazilian justice system, "[t]here is now a multi-door system, that is, there is more than one way to solve the conflict involving the Administration. This is because the legal system makes available to the Administration several ways to solve its controversies, often successively".

[476] G.J. de OLIVEIRA, « Os acordos administrativos na dogmática brasileira contemporânea », *Moreira, António Júdice et al*, 2020, pp. 103-113.

[477] *Ibid.* ; G.H.J. de OLIVEIRA et R.O.M. WANIS, « "Estado pandemia" e "Estado pós-pandemia": ensaio sobre influências do desenvolvimento e da nova governança pública para a emergência de modelos de Estado e de gestão pública mais eficientes e inclusivos », in *Direito em tempos de crise : COVID-19*, s.l., Quartier Latin, 2020.

Notably, this model neither supports specific proposals for bureaucratic administrative reforms nor engages with the legitimacy of public action or the foundational principles of such legitimacy.

Conversely, the second model, demarcated herein as **good governance**, emanates from the autonomy of hyper-individualistic society. This model perceives itself as exempt from any state authority, devoid of external definitions of public interests, and subsequently, endeavors to embed its quantitative, instrumentally rational models within the public sector. This ideal type exerts a definitive impact upon public action, navigating through managerialism and adhering to principles of consensus/contractualism and efficiency. Additionally, it is of import to note that while both models utilize common concepts, they do so with divergent objectives. The core of both is embedded within the Brazilian legal system and the Federal Constitution, whether to safeguard individual freedoms or to advocate for the enhancement of social rights.

This exposes a momentary portrait of the Brazilian framework, encapsulating the concepts intrinsic to each model, in their ideal types, of the modern state model, of sovereignty and bureaucracy, amalgamated with the Constitution and the managerialist phases of good governance:

Types/features	**Bureaucratic administration**	**Federal Constitution**	**NPM**	**Pragmatism**
Political action model	Authoritarian state	Democratic governance	Good governance	Good governance
Public action model	Power-duty	Duty-power	Efficiency	Efficiency
Legitimacy	Public interest	Fundamental Rights Human Dignity	Efficiency	Efficiency /results Fundamental Rights Human Dignity

Table 1: Models of state actions

Contrary to the preceding chapter, wherein the state existed as an artificial entity of the modern machine, it ceases to remain insulated. This transformation, transitioning from the category of *sovereign government* to a paradigm of interdependent *governance,* exerts a profound impact upon concepts hitherto aligned with the machine's imaginary. Whereas public interest, the

conceptual foundation upon which the state erected its legitimacy, is deemed mythical, the respective values associated with public and private spheres gradually converge, culminating in a tangible amalgamation.

Both interdependence and interconnectedness emerge from a process of autonomy of society, apparent through its individualistic/market characteristics as well as its social aspects. Nonetheless, as elucidated by **Alain Supiot,** it thrives not within the social, but rather, the economic sphere[478]. He contends that this induces an imbalance between the economic sphere, fortified with "*authorities*", and a social sphere, devoid thereof. Consequently, this disparity between the economic and the social yields nefarious effects. Furthermore, it besmirches freedom, theoretically the paramount asset to be safeguarded.

Hence, as will be examined, it is under the managerialist veneer of good governance that the Brazilian state's digital transformation operates, leading not solely to an economic transition but also to an amplification of inequality.

Section 2: The digital transformation of the state as a corollary of the postmodern political action

The preceding section elucidated how, in an ideal type framework, the postmodern state model generates political action through governance. This stands in contrast to the modern state's approach, wherein sovereignty emerges as the essential concept, producing corollaries. Although delineating models by *categorical* terms cannot be claimed to be systematic — it can be sustained that *government* is unmistakably dissimilar to *governance*, one unitary, the other plural—the incorporation of these ideal types of political action crucially forms the conceptual frameworks they accompany. This implies distinct understandings of organizational structures and engenders varied modalities of social engagements, with explicit objectives and legitimizations, which are, within the context of ideal types, interrelated. The state's digital transformation will engage with all these components and integrate additional elements such as

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[478] A. SUPIOT, « Aux origines des États : la souveraineté de la limite. (La geste gaullienne à la lumière de l'histoire des institutions) », *Revue Défense Nationale*, 2022, vol. 847, n° 2, pp. 30-38, disponible sur https://www.cairn.info/revue-defense-nationale-2022-2-page-30.htm.

digitalization, open governments, etc., inducing a dissonance between models and their associated concepts.

While initially viewed as supplementary, the acknowledgment that the digital domain permeates nearly every aspect of an individual's life highlights the nature of this transition. One of the leading theorists of digital government, institutionalist Jane Fountain, highlights that "*the real challenges lie not in achieving the technical capability of creating a government on the web, but rather in overcoming the entrenched organizational and political divisions within the state*"[479]. In effect, the impact of such technologies and the revolution for government goes beyond mere procedural acceleration, shedding light on why concepts such as "*efficiency*" are deemed rudimentary and outdated in the E-gov literature[480]. Therefore, it is crucial to comprehend these shifts, as they align with contemporary political and public models.

The **present Section** aims to examine the trajectory of Brazil's digital transformation, from the advent of electronic government to the establishment of digital public governance policies based on their relations with political and public actions **(§1)**. Additionally, a second paragraph examines the challenges associated with digital transformation in Brazil, focusing on the model of political action that has been adopted (*good governance*) and its inadequacies **(§2).**

[479] J.E. FOUNTAIN, *Building the Virtual State: Information Technology and Institutional Change*, s.l., Brookings Institution Press, 2004, p. 10, disponible sur https://muse.jhu.edu/pub/11/monograph/book/63890 (Consulté le 31 octobre 2023).

[480] S. QUINTARELLI *et al.*, « The Information Society and the Future of Digital Well-being », in *Global Happiness and Well-being Policy Report 2022*, s.l., Sustainable Development Solutions Network, 2022, pp. 115-133, disponible sur https://opus4.kobv.de/opus4-hsog/frontdoor/index/index/docId/4735 (Consulté le 26 octobre 2023).

§1 From E-government to public governance policy

Within the realm of the state and its intricate structure, one can perceive the digital transformation as a systematic and coherent process[481]. The Gartner Glossary[482] delineates stages that originate within electronic government and subsequently mature into digital government[483].

Similarly, the evolutionary framework proposed by Tomasz Janowski serves as a metric of analysis for studies in the field. The author differentiates between four transformative phases: **1)** Digitalization, referring to the integration of technology within governmental structures; **2)** Transformation, the stage in which government utilizes technology for its operations; **3)** Engagement, which embraces electronic governance; and ultimately, **4)** Contextualization, shifting the focus to governance driven by policy. Janowski's research accentuates how the initial two phases are predominantly focus on public administration. While, the subsequent

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[481] A first approximation can be identified in the distinction between digitization, which corresponds in the transition from analog to digital processes; of digitalization, emphasized in the procedural changes of government; and of digital transformation, which involves cultural, organizational, and relational outcomes. This initial distinction reveals that digital transformation goes far beyond the simple bureaucratic mutation of government in its administrative activities. A mere agility perspective, besides being primary in the digital transition universe, ignores the diverse potentials of a transition that involves changes not only organizationally, but also culturally, and in state relations - internal - and external, and with individuals and society at large. These moments are best identified by examining the levels of digital conversion pointed out by the literature. L. DONG, *Public administration theories: instrumental and value rationalities*, New York, NY, Etats-Unis d'Amérique, Palgrave Macmillan, 2015, cop. 2015 2015 ; « Definition of Digital Transformation - IT Glossary | Gartner », s.d., disponible sur https://www.gartner.com/en/information-technology/glossary/digital-transformation (Consulté le 26 octobre 2023) ; T. JANOWSKI, « Digital government evolution: From transformation to contextualization », *Government Information Quarterly*, juillet 2015, vol. 32, n° 3, pp. 221-236, disponible sur https://linkinghub.elsevier.com/retrieve/pii/S0740624X15000775 (Consulté le 26 octobre 2023) ; B. CHO, « Bibliometric Analysis of Academic Papers Citing Dunleavy et al.'s (2006) "New Public Management Is Dead—Long Live Digital-Era Governance": Identifying Research Clusters and Future Research Agendas », *Administration & Society*, mai 2023, vol. 55, n° 5, pp. 892-920, disponible sur http://journals.sagepub.com/doi/10.1177/00953997231157753 (Consulté le 17 octobre 2023) ; OECD, *The OECD Digital Government Policy Framework: Six dimensions of a Digital Government*, Paris, OECD, octobre 2020, disponible sur https://www.oecd-ilibrary.org/governance/the-oecd-digital-government-policy-framework_f64fed2a-en;jsessionid=J6IaAoiCoIWQQk2RQNuF7sv9kW72OhNgOE-LGMwg.ip-10-240-5-83 (Consulté le 18 octobre 2023).

[482]The initial model is illustrated as e-government, where services are provided. This is the first stage of the use of information technology in state activities. The second level is called open government, in which a transparent government is sought that engages with the citizen. The third level occurs when the State becomes data-centric. Finally, digital transformation can also be identified by its effects on government structure, functions, and relations with citizens. In this respect, Gartner Glossary. « Definition of Digital Transformation - IT Glossary | Gartner », *op. cit.*

[483] T. JANOWSKI, « Digital government evolution », *op. cit.*

stages correlate with *governance models* in which technology has become a fundamental pillar in administration[484].

This elucidated framework serves as the paramount foundation for comprehensive examination—attentive to its management model, political actions, and social relations—of the transition phases from the electronic model **(A)**, advancing through open government **(B),** to implementation of digital governance in Brazil **(C).**

A. Electronic Government, an instrument of managerialist logic

Globally governments adopted information technologies in a gradual manner, in tandem with the expansion of e-commerce in the 1990s. This period was the dawn of the diffusion of the internet, and just as such technologies found application within private enterprises and wider society, the public sector commenced with the incorporation of these into its operations. Within a universally recognized Western approach to public management for government, Information Technologies (ICT) was identified as instrumental in enhancing governmental operations[485]. In Brazil, its use dates back to the 1990s, during the process of modernization of public administration. The initial establishment of electronic government, or E-gov., materialized with the issuance of Decree No. 3,294/99, inaugurating the Information Society Program from the then Ministry of Science and Technology. Linked to the project of state modernization and managerialist reforms of publicization, it is clear from the onset that its implementation operated under the logic of efficiency[486]

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484 The critical distinction here is that, in the initial models, digital transformation is perceived as a supplementary element. Conversely, the subsequent ones regard it as a central component in state activities, necessitating a thorough reassessment of structures and functions.

[485] B. BOUNABAT, « From e-Government to digital Government: Stakes and Evolution Models. », *E-Ti: Electronic Journal of Information Technology*, 2017, vol. 10, n° 1, disponible sur https://search.ebscohost.com/login.aspx?direct=true&profile=ehost&scope=site&authtype=crawler&jrnl=11148802&AN=129502200&h=OySyau7DyGyCG5yEFW7G19wHLfdNsuOmajXS6UMWdRjhveaXY4xVJandg8LtxmQvX4vsBntsQF7YK6xOelAnIQ%3D%3D&crl=c (Consulté le 26 octobre 2023).

[486] D.A. NOGUEIRA JUNIOR, « Governo eletrónico Brasil e Portugal as limitações na aplicabilidade da comunicação interativa cidadã. », *Prisma.com*, 2022, vol. 47, pp. 3-18, disponible sur https://ojs.letras.up.pt/index.php/prismacom/article/view/11665/11723 (Consulté le 3 mai 2024) ; F. FILGUEIRAS, « Indo além do gerencial: a agenda da governança democrática e a mudança silenciada no Brasil », *Revista de Administração Pública*, février 2018, vol. 52, pp. 71-88, disponible sur https://www.scielo.br/j/rap/a/PryL9JzmYhyVBTrdG3GGxsr/?lang=pt (Consulté le 18 octobre 2023).

Subsequently, the foundation of the Brazilian E-gov. project was the global forum: "*Reinventing Government*", held in the United states in the late 1990s. The discussions within the meeting resonated with the discourse on the imperative of managerial reform of the state, guided by the narrative of modernizing public management through the development of Information Technologies, and above all, with the minimization of the state by way of substituting human labor for platforms. The movement gained momentum in Brazil with the reform of the public management model of NPM[487], intensifying the initiatives towards liberal reforms of the state[488]. Within this approach, technologies emerged as a proficient means to realize this aspiration more effectively.

Thus, Information Technologies were employed as a tool for program of state debureaucratization, serving to assist the establishment of a public sector operating under the logic of instrumental reason, in a technicist manner.

By the 2000s[489], an array of new policies and guidelines had been systematically instituted, encompassing initiatives from data infrastructure programs to decrees aimed at the simplification of services. A deliberate implementation of public policies employing Information Technologies to optimize daily endeavors and enhance the caliber of services rendered by the government ensued. Generally, the enactments of such policies, including those which pertain to transparency, embody an economics approach[490].

Given the profound connection to the process of state reform in the context of the Brazilian electronic government, it is discernible that the integration of information technologies within governmental structures is intrinsically linked to a neoliberal political philosophy and economic model, defined within the nation as *peripheral neoliberalism*[491]. The advent of electronic

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[487] F. FILGUEIRAS, « Indo além do gerencial », *op. cit.*

[488] D.A.N. JUNIOR, « Governo Eletrônico e Neoliberalismo », *op. cit.*

[489] In 2000, a presidential decree established a working group aimed at proposing public policies tailored to the new modes of electronic interaction. Consequently, some services began to be provided electronically, coupled with efforts to reduce bureaucracy in the delivered activities. J.S.D.S. CRISTOVAM, L.B. SAIKALI et T.P.D. SOUSA, « Governo digital na implementação de serviços públicos para a concretização de direitos sociais no Brasil », *Seqüência: Estudos Jurídicos e Políticos*, juin 2020, vol. 43, n° 84, pp. 209-242, disponible sur https://periodicos.ufsc.br/index.php/sequencia/article/view/2177-7055.2020v43n84p209 (Consulté le 26 octobre 2023).

[490] Ana Julia Possamai reports that between 1998 and 2010, various measures were implemented from a managerial perspective, concentrating on fiscal transparency and control over the use of public resources. Examples include regulations on bidding and contracts, electronic auction, the Fiscal Responsibility Law, and transparency portals. A.J. POSSAMAI, « Dados abertos no governo federal brasileiro : desafios de transparência e interoperabilidade », 2016, disponible sur https://lume.ufrgs.br/handle/10183/156363 (Consulté le 26 octobre 2023).

[491] D.A.N. JUNIOR, « Governo Eletrônico e Neoliberalismo », *op. cit.* ; R.D.B. DIAS, « Governo eletrônico: ferramenta democrática ou instrumento do neoliberalismo? », *Revista Tecnologia e Sociedade*, décembre 2012,

government served as a pivotal mechanism to dismantle the preceding bureaucratic management model.

This nascent configuration, thereby, is closely associated with the structure of administration. If the bureaucratic government symbolized authority, concretizing its endeavors through legality, as well as the legitimacy of public interest, the managerialism inherent in NPM, which underpins the logic introduced by electronic government, symbolizes the transition to a paradigm of a *performance governance*. The factors of this model denote a shift in the public sector's operational focus from public interest to a paradigm of efficiency. Not coincidentally, the fulcrum for the ascension of the regulatory state in Brazil is situated within a context of technological progression during the 1990s[492].

Pertaining to the modalities of association between state and society, electronic government adheres to the rationale of new public manageament – emerging from the initial managerialist wave. Within this framework, the individual was conceptualized not as a citizen but as a *consumer*, the user of a service, parallel to the delivery dynamics prevalent in the private sector. Although pluralistic mechanisms for social participation were enshrined in the federal constitution, the incorporation of electronic government via the management model did not seek to leverage these channels. Contrary, information technologies were deployed with an overt objective: the debureaucratization of the state. Consequently, there exists no perceptible acknowledgment of the role of citizens in the decision-making process. Hence, during this period, the utilization of information technologies was predominantly state-centric.

Conversely, in relation to *public action*, electronic government is intricately intertwined with the logic that substantiates it. As such, the state and the autonomous society undergo a transition from a relationship characterized by vertical/authoritarian dynamics to horizontal/consensus focused tendency. Electronic government, therefore, emerges as one facet of the shift of state functions towards a paradigm rooted in partnership. Here technologies are employed for the facilitation of internal management, serving as a modality to amplify the administration that was being rigorously quantified. It propounds the employment of business management strategies within governmental spheres, entailing the implementation of business management

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vol. 8, n° 15, disponible sur https://periodicos.utfpr.edu.br/rts/article/view/2593 (Consulté le 26 octobre 2023) ; F. FILGUEIRAS, « Indo além do gerencial », *op. cit.*

[492] J.S.D.S. CRISTOVAM, L.B. SAIKALI et T.P.D. SOUSA, « Governo digital na implementação de serviços públicos para a concretização de direitos sociais no Brasil », *op. cit.*

practices and their associated domains—traditionally utilized for mass industrial society—within the public sector.

Public interests, under the logic of NPM, are construed to be synonymous with the aggregate of individual interests. Concurrently, the legitimization of public acts transitions from being based on authority to a pronounced emphasis on efficiency, a pivotal dimension within electronic government. Electronic Government, therefore, can be defined as one of the elements within a larger dimension of political and economic structures. Which represent a counterpoint to the rational bureaucratic structure of traditional administration, bringing to the public sector a process of *autonomy of society*, especially through the hyper-individualistic bias. The very conception of the role of the state also derives from this concept, transitioning from an authoritarian construct to a model of horizontal relations, which changes the basis of legitimacy of state actions. The mutation from vertical relations to horizontal mechanisms constitutes the emergence of the logic of *good governance* in the public sector.

B. Open government, transparency, participation and collaboration

The primary modification of the potential of digital transition within governments—on a global scale—commenced towards the late 2000s with the inception of Government 2.0. Observed by way of the integration of Web 2.0 technologies into electronic government, aspiring to enhance the *interaction* between citizens and government. Concurrently, Tim O'Reilly[493] envisioned the potential for individuals to interact with and through the public sector. In turn, significant alterations began to manifest. Initially, the focus shifted towards citizens, now regarded as contributors to the management of public affairs, achievable primarily through applications, platforms, and social networks[494]. Thus, the first transformation is situated within the governments transitions from *state-centered* to exploring the *interactive* and communicative potentials enabled by ICTs, utilizing the technological instruments of the public sector not merely for managerial efficacy but for interaction with citizens.

Open government transforms public management and the society-state relationship. The concept garnered attention in 2009 when, as one of his initial administrative actions, the then

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[493] As the author states: "*But as with Web 2.0, the real secret of success in Government 2.0 is thinking about government as a platform*". T. O'REILLY, « Government 2.0 », *O'Reilly Media*, 2010, disponible sur https://www.oreilly.com/tim/gov2/ (Consulté le 26 octobre 2023).

[494] B. BOUNABAT, « From e-Government to digital Government », *op. cit.*

President of the United states, Barack Obama[495], issued an executive order establishing *transparency, participation*, and *collaboration* as the fundamental principles of government. This openness fosters a dynamic with tangible implications for the networked society[496]. Contrary to electronic government, open government considers interaction to be a fundamental tenet, thus aligning with the reticular nature of the network ecosystem itself, while also intensively integrating the possibilities offered by the term governance. From this point forward, transparency, participation, and collaboration have become integral components of any agenda of state digital transformation.

Transparency emerges as a pivotal keystone of governance concepts, serving as an indispensable conduit for *dialogue*. More precisely, it epitomizes the *procedural* dimension of governance wherein the public sector initiates interaction with an increasingly *autonomous society*. From this vantage point, the institutionalization of transparency becomes imperative for every political and managerial project. Regardless of whether the governance model is oriented, towards citizenship or leans towards a paradigm of *good governance*, transparency remains essential for attaining all objectives[497]. Conversely, transparency also functions as the means through which other elements of open government, namely *participation* and *collaboration*, are facilitated. Thus, transparency[498] is enunciated as the measure of unequivocal openness and unequivocal dissemination of information, adhering strictly to the principles of publicity of government acts—a constitutional principle in Brazil[499].

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[495] *"All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government*". U.S. DEPARTMENT OF DEFENSE, « DoD Open Government. FOIA Handbook », s.d., disponible sur https://open.defense.gov/transparency/FOIA/FOIA-Handbook/ (Consulté le 26 octobre 2023).

[496] It is indicated that conversion to an Open Government requires changes: 1- cultural, with the administration recognizing the central role of the citizen; 2- of the procedures offered, if it is not comfortable for the citizen, it must be modified; 3- that of the organization of the administration; less bureaucratic and more efficient and; 4- forms of relationship that occur through dialog. I. BOUHADANA et W. GILLES, « De l'esprit des gouvernements ouverts », *Revue Internationale des Gouvernements Ouverts Disponível em: http://ojs. imodev. org/index. php/RIGO/article/view/187/308. Acesso em*, 2020, vol. 19, disponible sur https://core.ac.uk/download/pdf/235040245.pdf (Consulté le 26 octobre 2023).

[497] W. GILLES et I. BOUHADANA, « L'effectivité du droit des données et des gouvernements ouverts », *Revue Internationale de droit des données et du numérique*, 2020, vol. 6, pp. 1-20, disponible sur https://core.ac.uk/download/pdf/322501057.pdf (Consulté le 26 octobre 2023).

[498] For the Federal Comptroller General – Controladoria Geral da União- CGU, transparency is "*Information about government activities is open, understandable, timely, freely accessible, and meets the basic open data standard*". CONTROLADORIA-GERAL DA UNIÃO, « O que é Governo Aberto — », s.d., disponible sur https://www.gov.br/cgu/pt-br/governo-aberto/governo-aberto-no-brasil/o-que-e-governo-aberto (Consulté le 26 octobre 2023).

[499] J.-C. Trichet argues that a transparent government must meet five criteria: clarity, truth-seeking, comprehensiveness, the need for public debate, and accountability. According to him, each of these five criteria contributes to strengthening the democratic process. E.C. BANK, « Reflections on the nature of monetary policy

As a result of the above-mentioned transition, Brazil has had navigate through these transformative currents[500]. Initially, efforts were directed towards the implementation of participatory mechanisms, as already envisioned in the Constitution, in addition to a deeper engagement with the realm of administration intrinsically aligned to transparency. Concomitant with other nations, Brazil has endeavored to assimilate the fundamental tenets of open government [501]. One example is its partnership in the open government **Partnership (**OGP), an international initiative aimed at disseminating transparency practices, access to information and social participation, as well as integrity, among others[502].

A significant factor in this field is the promulgation of the Access to Information Law (LAI), introduced in 2011[503]. Although its view extends beyond the digital transformation, numerous fundamental elements of open government are referenced within the legislation. Consequently, it is deemed to be "*audacious*" to embed the potential for enhanced openness and transparency within public administration—elements vital to open government. As elucidated by Eneida Desiree Salgado, the LAI [I504] is crafted with the intent of amplifying the constitutional premises

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non-standard measures and finance theory », *European Central Bank*, 18 novembre 2010, disponible sur https://www.ecb.europa.eu/press/key/date/2010/html/sp101118.en.html (Consulté le 26 octobre 2023).

[500]The concern of Open Government can be identified since the General Strategy of Information Technology (EGTI), edited over the years since the year 2011. Instituted in 2012 by Normative Instruction No. 4/2012, the *National Infrastructure of Open Data* (INDA) tata the set of standards, technologies, procedures and control mechanisms that aim to meet the conditions of dissemination and sharing of public data and information in the Open Data model, in attention to ePING. More recently, Decree No. 10,160 of December 9, 2019 in art 1 establishes the *National Open Government Policy*, within the federal Executive Branch. R.F. BRASIL, « Estratégia Brasileira para a Transformação Digital », s.d., disponible sur https://www.gov.br/mcti/pt-br/acompanhe-o-mcti/transformacaodigital/estrategia-digital (Consulté le 18 octobre 2023). A.J. POSSAMAI, « Dados abertos no governo federal brasileiro », *op. cit.*

[501] Brazil's participation in the OGP has placed access to information, public transparency and open government data in the same field. CGU have brought together previously separate initiatives, inserting open data in the transparency agenda.

[502]Legal system is in Decrees n. that deal with the Open Government Policy (Decree No. 10,160/2019) and Open Data Policy (Decree No. 9,903/2019). M. da E. REPUBLICA (PR), Decreto nº 10.332 de 28 de abril de 2020, *D.O.U de 29/04/2020, pág. nº 6*, 29 avril 2020, disponible sur https://legislacao.presidencia.gov.br/atos/?tipo=DEC&numero=10332&ano=2020&ato=8aeoXWU1EMZpWT6a4 (Consulté le 3 novembre 2023) ; S.-G. REPUBLICA (PR), Decreto nº 9.319, de 21 de março de 2018, Diário Oficial da União - Seção - 22/3/ , Página 2 (Publicação Original 2018, disponible sur https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/decreto/D9319.htm (Consulté le 3 novembre 2023).

[503]Law 12.527/2011 aims to ensure the "*transparent management of information, providing broad access to it and its disclosure*" (art. 6, I).
C.C. REPUBLICA (PR), Lei nº 12.527 de 29 de março de 2011, 18 novembre 2011, disponible sur https://legislacao.presidencia.gov.br/atos/?tipo=LEI&numero=14129&ano=2021&ato=d7cMTSE5UMZpWT475 (Consulté le 3 novembre 2023).

[504] The Law regulates the access of any citizen to information that is held by public bodies of the direct and indirect administration, the Executive, Legislative, Judiciary, and Public Prosecutor's Office, at all levels; except for information that is personal and in the event of secrecy, which is provided for in the law itself. It also applies to information on the destination of public resources that are received by private non-profit entities and in actions of public interest.

of openness and participation, additionally it incorporates several pivotal regulations integral to the process of governmental transparency.

Thus, transparency[505] has become a crucial rhetorical element of public entities. In order to support good governance, international organizations, such as the OECD, intensively promote transparency. According to the OECD, the objective of an open government is the combination of requirements[506] of increasing quality of public services and to make the governors *more* accountable[507].

Transparency is also defended as necessary for the publicization of actions, which appear as an exercise of vertical accountability[508] and brings new actors into public policies[509]. Inextricably intertwined with a sociopolitical interpretation of the political sphere, democratic governance concurrently necessitates transparency in public acts.

Within a governance model of political action, the legitimacy of institutions is contingent not merely upon the possibility of rational control over decisions but also upon the integration of individuals into the decision-making process. It underscores the pivotal role of transparency and participatory mechanisms in reinforcing institutional legitimacy[510]. This insertion, however, cannot occur only formally, thereby highlighting the second element of open government, *participation.*

Besides transparency policies, the construction of an open government drives greater *participation*. This is an aspect of democratic legitimation, which translates into forms of

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[505]Yet transparency itself is not a new principle. For instance, the right to petition for transparency and information is provided in art. 15 of the Declaration of the Rights of Man and Citizen of 1789. Article 19 of the 1948 Universal Declaration of Human Rights provides that everyone has the right "*to seek, receive, and impart information*". Art. 19 of the 1966 International Covenant on Civil and Political Rights further states that "everyone has the right to freedom of expression.

[506]Irene Bouhadana and William Gilles had formulated ten guiding principles of Open Government. 1. the right to transparency and access to public information; 2. the right to reuse public information; 3. the right of citizens to participate in public decision making; 4. the right to democratic renewal and pluralism; 5. the right to sincerity and trust in one's own government; 6. the right to accountable government; 7. the right to protection of open government actors; 8. the right to effective open government; 9. the right to proportionality and the justification of exceptions to open government principles; 10. The right to disseminate the culture of open government. I. BOUHADANA et W. GILLES, « De l'esprit des gouvernements ouverts », *op. cit.*

[507]For the Organization for Economic Cooperation and Development (OECD), Open Government refers to the transparency of government actions, the accessibility of government services and information, and the responsiveness of government to new ideas, demands, and needs. OECD, « Open government - OECD », s.d., disponible sur https://www.oecd.org/gov/open-government/ (Consulté le 31 octobre 2023).

[508] G.A. O'DONNELL, « Horizontal Accountability in New Democracies », *Journal of Democracy*, 1998, vol. 9, n° 3, pp. 112-126, disponible sur https://muse.jhu.edu/pub/1/article/16904 (Consulté le 31 octobre 2023).

[509] E.D. SALGADO, *Lei de acesso a informacao (LAI): comentarios a lei no. 12.527/2011 e ao decreto no. 7.724/2012*, s.l., Editora Atlas, 2015.

[510] *Ibid.*

participation by society in the political sphere. As observed, legally[511], social participation gains contours through the Constitution, which authorizes its instrumentalization by means of several provisions[512], the pivotal art.1§ unique. Bringing the citizen closer to the administration, participation refers to a way of introducing a more democratic course to administration[513]. The promotion of open government found a political niche that allowed for, at the time, the use of the participatory bias, by means of *societal* instruments, channels created by the constitution for a re-articulation of the relation between government and society. From this juncture, one can take account of the manifestation of numerous experiences, such as the participatory budget. Alongside the advent of new technologies, mechanisms for participation have been introduced within other branches of power, such as the legislative and the judiciary[514].

Collaboration constitutes the final element of open government, emphasizing its role as a conduit to synergies between the public sector and the private sector towards shared objectives. Collaboration comes to fruition when diverse entities within a public sector domain engage interactively towards collective ventures. As observed, best practices in governance also manifest through collaborative interactions between the public and private realms, where the application of business principles is valued. Therefore, concepts such as accountability, responsibility, and efficiency emerge. These concepts, rather than representing a transcendence

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[511] P. BONAVIDES, *Teoria constitucional da democracia participativa*, 26, São Paulo, Malheiros, 2001, disponible sur https://www.academia.edu/download/35462557/Paulo_Bonavides_-_Teoria_Constitucional_da_Democracia_Participativa_-_Ano_2001.pdf (Consulté le 31 octobre 2023).

[512] Art. 5 All are equal before the law, without distinction of any nature, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, safety and property, in the following terms: XXXIV - are assured to all, regardless of the payment of fees: a) the right to petition the Public Powers in defense of rights or against illegality or abuse of power; b) the obtaining of certificates in public offices, for the defense of rights and clarification of situations of personal interest; C.C. REPUBLICA (PR), Constituição da República Federativa do Brasil, *op. cit.*

[513] The success of the experience has gained international notoriety. However, some problems have already been identified in cases of participatory budgeting. Due to the inherent asymmetry in the relationships between the actors, outlined in the preponderance of state agents in the participatory process, many times the process can be co-opted. W. D. M. ROMÃO. Conselheiros do orçamento participativo nas frjas da sociedade política. *Lua Nova*, São Paulo, 84: 353-364, 2011, p.359-360.

[514] The *online* portal of the Chamber of Deputies (http://www2.camara.leg.br/) uses systems that prioritize social control and active voter participation in some moments of the legislative process. One of the sections is entitled "Help write the law": through it the citizen, using an electronic democracy mechanism, can analyze all bills in progress, propose amendments (total or partial), present substitutes and express agreement or disagreement. In the scope of the Judiciary, the electronic system has brought more celerity and also transparency to the process, constituting a great gain for society. Other innovations have been experimented in this power, attentive to issues such as excessive incarceration, or even the confusion regarding the adoption process in Brazil". L.R. CAMARGO KREUZ et A.C. AGUILAR VIANA, « 4ª Revolução Industrial e governo digital: exame de experiências implementadas no Brasil », *Revista Eurolatinoamericana de Derecho Administrativo*, décembre 2018, vol. 5, n° 2, pp. 267-286, disponible sur https://bibliotecavirtual.unl.edu.ar/publicaciones/index.php/Redoeda/article/view/9092 (Consulté le 31 octobre 2023).

of the NPM model, symbolize – from the standpoint of good governance - the instrumentalization of the quantitative reasoning model, albeit in a renewed form[515]. Consequently, while open government amplifies participatory instruments, it simultaneously paves the path for the intensification of managerialist models within the public sector.

Concerning the management models of open government., despite the explicit denotation embedded in the term "*government,*" the concept acts as a cornerstone for a political action model of governance. This arises due to the incorporation of elemental aspects concomitant to this paradigm (notably, interaction and plurality) while concurrently diverging from certain conventional components intrinsic to the political action model of government. The conceptual architecture of open government deviates from the traditional hierarchical/sovereign model, wherein the demarcation of public policies and actions was the sole province of the public sector.

Consequently, open government transcends a mere redefinition of the public sector; it distinctively positions itself as a model that *prioritizes citizens* over the government. Furthermore, its propositions aim to couple the interactivity afforded by technological advancements. Alternatively, its interactive essence aligns with a cybernetic logic, envisaging open government as the archetypal governance model that addresses the foundational facet of the cybernetic imaginary—interaction and dialogue.

The assimilation of open government catalyzes profound transformations, enveloping cultural, procedural, and organizational facets, as well as the dynamics interweaving the public sector and society. This insinuates alterations in legal relations and simultaneously heralds the inception of a distinctive vocabulary. Under open government, discourses commence on a cultural pivot from a secluded, regulatory model towards one that epitomizes transparency and openness.

Thus, in terms of an ideal type, this perspective shifts from a vertical government to governance. Such a transition necessitates recalibrations in administrative values, thereby mandating a shift *from state-centric* to *citizen-centric* orientations[516]. Accordingly, it engenders a process that nurtures transparency and openness, where dialogue and interaction are predominantly

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[515] On what Mazzucato reffers to: a parasite relation between private and public actors. About: M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, 1re éd., *op. cit.*

[516] OECD, *The OECD Digital Government Policy Framework*, *op. cit.*

predicated upon trust amongst the engaged entities, as opposed to control. The transmutation from a control model to one founded upon trust presents itself as a challenge for Brazil.

As noted, the institutional design implemented by the Constitution was formulated based on a logic of control[517]. Hence, new configurations created certain entities and granted more control and oversight powers to others. The history of corruption within the nation has led to the creation of a structure focused on control, an outcome that can also be attributed to the prevailing national culture of extensive mistrust, particularly towards actors within the public sector. This alteration is identified as one of the paramount challenges facing Brazil's digital transformation, as acknowledged both by the literature on the subject, as well as by evaluative institutions, such as the OECD. Furthermore, Brazil grapples with a culture that connotes a "*natural corruption of its people*". Corruption, often treated as a *folkloric entity*[518], has bequeathed a legacy of the criminalization of political action and, not infrequently, has incited a metaphorical "*witch hunt*"[519] directed towards public agents[520]. It is incontrovertible, however, that contemporary policies strive to re-evaluate this perception, through the instillation of a culture of robust public governance, which derives from corporate business practices and is intrinsically tied to the attainment of optimal outcomes within public management.

Therefore, open government, unlike the electronic government model, **harmonizes *two distinct paradigms*:** the pluralist perspective of the Brazilian Constitution (democratic governance) and the managerialist logic under the guise of good governance. Through permeation of the public sector by principles of governance such as transparency, participation, and collaboration, the efficiency of public management has been enhanced, especially in the context of debureaucratization. Thus, within this framework, Brazil's digital governance policy is conceived and primarily shaped by the characteristics of managerialist public management.

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[517] F.P. de A. MARQUES NETO et J.B. de PALMA, « Os sete impasses do controle da administração pública no Brasil », *op. cit.*

[518]For Jesse de Souza the thesis of the evil of origin accepts racism disguised as true culturalism. J. SOUSA, *A ralé brasileira: Quem é e como vive* -, Rio de Janeiro, Civilização Brasileira, 2022.

[519] E. GABARDO, « A aplicação dos princípios de direito penal no direito administrativo : breve estudo jurisprudencial a partir do princípio da insignificância », 2012, disponible sur https://dspace.almg.gov.br/handle/11037/3019 (Consulté le 31 octobre 2023).

[520]The generic term public agents is used to designate all agents that provide services to the Public Administration, from political agents to delegated agents.

C. Digital Policy and normative framework

A current analysis of Brazil's digital transformation unveils a broad program. The governance of the public sector in Brazil, as per the Brazilian Court of Audit[521], can be scrutinized from four discernible angels: the relationship between society and state; federative entities in conjunction with public policies; organs and entities; and finally intra-organizational activities.

The Brazilian digital transformation is thus demarcated along three principal axes. Foremost, and arguably of paramount pertinence, is the Digital Governance Strategy (EGD). Subsequently, two other discerned programs are "*The Digital-E-Digital Transformation Policy*" (E-digital) and the Open Data Policy. Thus, the Digital Government Act, introduced in 2021, endeavors to normatively systematize numerous issues pertinent to digital transformation. These projects are promoted within a rationale of governance (in a broadly-defined sense), which is designated within the discipline of public management as public governance.

The Digital Governance Strategy[522], formulated in 2015 and instituted in 2016 as the Digital Governance Policy[523], seeks to strengthen the public sector's utilization of technologies to enhance the availability of information, stimulate participation in the decision-making process, and augment the transparency and efficacy of the federal government (Article 2, III, of Decree No. 8,638/2016[524]). Digital transformation is the paramount objective of the EGD[525], introducing an approach of *citizen-centered* axes, aspiring to innovate and foster systemic integration, with the intention to "*transition from an e-government to a digital government*". The EGD undergoes revisions triennially, with various goals of digital transformation within

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[521] TRIBUNAL DE CONTAS DA UNIÃO, *Acordao 2569/2018-Plenario*, Brasília, TCU, 2018, disponible sur https://repositorio.cgu.gov.br/bitstream/1/33770/13/Acordao_2569__2018_%20Plenario.pdf (Consulté le 31 octobre 2023).

[522] This statute marks the official beginning of Brazil's transition to a digital government. Decree No. 8,638/2016 focuses on stipulations made by OECD's rapports.

[523] B.M. do PLANEJAMENTO et O. e GESTÃO, « Estratégia de Governança Digital da Administração Pública Federal 2016-19 », *https://www.governodigital.gov.br/documentos-e-arquivos/egd-estrategia-de-governanca-digital-da-administracao-federal-2016-2019.pdf/at_download/file*, mars 2016, disponible sur http://bibliotecadigital.economia.gov.br/handle/123456789/1021 (Consulté le 31 octobre 2023).

[524] In 2014, the OECD, in a digital transformation report advised Brazil to implement public management practices and the OECD's strategic recommendations on the subject. There is, in any case, an acquiescence in the literature on digital government in Brazil that the EGD results from the various analyses and suggestions promoted by the OECD.

[525] Per its webpage, "*as of 2015, the 'e-government' paradigm, which brought about the computerization of internal work processes (an internal view), evolved into the concept of 'digital government*'.

the federal public administration (encompassing direct, autonomous, and foundational sectors[526]).

The "*Brazilian Strategy for Digital Transformation (E-Digital)*"[527], inaugurated in 2018, stands as another policy of the digital transition, introducing guidelines for the public sector and society, aimed at planning initiatives for the benefit of the digital transformation[528].

Conclusively, the regulatory framework underpinning Brazil's digital transformation is expansive, encompassing norms, laws, resolutions, and decrees promulgated since the early 2000s, all concentrating on e-government, transparency and information policies, alongside measures for social participation. Via Decree No. 9.319/2018, the Interministerial Committee for Digital Transformation (CITDigital) was established, in tandem with a National Digital Transformation System, both of which are run by the Civil House of the Presidency. Consequently, it does not constitute an autonomous or independent entity but rather a body affixed to a ministry. Brazil maintains a Secretariat, a body subordinate to a ministry, tasked explicitly with the digital transformation of the state.

Among the normative provisions on the subject, the following are listed as the main provisions: ***i)*** Federal Decree No. 8,936/2016, which inaugurated the Digital Citizenship Platform; ***ii)*** Federal Decree No. 9,094/2017, which introduced procedures for simplifying public service; ***iii)*** Federal Decree No. 9,319/2018, which established the National System for Digital Transformation - SinDigital; ***iv)*** Federal Decree No. 9.756/2019, which created the unified citizen authentication solution; ***v)*** federal Decree No. 10,332/2020, which reflects the Digital Government Strategy for the period from 2020 to 2022, within the organs and entities of the direct federal public administration, which can be described as autarchic and foundational; and ***vi)*** federal Decree No. 10,996/22, which promoted specific changes in the Digital Government

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[526]The triennium 2020-2022 has its text in force through Decree no. 10,332, of April 28, 2020. Furthermore, the EGD brings the objectives for the triennium, platforms and integrated services - within a perspective of interoperability, public services considered as "*of the future and emerging*". R.F. BRASIL, « Estratégia de Governo Digital 2020-2022 », s.d., disponible sur https://www.gov.br/governodigital/pt-br/EGD2020/estrategia-de-governo-digital-2020-2022 (Consulté le 18 octobre 2023).

[527]According to Art. 1° the E-digital is composed of the following axes: enabling and digital transformation. The document aims to establish coordination among various actors. It comprises thematic axes, with 100 initiatives planned to be implemented. The transformation axes are placed together with the enabling axes. The transformation takes place through a data-driven economy (open data system); the world of connected devices (IOT); new business models (digital economy); and citizenship and government. S.-G. REPUBLICA (PR), Decreto nº 9.319, de 21 de março de 2018, *op. cit.*

[528] The Digital Transformation Strategy of services is predicated upon the execution of digital plans, enumerating services provided by all public administration bodies.

Strategy for the period from 2020 to 2022. Despite this extensive body of legislation[529], it is pertinent to assert that the paramount legislation concerning digital transformation emanates from the Digital Government Law. This statute, established through the publication of Law No. 14.129/2021, is perceived as a strategic response to the recommendations proffered by the OECD[530].

In summary, it is evident that a particular type of legislation regarding digital government has prevailed, intended to be applied at the federal level. Consequently, the aforementioned standards form the normative framework pivotal for the Brazilian digital government. Scrutiny of these documents, in the light of the instantiated policies, reveals the predominant objective to be fundamentally economic, embedded within the logic of *good governance*.

§2 The inadequacy of the good governance political action in Brazilian's digital transformation policies

An examination of pertinent documents reveals a trajectory in Brazilian public governance that is decidedly favors the perpetuation of practices of *good governance*. In articulating a policy premised upon *good governance*, tangible actions consistent with this ethos are brought to the fore. This outcome is perceptible within the very axis of Brazil's digital transformation initiatives. The EGD, to illustrate this point, represents a state policy that, since its inception in 2016, has persevered, albeit undergoing modifications[531]. The excerpt reveals that the objective

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[529] Other normative documents that relate to the theme: the Law No. 12,965, of April 23, 2014 (the so-called "Marco Civil da Internet") the Decree No. 8,771/2016, which regulates it. Also, Law No. 13,709, of August 14, 2018 ("General Law of Protection of Personal Data - LGPD"), Law No. 13,655, of April 25, 2018 ("Security Law for Public Innovation"), and Law No. 13,874, of September 20, 2019 ("Declaration of Economic Freedom Rights").

[530] V.R.L. do VALLE, *Governo digital e a busca por inovação na Administração Pública: A Lei 14.129, de 29 de março de 2021*, Belo Horizonte, MG, Editora Fórum, 28 septembre 2021.

[531] According to the government website, "*One of the major objectives of the EGD is to converge the efforts of infrastructure, platforms, systems and services of the agencies that make up the System for the Administration of Information Technology Resources of the Federal Executive Branch (Sisp), contributing to increase the effectiveness of the generation of benefits for Brazilian society by expanding access to government information, improving digital public services and increasing social participation.* R.F. BRASIL, « Estratégia de Governo Digital 2020-2022 », *op. cit.*

of the program is to increase the ***"effectiveness"*** of generating benefits, accomplished by way of three strategies, *access to information*[532]; *service* delivery[533], and *social participation*[534].

Examining these strategiesand the digital transformation also reveals other shortcomings of the Brazilian digital transformation, which will imply the inadequacy of the governance model adopted. Thus, it is worth examining the relevant axis of transformation listed in the Brazilian policy, Access **(A)**, Services **(B)**, Participation **(C)**, as well as the shortcomings of the NPM **(D)**.

A. Access and inclusion

Access is perceived as the inaugural step of the digital transformation. Enshrined in Article 5, XXXIII, of the Federal Constitution, access to information is regarded as a fundamental right, guaranteeing all citizens the entitlement to procure information pertinent to their individual interest from public entities. Notably, access emerges as a paramount consideration within Brazilian policies. Although Brazil has the fifth largest number of Internet users in the world[535], it ranks 49th[536] in the United Nations digital government index 2022. The viewpoint that access remains a pivotal component of governance is underscored by the Federal Audit Court, which emphasized that the process "*continues to be in an implementation phase within the federal public administration, particularly in the Federal Executive Branch"*[537].

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[532]Improving the supply and use of open data; use of decrees in order to promote transparency and publicity by public founders

[533]Promotion of public services and expansion of its supply through digital transformation, sharing and integration of processes, systems, services and data infrastructure

[534]Its goal is to "*guide and integrate the initiatives related to digital governance in the direct, autarchic and foundational administration of the Federal Executive Power, contributing to increase the effectiveness of generating benefits for the Brazilian society by expanding access to government information, improving digital public services and expanding social participation.* B.M. do PLANEJAMENTO et O. e GESTÃO, « Estratégia de Governança Digital da Administração Pública Federal 2016-19 », *op. cit.*

[535] Information about 2022, in a report disclamed at Forbes. A. BARBOSA, « Brasil já é o 5° país com mais usuários de internet no mundo », *Forbes*, s.d., disponible sur https://forbes.com.br/forbes-tech/2022/10/brasil-ja-e-o-5o-pais-com-mais-usuarios-de-internet-no-mundo/ (Consulté le 31 octobre 2023).

[536]The United Nations Reports shows Brazil at the group "Very high" in e-government. In 2018, Brazil was ranked 44th in the world in terms of e-government, a position it lost in comparison to the previous report conducted in 2018. The Survey assesses the development status of the digital government of United Nations Member States, ranking countries to each other. It measures the digital government's effectiveness in providing public services and identifying digital development patterns and performance patterns. UNITED NATIONS, *The future of digital government*, United Nations e-government survey, n° 2022, New York, United Nations, 2022.

[537] T. de C. da U. TRIBUNAL DE CONTAS DA UNIÃO, Acordao 1784/Plenário, 28 juillet 2021, disponible sur https://pesquisa.apps.tcu.gov.br/documento/acordao-completo/*/NUMACORDAO%253A1784%2520ANOACORDAO%253A2021%2520COLEGIADO%253A%2

In numerical terms, a substantial number of users is evident, which could imply extensive penetration among the population. Nevertheless, *access* and *inclusion* are not synonymous, and although access is a crucial component for both *good governance* and *democratic governance*, for the former, inclusion is not. A governance model steeped in managerialism is founded on individualism and entrepreneurism, indicating that its initiatives will not prioritize inclusion, but rather foster individualistic accomplishments.

This philosophy is apparent, for instance, in Decree No. 9.319/2018, which inaugurates the National System for Digital Transformation and order the governance structure to effectuate the Brazilian Strategy for Digital Transformation. Wherein access is identified as one of its foundational factors*: a) infrastructure, access to information and communication technologies: aims to expand of the population's access to the internet and digital technologies, with quality of service and economy*[538].Indeed, inclusion does not reside within the primacy rhetoric of *good governance* and, therefore, does not constitute a priority. Consequently, the reality of the Brazilian transformation, actualized within the managerialist model of *good governance*, prompts an augmentation of online apparatuses, as well as engendering disparity in access and utilization.

The Brazilian Federal Audit Court, within its evaluative report of the Brazilian federal digital transformation policy (Judgment 1784/2021[539] - Plenary), accentuated that the audit took note of regulations positing analogous competencies for diverse structures. Concerning the pandemic's impact, the audit observed advancements in efficiency due to digital transformation, advancements which remained unaligned to the population's access to digital means, thereby intensifying inequality.

These results highlight that this project has been implemented with a focus on access "*with a view toward the debureaucratization of public services provided by the State*"[540]. Similarly, the "*Federal Development Strategy*" addresses governmental planning aimed at future delineation of the Federal Public Administration. According to the document, its primary directive is to "*enhance the income and quality of life of the Brazilian population whilst reducing social and regional disparities*". Upon examining the challenges and guidelines stipulated in the document, the initial element primarily addresses the debureaucratization of services, followed

522Primeira%2520C%25C3%25A2mara%2522/DTRELEVANCIA%2520desc%252C%2520NUMACORDAO INT%2520desc/0 (Consulté le 7 novembre 2023).

[538] *Ibid.*

[539] *Ibid.*

[540] TRIBUNAL DE CONTAS DA UNIÃO, *Acordao 2569/2018-Plenario*, *op. cit.*

by investments in infrastructure, and finally provisions on digital inclusion[541]. The policy's concern, it is observed, is structured as a single element within a broader vision. Nevertheless, there exists no distinct policy expressly targeting digital inclusion and education.

It is no wonder, then, that the growth of the digital revolution has been accompanied by an increase in ***social inequalities***. Digital elites have been formed and an increase in social exclusion due to inaccessibility to ICT can be observed[542]. This circumstance results in a digital evolution unaccompanied by social development, a problem that is evident in Brazil. The realization of the *good governance* model thus culminates in digital transformation initiatives, wherein digital inclusion is not accorded prioritization in the political agenda. Within this framework, inclusion invariably succumbs to posteriority, subordinated to preoccupations of economic development and digital service delivery, conjoined with the debureaucratization of organizational machinery.

B. Public services

One of the relevant factors of the digital transformation is the provision of public services. According to the government's website, the goal is to "*transform the government by entering the digital age, offering better, simpler, more accessible and cheaper services to* citizens"[543]. The components considered essential for the provision of public services are set forth in Art. 18 and are I - the National Public Services Base; II - the User Service Charters, referred to in Law No. 13,460, of June 26, 2017; and III - the Digital Government Platforms. Upon scrutiny of the government's website, one notices that the proposal gravitates towards the enhancement of *simplicity* and *accessibility* of services through the employment digital technologies[544]. The purposes and strategies for the provision of public services also reveals an economic rationale, eschewing a commitment to service quality.

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[541] Challenge: expand investments in infrastructure" (item 3.3.1, page 29), bringing the following proposition for digital inclusion: "reduce the digital gap among the Brazilian population, promoting access to ICT services in economic conditions that enable the use and enjoyment of services;"

[542] N. COULDRY et U.A. MEJIAS, « Le colonialisme des données : repenser la relation entre le big data et le sujet contemporain », *Questions de communication*, 2022, vol. 42, n° 2, pp. 205-221, disponible sur https://www.cairn.info/revue-questions-de-communication-2022-2-page-205.htm (Consulté le 28 octobre 2023).

[543] Original : *Buscamos, com ela, oferecer políticas públicas e serviços de melhor qualidade, mais simples, acessíveis a qualquer hora e lugar e a um custo menor para o cidadão*. R.F. BRASIL, « Estratégia de Governo Digital 2020-2022 », *op. cit.*

[544] R.F. BRASIL, « Estratégia Brasileira para a Transformação Digital », *op. cit.*

While quality does permeate the discourse in isolated instances, it occupies a subsidiary position[545]. On the government website, for instance, it states that "*the goal of the Secretariat of Digital Government, responsible for the digital transformation of the Federal Government, is to complete the digitization of 100% of the Union's services by the end of* 2022"[546]. The policy, therefore, focuses on cost reduction and the digitalization of services.

The Digital Government Act, the Digital Transformation Project, and the official websites reinforce quantitative optimization. Notably, the government has prominently demonstrated the pursuit of the objective of the digital transition of services at the federal level. These results underscore an extensive transition towards the digitalization of services.

In alignment with description on the "*gov.br*" website[547], even preceding the advent of the coronavirus pandemic in 2019, over 515 services were digitally transformed by the federal government. Reports disseminated by the Bolsonaro government (2018-2022) likewise underscore the digital transformation within this period, particularly from a numerical perspective. According to the government's website, by the culmination of 2021, out of the 4,773,000 services proffered by federal agencies, 72% had undergone a digital transformation, a statistic purportedly corresponding to 91% of demands, further engaging 114 million users[548].

Nevertheless, *quality* does not necessarily accompany *quantity*. When considering the "*users*" engagement with these services, or even the quality-of-service utilization, outcomes diverge. Indeed, the manner in which Brazil's digital transformation has unfolded can be gauged by various rankings. While Brazil has made strides in the digital transformation of its government, ranking second in the World Bank's GovTech 2023 (up from fifth in the 2022 report), and climbing in the latest UN rankings (from 56th to 49th position), as well as in the provision of its own services (from 21st to 16th), the shortcomings of a project implemented under the logic

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[545] *Ibid.*

[546] *One of the major objectives of the EGD is to converge the efforts of* R.F. BRASIL, « Estratégia de Governo Digital 2020-2022 », *op. cit.*

[547] As for the Digital Transit License, it is offered by an application, in which there is the option of document management. The DTC is valid throughout Brazil in the same way as the Driver's License (CNH). To do so, the user of the service must install the CDT application on his cell phone, register, add the CNH on the page, which will be validated by a face validation. In other words, although there are amenities of the service provided, it does not exclude the need to perform the physical service that corresponds in the National Driver's License. The indicated level of digital conversion has therefore not been reached here.
A.C.A. VIANA et B.M. BERTOTTI, « Smart cities e o outro lado da moeda: a sociedade de vigilância », *International Journal of Digital Law*, s.d., disponible sur https://scholar.archive.org/work/gyielozurrhjzaug4q4e6krxpu/access/wayback/https://journal.nuped.com.br/index.php/revista/article/download/viana-2021/681/2177 (Consulté le 28 octobre 2023).

[548] R.F. BRASIL, « Um Governo Centrado no Cidadão », s.d., disponible sur https://www.gov.br/governodigital/pt-br/EGD2020/centrado-no-cidadao (Consulté le 18 octobre 2023).

of good governance are highlighted by the lack of progress in other dimensions[549]. A report published in 2023 by Ernst & Young revealed that only 36% of the population *trusts* the government[550].

Thus, just as Brazil is experiencing growth in digitization and the availability of services, the same cannot be said regarding the population's perception of this change. Already in August 2021, when the Brazilian Court of Audit published a report evaluating the Brazilian federal digital transformation policy (Judgment 1784/2021 - Plenary), this reality was confirmed[551]. According to the audit, flaws were observed in the lack of prioritization of the use of digital public services, in the face of an absence of a systemic vision on the transformation, which results in the limited use of services by the population, especially by the least favored. This insight, provided by the Court of Auditors, illuminates another facet of Brazilian digital transformation: participation. This further buttress the tendency toward the instrumentalization of ICT by a managerialist rationale.

C. Social Participation

If at the advent of open government, participation mechanisms were employed by governments, participation experiences have been progressively hollowed out over the years, notably as a result of shifts in political power. In 2018, the decree underpinning social participation faced revocation, and subsequent disassociation with societal instruments transpired through the adoption of other governmental policies. Therefore, a discernible decline in measures fostering citizen participation has been observed.

Brazil has been hailed as an *example* concerning mechanisms of social participation, especially in the early 2010s, largely arising from emancipatory projects enshrined in the constitution. However, the dismantling of these initiatives has been evident since 2018, which had led Brazil to fall from the 12th to the 18th position in 2020, a regression potentially attributable to the

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[549] W. BANK, « GovTech Maturity Index, 2022 Update: Trends in Public Sector Digital Transformation », décembre 2022, disponible sur http://hdl.handle.net/10986/38499 (Consulté le 31 octobre 2023) ; UNITED NATIONS, *The future of digital government*, *op. cit.*

[550] A. YOUNG ERNEST, « Brasil melhora na digitalização do governo, mas confiança da população ainda é baixa », *Ernest Young*, s.d., disponible sur https://www.ey.com/pt_br/agencia-ey/noticias/brasil-melhora-digitalizacao-governo-mas-confianca-populacao-baixa (Consulté le 7 novembre 2023).

[551] TRIBUNAL DE CONTAS DA UNIÃO, *Acordao 2569/2018-Plenario*, *op. cit.*

excision of various social participation programs. Still, the 2022 United Nations report, awarded Brazil in a better rank (11th), especially due the increase of consultations[552].

However, one cannot dismiss the governance model adopted, that of managerialism. José Sergio da Silva Cristóvam et al. observe that the Brazilian Federal Public Governance Policy considers participation as mere simulacrum, which, in their words, "*ultimately deviates from horizontal relational mechanisms*"[553]. The authors further state that this model more closely aligns with that of NPM than a genuine dialogic management model. This is primarily because, amongst managerialist models, NPM, despite its preliminary nature, remains tethered to a state-centric logic, within a rationale of competitiveness, avoiding interaction possibilities and perceiving individuals merely as users rather than as collaborators. Conversely, the managerialist model of new public governance, even though it draws inspiration from corporate frameworks, includes the potential for interaction between state and Society, thus fostering such an exchange.

An emphasis is warranted on the fact that although *good governa*nce encourages citizen participation, its focus rests on direct collaborations between public and private sectors. Meanwhile, mechanisms of participation are without an obligatory character, aligning with an interpretation of legitimacy derived from *an instrumental rationale.* Wherein the mere provision of mechanisms suffices to preserve the legitimacies of actions mobilized within various arenas. In this vein, and condensed within the practices of governance, the simple availability of policies and methodologies for social participation gains acceptance, given that priorities are meeting technical necessities, not in catalyzing substantial modifications through intersubjective biases in public arenas. As articulated by Possamai, although Information Technologies embody practices utilizing technologies for social participation, control, and

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[552] UNITED NATIONS (éd.), *The future of digital government*, United Nations e-government survey, n° 2022, New York, United Nations, 2022.

[553]One can see that there is a symbolization of public governance at the federal level, since the consolidated policy does not effectively provide adequate conditions for the practice, in the real scenario, of articulation between State, market and Society. It is relevant to point out that the governance policy of the federal public administration, despite containing guidelines to stimulate social participation, avoids the challenging task of determining effective arrangements for horizontalizing relations, which are indispensable in the logic of administrative democratization. J.S. da S. CRISTÓVAM, L.M.S.M. DE CASIMIRO et T.P. DE SOUSA, « Política de governança pública federal: adequação, modelo de gestão e desafios », *Direito Administrativo em transformação*, 1, 1re éd., Florianópolis: Habitus, 2020

transparency, they find themselves subordinate to a *broadcasting mode*—namely, *unidirectional employment*[554].

In fact, with regards to Brazils digital government, little attention has been given to the aspirations of society and the logic of citizen collaboration. That is, a *centralizing formula* prevails, which disseminates information instead of establishing *communication* with citizens. A typical relationship in the mold of managerialist management that sees individuals as consumers and users of organizations, built for industrial and mass structures, one, however, that does not explore the potential for connection between state and Society[555]. This creates a paradox, as the pursuit of efficiency and standardization, aided by technology, may result in ineffective digital government with negligible impact or utility for citizens[556]. In summary, the "*interactive*" essence, proffered by technologies, is poorly leveraged, marking a regression for the digital transformation.

D. De-burecrautisation

Information technology emerges not merely as a tool but a *pivotal* element in transformative initiatives. Despite the existence of policies, the Brazilian government persists in upholding its structural and rational framework, constructed for a mass-scale industrial world[557]. Upon mapping potential obstacles to the integration of digital government in Brazil, Vanice do Valle and Fabricio Motta highlight the influence of the bureaucratic model and potential conflicts with the principles of debureaucratization, flexibility, and innovation. Furthermore, they accentuate the idea of control, which struggles to normalize *the risks*. Such elements, however, are neither seized upon nor understood by governments. Consequently, a substantial *desynchronization* of a - heavy - state emerges in a digitalized and *hyper-fluidic* ecosystem. In essence, while disruptive technologies seek to implement innovative instruments, this endeavor is executed within archaic frameworks[558].

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[554] A.J. POSSAMAI et V.G. DE SOUZA, « Transparência e Dados Abertos Governamentais: Possibilidades e Desafios a Partir da Lei De Acesso À Informação », *Administração Pública e Gestão Social*, janvier 2020, vol. 12, n° 2, disponible sur https://periodicos.ufv.br/apgs/article/view/5872.
[555] D.A.N. JUNIOR, « Governo Eletrônico e Neoliberalismo », *op. cit.*
[556] K. LOPES, E. M LUCIANO et M. MACADAR, « Criando Valor Público em Serviços Digitais: uma proposta de conceito », décembre 2018, pp. 207-221.
[557] D.A.N. JUNIOR, « Governo Eletrônico e Neoliberalismo », *op. cit.*
[558] *Ibid.*

For Vanice do Valle and Fabrício Motta[559], overcoming these problems lies in the adoption of practices based on the principles of transparency, innovation and trust by the government. Similarly, Lucas Carvalho[560] highlights that the digital government paradigm advances in relation to electronic government, particularly through the adoption of an institutional coordination strategy and the expansion of the scope of its central actions, which are no longer limited to internal management improvement processes[561]. So, it is considered that Brazil needs to enforce greater efficiency in the public sector, along with greater participation, as well as to promote spaces for innovation[562].

As noted, the authors start from the perception that a bureaucratic management model is insufficient and inadequate for a digital government oriented to a governance logic. These principles, in fact, are essential. Transparency, trust, and innovation should be employed and taken as instruments of the vocabulary of public law for the digital state. However, it must be asserted that they are insufficient.

As illuminated by Dario Nogueira Junior, the essence of digital transformation is evident not merely in its utility but is also embedded in its *political ideology*[563]. In dissecting neoliberalism in Brazil, Luiz Filgueiras delineates a distinction between the political-economic model of the project and peripheral neoliberalism, showcasing the latter as the more particular mode of Brazil[564].

Consequently, digital transformation, although harboring elements of social participation, is intrinsically imbued with a neoliberal framework, centering not on interactivity or dialogue but on envisioning the individual as a consumer and deploying technologies for cost reduction. This unveils an additional quandary inherent to digital transformation. An investigation of its past implementation as public policy, its normative underpinnings, and recent experiences reveal

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[559] V.R.L. do VALLE, *Governo digital e a busca por inovação na Administração Pública*, *op. cit.*

[560] L.B. de CARVALHO, « Governo digital e direito administrativo: entre a burocracia, a confiança e a inovação », *Revista de Direito Administrativo*, décembre 2020, vol. 279, n° 3, pp. 115-148, disponible sur https://periodicos.fgv.br/rda/article/view/82959 (Consulté le 17 octobre 2023).

[561] In this sense is also José Cristovam that the federal governance policy should treat governance as a management model and be guided by "*participation and transparency, indispensable elements for* innovation. J.S.D.S. CRISTOVAM, L.B. SAIKALI et T.P.D. SOUSA, « Governo digital na implementação de serviços públicos para a concretização de direitos sociais no Brasil », *op. cit.*

[562] L.B. de CARVALHO, « Governo digital e direito administrativo », *op. cit.* ; V.R.L. do VALLE, *Governo digital e a busca por inovação na Administração Pública*, *op. cit.* ; J.S. da S. CRISTOVAM, L.M.S.M. DE CASIMIRO et T.P. DE SOUSA, « Política de governança pública federal: adequação, modelo de gestão e desafios », *op. cit.*

[563] D.A.N. JUNIOR, « Governo Eletrônico e Neoliberalismo », *op. cit.*

[564] F. FILGUEIRAS, « Indo além do gerencial », *op. cit.*

that the paramount objective of digital government in Brazil is to secure efficiency through a distinctly economic lens, as aforementioned[565].

The most recent legislative enactments in Brazil are regulatory mechanisms honed in on the repercussions of public managerial decisions, dependent on economic results (given this doctrine does not favor social objectives). A substantial segment of this doctrine supports an administrative law grounded in an economic analysis of law; a consequentialism focused on outcomes[566]. The novel statutes within the Brazilian legal architecture adhere to this reasoning. Law No. 14.129/2021, which instituted Digital Government in Brazil[567], was conceptualized entirely based on the rationality of outcomes, critically influenced by the NPM.

Nevertheless, academic discourse highlights that the decentralization of NPM has led to challenges for users of public services and other constituents of civil society, who have been entrusted with the task of consolidating public services into *usable* entities. In addition, this ideology has incurred exorbitant costs, subpar services, and the monopolization of government contracts by a limited consortium of companies[568]. It persists in advocating intensified administrative action centered on efficiency-oriented practices[569].

In essence, the digital transformation operates within a quantitative, economic framework, prioritizing cost reduction and neglecting interactive dimensions, focused exclusively on economic outcomes without consideration for social inequalities. It can be succinctly concluded that the digital transformation in Brazil is economically oriented[570].

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[565]The transformation improves government efficiency. Anvisa's 950 employees nationwide worked on the International Certificate of Vaccination and Prophylaxis. That leaves 258 employees. The employees were transferred to higher demand, more complex areas P.Gov. br M. da G. e da I. em S.P. REPUBLICA (PR), « Histórico — Governo Digital », *Gov.br*, s.d., disponible sur https://www.gov.br/governodigital/pt-br/estrategia-de-governanca-digital/historico (Consulté le 4 novembre 2023).

[566]A study evaluated the foreigners most cited by Brazilian administrators over a period of ten years. The results prove the tendency of the economic analysis of law and consequentialist theories as the predominance of studies. E. JORDÃO, « Quais estrangeiros fazem a cabeça dos nossos administrativistas? », *JOTA Info*, 13 avril 2021, disponible sur https://www.jota.info/opiniao-e-analise/colunas/publicistas/quais-estrangeiros-fazem-a-cabeca-dos-nossos-administrativistas-13042021 (Consulté le 4 novembre 2023).

[567] The caput of the first article of the law leaves no doubt as to the desideratum of the norm, which provides guidelines and principles of Digital Government aimed at public efficiency.

[568] R.P. de SOUZA, « Em busca de uma administração pública de resultados », *Controle da administração pública*, 2017, pp. 406-24, disponible sur https://repositorio.usp.br/item/002805017 (Consulté le 4 novembre 2023).

[569] M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, 1re éd., *op. cit.*

[570]In 2019, 28 agencies have made more than 500 public services digital. This transformation generates massive value. The reduction of $345 million in annual government spending could fund 156 new emergency care units or 182 daycare centers. Access to government at any time, from anywhere, has already saved citizens 146 million hours a year in travel, queues and bureaucracy. It's like giving the people of Rio de Janeiro two extra days of work a year P.Gov. br M. da G. e da I. em S.P. REPUBLICA (PR), « Histórico — Governo Digital », *op. cit.*

The search for de-bureaucratization also shines light on the actuality that the regulatory framework is more akin to a project of internal relationships and efficiencies of the administration's organizational activities. Hence, the managerialism framework not only stands at odds with the ethos of digital government but also significantly curtails its potential, masquerading under the guise of purported, yet unrealized, efficiency[571]. Furthermore, its incompatibility with digital government is underscored by the relational nature of the latter, which accentuates collective interests, whereas NPM is predicated on individualistic pursuits[572].

In this vein, it can be stated that the academia that focuses on efficiency warrants reconsideration. Even when perceived through the lens of efficiency within a societal narrative[573], the principle itself beckons reevaluation, given its inextricable association with a particular rationale – the managerialist – characterized by a results-focused managerial model.

Moreover, the invocation of efficiency has become an obsolete tool in public management and the literature of political science. Herein, efficiency transcends a mere terminological presence in political and organizational discourse; within the jurisdictional domain, it acquires a distinct nuance in correlation to the constitutional framework. Hence, it is imperative to postulate the existence of strong doctrine that recognizes the transition from government to a governance paradigm. Nonetheless, envisaging and establishing a governance model[574], inspired by Anglo-Saxon governance, results in fostering hyper-individualism within public realms — which is not feasible.

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[571] B. BOZEMAN, « Public-Value Failure: When Efficient Markets May Not Do », *Public Administration Review*, 2002, vol. 62, n° 2, pp. 145-161, disponible sur https://www.jstor.org/stable/3109898 (Consulté le 17 octobre 2023).

[572] S. ZUBOFF, *The age of surveillance capitalism*, *op. cit.*

[573]This is the case, for example, of José Cristiovam: *Therefore, the Constitutional Principle of Efficiency and good administration are the driving springs for the application of information and communication technologies in administrative action. They constitute fundamental legal incentives for innovation in social rights and, as an effect, in public services, which are considered to be economic activities that are incumbent upon and owned by the state - exercised directly or indirectly - under the regime of public law. "It is not difficult to agree with the statement that public services constitute an instrument for the realization of fundamental social rights."* T.P. de SOUSA, J.S. da S. CRISTOVAM et R.C.R. MACHADO, « Constitucionalismo e administração pública digitais: inovação tecnológica e políticas públicas para o desenvolvimento no Brasil », *Revista Brasileira de Políticas Públicas*, septembre 2022, vol. 12, n° 2, disponible sur https://www.publicacoesacademicas.uniceub.br/RBPP/article/view/7830 (Consulté le 4 novembre 2023).

[574] José Faleiros Junior highlights the transition to governance, relying on the Anglo-Saxon tradition, indicating that what is relevant is how it affects the fulfillment of state activities.J. FALEIROS JUNIOR, « Governo eletrônico, de performance e digital: qual é o melhor arquétipo conceitual para a Administração Pública do século XXI? », *Revista da Procuradoria-Geral do Município de Porto Alegre*, 2022, vol. 1, n° 1, disponible sur https://www.academia.edu/94480011/Governo_eletr%C3%B4nico_de_performance_e_digital_qual_%C3%A9_o_melhor_arqu%C3%A9tipo_conceitual_para_a_Administra%C3%A7%C3%A3o_P%C3%BAblica_do_s%C3%A9culo_XXI (Consulté le 4 novembre 2023).

It is postulated, instead, that the path should *turn*. Namely, the transformation towards digital governance by governments should unfold with a commitment to accommodate the rationality of a network-oriented governance model, one which elevates public values above outcome-centric efficiency.

Section Considerations

As aforementioned, the thesis proposes a study of *concepts* and their *correlations*, especially the categories that make up a given *imaginary,* which can help identify models, in ideal types, that constitute the logic of Brazilian digital transformation and public governance policies.

The governance paradigm is an imaginary accompanied by its elements. In turn, as both *democratic governance* - and *good governance* - managerial *governance*- employ common concepts, the adoption of the managerialist model using similar nomenclatures, such as transparency and openness, suggest an apparent attention to the social aspect, one however, that has not materialized.

It is thereby observed that digital transformation of the Brazilian state was initially instrumentalized within the managerialist logic and has remained within such confines. Although open government serves as a conduit for digital transformation oriented towards citizen participation, the legal frameworks and executed policies prioritize the methodologies of *good governance* over socially oriented models, which remain largely cosmetic. Consequently, it can be asserted that the instituted policies predominantly focus on efficiency and outcomes for public administration.

These results-based policies are aligned, as demonstrated, with the *pragmatic juridical turn* defended by an element of the Brazilian publicist doctrine, which encourages a combination between "*effectiveness and optimal results*" in the public sector, from which the manager assumes his *responsibilities*.

While models for participation and interaction are instituted, they are not accorded priority. Not by chance, scholarship has already identified that not only the policy is managerialist, but also that the projects of *democratic governance are* not seriously adopted. That is, the conception of public governance in the mentioned decree "*diverges, in terms, from the construction of*

governance that foresees participation as an indispensable element, which makes the federal governance policy symbolic and close to the NPM *theory*"[575].

Conversely, *good governance* utilizes technological tools to instantiate managerialist practices within the public sector. Additionally, given the managerialist nature of the employed management model, the political and public discourse surrounding digital transformation ultimately fails to incorporate the concepts integral to the imaginary of the government model. Elements of authority and public interest, pivotal categories within this imaginary, are absent within digital governance models, which accentuate outcomes and the assurance of efficiency. In essence, they reinforce the managerialist logic, aligning with the prevailing trend of results-oriented management.

This trend also reflects the absence of concepts related to government and bureaucracy. That is, concepts that are *categories of* the traditional model of authority, which guaranteed the *public interest.* In the Public Governance Policy Decree, for instance, public interest is mentioned tangentially as one opportunity, isolated, within the definition of *public value,* which, in turn, also boils down to a *logic of the result*[576]. In other words, the basic elements of the government model, and their correlations, are not employed to the full extent of their potentiality.

This reveals an important point: that governance and digital transformation policy in Brazil already operates within the *governance* paradigm, implemented by way of the concepts and vocabularies proper to public management, notably the managerialism that stems from the political action of *good governance*. There are, in turn, no political projects of governance that are linked to traditional management models, or even methods of social relations established within the government model, i.e., authoritarian and public interest.

Thus, it can be concluded that the digital transformation model of Brazil operates within a specific ideal type, named here *good governance,* which translates into managerialist management models which focus on *the result* and have as their principles, *efficiency and debureaucratization*.

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[575] J.S. da S. CRISTOVAM, L.M.S.M. DE CASIMIRO et T.P. DE SOUSA, « Política de governança pública federal: adequação, modelo de gestão e desafios », *op. cit.*

[576] S.-G. REPUBLICA (PR), Decreto nº 9.203, de 22 de novembro de 2017, 22 novembre 2017, disponible sur https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/d9203.htm (Consulté le 1 novembre 2023).

Title considerations

The present title aimed to demonstrate the deficiencies of the *public law of power of authority* and the inadequacy of the *public law of good governance* in designing a digital state situated in a data society. The research proceeded by employing ideal types, using specific concepts as categories, and seeking correlations between them. Instead of dealing solely with the study of the legal content that constitutes public law, an interdisciplinary approach was adopted, integrating the discipline of general theory of public law, including a particular emphasis on *political action* and the categories that define such models and their interconnections.

The discipline of public law was examined with attention to the mutations and peculiarities of *social relations*. Further, the state's digital transformation was scrutinized, focusing on the Brazilian transition towards an ideal type model of *political action*. By examining *correlations* between *institutions*, *legal norms*, and *social relations* evidence was found that the authority-based power of public law was a corollary of the modern state's model of political action. This model was designed with attention to the structure of modern industrial society, guided by the ***code*** (orientation) of *individual autonomy* and the metaphor of the *modern subject machine*. Significantly, the incompatibility of authority-based public law lies precisely *in the imaginary* that inspired it, that of the rational subject as a machine. This is as the information society embodied the imaginary of cybernetics and the network paradigm.

Several ***essential distinctions*** separated the imaginary of the machine from that of cybernetics. The modern machine was artificial, seeking materialization through the emergence of the subject and its comprehensive protection. They was furthermore, characterized by scientism and rationality, leading to a desire to conceive the world in isolation, prioritizing the self over the collective and individual autonomy over the space and environment in which one lives. The pursuit of emancipation led to the quest for freedom, while such separation resulted in the establishment of objective sciences. Consequently, law transformed from a relational and practical science into a static, substantial, and autonomous ontology. Modern law became law for the protection of individuals, reaching its zenith in solid modernity characterized by pure dichotomies, ultimately culminating in positivistic law and the construction of public law towards this modulation, emphasizing the primacy of the individual.

Cybernetics, on the other hand, introduces an imaginary that revolves around *interaction.* Unlike the machine imaginary that separates and opposes elements, cybernetics emphasizes the interactive nature of all actors, including humans and machines. It is an imaginary that brings

back the notion of hybrids and calls for a renewed relational perspective of law, which was overshadowed during the modern era. Furthermore, the contemporary scenario necessitates a confrontation with the modern subject, a category absents in the previous governance model.

The advent of the *network paradigm* unveils *new social rel*ations. Moreover, the fragmentation of the unified perception of sovereignty, a category that underpins the ideal type model of modern governance and political action, influences the emergence of the postmodern political action model. This emergence entails transformations for the concepts aligned with the political and public action models.

Modernity, its imaginary centered around the primacy of the individual and individual autonomy, undergoes diverse transformations within the realms of *autonomy and sovereignty*, namely, *freedom and authority*. The fragmentation of sovereignty prompts the consideration of *interdependent* and *interconnected* models of political action that correspond to *society's autonomous processes*. Consequently, one can envision a civil society that engages in the political sphere through participatory mechanisms, forming a social sphere referred here as the societal sphere, which has been a component of Brazilian law since the introduction of the federal constitution.

Self-regulation of society affects the creation of internal rules by private individuals, their collaboration with the state in public affairs, while respecting their autonomy, as well as the gradual imposition of quantitative principles in the public sector. By embracing hyper-individualism, this approach does not prioritize the socio-political bias, as it deems itself capable of self-regulation and opposes social and collective rights due to its utilitarian nature. Conversely, within their autonomous space, the individual perceives themselves as autonomous in all spheres, bereft of the need for dependence on an authoritative figure and, therefore, without the need for a representative of the public interest.

The state's digital transformation is established through the managerialist model, the political action of *good governance*, and the implementation of instrumental reasoning within the public sector, ultimately rooted in individualism. However, despite mechanisms to implement the societal sphere, these are not given priority, while digital inclusion is also considered secondary. Moreover, the social management approach fails to introduce models of organizational or bureaucratic transformation, thereby representing a lack of mutations in the government structure. This scenario clearly illustrates the inadequacy of the *good governance* model in

Brazil, a country marked by significant inequality where policies cannot and should not relegate inclusion to a secondary position.

In sum, it follows that:

i) the public law of authority correlates with the *political action* model of *sovereign government,* and, consequently, with all the elements that compose it (*bureaucratic, authority, public interest, vertical relations*). This already reveals its incompatibility with the other government models, those of distinct natures and clearly of divergent imaginaries. However, it is precisely this model of government, still bureaucratic, that the literature, studies, and various reports point out to be most similar to the organization's practice (notably the bureaucratic structure);

ii) the *public law of governance,* can either align itself with a consensual model of *democratic governance – societal* -, or with that of *good governance* (hyper-individualistic), concerning the former, the methods of interaction with the state derive from the space considered social. The second, on the other hand, employs the governance model of new public mangeament and public governance. However, while new public management is linked to the imaginary of the machine, of industrial relations, the nature of public governance is that of cybernetics, even though its focus is results and efficiency. The literature demonstrates that there is a strong defense of public governance, beyond the mechanisms of digital transformation employed - to a great extent - within the logic of managerialism, especially as they do not enhance the participatory approach, nor are concerned with the inclusion of society in the digital ecosystem. Therefore, this interpretation is flawed as it does not explore the potentialities of transformation, while also placing individualistic readings in a reticular space.

Given the incompatibility of one model and the inadequacy of another, it becomes imperative to reconsider the legitimization of state action. Therefore, if the public law of the modern state was crafted with a focus on the static categories of the modern machine from which authority emerged, the model of the postmodern state is situated within a framework that recognizes the plurality of actors. The upcoming title will endeavor to explore just this, founded on the characteristics of this novel environment and society, seeking to establish a public law suitable for a model of political action in the digital state.

Title 2. The Digital State, a reality that requires a convergent framework structures

> *"We are all 'individuals in law', called to seek individual solutions to socially generated problems. If there is a chance to solve socially generated problems, the solution can only be collective".*
>
> Zygmunt BAUMAN[577]

The philosopher Zygmunt Bauman has asserted that society has undergone a "*liquid modernity*," as the chimera of pure and solid modernity has been broken. According to him, the advancement of society doesn't simply depend on individual empowerment, but on collective decisions that affect the community. On the basis of this perception, the purpose of this title is to examine an ideal type of political action for a data-dependent society, the "Digital State", and the adaptations of public law to such conditions.

Title 1 explored the correlations between the state, social relations and the law, based on models of political action in ideal types, namely, the sovereign government of the modern state and the governance of the postmodern state. It elucidated that the legal rights emanating from authority were defined as the power of the state, centralized around the pivotal concept of public interest, a direct corollary of the model of political action. This domain of public law was shaped for the modern subject, aimed at safeguarding individual autonomy through the concept of freedom. Consequently, the modern state, sovereign government, individualistic society, and the public rights of authority were determined as interconnected categories. Furthermore, the public actions of authority find their roots in external legitimization, possessing negative validity in an autonomous legal system, characterized by unilateral legal relationships.

The realm of public law affiliated with the postmodern model of political action corresponds to governance. Within the paradigm of good governance, public actions originate from *consensus*,

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[577] Z. BAUMAN et X. DE LA VEGA, « Vivre dans la « modernité liquide » »:, *L'Individu contemporain*, Éditions Sciences Humaines, 2014.

procedural developments, and contract theories with the legitimization of public interest being superseded by performance, efficiency and results.

Conversely, democratic governance is a deferral of the Brazilian constitutional framework, materialized through consensus in procedural advancements and democratization. While societal approaches conceive the public domain as an arena of democratization, the confines of *good governance* embody the hyper-individualistic rationale of instrumental reason. Finally, procedural actions supplant the unilateral legal relationships between state and Society.

It is within this scenario that the digital transformation of the state emerges.

Thus, the **Present Title** strives to unveil the characteristics of an ideal type, which will be contrasted to, that which was previously analyzed .

The pursuit commences by taking new approaches to *political and public action models into account*, as well as a concomitant public law, aspiring to bridge the gaps identified the preceding Title to a network ecosystem and a data emergent society.

The acknowledged gaps in the earlier Title correspond to:

i) Concerning the *sovereign government* model, an incompatibility exists between the inherent *imaginary* — the rationality — orchestrating the institutional arrangement of social, political, and economic relations. As well as the perception allocated to concepts, tethered to a rationalist, scientific model, envisioned by and for the rational, individualistic subject.

In this vein, both *the pyramidal design* and *the dichotomous code* of the individual's prevailing private legal depositions are irreconcilable , including the autonomous arrangement of law and additional disciplines of digital state actions;

ii) Pertaining to the *good governance model*, the misadaptation of its form relates to the value/objective/purpose nestled within the scope of political and public actions, namely, those geared towards efficiency, result-oriented management, emanating from rationalist positions, in addition to the expansion of the individual in the public realm. Whereas the initial model gains its legitimacy from the sovereignty, the latter instills private objectives within the public milieu.

Moreover, both safeguard the *antagonistic relations* between state and Society, which prove inept at navigating the nuances of an *inherently reticular environment*, demanding a recalibration and adaptation of legal stances to actors and their actions. Cyberspace and the

society encapsulate visions congruent with its nature and particularities (network, connection, and interactivity).

Against this backdrop, the proposition – as aforementioned - unfolds to examine the public law of the digital state through the lens of the cybernetic imaginary. Just as a public law of authority is linked to the political action of the modern state — the sovereign government —, the hypothesis herein contemplates the public law of the digital state through fundamental characteristics inherent in its own rationale, rooted in an interactive and relational vision.

This exercise must be conducted in the same manner as the **First Title**, by examining the *correlations* among *categories* within an *inherent imaginary*.

Additionally, as established in the **First Title**, public law encompasses *political and public dimensions*, both *interconnected* and mutually dependent, reliant *on the code* set within an imaginary.

In essence, public law here discerns the nexus and relationship between political and public action, given it begins with ***state actions.***

Hence, the following trajectory may be defined:

1. The digital state, as an ideal type of **political action,** is delimited as **network governance**, apprehended through the informational paradigm, in the code of a *data-dependent society*. Thus, it departs from the machine imaginary and the rational subject. While governance signifies plurality (as opposed to a unitary perception of government), which curates interconnectedness, interdependence, and processes of power mutations; network signifies a relational nature, which aligns with the cybernetic imaginary and underpins the formation of institutions and norms, as well as the mutation from autonomous law to a relational perspective of law **(Chapter 3)**.

2. **Public action**, in turn, will be examined through the public value management model. Public value, refers both to a *category* of public management and represents an independent *concept* , which is defined as equivalent to the notion of common good, which, in turn, will be comparable to Brazilian's juridical notion of public interest.

As a *governance* model, its legitimacy will be intrinsic, and to verify its validity, it will rely upon criteria which differ from those of *good governance*. Thus, legitimation *by consensus* derives from effective participation (*communicative*) and *responsibilities*, by interpretation of the common good, public value and public interest **(Chapter 4)**.

Chapter 3. Defining public law of "the common good" for a Digital State model

The **First Section** examines the emerging phenomenon of data-driven government dynamics and the attempts to identify a political action model *(networked governance)* which reflects these characteristics, while not losing sight of data societies normative gaps .
The Second Section defines the *public law of the digital state* by using the *material criterion* of public law from a relational perception, oriented towards "*res publica*", and the "*common good*". In both governance and administrative procedures, the common good is the primary justification and guiding principle.

Section 1: The emergence of the data society as a vector for the development of the digital state's political action

Shoshanna Zuboff[578], highlighting the historical relevance of the contemporary revolution, narrates that at the time of the industrial revolution of electricity in 1912, Thomas Edison presented his vision of a new industrial civilization to Henry Ford. Which denotes a precise model of mass production - to all - establishing capitalism's dominance as the basis for creating wealth in the modern industrial society of the 20th century. Max Weber explains, in the same vein, that from the concentration of modes of production and a calculable legal system, an administration could be defined in terms of formal rules[579]. All of these structures, which correspond and exhibit similar patterns, were formulated within systems oriented ***towards the individual***. Proceeding on the basis of this inference, Shoshana Zuboff contends that society is the course of a confrontation similar to that of 1912. This association, for the purposes of this research, may be characterized as the ***data society***[580].

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[578] S. ZUBOFF, *The age of surveillance capitalism : the fight for a human future at the new frontier of power, Country: GB20 cm. Notes bibliogr. pages 537-663. Index.*, London, Profile books, 2019
[579] M. WEBER, J.M.M. de MACEDO et A.F. PIERUCCI, *A ética protestante e o espírito do capitalismo*, 17. reimpr., São Paulo, Companhia das Letras, 2017
[580] S. ZUBOFF, *The age of surveillance capitalism*, *op. cit.*

Data is nothing new, it has played an integral role in assisting our understanding of, for instance, the happenings of the universe and the Earth's climate[581]. Still, "*data is not just telling you what is happening in the world (...) it is also telling you where the world is going*"[582].

Previously perceived as a mere auxiliary resource for study or analysis, data is now acknowledged as a *reusable* asset, the significance of which *depends* on its utilization and mobilization, as well as the context in which it is amalgamated with other data[583]. In sum, *data* not only *constitutes* but also *creates* digital ecosystems[584].

Hence, the following is a proposal for a model (*in ideal type, specifically for theoretical purposes for a correlation exercise)* of political action of the "***digital state***", formatted under consideration of the *data society* **(§1).** Thus, it aims to identify appropriate approaches and then delineate a model of political action of the digital state **(§2).**

§1 The emergence of network governance for a digital state

Within the realms of political science, public management, and similarly within certain streams of economics, several propositions will be suggested for the usage of data in a networked ecosystem **(A)**[585].

Therefore, it is pertinent to consider alternative approaches regarding governance, in order to subsequently outline the model to be adopted **(B)**.

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[581] The facilities of public data mean that today, for example, anyone can access real-time statistics on weather and atmosphere by NASA N. EARTH SCIENCE DATA SYSTEMS, « Earthdata | Earthdata », 26 octobre 2023, disponible sur https://www.earthdata.nasa.gov/ (Consulté le 27 octobre 2023).

[582] L. GITELMAN (dir.), *« Raw Data » Is an Oxymoron*, The MIT Press, 2013

[583] A. BEAULIEU et S. LEONELLI, *Data and society: a critical introduction*, London, Sage Publications Ltd, 2022, p. 143

[584] As stated by Boot Lee, "*Data is now becoming a proxy for reality itself-beyond everywhere, it is becoming everything.*" L. BOOT, « Lisa Gitelman's Raw Data Is an Oxymoron Revisited For a Pandemic », *Rhizomes*, juin 2020

[585] Mariana Mazzucato highlights that the question lies contemplating about a better platform economy, and what kind of environment is needed to produce that. In this sense, theorists of the innovation economy states that the legitimacy of capitalism lies in ensuring that the wealth made by the few generates benefits for the many. M. MAZZUCATO, « Reimagining the Platform Economy », *Project Syndicate*, 5 février 2021, disponible sur https://www.project-syndicate.org/onpoint/platform-economy-data-generation-and-value-extraction-by-mariana-mazzucato-et-al-2021-02 (Consulté le 27 octobre 2023).

A. Open government Data and Digital Government

Chapter 2 demonstrated that the "open government" model initiated a pivotal shift in the digital transition process. Despite borrowing from the foundations of the former model, open government data alters this trajectory, thus deepening the transition.

Indeed, digitization roots itself in an ecosystem that positions the interconnected user at the heart of the apparatus. Herein lies a feasible platform for interaction, placing the citizen at the forefront. However, a government that proposes to be open to and by data no longer places the citizen as its nucleus; rather, data itself becomes the focal point. This shift is radical because the emphasis is no longer on an institution or individual — a figure — or even citizens. The epicenter of government in cyberspace becomes the element that constitutes this environment: ***data***[586].

The intention behind data openness transcends merely permitting citizens to enact social control or individuals to collaborate; it unveils data for governments, public agencies, individuals, citizens, and companies to utilize, reuse, share, and corroborate within this framework. Thus, a government saturated with data provides not only for data storage and openness but also for ensuring this data becomes accessible for utilization throughout an entire ecosystem.

The literature highlights an "*end-to-end digitalization process, which relegates traditional methods of electronic governance to obsolescence, shifting from a mere focus on efficiency to "joint construction*" [587]. Accordingly, within the public sector, the emergence of a data society will necessitate a transformation in the data-administration relationship, positioning it as the center of the ecosystem, as established. Consequently, the government must reconfigure its structure to harness this potential. These are phenomena unanticipated by open government and traditional bureaucratic administrations alike, indicating that the data society is introducing new, *uncharted demands.*

Therefore, increasingly open data and the exchange of information also demands that governments contemplate which type of organization *and infrastructure is the most* suitable

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[586] W. GILLES et I. BOUHADANA, « L'effectivité du droit des données et des gouvernements ouverts », *Revue Internationale de droit des données et du numérique*, 2020, vol. 6, pp. 1-20, disponible sur https://core.ac.uk/download/pdf/322501057.pdf (Consulté le 26 octobre 2023).

[587] B. BOUNABAT, « From e-Government to digital Government: Stakes and Evolution Models. », *E-Ti: Electronic Journal of Information Technology*, 2017, vol. 10, n° 1, disponible sur https://search.ebscohost.com/login.aspx?direct=true&profile=ehost&scope=site&authtype=crawler&jrnl=11148802&AN=129502200&h=OySyau7DyGyCG5yEFW7G19wHLfdNsuOmajXS6UMWdRjhveaXY4xVJandg8LtxmQvX4vsBntsQF7YK6xOelAnIQ%3D%3D&crl=c (Consulté le 26 octobre 2023).

to these peculiarities. To begin *quantity and storage present an issue.* In Weberian-style bureaucratic organizations, the storage and use of information was limited. The *information* regime was based on data compression, which led to high information loss[588]. Data was an expensive commodity, difficult to store, which required a system of information technology of a massive scale[589].

The digital transformation changes this context. Namely, because the administration finds itself in the "*data Himalayas*"[590], where public administrations collect and store large amounts of data not only about institutions but also about citizens. However, unlike private companies, much of the information that is under the domain of the administration is disconfigured, or disorganized[591], which, in fact, reveals that the *amount of* data alone is not sufficient.

Furthermore, the digital policies and regulations of government provide guidelines to implement government as a platform and promote the use of anonymized data by individuals and legal entities from various sectors of society.

In this view, the Brazilian government considers open government data as a "*methodology for publishing government data in reusable formats*"[592] for the purpose of increasing transparency and citizen participation, as well as promoting collaborative actions by society. This definition, as it turns out, highlights the *procedural* nature of government driven by data such as open government, which laid the fundamental foundations for the process of openness.

However, between the *posited devices*, the *imagined policy* and *management* norm posited, *and reality,* there are numerous discrepancies. Accordingly, data is not only comprised of immense volumes but is also predicated on the employment of appropriate technology, and the requisite knowledge thereof. Thereby necessitating the existence of suitable spaces, instrumentalities,

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[588] P. DUNLEAVY, « Information regimes in government bureaucracies and "digital decompression" », in, University of York, York, United Kingdom, 12 avril 2022, disponible sur http://eprints.lse.ac.uk/114488/ (Consulté le 27 octobre 2023).

[589] *Data collection, storage and analysis were often difficult, time consuming and expensive. The difficulties in handling data led people to use as little data as possible. The very methods and techniques, the structures and institutions of discovery were designed so that the most insights could be squeezed out of the least amount of data possible* V. MAYER-SCHÖNBERGER et K. CUKIER, *Big data : la révolution des données est en marche*, Paris, R. Laffont, 2014.

[590] D. ROGERS, *The Digital Transformation Playbook: Rethink Your Business for the Digital Age*, Columbia University Press, 2016

[591] J.R.R. AFONSO et B.M. MONTEIRO, « Do governo eletrônico à governança pública digital: muito por fazer (e ganhar) no Brasil », *Revista Conjuntura Econômica*, juin 2022, vol. 76, n° 06, pp. 22-24, disponible sur https://periodicos.fgv.br/rce/article/view/86085 (Consulté le 18 octobre 2023).

[592] CONTROLADORIA-GERAL DA UNIÃO, *O que é Governo Aberto* —, dispomible sur https://www.gov.br/cgu/pt-br/governo-aberto/governo-aberto-no-brasil/o-que-e-governo-aberto, consulté le 26 octobre 2023

and proficiencies – factors which are distinctly unfavorable within the prevailing landscape of data colonization.

Thus, data ecosystem and an open government of data require other considerations than the mere adjustment of policies and legal norms.

Data is generated everywhere, and the challenge is to turn it into information. The key to using data is connection, and data is key to building a network. Therefore, the relevant point can be found in the fact that likewise in public management - notably in the digital literature - the process of opening data means a change of the purpose of management.

It is not a managerialist model of process optimization, but a process *of joint construction*. This seems appropriate in the face of an ecosystem that is not centered on the citizen, ***but on data***, which consequently produces values. This clarifies why the United Nations indicates that the three principles of open government are envisaged ***according to their purpose***.

Therefore, government driven by data represents a pivotal juncture, ushering in a renewed perspective on digital transformation, in which the focus on data. This trajectory of this transition includes novel elements, necessitating the implementation of numerous characteristics inherent to the open government model.

Corresponding to this assertion, the literature concerning digital government, generally, directs attention towards key concepts that elucidate its departure from the initial electronic government model. These concepts are disposed towards enhancing the agility of service delivery and underpinning a *"state-centric"* model.

Two repercussions of the digital transformation are discussed: ***firstly,*** the alteration in social relations, especially concerning citizen participation and civic engagement; and ***secondly,*** the perturbation of governmental and public policy-making processes.

From this vantage point, ***two constitutive elements*** that underscore the rationality of Digital Government are derived: it is a government *the architecture of which* is predicated upon data and information, and on *the objective of which* is the generation of "public values".

B. The governance approaches

The academic discourse on public management and digital governance examines the digital transformation of state mechanisms and the integration of information technology, drawing

upon theoretical models of governance. These models provide a framework for analyzing the adoption of technologies in a structured manner, often delineated by distinct phases and stages[593]

. According to a literature review, the trajectory of the digital shift within the public sector is driven by paradigms aimed at collaborative value construction - public - and interaction with networked ecosystems. Thus, it is necessary to examine which approaches will be most suitable for a data-driven society. The approach can be seen in both the school of thought of political science that emphasize information as a paradigm **(1.)** and in current economic disciplines that focus on new views of production in the public space **(2.).**

1- Digital Era Governance

In political science, Digital era governance can be considered as a movement in it of itself, which links governance to the public sector's use of information technology. One of the pioneering works[594], by Patrick Dunleavy et al[595], shows that *digital governance* identifies information technologies not as mere accessories, but as key elements of government structures[596], service delivery and functions. Thus, these constitute a new paradigm of state

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[593] I. MERGEL, N. EDELMANN et N. HAUG, « Defining digital transformation: Results from expert interviews », *Government Information Quarterly*, octobre 2019, vol. 36, n° 4, p. 101385, disponible sur https://linkinghub.elsevier.com/retrieve/pii/S0740624X18304131 (Consulté le 27 octobre 2023).

[594]As Beomgeun Cho notes, Dunleavy et al. developed Digital-Era Governance (DEG) as a way to explain the transformation of government bureaucracy in the post-NPMP era, linking the field of digital government to changes in modes of public administration, which have otherwise been treated as disconnected, or even ancillary. B. CHO, « Bibliometric Analysis of Academic Papers Citing Dunleavy et al.'s (2006) "New Public Management Is Dead—Long Live Digital-Era Governance": Identifying Research Clusters and Future Research Agendas », *Administration & Society*, mai 2023, vol. 55, n° 5, pp. 892-920, disponible sur http://journals.sagepub.com/doi/10.1177/00953997231157753 (Consulté le 17 octobre 2023).

[595]In 1994, alongside Professor Christopher Hood and Patrick Dunleavy published an article highlighting the mutation from bureaucracy to the NPM. Christopher Hood is known to have coined the term "*new public management*", in a seminal work of 1991. In 2006, Patrick Dunleavy published a seminal article on the issue of governance in the digital age, entitled "*New public management is dead: Long live digital era governance*". Since then, the professor has dedicated himself to demonstrating the overcoming of the NPM model, which he himself defended decades before. His major criticisms lie in NPM's insufficiency in dealing with interactive spaces, in addition to competition-centric rationality and corporate management. His further analysis highlights how a public sector environment needs to be concerned with interactive spaces and attentive to public sector purposes, which correspond not in competitions to achieve goals, but in building assets that are for the benefit of the community. About: P. DUNLEAVY, « New Public Management Is Dead--Long Live Digital-Era Governance », *Journal of Public Administration Research and Theory*, septembre 2005, vol. 16, n° 3, pp. 467-494, disponible sur https://academic.oup.com/jpart/article-lookup/doi/10.1093/jopart/mui057 (Consulté le 27 octobre 2023) ; P. DUNLEAVY et C. HOOD, « From old public administration to new public management », *Public Money & Management*, juillet 1994, vol. 14, n° 3, pp. 9-16, disponible sur http://www.tandfonline.com/doi/abs/10.1080/09540969409387823 (Consulté le 27 octobre 2023).

[596] That is, for instance, the advice of Antonio Cordella: "*ICT-enabled public sector reforms are complex phenomena that cannot be studied solely on the basis of private sector management models that essentially*

action[597] influencing not only that discipline, but also studies of public management , as well as those focused on the digital transformation.

Therefore, in the realm of law this transformation cannot be simply understood as a rhetoric, or simply as an approach *internal to* public management. Consequently, it is deemed essential to scrutinize the ramifications of what within the realm of political science is considered as a paradigm because it pertains, initially, to a political model of the state, adapted to a digitized institution [598].

As displayed, the digital transformation emerged within the postmodern state ideal type of political action, utilizing managerial styles of organization. Nevertheless, since its emergence, the "*managerial robes*"[599] have been updated.

Along these lines, the work of Dunleavy et al. points out that the dominant *new public management* model has marginalized technological change in favor of corporate leadership structures[600].

By proposing to surmount this model, the authors remember that the governance practices that were shaped by the Industrial Revolution and the Enlightenment are only one facet of the contemporary world[601]. Thus, one must begin by recognizing that digital era governance

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conceive of technology as an enabler". A. CORDELLA et C.M. BONINA, « A public value perspective for ICT enabled public sector reforms: A theoretical reflection », *Government Information Quarterly*, 29

[597]Research conducted by bibliometric tracking investigating the influence of DEG in the administrative reform debate, points out that DEG emerges as the main replacement idea for NPM. Influential and related themes are public value and digital government. Also, it was identified that NPM remains an important toolkit and the ideals of DEG are treated in a supplementary way, rather than as a true reform. About: B. CHO, *op. cit.*, *Administration & Society*, 55

[598]Ponders Patrick Dunleavy "*Public managers operate (by and large) with only 'quasi-paradigms' competing for plausibility*". In: P. DUNLEAVY et M. EVANS, « Australian administrative elites and the challenges of digital-era change », *Journal of Chinese Governance*, avril 2019, vol. 4, n° 2, pp. 181-200, disponible sur https://www.tandfonline.com/doi/full/10.1080/23812346.2019.1596544 (Consulté le 27 octobre 2023).

[599] Thereza Nobrega points out that Brazil has already seen at least three changes of season in managerialist logic. "*At the beginning of the 21st century, managerialism changed clothes in three seasons and agendas were being revised in the more affluent public administrations, always thirsty for more governance and, therefore, for more automation and artificial intelligence resources simultaneously with the academic movement of reflection on the internationalization of administrative law*" T.C. DE ALBUQUERQUE NÓBREGA, « Contratos públicos na emergência em saúde pública da COVID-19: diálogos entre Brasil, Argentina, Colômbia e México », *Coleção De Direito Administrativo Sancionador: Direito Administrativo Sancionador Comparado*, Rio de Janeiro, RJ, Ceej, 2021

[600] M. GUENOUN et N. MATYJASIK, « La fin de l'histoire du NPM ? », *En finir avec le New Public Management*, Vincennes, Institut de la gestion publique et du développement économique, 2019

[601] P. DUNLEAVY, *op. cit.*, *Journal of Public Administration Research and Theory*, 16

pursues to overcome the new public management model, which, as seen, was instrumentalized on a large scale in Brazil[602].

Digital era governance, however, goes beyond an opposition to new public management. The work of Dunleavy et al. is considered as a precursor to the identification of information technologies as enablers of a new conceptualization of government[603].

The mutation to a network governance model means a change in the ***nature of*** state functions and the ***role of*** information technology, which can transcend the limitations arising from the good governance model[604]. This will be done, because digital era governance will turn to the particularity that was not addressed in the previous models, data and information. It is concerned with approaching the state as a set of exchanges between internal and external actors[605]. In the new public management model, information technologies had a limited perspective, to an operational use, clearly earmarked for the internal efficiency of the government and the debureaucratization of its structure.

As already noted, both open government and government driven by data bring significant changes[606]. The data revolution implies a new grammar of production, focused on data and its multiple facets.

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[602] As Albuquerque Nobrega reminds "*The crisis of the entrepreneurial state is reported in Brazil and Latin America with the discourse of managerial reform (...) working with strong academic symbolism*". T.C. DE ALBUQUERQUE NÓBREGA, *op. cit.*, *Coleção De Direito Administrativo Sancionador: Direito Administrativo Sancionador Comparado*

[603] R.-M. SOE et W. DRECHSLER, « Agile local governments: Experimentation before implementation », *Government Information Quarterly*, avril 2018, vol. 35, n° 2, pp. 323-335, disponible sur https://linkinghub.elsevier.com/retrieve/pii/S0740624X1630315X (Consulté le 30 octobre 2023).

[604] Cepik et al. explain how the change in the area of ICT technologies is useful in explaining the mutation from managerial government to governance. Understanding the distinction between ICT management and governance is crucial. *ICT management* is concerned with the administration of internal processes, their automation and efficiency, and the choices that should be made regarding goods and services. *ICT governance* is broader and focuses on the use of ICT to satisfy the demands and goals of the business and its customers now and in the future, or in the case of the public sector, the goals of the public administration, its core activities, and its customers (citizens, businesses, third sector). It serves as a guide for dealing with technologies that involve parties other than the agency and/or administration, whose interactions must be planned and built on mutual trust. Through governance, it is determined who makes ICT choices and how these decisions are monitored in order to better align technologies with the organization's goals and objectives. M.A.C. CEPIK, D.R. CANABARRO et A.J. POSSAMAI, « Do novo gerencialismo público à era da governança digital », 2010, disponible sur https://lume.ufrgs.br/handle/10183/79095 (Consulté le 30 octobre 2023).

[605] M. GUENOUN et N. MATYJASIK, *op. cit.*

[606] The first is for introducing interconnectivity and the second for placing the need for it for the production and adequate use of information, since the ecosystem becomes data-centric. In this sense, ICT management also highlights the qualitative leap in the use of technologies in the public sector. If before ICT management was reduced and limited to protocol management, of automated issues, with time it becomes more demanded, to deal with the openness provided by new technologies. This approach to treatment ends up going beyond the mere governmental efficiency in service delivery and in the performance of its internal activities. M.A.C. CEPIK, D.R. CANABARRO et A.J. POSSAMAI, *op. cit.*, 2010

Therefore, in parallel to practices aimed at *efficiency*, the perspective of network governance is being developed.

Patrick Dunleavy et al. highlight[607], displays changes fostering an increasingly agile government, however with a focus on people, allowing access to citizens and businesses to participate and monitor the execution of their demands. He refers to the three fundamental changes of *Digital era governance* , which will serve as metrics for further research on the subject: the *reintegration*[608], the development of a *holistic vision,* and the transformations operated by *digitalization*. The first means to reintegrate diverse public sector spaces, while the second is aimed at the process of the digitalization of the public sector. Finally, the *holistic vision*, for Dunleavy, refers initially to governments being designed based on user demand[609]. The purpose would be to have a more comprehensive vision than the limited one of good governance.

With the impact of the ***digital turn***, Dunleavy moves to examine the criteria of technologies such as *big data* and artificial intelligence[610].

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[607] Dunleavy note that the NPM in public sector emphasized disaggregation, competition, and incentives. This wave has largely stalled or reversed in some "top" countries, but its effects are still being felt in countries new to NPM. P. DUNLEAVY, *op. cit.*, *Journal of Public Administration Research and Theory*, 16 ; A. CORDELLA et C.M. BONINA, « A public value perspective for ICT enabled public sector reforms: A theoretical reflection », *Government Information Quarterly*, 29

[608] *Reintegration* refers to the reaction to the problems resulting from NPM. It is the process of regrouping elements that NPM has separated, i.e., into distinct divisional structures across the public sector. The aim is to reduce the "*bureaucratic islands*" that exist between federal, state and municipal governments. It seeks, therefore, to simplify and coordinate public policies, as well as the administration's final activities. Several principles are listed for this purpose, such as (*network simplification* and *reinstating central processes). Digitalization* - which envisages digital *par default* - deals, as already visualized, with the process of digital conversion of the online world. P. DUNLEAVY, M. EVANS et C. MCGREGOR, *Connected Government: Towards digital era governance?*, Canberra, University of Canberra, 2015.

[609] As DEG emphasizes the role of information, the holistic view will already encompass mechanisms to be adopted that address procedural issues about the use of data and information in the public sector. It also requires a commitment to be made by governments and their agencies to share and use information, rather than an *ad eternum* collection. The holistic view has two precise values that underpin it, a *data warehousing* system that makes information and services available to citizens in a proactive way. The holistic view also corresponds to a shift from a *one stop provision* model to integrated networked services. P. DUNLEAVY, *op. cit.*, *Journal of Public Administration Research and Theory*, 16

[610] In mission-critical roles these organizations place a premium on recording fully recoverable or replicable information. Professional expertise and cultures provided a key to them being able to create, maintain and decode economically much more re- expandable records and files - using a 'lossless' information regime. P. DUNLEAVY, « Information regimes in government bureaucracies and "digital decompression" »

According to the author, *information* refers to a fundamental concern, given that governments will now also rely on *building* information through data and its metrics[611]. The rapid expansion of information as a *valuable product* changes the landscape.

Thus, a policy model that only emphasizes digitalization, which corresponds to the first stage of the digital transformation process, will be insufficient.

This highlights that digital era gov*ernance* will become concerned *with how* a government should adapt and mold itself to an ecosystem that is data-centric. It is the same rationale that is found in the concept of government driven by data. If o*pen government* is traditionally defined in terms of transparency, participation and collaboration[612], a government driven by data is concerned with the *public value* that these principles generate.

Therefore, the digital era governance model focuses on the relevance of the state's use of the information technologies to increase state capacity and governance. It prioritizes the cooperation of public and private agencies and seeks to establish value from joint efforts (through public-private partnerships)[613].

These changes are reflected in the change of the ***purposes of*** government action. While *new public management* and other managerial proposals focus on ***results to*** be achieved, the digital model focuses on the ***impacts caused***. What matters is the process, public policies, actions, and *services,* not the individual results of the actors.

The Digital era governance model encapsulates *three foundational concepts*: ***i)*** the digital environment, ***ii)*** the digital citizen, and ***iii)*** the digital government.

The digital environment pertains to the influence of the digital era upon both the physical and digital world, including the effects of the internet, web-based technologies and applications upon society and the economy. In addition, to the modalities through which they have transformed our lives.

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[611] According to the author "*In today's digital age, governance wave technologies that facilitate big data approaches, artificial intelligence, and data science have made a new regime of lossless, uncompressed data information feasible and expanded data science, opening up a potential for bureaucratic operations to change in fundamental ways. Full digital data collection or early-stage recording of interactions, plus full storage, organic indexing, and new analytic capabilities can avoid much of the previous need for data compression and promote forms of post-hoc knowledge development, for example through machine learning and algorithmic governance".* In: P. DUNLEAVY, *ibid.*

[612] W.K. GILLES, « From The Right to Transparency to Open Government in a Digital Era. A French Approach », in, 2016, disponible sur https://api.semanticscholar.org/CorpusID:157326868.

[613] M.A.C. CEPIK, D.R. CANABARRO et A.J. POSSAMAI, *op. cit.*, 2010

In turn, *the digital citizen* refers to the ways in which the digital era influences how individuals interact with the government, encompassing how they use the internet, web-based technologies and applications, as well as, how they communicate with the government, and participate in governmental activities.

Finally, the digital government pertains to how the digital era influences governmental operations, including the way governments utilizes information technologies and communicates with the general public, and other entities[614].

Hence, the digital government fundamentally transforms the methods by which public power produces value and interacts with actors. These transformations are mediated not only by virtual technology but also through organizational and institutional factors[615].

Regarding the domain of political power of the state, new technologies are integrated into an ideal type governance model, which directly impacts political and public actions, furthermore entailing a new vocabulary.

This account demonstrates that the evolution of technologies within the public sector implies not only the expansion of management and governance models but also the transformation of political action itself. Initially, technologies were confined to a technical means of management; however, their application has since evolved to align with governance models and has become a fundamental element in the conceptualization of a political action model. Thus, information technologies and data usage should be considered not merely as technical types or organizational management tools but also as a form of governance, signifying a novel approach to conceiving state political action. It is, therefore, more than just a managerial matter.

In this manner, while governance is addressed through the informational paradigm in the fields of political science and public administration, there is also literature in economics that relies on it.

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[614] P. DUNLEAVY, M. EVANS et C. MCGREGOR, *Connected Government*, *op. cit.*

[615] J. CHEVALLIER, « Vers l'État-plateforme ? », *Revue française d'administration publique*, 167

2- Economics from the Public Purpose approach

The propositions from authors aligned with the economic current of innovation harmonize with the concepts of network spaces[616]. For example, Mariana Mazzucato advocates for superseding the concept of good governance with that of public purpose.

This perspective is significant as, albeit emanating from the discipline of economics, it does not anchor itself in an individualistic viewpoint but rather in a collective construction of *common goods*. The author delineates a model, the rationale of which might prove useful to the public sector, particularly given its potential to reinvigorate the value of the *"public*," which has been eclipsed by the logic of efficiency governance. The transition she champions involves a pivot from an extraction model to a creation model. Through a well-defined purpose, missions are devised for collaborative ventures, incorporating both public and private agents.

The author explains that public goods must not be understood as market failures, but as common goals. According to her, it is vital to have adequate knowledge of their production, which can only be achieved through a "*theory of collective value creation*"[617].

In this sense, Mazzucato envisions a redirection of the economic perception of value, which can also be understood as a repositioning of the political perception of governance.

According to her, the notions of common good and public value, once linked with the production and distribution of goods, result in a co-constructive model of a more inclusive society. The author, therefore, advocates a model of governance, which includes a shift in the perception of goods and their use. It also requires behavioral changes since subjects are no longer envisaged as selfish individuals opposed to the actors they relate to (which is done in rational theories).

That is, if good governance comes from the hyper-individualism of quantitative logic, governance of the public purpose comes from a collective perception of the production and distribution of goods, not discriminating individualistic perceptions, but spaces of collectivity, which interact. It is an approach, therefore, that is focused on spaces of collective construction.

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[616] One particular demonstration can be found at Carlota Perez works, that focalizes the new green deal in digital age. About: C. PEREZ, « Capitalism, technology and a green global golden age: the role of history in helping to shape the future », *Rethinking Capitalism: Economics and Policy for Sustainable and Inclusive Growth*, 1

[617] M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, 1re éd., Harper Business, 2021

The approach suggests major modifications.

First, by reestablishing the public in the public space, that will change the ***purpose of the actions*** practiced. For the author, the public is not to be confused with government; the public refers to *"value created collectively"*[618], by different agents and for the community in the public interest. In this vision, not only are public and government not synonymous, but government is indispensable for the collective construction of values.

Thus, if good governance aims for results, the public purpose approach aims to foster the common good. For Mazzucato, *public purpose* should be at the core of how wealth is collectively created to bring about a stronger alignment between value creation and value distribution[619].

She therefore advocates for a "purpose" approach, which will also require a repositioning of interactions and how they are viewed. In her terms, "*value by stakeholders must start with the recognition that value is created collectively by various groups, including companies, workers, and local and central governments"*. This condition shines light on an indispensable observation, collective creation[620].

Thus, rather than nurturing and perpetuating an extraction system, Mazzucato proposes to cultivate collective purpose for the *common good*,. This while simultaneously respecting differentiated roles, lived experiences, capabilities, and responsibilities to attain and maintain a reasonable balance across all sectors. Similarly, the author elucidates, that the *common good* approach incorporates it as a collective objective. It is not a concept per se, but rather an intrinsic approach. That is: "*A market-modeling approach to the common good must alter the manner in which the public and private sectors cooperate; a shift towards a mutualistic relationship characterized by shared goals oriented towards a common objective is requisite*"[621].

In this respect, it posits an alternative model of structures and practices that guard and orchestrate rights and obligations for all parties, for which she substitutes the term

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[618] M. MAZZUCATO, *ibid.*

[619] For her, value distribution should not only be redistribution (ex post), but also pre-distribution ex ante: a more symbiotic way for economic actors to relate, collaborate, and share. This means a new narrative and also a reworked vocabulary. M. MAZZUCATO, *ibid.*

[620] M. MAZZUCATO, « Transformational change in Latin America and the Caribbean: A mission-oriented approach », 2023 ; M. MAZZUCATO, « For the Common Good \textbar by Mariana Mazzucato »

[621] UCL, « A collective response to our global challenges: a common good and 'market-shaping' approach »

"*stakeholder*" with "*careholder*", a vital governance factor. Depicted as moral criteria and a trust system[622].

The idea of public purpose contemplates a reinvention of governments to endow them with tools to conduct an approach that is "*mission-oriented*"[623].

Herein, the purpose shifts to the governance core and assumes an expanded position of stakeholders. This embodies a shift in the relationship between the public and private sectors and between them and civil society, where work is conducted symbiotically towards a common objective. This does not imply isolated efforts, but demands partnerships and collaborative endeavors with businesses[624].

Mariana Mazzucato advocates for missions to be posited and established in order to meet objectives while concurrently structuring projects that permit the implementation by actors with an impetus to achieve said objectives. In this light, the approach is geared towards the *common good*, meaning "*the collaborative endeavors necessary to realize these missions must be designed to mirror the principles of the common good*"[625].

In sum, Mazzucato's approach diverges from corporate governance (*good governance*) in ***two scenarios:***

The first, it emphasizes *the core* and *purpose of* actions, which are regarded as collective constructions, and also, perceived as common goods.

The second pertains to a *repositioning* regarding *legitimizations*, risks, and equitable shareholding. Thus, actors deliberate the design and even co-create with the market, using the common good as a primary objective[626].

The author, therefore, means to underscore anew the potentiality of the public sector to orient towards the public purpose, which furthermore, implies the definition of goals to attain such purposes. Consequently, this thought does not rest on the *status quo*. The mission does not lie in choosing individual sectors but in identifying problems that can catalyze collaboration across

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[622] UCL, *ibid.*
[623] M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, *op. cit.*
[624] UCL, « A collective response to our global challenges »
[625] UCL, *ibid.*
[626] M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, *op. cit.*

various sectors. Policies are conglomerates of different solutions (projects) by various organizations (public and private)[627].

Hence, if good governance originates from the hyper-individualism of quantitative logic, the governance of public purpose originates from a collective perception of the production and distribution of goods, not in individualistic terms, but in collective spaces, which interact[628]. Therefore, it is an approach that turns towards a dialogic bias and examines the public space as a place of joint construction.

§2 The construction of network governance as a political action model

Upon a cross-sectional reading of governance, employing, demarcations from the literature of political science, economics, and public management, as well as the justifications of the preceding narrative, the following definition is proposed: in terms of an ideal type, ***the digital state is delimited as a category that translates into the political action model of network governance***.

In order to think about the construction of an ideal type of political action, of the digital state, one must focus on the society that is established as a code, that refers to a society whose relations occur in a *reticular* environment, and that has singular characteristics **(A).**

Network governance, therefore, must be *plural* **(B)** and *relational* **(C)**.

A. The code, the data society: from society autonomy to an interdependent ecosystem

Taking into account the hypothetical and theoretical exercise of the thesis - *based on correlations between categories* - the chapter will establish a diagram of the correlations between the digital state and the data society, before examining public law at its core.

As Maurice Hauriou asserts, the state, as a historical social formation, arises as an institution crafted to harbor a specific mode of *social relations*[629]. The modern state encompasses the

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[627] M. MAZZUCATO, « For the Common Good \textbar by Mariana Mazzucato »

[628] M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, *op. cit.*

[629] When society speaks about the regime of State, it is considered the quality given to the social relations by the state, relating to the quality of individuals.

individualistic society of the rational subject. The digital state model, in the guise of an ideal type, will flourish within an emerging universe, with distinct characteristics.

Hence, as an ideal type, it cannot be thought of in isolation but in conjunction with the society surrounding it.

This knowledge is necessary to understand its particularities and its effects on social relations and the construction of this ideal type. These categories are composed of the digital state (the network governance model); a data-dependent society (an interpedently society) and, consequently, a public law that incorporates these relationships. Therefore, the examination of this model of political action must encompass ***its code.***

In **Chapter 1**, the cybernetics imaginary illustrated that the network paradigm brings a renewed, *reticular* nature. Data, conversely, *amplifies the distinctions* inherent to the modern rationalization framework. It can initially be emphasized that the data society aligns with perspectives that criticize scientific truth[630]. Opposing this myth[631], and the norms of enlightenment dispersed through institutions[632], the contemporary world is perceived as contingent, varied, unstable, and indeterminable. Skepticism regarding objectivity and the coherence of identities prevails[633]. The emphasis is not on the exclusion of the individual, but on the non-existence of a *pure universe*.

Moreover, the datified society is not one *of truth* but *of correlations*[634]. Such an array of peculiarities prompts the suggestion that the data society signifies an *anthropological shift*, in which lies an "***interdependent ecosystem"***, including a core characteristic of "***dependence on data***".

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[630]This myth has been questioned not recently. John Dewey and Wittengstein speak of uncertainty, for example. They counter the truth myth of the search for truth and that this search in reality is a barrier to uncertainty, to the inconsistencies of life. John Keane also talks about the vulnerability of the human and the lack of certainty in life that is often barred by the myth of truth. J. DEWEY et G. LEJEUNE, « De l'absolutisme à l'expérimentalisme », *Philosophie*, N° 138

[631]In Jacques Chevallier's terms: "*Reason is accompanied by* ***myths and promises****: belief in the virtue of "Science" and the individual as the skilled one (scientism)…* J. CHEVALLIER, *L'Etat post-moderne*, 5e éd., Paris, France, LGDJ, 2017.

[632]Massimo Vogliotti states as essential points of law in modernity lies exacltly on the "*myth of the completeness of the code*." M. VOGLIOTTI, « La science juridique entre « grand style » et nihilisme. Un essai de « droit et littérature » en hommage à François Ost », *in* Y. CARTUYVELS *et al.* (éds.), *Le droit malgré tout*, s.l., Presses de l'Université Saint-Louis, 2018, pp. 587-616, disponible sur http://books.openedition.org/pusl/23739 (Consulté le 24 octobre 2023).

[633] T. EAGLETON, *The illusions of postmodernism*, 1996, disponible sur https://data.bnf.fr/temp-work/626b257459b6644b29fe962acb89eae0/ (Consulté le 30 octobre 2023).

[634] V. MAYER-SCHÖNBERGER et T. RAMGE, *Access rules : freeing data from big tech for a better future*, *Country: US22 cm. Includes bibliographical references and index.*, Oakland [California], University of California Press, 2022

The previous chapter stressed the importance of the process of autonomy of society and its effects not only on society, but on social relations, institutions and the legal system. The data society deepens this scheme.

Sebastien Soriano identifies three pivotal points that affect the relationship between society and the state[635].

The first, resides in the *deconfiguration of intermediate bodies*[636]. In a society that can utilize social networks instantaneously and with the *right to a voice*, value systems are in competition and large – traditional - organizations are in crisis, leading to the rise of different dimensions of communication in a novel space, including both social and economical domains. Commodification and the globalization of the social are connected, as seen by emerging social spaces and novel , all possessing different positions in the reticulated world of cyberspace[637].

The second point emphasizes the crucial role of *infrastructure and networks*. While industrial development has historically entailed the delegation of state services and activities—retaining state ownership—digital companies' technologies are not only upheld by private actors but also have become indispensable in daily lives. The internet and various other forms of infrastructure serve as examples, themselves ventures overseen by private entities. Conversely, it is within the state's jurisdiction to devise policies facilitating access to this infrastructure.

Consequently, as Information Technologies become indispensable, they necessitate their own infrastructure, the provision of which is demanded given the interpretation of it as a state obligation. The relationships forged within this schema are multifaceted, involving both public and private entities[638].

The third point is that the object of autonomy also diverges. Hence, its focus is not only on the individual asserting their autonomy or liberty, or even only on social collectivity. Instead, it encompasses an ensemble of actors and in an intersecting environment, the ecosystem of which permeates various domains, such as businesses, associative networks, and other sectors[639].

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635 S. SORIANO, *Un avenir pour le service public : un nouvel État face à la vague écologique, numérique, démocratique*, *Country: FR22 cm. Bibliogr. p. 224-227.*, Paris, Odile Jacob, 2020.

636 J. CHEVALLIER, « La gouvernance, un nouveau paradigme étatique ? », *Revue française d'administration publique*, 105-106 ; H. BOUILLON, *Le droit administratif à l'ère de la gouvernance : les idées politiques du droit administratif*, *Country: FR24 cm. Bibliogr. p. 185-197. Index.*, Paris, Mare & Martin, 2021.

637 S. SORIANO, *Un avenir pour le service public*, *op. cit.*

638 S. SORIANO, *ibid.*

639 N. COLIN et H. VERDIER, *L'âge de la multitude*, 2e éd., Paris, Armand Colin, 2015.

These examples demonstrate that, if the process of the *autonomy of society* highlighted the emergence of intermediaries and broke with the modern dichotomy, in a data society, not only do multiple actors coexist, but they are interdependent.

The shift is "*from the individual to the ecosystem*"[640]. Public power must handle not merely individual demands but those of an entire network. It additionally depends on the *connection*s made in these spaces. In data society, therefore, the public sector does not depend on the isolated individual, but confronts interconnected relationships, within a reticular space, connected by data. Thus, instead of dichotomous categories, the data society functions through a network. Not only that, it depends on the connections made in these spaces, since it is not just a society of isolated individuals, but as it is a networked ecosystem, there is talk of employing a "holistic"[641] reading of this ecosystem. It is the connection that accounts for and constitutes the nature of the code. The governance model, therefore, must be thought of being situated within this structure, and must be attentive to the mutations of society and social relations, which imply concieving of a specific governance model, designed for an ecosystem, run by data.

B. Plurality by the good government

Governance is a *plural* model. In Jacques Chevallier's terms, it is a ***pluralistic***, interactive approach to *collective action*. It is distinguished by "*forms of interaction between actors*"[642]. Hence, it is through this pluralistic nature that interdependence and interconnectedness is brought about, as well as, enabling the examination of various actors, so far *erased* by the static relations of the modern mechanistic universe, or excluded by the dichotomous logic.

Indeed, if the first modernity has the figure of the *pyramid* as its peak, and the second is a universe of *dichotomies*, the end of the 19th century shows the sovereign model its "***first cracks***"[643]. The "*hybrids*" that modernity had suppressed reappeared. Between fact and law,

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[640] S. SORIANO, *Un avenir pour le service public*, *op. cit.*

[641] J. van Dijck, T. Poell et M. de Waal, The platform society : public values in a connective world, Country: US24 cm. Bibliogr. p. 187-214. Index., New York, NY, Oxford university press, 2018 ; M. Mazzucato, Mission economy:a Moonshot Guide to Changing Capitalism, 1, op. cit. ; S. Soriano, Un avenir pour le service public, op. cit.

[642] J. CHEVALLIER, *op. cit.*, *Revue française d'administration publique*, 105-106

[643] M. VOGLIOTTI, « De la pureté à l'hybridation : pour un dépassement de la modernité juridique », *Revue interdisciplinaire d'études juridiques*, 2009, vol. 62, n° 1, pp. 107-124, disponible sur https://www.cairn.info/revue-interdisciplinaire-d-etudes-juridiques-2009-1-page-107.htm.

equity reappears; between objectivity and subjectivity, intersubjectivity; between author and reader, the interpreter; between authority and reason, temperance[644].

As seen, the resurgence of hybrids, shaking the *dichotomous* structures erected by liberalism, destabilizes the centralizing formulas of the modern state's model of political action. Without purifying processes, the *pyramid* paradigm inevitably goes into crisis[645].

Therefore, the universe of hybrids did not arise with the digital revolution, or with the impact of globalization. These phenomena, in fact, were determinant in demonstrating the chimera of a dichotomic universe - the idea of purity -, as Bruno Latour enunciated when he said "*we have never been modern*"[646].

As Antônio Manuel Hespanha notes in his analysis of sovereignty, the "*pre-modern seems to ideally combine with the postmodern in the name of a sovereignty that, in the first case, 'is not yet' and, in the second case, 'is no longer'*".

In summary, the pre-modern and the postmodern are plural models.

Upon examining the framework of contemporary *governance*, Daniel Mockle assigns two major approaches. Additionally, **Chapter 2** demonstrated that governance approaches can come from the *corporate universe* or from *democratic currents*.

Accordingly, the Brazilian Constitution exhibits several characteristics that can be compared to the democratic governance model. Dialogue between the powers as well as insertion of spaces for communication and social participation give democratic rule of law its tone. Democratic instruments aim to close the gaps identified in the model of solid modernity (representation and static separation of powers).

In turn, the corporate model is linked to quantitative issues of *good governance*, referring to the guarantees of normative "*measurability*", which are delegated to the consignment of the third generation of principles (efficacy, accountability, precaution, quality). As Daniel Mockle explains, these are reflective principles of "*quantification and calculability*" in *public action*[647]. However, as aforementioned, *good governance* is insufficiently able to respond to the

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644 M. VOGLIOTTI, « De la pureté à l'hybridation : pour un dépassement de la modernité juridique », *Revue interdisciplinaire d'études juridiques*, 62

645 M. VOGLIOTTI, « L'érosion de la pyramide pénale moderne et l'hypothèse du réseau », *Revue interdisciplinaire d'études juridiques*, 55

646 B. LATOUR, *Nous n'avons jamais été modernes: Essai d'anthropologie symétrique*, La Découverte, 2006.

647 D. MOCKLE, *La gouvernance, le droit et l'Etat : la question du droit dans la gouvernance publique*, *Country: BE24 cm. Bibliogr. p. [267]-299.*, Bruxelles, Bruylant, 2007 ; D. MOCKLE, *La gouvernance publique*, *Country: FR24 cm. Bibliogr. p. 283-303.*, Paris-La Défense, LGDJ, 2022

realities of cyberspace and a data-dependent society. Developed from the corporate world, it is established in individualist and private terms for data extraction.

Thus, in the context of the autonomy of society and governance, the social space of democratic governance is overshadowed by hyperindividualism, the rationality of which enters all spaces, whether public or private, in new dimensions and power relations, necessitating a revision of theories concerning the public sphere.

Given this context, one assumes a particular understanding of governance through a good government approach that does not exclude democratic bias, but emphasizes broader points within state activities.

Chapter 1 highlighted that the modern perception of *government* is inherently tied to the notion of *sovereignty* and is also connected to the sciences of state theories—namely political philosophy, political science, and public law (both constitutional and administrative). Also, that the governmental perspective of administration is linked to the concept of bureaucracy.

On the other hand, as established, the recent principles of public management governance originate from managerialism. In the contemporary context of public law and public management, the term *"governance"* has taken on a more colloquial meaning, derived from corporate management models. Yet, governance as a political concept is pre-modern, associated with a non-monolithic conception of power. In fact, its notion as a fundamental facet of government, aimed at ensuring the common good, is, in truth, older[648].

Henceforth, the principle of *"good government"* constitutes a cornerstone of political philosophy, the observance of which reveals the essential nuances of an ideal type, signifying a different notion to the modern perception of sovereign government.

In fact, primordial traditional law, pertaining to *good government* ostensibly antecedes the state in legal and institutional history (the modern machine). Despite this, it resides in the past, not utilized by Enlightenment reforms, though perennial in Westminster models[649].

Accordingly, good government constitutes one of the structuring principles of public law, similarly to the rule of law and constitutionalism, the applicability of which, therefore, could

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[648] D. MOCKLE, « Le principe général du bon gouvernement », *Les Cahiers de droit*, 2019, vol. 60, n° 4, pp. 1031-1086, disponible sur https://www.erudit.org/fr/revues/cd1/2019-v60-n4-cd05038/1066349ar/ (Consulté le 8 octobre 2023).

[649] D. MOCKLE, *La gouvernance publique*, *op. cit.*

be feasibly reevoked[650]. That is to say, the idea of good government cannot be regarded as obsolete, particularly because it directly associates with the public good and the principles of public law, as the common good and general interest (public interest in the Brazilian case).

Essentially, it does not relate to corporative governance as it emanates from modern political theory as well as the *res publica*[651].

In **Chapter 1**, the research utilized allegories as foundational elements, supporting an aesthetic perception of a distinct imaginary. If the Leviathan is depicted as a figure that exemplifies a centralized, nation-state, the fresco by Ambrogio Lorenzetti is frequently cited as a depiction that most faithfully embodies the concept of good government, tied to the *res publica*[652].

Considered as the first "*political*"[653] allegory, using it can be useful to reflect on the structures of institutions and how the pre-modern has similarities with the postmodern, in state terms, in light of a model type of governance.

In Lorenzetti's allegory, good government is conceptualized in an *interdependent* and *plural* manner[654]. It encapsulates the pursuit of the common good and is underpinned by a pluralistic notion of governance, echoing the ancient understanding of the term. Opposed to the modern sovereign government, the allegory of good government signifies the idea of a community in which there is a greater shared perception of authority. In the allegorical perspective of governance, a good governm*ent* is one in which there is balance, given the absence of a centralized power in a unified form, containing a ruler who prioritizes the well-being of the

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650 S. BESSON, « Democratic Representation within International Organizations: From International Good Governance to International Good Government », *International Organizations Law Review*, 19, *op.cit.*

651 D. MOCKLE, « Le principe général du bon gouvernement », *cd1*, 60

652Certain scholars such as Alain Supiot, Henri Bouillon, and Daniel Mockle reference the frescoes by the artist Ambrogio Lorenzetti. A meticulous study on the fresco and the notion of good governance has been conducted by Quentin Skinner, who elaborates on the association of the idea of good governance, as a political concept, with Cicero's principles of res publica. Q. SKINNER, *L'artiste en philosophe politique : Ambrogio Lorenzetti et le « Bon gouvernement »*, *Country: FR18 cm. Notes bibliogr. Index.*, trad. par Rosine CHRISTIN, Paris, Raisons d'agir éd, 2003.

653For Patrick Boucheron, the allegory highlights a familiarity with political thought, as well as an intellectual disposition to understand the "collective" movement, the lines and relations that are essential. P. BOUCHERON, « "Tournez les yeux pour admirer, vous qui exercez le pouvoir, celle qui est peinte ici". La fresque du Bon Gouvernement d'Ambrogio Lorenzetti », *Annales. Histoire, Sciences Sociales*, 60e année

654In a synthesis that now unites, around the figure of the Common Good, not four, but six cardinal virtues (to the left: Peace, Fortitude, and Prudence; to the right: Magnanimity, Temperance, and Justice) inherited from Antiquity, to the three theological virtues (Faith, Hope, and Charity). D. MOCKLE, *op. cit.*, *cd1*, 60

community. There is a connection between people who are united by a common good (represented in the figure of the ruler), but who depend on justice for harmony[655].

Lorenzetti's depiction of the establishment of these characteristics resides also in their **opposites,** that is, the portrayal of bad government. Alongside good government, the fresco of bad government represents a tyrant, which brings to mind more than the idea of simple authoritarianism, but refers to a despotic attitude of unrestrained power[656]. It not only centers on a central figure, which by itself already constitutes an imbalance, in which there is no justice, but also because actions are execute for personal interest[657].

Thus, as can be seen, the concept of bad government is intrinsically linked to personal interest, which can manifest itself in the figure of a sovereign, but also permeates the community at large. In essence, political acts should be carried out with the welfare of the community as their central rationale and aim, not individual interests.

Personal interest is absent from the lexicon of *good government*; instead, it is situated within the realm of bad government. The individual protection that has directed public law and continues to underpin contemporary legal doctrine, adopting the principles of market individualist theories in corporate governance, stand in stark contrast to this framework.

Thus, if good governance privileges the individual, the core of good governmen*t* is the bounds for the well-being of the community, and not the individual.

In this vein, Patrick Boucheron[658] elucidates that, inherent in the core of Lorenzetti's fresco, lies the implication that the perception of a government as being *"virtuous"* does not derive from a celestial illumination, nor from a determined legitimacy. However, rather because it translates into beneficial deeds visible to all, from whence *all reap benefits* and that are immanent to human ordination. The city, within this interpretation, emerges as a fountain of authority and establishes itself as the measure of all things[659].

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[655]Contrary to Delacroix's painting that represents and constitutes liberty – Ambrogio's fresco commissioned still in the 14th century, that is, under a regime, a rationality where the initial ideas of Liberty, Democracy. The idea of freedom, of guarantees and subjective and individual rights, and even a contemporary perception of democracy are all categories of the modern universe, notably inaugurated in the advent of the rule of law. D. MOCKLE, *ibid.*

[656] A. SUPIOT, *La gouvernance par les nombres : cours au Collège de France, 2012-2014, Country: FRill. 22 cm. Index.*, Nantes] [Paris, Institut d'études avancées de Nantes Fayard, 2015.

[657] D. MOCKLE, *op. cit.*, *cdl*, 60

[658] P. BOUCHERON, *op. cit.*, *Annales. Histoire, Sciences Sociales*, 60e année

[659] L. FLORIDI, *Il verde e il blu: idee ingenue per migliorare la politica*, Raffaello Cortina editore, 2020.

Consequently, the political significance of the work resides in the visual mechanics that unveil a perception, perpetually amenable to contemporary reinterpretation, of a public space[660]. Furthermore, it must be understood that virtuousness is not validated by way of results-based criteria, but rather by the examination of actions tailored to the *welfare of the population*.

Through the logic of good government, the model of political action gains its legitimacy in a particular manner. Initially, ***its form*** is not derived from a unitary vision but from a notion of plurality that affects legitimization mechanisms. The intrinsic and plural legitimacy of governance has a direct impact on the mechanisms of realization, which rely on the principles of public action.

As the form of plurality evolves, the actors also change. Concerning the concept of sovereignty, the legitimate authorities were the state (through a monarch or the population), however, in governance, the legitimacy is plural.

In this regard, the model of *democratic governance* can align with the principles of *good government*, provided that the plurality of spaces of power is considered, These include state powers — the Executive, Legislative, and Judicial branches — as well as societal participation, within the realm of citizenship. Such normative support finds its foundation in the legal system, particularly in the Federal Constitution.

Moreover, consideration must be given to the networked environment and the hybrid spaces of interaction between public and private actors. As demonstrated, smart cities operate through the deployment of devices provided by both public and private entities, furthermore the flow of information becomes a value-creation mechanism. Therefore, while the modern rationale separated economic and political powers, leaving the former within its autonomous sphere, the rationale of *good government* repositions the legitimate parties.

Political and public actions are interdependent, with governance being crucial for the consolidation of legitimacy. That is, legitimacy of governance is *contextual,* it depends on the *action* (public), and is evaluated based on the question of whether it was performed for the well-being of the community. The latter constitutes the *core* of the components of governance, that is: the **procedure and the substance**.

Proceduralism introduces the tools and methods essential for a functional, procedural governance model. This governance structure is composed of both *substantive* and *procedural*

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[660] P. BOUCHERON, *op. cit.*, *Annales. Histoire, Sciences Sociales*, 60e année, *op.cit.*

elements. Procedural criteria account for the methods, models, and principles that must be adhered to. In the model of good government, principles such as precaution, temperance (proportionality), and due process are fundamental. These principles are pivotal for establishing a dialogic format because they form the basis of the governance structure. For instance, precaution introduces the idea of a priori mechanisms. The dialogical nature of power is highlighted by justice and temperance. Therefore, procedural mechanisms set the tone for establishing good government, emphasizing the importance of methodical, principled approaches in shaping effective and equitable governance systems.

By its substance, good government implies a reevaluation of the value criterion of this political type, where, in the case of good government, the common good is paramount. In this rationality, it is important to re-invoke that, even if absolutist sovereignty still privileged the *common good* as the purpose of the ruler's actions, serving as its locus of legitimization, the modern dichotomy that delineated public law and the concepts of freedom and equality placed the protection of the individual in the foreground, including within public law. Consequently, political action was reduced to ensuring the protection of the individual and their freedom, rather than the common good.

The emergence of globalization and movements towards democratic governance and good governance have not altered this scheme. In the first instance, the aim was directed towards ensuring democracy (necessary for achieving freedom). In the latter case, however, there was a hypertrophy of the individual.

The model of good government reestablishes the common good at the center of the purpose of political action. In good government, the purpose is not to guarantee fundamental rights, protect the individual, or even to deepen democracy. The purpose, instead, of *good government* is the well-being of the population[661]. Virtuousness is calculated and conferred by such value.

From this perspective, Daniel Mockle emphasizes that the starting point of good government lies in the common good. Therefore, it does not alter the legitimacy motivation of public law in the public interest. Thus, it will perpetually be under the auspices of public law, political science, and political philosophy[662]. Hence, through the ideal of political action of *good government*, it is possible to reposition the purpose of public law, replacing its focus on the

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[661] L. FLORIDI, *Il verde e il blu: idee ingenue per migliorare la politica*, *op. cit.*

[662] D. MOCKLE, *op. cit.*, *cdl*, 60

primacy of the individual and the prevalence of private over public, thereby reclaiming the ideal of governance that was obscured in Enlightenment ideals.

Therefore, the first justification for governance as a model of political action is to be found **in the plurality**. Moreover, it is its interpretation within the cybernetic imaginary that will make it possible to understand that governance, as a type of political action in the broad sense, will encompass not only diverse human actors but also non-humans .

As José Van Dijck notes, the relationships between actors in the "*tree*"[663] of cyberspace, originate from information systems, which are complex structures with interdependent layers that intertwine visibly and invisibly, below and above ground, horizontally and vertically. It is "*an evolving dynamic process driven by human and non-human actors*". It concerns the "*dissemination between digital infrastructures, economic processes, and governmental structures of platforms in different economic sectors and spheres of life*"[664]. This peculiarity may find support in the perspective of cybernetics.

C. Cybernetics, a relational model

Alain Supiot, in referring to a shift from a government by laws to what he calls governance by numbers, highlights that this is the ideal of government by calculations, was/can be achieved within the framework of the digital revolution[665]. Supiot identifies, therefore, that the employment of the cyber age is done by way of an economic logic. The consequence, as seen,

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[663] It is important to bring the description of the tree of actors and structure of cyberspace : "*To envisage the platform ecosystem's hierarchical and interdependent nature, we imagine a tree that consists of three interconnected layers: the roots of digital infrastructures all leading to the trunk of intermediary platforms which branch out into industrial and societal sectors that all grow their own twigs and leaves. The tree metaphor emphasizes how platforms constitute "living" dynamic systems, always morphing and hence co-shaping its species. Like air and water can be absorbed by leaves, branches, and roots to make the tree grow, platformization is a process in which data are continuously collected and absorbed. Data (knowingly) provided and (unknowingly) exhaled by users form the oxygen and carbon dioxide feeding the platform ecosystem. Due to the ubiquitous distribution of APIs, the process of absorbing data and turning them into nutrients-a metaphorical kind of photosynthesis-stimulates growth, upward, downward, and sideways. Each tree is part of a larger ecosystem-a global connective network driven by organic and anorganic forces. Resisting the temptation to build on this metaphor, we instead concentrate on the three layers that constitute its basic shape: roots, trunk, and branches*". J. VAN DIJCK, « Seeing the forest for the trees: Visualizing platformization and its governance », *New Media & Society*, juillet 2020, vol. 23, p. 146144482094029.

[664] J. VAN DIJCK, *ibid.*

[665] The inversion of the rule of law in favor of governance by numbers is part of the long history of the ideal of harmony through calculation, whose latest avatar - the digital revolution - dominates the contemporary imagination. This cybernetic imaginary leads us to think of normativity no longer in terms of legislation, but in terms of programming. A. SUPIOT, *La gouvernance par les nombres : cours au Collège de France, 2012-2014, Country: FRill. 18 cm. Index.*, [Nouvelle éd. avec une] préface inédite., Paris, Pluriel, 2020.

lies in institutions pursuing maximum production of public goods, with public institutions being equivalent to private ones[666]. It is a political action model of good governance, the legitimacy of which is based on results - the outputs - , enabling an economical conception of law[667]. Supiot also emphasizes that cybernetics was employed by technical theorists to implement instrumental reason.

This legitimation, however, stems from an individualistic school of thought, and therefore cannot cover all the nuances of an ecosystem the code of which is not the individual, but a society that depends on data. Moreover, as aforementioned, it leads to a systematic extraction of data, an approach that does not enhance the amenities offered by *information for* the public sector.

The present research, on the other hand, seeks to employ this imaginary by detaching itself from systemic quantitative self-regulation in order to reason from a relational perspective, focused on the well-being of the community, one which is not explored in the technical and individualistic model.

The inversion of the rule of law in favor of governance by numbers is part of the long history of the ideal of harmony through calculation, whose latest avatar - the digital revolution - dominates the contemporary imagination. This cybernetic imaginary leads to an understanding of legal system no longer along terms of legislation, but in terms of programming[668].

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[666] S. BESSON. Le *droit international face à la distinction public/privé*. Leçon d'ouverture. Cours au College de France. 2021-2022. https://www.college-de-france.fr/sites/default/files/documents/samantha-besson/UPL4883524991174199192_Besson_PP_1_220222.pdf.

[667] S. BESSON. Le *droit international face à la distinction public/privé*. Leçon d'ouverture. Cours au College de France. 2021-2022. https://www.college-de-france.fr/sites/default/files/documents/samantha-besson/UPL4883524991174199192_Besson_PP_1_220222.pdf.

[668] In the words of Alain Supiot: "*This distinction returns today with the attribution to independent authorities of a techno-scientific teaching on power. The reason for power is no longer sought in a sovereign authority that transcends society, but in the rules of operation inherent to it. The question of power is no longer posed in terms of sovereign government, but of effective governance. This evolution is in line with the perspectives outlined after the war by cybernetic theorists, who linked governance ("cybernetics" was built from the Greek kubernetes: the pilot, the one who holds the helm) and regulation (inherent in all homeostatic systems) into a global theory of systems (mechanical, biological, and human) that would supposedly protect from anthropic disorder."*
Original : « *Cette distinction fait aujourd'hui retour avec l'attribution à des Autorités indépendantes d'un magistère techno-scientifique sur le pouvoir. La raison du pouvoir n'est plus alors recherchée dans une instance souveraine transcendant la société, mais dans des règles de fonctionnement inhérentes à celle-ci. La question du pouvoir ne se pose plus dès lors en termes de gouvernement souverain, mais de gouvernance efficace. Cette évolution s'inscrit dans les perspectives tracées après-guerre par les théoriciens de la cybernétique, qui associaient la governance (« cybernétique » a été construit sur le grec kubernetes : le pilote, celui qui tient le gouvernail) et la régulation (inhérente à tout système homéostatique) dans une théorie globale des systèmes (mécaniques, biologiques et humains) censée nous prémunir du désordre entropique*»A. SUPIOT, « Chapitre 5. Raisonner les pouvoirs : du gouvernement à la « gouvernance » », *Homo juridicus*, Paris, Le Seuil, 2005

In turn, Norbert Wiener's work turns to communication[669]. Using functional analogies, he reconsiders the relationship between the living and the non-living, with a study focused on the *interaction* between objects. Cybernetics rethinks subjectivity, no longer as "*interiority*," but as a space of permanent negotiation between different beings, distributed to several *poles* (natural/artificial, organic/mechanical).

Therefore, the technical explorations of cybernetics constitute what the author himself aimed to avoid, "*the human exploitation of the human*". The author even warned about the danger of using machines for this purpose, showing that their potential use allows for the possibility of the employment of the most distinctive human attribute, communication[670]. In addition, he criticizes the vision of value tied to the market, pointing to the need to observe approaches that emphasize moral values[671].

In a work focused on the human sciences, the author makes use of a theoretical approach that emanates from the correlation of cybernetics with the pragmatic theory of John Dewey[672], in which he displays the humanistic and relativistic bias of cybernetics[673]. In turn, in a pragma method, John Dewey states his method for achieving the common good, established by the art of communication as the end of the public and of society[674]. For Dewey, community is the result

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[669] In his terms: *"I have said, moreover, that for man to be alive is for him to participate in a world-wide scheme of communication"*. N. WIENER, *Cybernétique et société. « Cybernetics and society (the human use of human beings) ». Traduit de l'anglais, op. cit.*

[670] In his terms: *The purpose of this book is to explain the potentialities of the machine in fields that have hitherto been considered purely human and to warn against the dangers of a purely selfish exploitation of these possibilities in a world in which human beings, human things are very important* N. WIENER, *Cybernétique et société. « Cybernetics and society (the human use of human beings) ». Traduit de l'anglais, op. cit.*

[671] Also in his terms: *"In this environment, questions of information will be evaluated according to the standard American criterion of valuation: a thing is worth a commodity for what it will bring on the open market. This is the official doctrine of an orthodoxy which it is becoming increasingly dangerous for a resident of the United States to resist. It is perhaps worth pointing out that it does not represent a universal basis of human values.* N. WIENER, *ibid.*

[672] Wiener extended Dewey's pragmatism to mechanical-electrical communication systems, where both propounded a democratic vision, which Wiener called an ideal, in the face of the human capacity for learning. L. MOORHEAD, « Down the Rabbit Hole: Tracking the Humanizing Effect of John Dewey?s Pragmatism on Norbert Wiener », *IEEE Technol. Soc. Mag.*, 34

[673] Relativism is "*closely related*" to pragmatism to the point that a relativistic pragmatism is possible". In .L. MOORHEAD, *ibid.*

[674] John Dewey highlights that "*We have only touched on the conditions under which the Great Society could become a Great Community, i.e., a society in which the ever-increasing and confusingly ramified consequences of social activities would be known in the full sense of that word, so that an organized and articulate Public would be born. The highest and most difficult kind of investigation, together with an art of subtle, living, receptive communication, must take hold of the physical machinery of transmission and circulation and breathe life into it".* J. DEWEY et J. ZASK, « Le public et ses problèmes: Extrait de *The Public and its Problems* (1927), repris dans *John Dewey. The Later Works* , vol. 2, édités par Jo Ann Boydston et associés, Carbondale, Southern Illinois University Press (1re éd., 1977), paperbound, 1983 », *Hermès*, n° 31

of ***common*** + ***unity***, in which communication plays an essential role, the phenomenon that leads the relationship to achieve the good, which will be common.

In Wieners lectures, Dewey's perception of pragmatism adheres to an instrumentalist framework, which denotes that entities are adjudicated based on their instrumental *value for action*. This necessitates adjustments determined by *reciprocal exchanges*, thereby aligning with the relativistic approach. Within this perspective, knowledge is circumscribed by its inherent limitations. In conjunction with pragmatism, this signifies that its comprehension must be examined within practical empirical contexts, wherein thought functions as a guide[675].

For him, relativism refers to a theory of the *relativity of* knowledge, which when combined with pragmatism, shows that meaning must be sought through feedback therefore, a behavioral theory. Feedback, in turn, is the result of the organism's action and transformation in the world[676].

Therefore, it is understood that it is possible to draw inspiration from the imaginary of cybernetics to allude to the relational bias of cyberspace, and of the relationships in it, which are at odds with the imaginary of "*modern progress*"[677], the object of criticism by the author.

Moreover, it connects to the *relational imaginary*, as already noted in **Chapter 1**. In disciplines such as physics, philosophy, or biology, a relational theory evaluates the understanding of reality based on the analysis of the positions of objects and their relevance if and when they enter into exchange with other objects. Space does not exist independently of the objects in relation to it[678] .

In political science and public management, those that best fit the cybernetic paradigm are those that focus on the *interactive* and *communicational* nature of the ecosystem, because they take advantage of the interactive and reticular bias of a holistic ecosystem.

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[675] Relativism is "*closely related*" to pragmatism to the point that a relativistic pragmatism is possible". In .L. MOORHEAD, *op. cit.*, *IEEE Technol. Soc. Mag.*, 34

[676] It can be as simple as an ordinary reflex, but it is most valuable when it arises from a 'higher order,' when future conduct matches past performance .L. MOORHEAD, *op. cit.*, *IEEE Technol. Soc. Mag.*, 34

[677] Again, with Wiener, "*It will be equally true to say that the modern period is the age of consistent and unbridled exploitation: of an exploitation of natural resources; of an exploitation of the so-called conquered primitive peoples; and, finally, of a systematic exploitation of the average man. The modern period begins with the age of exploitation*". N. WIENER, *Cybernétique et société. « Cybernetics and society (the human use of human beings) ». Traduit de l'anglais, op. cit.*

[678] E. JEULAND, *Théorie relationiste [sic] du droit : de la French theory à une pensée européenne des rapports de droit*, Issy-les-Moulineaux, LGDJ-Lextenso éditions, 2016.

Thus, they start from relational perspectives, and seek to build a perception of the collectivity of values.

In the same vein, one may find the ideas of Donna Haraway, particularly regarding her conceptualization of the cyborg imaginary[679], wherein she seeks to transcend established dualisms expressed in oppositions, aiming to recognize and engage with spaces that are interdependent (not autopoietic). The essence lies in opposing totalitarian and autonomous dispositions, instead contemplating the relational ontology of these frameworks.

What may be employed from Haraway of relevance for the present research objectives, resides in the acknowledgement of transcending dualisms, a hallmark of modernity, which denotes an incontingent and emergent perspective, and in this regard, a relational bias. The objective lies in redefining the boundaries of science in partial connection with others[680].

Hence, a pertinent factor within the relational perspective, resides in the ***ontological role*** of transitioning from an autonomous understanding of the modern machine towards reclaiming an interdependent relational vision.

Within its core, it intrinsically harbors a *relational interpretation*. Hence, one might employ the precepts of Luciano Floridi when he analyzes the idea of good government, elucidating its relationship with the *relational ontology* intrinsic to political thought itself, which should transition from a static approach to a relational one.

Firstly, the author contends that society comprises of the multifaceted relationships of individuals, without negating the individual in this perspective, but positioning them in a dependent, hence relational, manner[681]

. This relationship sets the tone, as it introduces elements of instability, emergence, and the necessity for continual interaction[682].

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[679] D. HARAWAY, « Manifeste Cyborg : Science, technologie et féminisme socialiste à la fin du XXe siècle [1] | Cairn.info », s.d., disponible sur https://www.cairn.info/revue-mouvements-2006-3-page-15.htm (Consulté le 19 octobre 2023).

[680] The cyborg imagery offers an interpretation aiming to transcend the 'labyrinth of dualisms' through the rejection of an all-encompassing theory and the acknowledgment of responsibility for social relations in sciences and technology. D. HARAWAY, *ibid.*

[681] L. FLORIDI, « Infraethics–on the Conditions of Possibility of Morality », *Philosophy & Technology*, décembre 2017, vol. 30, n° 4, pp. 391-394, disponible sur https://doi.org/10.1007/s13347-017-0291-1.

[682] For the author : *« a relational and not "substantial" (thing-oriented) view of society ex- plains the current tendency of politics to become global and cosmopolitan, more based on diplomacy (a coming together of relations) than on war (a clash of things) according to a reticular philosophy. This paradigm shift, which has been necessary since the rise of information societies, implies the abandonment not only of an Aristotelian ontology of the primacy of things, but also of a Newtonian ontology of space and time as rigid con- tainers, within which things are*

Floridi propounds, thus, a political philosophy via a relational framework. This paradigm prevails because the solutions proffered by these ideas are not immutable, akin to laws of nature, but rather are contingent, parallel to human history, and must thus morph in tandem with the challenges they address. These *good ideas* exists as *relational*: partially tethered to circumstances and iteratively shifting with them in a quest for enrichment. Politics, in this theory, tends to *the relationships* that form and intertwine entities. The emphasis of politics rests on prioritizing relationships over things, hereby becoming *cybernetic in nature*[683]. Thus, it becomes preoccupied with determining the quality of its directional choice.

For Floridi, the state does not crystallize as the organizational terminus, but rather manifests as a relational juncture—a dynamic interface teeming with varied typologies. In the digital epoch and within globalization, the necessity of the state becomes magnified, interpreted as an *interactive,* and coordinative interface between local and global realities. The state's exigency is ever-intensifying; it both possesses the capability (power of convocation) and bears the duty of coordination (infra-ethics) among various agents in the stewardship of public rationale. Corrections only materialize if both relationships therein are remediated. This should serve as a source of moderate comfort and optimism, since repairing relationships often proves easier than correction[684].

Hence, the good government concept, intertwined with the cybernetic vision, positions the public space as where the common good evolves – relationally, and contextually. This purpose underpins relations in the public domain, embraced when recognizing public actions are oriented towards the common good rather than personal interests.

The cybernetics approach, therefore, provides the basis for designing a governance model that deals with cyberspace and also focuses on the plural characteristic, i.e., a data-dependent society.

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positioned, move, interact, and change" L. FLORIDI, *Il verde e il blu: idee ingenue per migliorare la politica, op. cit.*

[683] For Floridi :« *Politics is cybernetics. In Plato, the kybernetes or "steersman" is the pilot of the ship, which navigates in the right direction, even against the current or unfavourable winds, and therefore sometimes indirectly and obliquely. Politics' main task is not to man- age the speed of change (for example technological innovation), but to deter- mine the goodness of the direction of change* »L. FLORIDI, *Il verde e il blu: idee ingenue per migliorare la politica, op. cit.*

[684](i.e., entities formed and interconnected via relationships). For instance, mending the trust relationship between social partners proves less arduous than "fixing" the social partners themselves to enable a functioning trust relationship. L. FLORIDI, *ibid.*

Examining governance through cybernetics justifies the relational and interactive bias that gives the keynote to the network, the second word that makes up the digital state's model of political action. On the one hand, the autonomy of the individual gave rise to the codification of the political action model of sovereign government and the power of authority, and the process of autonomy of society to the governance model. On the other hand, i***t is the data dependent society that will be the vector of the development of the public law of the digital state model***.

That is to say, it is this society, centered on data, that represents the code of the model of political action. The plurality of governance is aligned to the imaginary of cybernetics. But cybernetics is interactive, thus attracting the *relationality, a* fundamental factor in replacing the rational machine and good technical governance. It lies in a ***mutation from the autonomy of society to an ecosystem of relations.***

Ultimately, this perspective aspires to represent the ideal of a *network governance* political action model. Furthermore, it is not concerned with providing the protection of the fundamental rights of citizens. Instead, reclaiming the notion of good government, obscured by the Enlightenment revolutions, and repositioning the purpose of government, that is, ensuring the common good.

Paragraph considerations: delimitations of the digital state model

The **present paragraph** defines the digital state as a political action model correlated to the data society.

As for ***the form*** *of political action*, the digital state model is based on two main principles: the *network paradigm*, and *governance*, which defines public action as well as the roles of actors and parties within the network ecosystem. The ***code*** (orientation) of which is developed by a society that relies on data, and the purpose of which. is to achieve common goals.

Firstly, the code is conceptualized as being contingent on "society". Due to the fact that ***"interconnected actors***" exist, the code needs to consider the multiplicity of agents in diverse and interdependent relationships with care. Hence, the elucidation of intermediary actors necessitates a *recalibration within the code*, as it underscores that the structure of the modern state model — pertaining to sovereign government (*political action*) and authority *(public action*), and fundamentally individualistic — remains incongruent. This incongruity arises from

its construction for a system and framework directed toward opposing relations, within confines devoid of intermediary entities. Cybernetics, in this instance, strengthens these biases.

Thus, the digital state refers to a mode of political action which is based on a specific code (Society + data). Hence, as for the category "society", it is classified as a "*data-dependent society", the* reticular nature of which requires an interpretation that takes into account its hybrid nature. The data society emphasizes a relational ontological nature, aligning with an ecosystem's interdependence, rather than an individual.

Secondly, this imaginary and its codification determine the political action model of the digital state, combining two elements, governance and network**,** plurality and relational. *Good government* justifies the first, while cybernetic ontology and good government support the second.

The research considers the composition of ***the form of governance*** based on the perception of "good government". The form of government is intrinsically legitimized in two ways: *procedurally and materially*. The procedural dimension involves the principles and procedures that will justify the establishment of these relationships, while the material dimension promotes the perception of the value of the *"common good"*.

In terms **of value,** the common good refers to the well-being of the community. The opposite of *good government* is *bad government*, which represents personal interests. The corresponding principles are put in place to verify whether the action of those who have the prerogative to act, act for the common good. Therefore, justice, temperance, and prudence should verify the value of the well-being of the community, not the individual.

Hence, the above-mentioned actions refer to both political and public actions, which are ***validated*** through *plurality* and interdependence. As a consequence, plurality examines the legitimacy of agents based on their duties, rights, and obligations. Plurality also refers to the absence of a centralized authority and of legitimacy, concerning the value of that authority.

Besides, network governance, as an ideal model, is an approach to political action that is driven by technological potential and focuses on data. Additionally, the networked environment promotes interactivity by creating new typologies of communication.

Consequently, cybernetics permits the interpretation of the networked ecosystem as a space of communication, the rationality of which is not determined by the machine, but by performance. As a result, just as the artificial man machine relates to modernity, cybernetics is the robotics of communication and interaction that aims to develop imaginative concepts.

A "*relational paradigm*" may be emerging as a result. Using cybernetics to recover the pragmatist, relativist, and contextual characteristics of "*good government*", this paradigm focuses on relationships. Accordingly, the principle of *good government* lends support to the relational approach that emphasizes the importance of the common good as the central concept of government.

The relationship is based on cybernetics, which explains the interdependence of agents, actors, users, and humans. Due to the fact that it doesn't focus on the agent, ***but on actions within a given context,*** it is a relational and non-autonomous ontology.

By applying the theory of cybernetics developed by Wiener, the information revolution can influence human development if it allows individuals to communicate between each other. Due to the performative nature of the network, this remains possible.

A communicative aspiration, however, requires the consolidation of previous processes. In order for people to effectively communicate, appropriate information must be included and made accessible. Therefore, if communication is at the heart of cybernetics, it can be effectively realized through the possible communication channels of procedural, instrumental, and communicative democratic processes. Brazil's legal order stipulates openness to communication and participation, however these processes are not compulsory.

As a result of the cybernetic bias, another essential aspect of networked space is ***its interactivity***, the interdependence of actors, and the need to overcome dualisms as legal principles. A social communicative bias facilitates communication.

In contrast, cybernetics and the reticular nature of cyberspace highlight that the *common good* can be observed through practice. Basically, in the communicative sphere, the societal space values and seeks the common good. An assertion based on Wiener's and Dewey's arguments.

Governance, on the other hand, is not solely composed of relationships between individuals in a concrete situation. It possesses a core value that guides relationships within the community as the "*solid foundation*" of the community itself.

This is how *good government* is justified based on actions that promote the *common good.* It is impossible to erase this core. Cybernetics, ***the kuber***, the pilot, is oriented towards the good of the whole instead of the interests of the individual. Cybernetics is characterized by the exchange of information control *between machines.* That is, it is an imaginary that holds, precisely, within its nature, exchanges between human and non-human, artificial and biological entities.

In Norbert Wiener's terms, "*cybernetics (from a Greek word meaning "to govern") can be defined as the science of control by information machines, whether these machines are natural, such as organic machines, or artificial*"[685].

Alain Supiot, in turn, explains the equivalent etymology of cybernetics and governance, *kubernetes* which in Greek means: *the pilot*[686]. This peculiarity - plural - allows one to establish a model of political action of the digital state that does not have the individual, or society as its code.

In this logic, it is important to emphasize that cybernetics can justify forms of communication that are based on democratic models, like societal spaces, but are not limited to them. As a result of its interactive and interdependent nature, the space resides within the system as a whole.

Consequently, governance as a category will have specific, **procedural, and material dimensions.** Governing the public sector can have no other basic value than collective well-being.

As such, ***the value of the community*** corresponds to the substance of the relationships through multiple procedures; democracy is one example. Since the system itself is an interactive and relational bias, the procedural facet attracts the two dimensions that comprise it, thus implying ***that all procedural modalities have a common purpose.***

Essentially, networked governance, good government, and cybernetics are a model of ideal governance and an approach that emphasizes plurality and interdependence. Thus, the logic of good government and cybernetics is applied to its procedural and substantive dimensions, thus considering a range of principles that accompany the idea of good government.

The rationale for this substantive, material bias is the common good, which represents the basic value, the purpose, and the standard of evaluation of political and public actions. This nature is also justified in a cybernetic and relational approach by the communicative bias, the networked society's performative nature.

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[685] N. WIENER, *Cybernétique et société. « Cybernetics and society (the human use of human beings) ». Traduit de l'anglais, Country: FR*, Paris, Deux-Rives, 1952

[686] Plato referred to the terms "rule," "helm," "government," or "governor" share this common etymology with the term "cybernetics."»L. FLORIDI, *Il verde e il blu: idee ingenue per migliorare la politica, op. cit.*

In this context, participatory, communicative, and social approaches are used to establish procedural models in which the "*consensus*" is also taken into account. Moreover, good government is grounded ***in the material legitimacy of public law***, which is the public good.

Hence, ***networked governance can be described as a pluralistic and relational archetype of political action, based on the novel typology digital state***s. Furthermore, it is codified by a data-dependent society that targets the nuanced particularities of cyberspace, particularly in the public domain.

By moving away from the data-mining paradigm of good governance, this formulation stresses societal interest and the common good, anchored in the principle of good governance. With these attributes in mind, it is conceivable to reconceive public law.

Section 2: Network governance as the frame for the public law of the digital state model

> *"For relations between individuals to be governed by the rule of law and not by the "law" of the strongest, the "res publica" must stand firm. This subordination of the private to the public makes the law's structure intelligible and reliable".*
>
> - Alain SUPIOT[687].

In his analysis of public law and the interaction between individuals and institutions, Alain Supiot emphasized the necessity of recalibrating legal positions in contemporary society. According to him, the public realm, the *res publica*, and collective interests should be prioritized over private interests[688]. Taking this mantra as a beacon, **Section 2** analyzes how public law should be adapted to the digital state model outlined in the previous section.

As exposed in **Chapter 1**, Brazilian public law's founding core can be found in the dogmatic department of administrative law[689]. This discipline usually deals with the dichotomy between freedom/authority[690], attached to the subjects rights.

As already established in **Chapter 1,** public law as the "*Law of **the** State*" is generally taken as a sacrosanct and self-evident truth. Concerning this point, in French doctrine, Benoit Plessix, upon noticing about the few inquiries made of public law, asserts that this is because "*the "science of law" consists more in applied research than in fundamental research*"[691]. For the author this represents a conceptual neglect of the discipline and its core elements[692]. In the Brazilian sphere,

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[687] A. SUPIOT, « The public–private relation in the context of today's refeudalization », *International Journal of Constitutional Law*, janvier 2013, vol. 11, n° 1, pp. 129-145, disponible sur https://doi.org/10.1093/icon/mos050 (Consulté le 18 octobre 2023).
[688] *Ibid.*
[689] Is the public interest of the state supreme or not? This is a recurring question in the doctrine.
[690] Augustin Gordillo had already stated that the discipline was intended to deal with this *dichotomy,* whose tension was already visualized by jurists as a limit to the very continuation of the branch. A. GORDILLO Tratado de Derecho Administrativo - Tomo 3 : El Acto Administrativo. - 10a ed. - Bue- nos Aires : Fundación de Derecho Administrativo, 2011.
[691] B. PLESSIX, *Le droit public*, Que sais-je ?, n° n° 4167, Paris, Que sais-je ?, 2022.
[692]Research made in the Brazilian scientific journals portal (*Capes.org*), to map the specific doctrine of Brazilian public law for the thesis research, resulted in a total of 108 dissertations related to the theme, and only one dealt

Martin Perius Haerbelin[693], when proposing to analyze the epistemology of Brazilian public law, employs an identical perception through the utilization of its nuclear concept - the public interest"[694].

Nonetheless, as Gaston Bachelart warns at "*the formation of scientific knowledge*", consolidated knowledge that is rarely questioned constitutes an obstacle in the construction of knowledge itself[695]. In turn, Alain Supiot considers the need to "*think differently to be able to think the same*".

In this sense, an alternative to public law lies in recovering concepts and notions, examining their origin and meaning[696].

Therefore, public law should be thought of by way of *its material criterion*, which leads to an analysis of its substantive means and origins. That option seems in line with the emerging scheme within the network ecosystem and law. The network paradigm is regarded as a point that marks the return of ancient concepts, such as *empire* and *authority*. These concepts dilute the modern dichotomous models, and the modern sovereign, to the point that the network marks a *refeudalization*, in the sense of ***interdependence***[697].

Hence, in the same way that the Renaissance moment revived the pictorial perspective - always present in civilization, but erased by the lens of the Middle Ages that preached the monocular gaze - *cybernetics* alongside *information technologies* could reawake *interdependence* and *relation,* erased by the artificiality of the modern rational subject.

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specifically with public law and its epistemology, in a work about the legal conceptualization of public interest. Furthermore, searches carried out in Brazilian libraries also have a common denominator: the works on public law (in this nomenclature) date back to the 19th or early 20th century, when the discipline of administrative law was still being developed. From the moment when the legitimating core of public law began to be treated as a category of analysis of administrative law, studies of legal dogmatics on and about public law itself became increasingly scarce. This lack is not isolated. Benoit Plessix lists three contemporary French works (other than his own) that address the topic and mentions the work of London School of Economics professor Martin Loughlin on public law. Interest in public law as a discipline is still modest but can be identified mainly within the framework of international law. In addition, the emergence of postmodern law and the digital universe, has brought public law into focus, with a new look. *Ibid.*

[693] M.P. HAEBERLIN, « Crítica da razão do Estado: uma (re) formulação do conceito de interesse público e a correlata construção de um Estado meritocrático de direito », Mártin Perius Haeberlin. - Porto Alegre , 2014.

[694] The author further states: *This is the perspective in which we address the tendency, more usual than commonly perceived, of making plural and dissonant concepts of public interest emerge from jurisprudence and occasional doctrinal analyses, rather than aiming at the solution of concrete problems - treating the theme always and only by the inductive method than seeking to extract the solution to these problems from solid and valid premises with a view to universality. Ibid.*

[695] G. BACHELARD. *La formation de l'esprit scientifique.* 1934, p.20.

[696] M. STOLLEIS, « Droit naturel et théorie générale de l'État dans l'Allemagne du XIXe siècle », *Le Débat*, 1993, vol. 74, n° 2, p. 63, disponible sur http://www.cairn.info/revue-le-debat-1993-2-page-63.htm (Consulté le 24 octobre 2023).

[697] A. SUPIOT, « The public–private relation in the context of today's refeudalization », *op. cit.*

In this context, the present research aims to examine public law from the *cybernetic imaginary* (disposed in **Chapter 1**), integrating approaches based on *network governance* and cybernetic bias (disposed in **Section 1** of the **present Chapter**). Thereby, the legal perception of *res publica* by *good government of the common good* **(§1)**, alongside the *cybernetic* imaginary **(§2)**, that justifies a relational perception of law, is exposed.

§1 The public law of the common good

It is proposed to consider public law by its material criterium, as the *res publica* for the common good **(A)**, stating its primacy over the private **(B)**.

A. public law as the law of the *Res publica*

Although the ***contemporary opposition*** between public and private law is modern (as exposed in **Chapter 1**), its distinction and origin are *more ancient*. It originates both in Roman-Germanic law and in common law[698].

Ulpian, as recorded in the *Digest*[699], is among the first to address the concept in the legal domain, marking the inception of the public/private distinction within Western history, through the incorporation of the Justinian Code (*Corpus Iuris Civilis*)[700]. Originating from the Roman conceptualization, public law is defined as the law that governs the *res publica*. *Res publica*, in turn, relates to the community. Indeed, as Jean-louis Vullierme explains, "*Res publica is mistakenly taken to mean only the State in erroneous Latin versions, but it denotes what, in a political community, concerns everyone and should, therefore, be discussed publicly*"[701].

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[698] *Ibid.*

[699] "*Hujus studii duæ sunt positiones, publicum et privatum. Publicum ius est quod ad statum rei romanæ spectat. Privatum quod ad singulorum utilitatem* »
In English: « *public law is that which concerns the Roman state; private law is that which concerns individual utility* ». N. BOBBIO, M.A. NOGUEIRA et C. LAFER, *Estado, governo, sociedade: Fragmentos de um dicionario politico*, Rio de Janeiro, Paz e Terra, 2021.

[700] M. AMHLAIGH et C. S, « Defending the Domain of public law (against Three Critiques of the Public/Private Divide) »; J. HABERMAS et W. REHG, « Constitutional Democracy: A Paradoxical Union of Contradictory Principles? », *Political Theory*, 29

[701] J.-L. VULLIERME, « Penser les droits de l'homme avec Michel Villey », *Revue européenne des sciences sociales. European Journal of Social Sciences*, décembre 2018, n° 56-2, pp. 241-259, disponible sur https://journals.openedition.org/ress/4640 (Consulté le 6 novembre 2023).

Thus, the first premise is that the relationship of public law is a matter ***of the community*** (the *thing* of Rome), whose "***res"*** is not linked to the state but instead that which is of interest to all.

An examination by the good government approach reveals its connection to the domain of law within the ideas of *res publica* and collective purposes, instead of the people's utility[702]. The good government approaches concept of the common good in *res publica* [703], in turn, finds its roots in the definition provided by Cicero[704], whose expression encompasses the following series of elements[705].

His notion was not associated with any specific institution or legal entity. Rather Cicero's conception of the *res publica*[706] referred to what might be considered a collective[707] in a communal sense[708]. Cicero refers to the *res*, as a "*thing"*, and "*populis"*, as *the people*. It is stipulated that he was the first to identify a "*common good*" singularized as ***an end*** (*common utility*) and ***a means*** (*process*) without an equivalent in private activity. In other words, a common utility ***determined by the rules*** (*laws)* that the entire collectivity (*the people*) adopts.

The *common good*, as a *thing of the people*, configures the *res publica* within "*a society*", a "*consensus*" and a "*common utility*" [709].

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[702] O. KHARKHORDIN, « Why "Res Publica" Is Not a State: The Stoic Grammar and Discursive Practices in Cicero's Conception », *History of Political Thought*, 2010, vol. 31, n° 2, pp. 221-245, disponible sur https://www.jstor.org/stable/26224115 (Consulté le 30 octobre 2023).

[703] Q. SKINNER, *L'artiste en philosophe politique : Ambrogio Lorenzetti et le « Bon gouvernement »*, Cours et travaux, Paris, Raisons d'agir éd, 2003.

[704] It is important to emphasize that the discussion about *res publica*, *common good*, and consensus is not limited to the model of the *good government* approach, nor solely to Cicero's perception. However, in this thesis, the focus is not on the discussion of the various perceptions of the concept itself, but on its understanding within the Framework of *good government* and Cicero's conception of the common good, as this is linked to the governance model being addressed, that is, the *good government*. This means that debates about the perception of *páthos* and *lepka*, as well as distinctions in the perception of the common good by Aristotle and Cicero, will not be addressed, as they exceed the scope of the research due to their detail and complexity.

[705] O. KHARKHORDIN, « Why "Res Publica" Is Not a State », *op. cit.*

[706]The fundamental criterion remains that of the various subjects to which the general notion of *utilitas* can be referred: besides the *singulorum Utilitas* [utility of individuals] of the definition cited, one must not forget the famous Ciceronian definition of *res publica,* according to which it is a "thing of the people", provided that by people is meant not just any aggregation of men, but a society held together, rather than by a juridical bond, by the *utilitatis communione* [common utility] [*De re publica*, I, 41, 48]. B. PLESSIX, *Le droit public*, *op. cit.*

[707]In his own words: "The res publica is the thing of the people [res publica est res populi], and by the people is to be understood not merely any collection of men grouped in a herd, but a numerous group of men forming a society united by their consent to the law [juris consensu] and by the pooling of certain interests [utilitas communis] *Ibid.*

[708][De Re Publica-Lib.I] 25.39. 'Est igitur,' inquitAfricanus, 'res publica | res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus, eius autem prima causa coëundi est non tam inbecilitas quam naturalis quaedam hominum quasi congregatio; non est enim singulare nec solivagum genus hoc, sed ita generatum ut ne in omnium quidem rerum affluen<tia>. [Excidit quaternionis VIIII. folio secundum] idque ipsa natura non invitaret solum sed etiam cogeret. *Ibid.*

[709] *Ibid.*

That highlights that this perception of the *common good* derives from a conception, in which the ***res** of the people* will be considered a *common good* as a result of a *process*. That is to say, it has a procedural dimension, the substance of this dimension lies in the definition of *the common good.* the criteria of the procedural dimension are as follows, the *society, consensus,* and *common utility.* Hence, one can observe that the *res publica* is an institutional arrangement of a *civitas,* a community that discusses things common to all people.

In studying the concept, the philosopher of law and political sciences Norberto Bobbio explains that the fundamental characteristic of the *res publica* is that "*Whatever its origin (...) reflects the situation of a social group in which the differentiation has already occurred* ***between*** *that* ***which belongs*** *to the group as such,* ***the collectivity****, and that* ***which belongs*** *to* ***the individual*** *members"*[710].

By this explanation one can conclude that the core meaning of *res publica,* can be stated as a *res of the Populi,* a consecration of people who associate themselves through a consensus and a common utility"[711]. Similarly, Brazilian scholar Mario Aguiar didactically explains this passage by its constitutive elements, delineating that it is within a *res publica,* that a *civitas* operates. The *civitas* is the society, while a people that must have a consensus are a *utilitatis communo*, with a certain commonality of rules.

The author asserts that the ***res*** is realized when the masses organize themselves to meet the conditions of a consensus and the utility of the community. It will thus be living in a *civitas* and is the holder of the ***res***, which is the core of the *res publica*[712].

Consensus, in turn, derives from "*sentire*" and substantiates collective sharing, a consensus. The element of *sentire* exposed that for this consensus to be effective it needs to be ***"felt"***[713] by

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[710] N. BOBBIO, M.A. NOGUEIRA et C. LAFER, *Estado, governo, sociedade*, *op. cit.*

[711] In short, as Mario Aguiar explains: "*If we wanted to apply the language of first-order predicates we could describe it thus: a res publica(R)is res populi, something that belongs to the Populus (P); the populus exists as such if, and only if, such an association is doubly qualified by the iuris consensus (IC)and the utilitatis communio (UC); it is this totality of definition that Asmis aptly called the etymological depacot.* M. AGUIAR, « Sobre a Definição de Res Publica em Cícero (Rep. 1.39) », *Journal of Ancient Philosophy*, décembre 2018, vol. 12, n° 2, pp. 133-178, disponible sur http://www.revistas.usp.br/filosofiaantiga/article/view/145275 (Consulté le 30 octobre 2023).

[712] *Ibid.*

[713] The issue of feeling is a complex topic in itself and does not lend itself to an extensive discussion in this research. However, it is important to highlight the role of affection and passions in the context of feeling. In any case, Kharkhordin explains that in Cicero's theory, *res publica* relies upon something that cannot ne be touched, but « *be impressed on the soul, first by giving a definition that enlightens the preconceptions (on moral and political matters), already held by listening citizens, and then perfected by supplying additional arguments. That is what the dialogue De re publica does: it sets the stage for the progressive impression on the souls of the listeners of Cicero's definition of res publica* ». O. KHARKHORDIN, « Why "Res Publica" Is Not a State », *op. cit.*

the *civitas,* that is, it is not a symbolic or formal landmark, but a relevant stage in the process of building the common good. The *utilitas*[714] will be the element that characterizes the structure of the *populus*. Therefore, Cicero distinguishes the *populus* from other aggregations of people. The *Populus* handles common decisions, dealing with the binary utility/consensus, which will be the criterion of legitimacy. The members will be able to identify themselves as part of this communion of consensus and *utilitas,* if they are able feel the root of the *sentire* [715].

The consensus[716] is also understood as a sense of justice that the *populis* shares, without the need for opposition between the *civile* and the *naturale*[717]. In addition, in Cicero's view, the ties that bind the *res publica* are framed as a bond of law, *a connection*. If this bond dissolves, the *res publica* ceases to exist. Similarly, without the *populus*, there is no owner of the *res,* and consequently, no *res publica*. These are theoretical criteria to demonstrate the presence of a *res populi*, that is, the *commonwealth* or public matter. It is ***this bond*** that establishes consensus and furthermore cannot be conceived of as metaphorical. The *res publica*, therefore, alludes *to the act* and not to the subject, with the former the more relevant factor[718].

On the other hand, the *res publica* as a juridical product is the result of a process of joint construction. As Michel Villey[719] explains, the Roman notion of rights is related to *res* and *jus*. While *res* represents the action, *jus* signifies the *right*. Thusly, *right* signifies both subjective and objective dimensions, which are different from the traditional perspective of modern law. In this way, the supremacy arises because of the objective values stated by the *community,* that constitute the core basis of the rules for the well-being of the collectivity.

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[714]*In Cicero, the common utility (public interest) would not be linked to the notion of honesty, but to what can be understood by the* ***"Roman spirit"****, so that it could not be reduced to a narrow political utility linked and limited to the petty ends of the* ***"reason of state"****. In this way, "there would be no way for the private interest to be other than coincident with the common interest, but if some 'apparent' opposition arose between the two, the latter should prevail".* J.S.D.S. CRISTOVAM, « Sobre a noção de bem comum no pensamento político ocidental: entre becos e encruzilhadas da dimensão ancestral do moderno conceito de interesse público », *Revista de Investigações Constitucionais*, avril 2019, vol. 6, n° 1, p. 107, disponible sur https://revistas.ufpr.br/rinc/article/view/57508 (Consulté le 17 octobre 2023).

[715]M. AGUIAR, « Sobre a Definição de Res Publica em Cícero (Rep. 1.39) », *op. cit.*

[716]Laureano posits: "*iuris consensus* is "a shared sense of justice" that is reflected "in the moral life and institutional arrangements of a society." This is a population that has consensus about matters of law, custom, and even the political regime under which they are living. This does not mean that natural law is absent. As mentioned above, it is the root of unity among men. R. LAUREANO, « A definição de res publica em Cícero: legitimidade, uso da força e constituição mista no conceito que fundou uma tradição », *Revista Brasileira de Ciência Política*, 2020, n° 33, p. e235352, disponible sur http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-33522020000300208&tlng=pt (Consulté le 30 octobre 2023).

[717] *Ibid.*

[718] O. KHARKHORDIN, « Why "Res Publica" Is Not a State », *op. cit.*

[719] M. VILLEY et M. VILLET, « l'idée du droit subjectif et les systèmes juridiques romains », *Revue historique de droit français et étranger (1922-)*, 1946, vol. 24, pp. 201-228, disponible sur http://www.jstor.org/stable/43844228 (Consulté le 13 janvier 2024).

Thus, one can consider that the significance of this theory lies regarding the ***res*** as an ***outcome***, which in law is objectified, thus distinguishing *iuris* and *jus*. While the construction of the decision of the common good is a practical matter, the public space is seen as a venue for defining the common good, not in a pre-established modelas it highlights the actions and interactions of agents, rather than the agents themselves.

This understanding of the *res publica* reveals both the practical and dialogical ontological nature of law, which necessitates a specific process and possesses its substance. The proposition is the well-being of the community. Regarding ***the value*** and its mode of assessment, it is placed in the realm of "*sentire*", emphasizing the emotional relationships instead of quantitative perspectives. This is because the primary concern for a republic is not the achievement of goals, but the well-being of the community, which is realized through affections of relationships, rather than individual satisfactions.

In this way, the defense of an ecosystem that changes from a model of extraction to a holistic understanding can be conceived of in terms of the *res publica* and the common good. This construction has similarities with the reading of network governance delimited in the previous section. As seen, the common good that underpins a network governance approach means attention to a ***product*** that results from the joint effort of a ***collective act.***

In addition, as network governance has a functional nature, it will be fulfilled by both procedural and substantive elements. If the procedural dimension will guarantee the process of consensus, the substantive dimension highlights that ***the value of a res publica*** resides in the well-being of the community, in other words the common good, a value and a substance of the *res publica.*

Another important element of the definition of *res publica* is linked to the term *societatus* which deals with the existing relationship of the multitude with the *civita*, a bond of union and its

components, which clarifies that the *res publica* is an entity of legal existence. It is a *partnership* that has as its objective[720] the *common benefit of* the people, within their duties[721].

Here, therefore, similarities with the *public purpose* approach can be observed (exposed at **Section 1 of present Chapter),** which places the ***fundamental condition*** of the collective construction of public values, which emphasize the sharing of rights and duties. Similarly, the conception of *res publica* is better associated with the *Digital era governance* model and the *public purpose approach* than the *good governance* approach, which is interested in the results to be achieved, in maximizing individual utilities. This approach is opposed to the perception of *res publica,* since the latter considers the common good indispensable to guarantee life in the *civita.*

In sum, the concept and vocabulary of *res publica* coincides with the vocabulary of governance. The shared construction (*process*) made by the people, which is constituted in the community (*the interested parties*), the application of which results in a consensus (*the consensus itself*), and will result in the common good, as well as a core that designs the relations establish in a particular space (the core as the common good).

B. The primacy of the common good

Based on Cicero's perspective, Roman law consecrated a *jus publicum* separate from *jus privatum*. In this way, the Digest will establish that private law concerns individual utility, while public law concerns the *status of the Roman thing*[722]. As noted, it is the - *res* -, the good of the collectivity, not the state/civitas itself. Not by chance, Samantha Besson, when studying the passages of the Digest, mentions that the study of the precepts of law involves ***two positions:***

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[720] Finally, the absence of a relation of the aforementioned perception to a contractualist theory is highlighted It is important to remove this hypothesis from the horizon. Many characteristics of a contractualist theory are not present in Cicero's work. One can cite some of the most basic ones: as a partisan of the natural association of men, there is no state of nature in his text, much less one that contains any modern conception of the individual, because the governing body is created by concession from the collective *populus*. The delegation of powers to the consilium does not occur through an abdication of natural rights in exchange for civil rights; on the contrary, natural rights manifest themselves in just governments in communion with civil rights. And the concept of the state, fundamental in contractualism, cannot be applied to Cicero's work. R. LAUREANO, « A definição de res publica em Cícero », *op. cit.*

[721] *Ibid.*

[722] As states Benoit Plessix: "*There are indeed things of public utility, others of private utility.* B. PLESSIX, *Le droit public*, *op. cit.*

the private and the public. As she explains, the public is that which guards the *Roman state of things, while the* private is that which deals with the utility of individuals.

In the Digest, the author highlights that there are, in effect, factors that are useful to the public and others that are useful to the private, as well as that the public consists of the sacred things, of praetors and magistrates. Private law, on the other hand, consists of natural law, of the people, and civil law[723].

Within this rationality of two distinct (but not opposed) positions, one finds a differentiated legitimacy of the domain of the public. Alain Supiot explains that their distinct positions - one of the collectivities and the other of private interest - gives a *corpus iuris* to the possibility of taking two positions because the horizontal adjustment of private interests would depend on the vertical stability of public institutions. The *res publica* should mean that people would be governed by law, but not by the "*law*" *of* the strongest[724].

Indeed, the bond uniting the *citizens* of a *res publica*, ensuring its maintenance and guarantee, is established through the law that guides and directs deliberations, whether made by one, a few, or all. Thus, the notion of ***law as a bond*** stem from the same binding obligation, that is, a ligament[725]. This public-private subordination makes the law understandable and reliable. Supiot further explains, that the *res publica* must be healthy to contain individual interests. In other words, transposing to cyberlaw what one cannot admit in public spaces is the insertion of individualistic ideals, precisely the logic of good governance[726].

In this way, it is important to note that this dogmatic structure was employed not only in classical Rome, but also in the monarchies of the *ancien régime* and colonial empires[727]. In all of them, there is a separation between private utilities and those of the collectivity, the latter prevailing. The "*love and virtue*" of the republic will materialize later, as a result of the first wave of modernity and the nation-state as a sovereign figure. In this sense, one can see, for instance, Montesquieu's construing of public matters, which, according to him, could not be discussed in the same way as private interests[728]. Dryly, Montesquieu considers it vile to try to

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[723] S. BESSON, « Droit international des institutions », *L'annuaire du Collège de France*, février 2023, n° 120, pp. 475-483, disponible sur http://journals.openedition.org/annuaire-cdf/18584 (Consulté le 30 octobre 2023).
[724] A. SUPIOT, « The public–private relation in the context of today's refeudalization », *op. cit.*
[725] O. KHARKHORDIN, « Why "Res Publica" Is Not a State », *op. cit.*
[726] A. SUPIOT, « The public–private relation in the context of today's refeudalization », *op. cit.*
[727] *Ibid.*
[728] J. VAN MEERBEECK, « Droit public et droit privé : ni summa ni divisio? », 2019, disponible sur https://dial.uclouvain.be/pr/boreal/object/boreal:218769 (Consulté le 30 octobre 2023).

decide the rights of royalty, nations and the universe, by the same maxims that private individuals decide the right concerning a drip[729].

Thus, this exposition reveals that public law, in its origin included the prevalence of the public over the private, and not the opposite. The strongest among these dimensions is be the public. An assertion explicit for Norberto Bobbio, given that the definition of private derived from that which "*is not public*". Not by chance, the original definition is accompanied by the notion of the *supremacy of the public over the private*[730].

As distinct positions, public is public because it is codified as a result of a consensus in which common utility is reached (in a specific legitimation process). It is "***res***", a quality of a proper subject of the community, and thus, it should prevail to maintain the equalities of the horizontal position (the private space). Indeed, the public as supreme over the private is the keynote of Western history, and its exchange is more recent, only with the advent of the rule of law, as aforementioned.

Although the common good has inspired important authors of politics, the Enlightenment ideals tried to distance themselves from the expression, especially because of its association with the church[731]. Consequently, the criterion of the *common good and the public's primacy* over the private was not absorbed as a fundamental element in the development of the *summa divisio* individualist/modern/liberal *dichotomy* and has been sparcely valued until this point[732]. As seen, Western public law was designed on the primacy of the individual, to guarantee his subjective rights. Hence, public law was adapted to him, and established not for the whatever

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[729]In his words : *« That one should not decide by the rules of civil law, when it is a question of deciding by those of political law (...) It is ridiculous to pretend to decide on the rights of kingdoms, nations & the universe, by the same maxims on which one decides between individuals on a right for a gutter, to use Cicero's expression ».*
Original : « *Qu'il ne faut point décider par les regles du droit civil, quand il s'agit de décider par celles du droit politique. (...) Il est ridicule de prétendre décider des droits des royaumes, des nations & de l'univers, par les mêmes maximes sur lesquelles on décide entre particuliers d'un droit pour une gouttiere, pour me servir de l'expression de Cicéron* », p.227. MONTESQUIEU, *De l'esprit des lois , par Montesquieu*, Paris, Vve Dabo, 1824, p. 224, disponible sur http://gallica.bnf.fr/ark:/12148/bpt6k9691133s (Consulté le 23 octobre 2023).

[730] The original differentiation between public and private law is accompanied by the affirmation of the supremacy of the former over the latter, as is attested by one of the fundamental principles governing every system in which the great division is in force - the principle according to which "*ius publicum privatorum pactis mutari non potest* "* [*Digest,* 38, 2, 14] or "*privatorum conventio iuri publico non derogat* "** [*ib*., 45, 50, 17. N. BOBBIO, M.A. NOGUEIRA et C. LAFER, *Estado, governo, sociedade*, *op. cit.*

[731]He explains that Cicero influenced medieval-like St. Augustine, and modern like Machiavelli and Montesquieu, but that such a tradition was hampered because of a lack of adequate understanding of his philosophy, an aversion to the Enlightenment to the remnants of church power. I.M. SANTOS, « A res publica entre a ideia e a história: filosofia, eloquência e tradição no pensamento político-jurídico de Marco Túlio Cícero », février 2017, disponible sur https://repositorio.ufmg.br/handle/1843/BUBD-AY4KWQ (Consulté le 30 octobre 2023).

[732] V. CORREIA, « A Dicotomia Público-Privado », *Poliética*, novembre 2015, vol. 3, n° 1, pp. 7-44, disponible sur https://revistas.pucsp.br/index.php/PoliEtica/article/view/19492 (Consulté le 30 octobre 2023).

public matters of the collectivity, but to guarantee the individual rights of people[733]. In truth, this anthropocentric perspective of law is more contested when one takes into account the study of specific domains, such as ecological rights, for which utilize broader view of law[734].

Nevertheless, within the *res publica* framework, the ***repositioning of the public before the private*** is advocated.

In this sense and specifically within this interpretation, it seems aligned to the Brazilian schools of thought that impose the supremacy of the public interest over the private. This is the argument of Maria Sylvia Zanella DiPietro[735], who highlights the Roman origin of the supremacy of the public interest over the private, notably the perception of *res publica concerning* the right to the protection of the common good. It is possible to state, therefore, the idea of "*supremacy of the public interes*t", as a legal principle capable of repositioning the primacy of the public over the private, which was deprived in the advent of the legalistic rule of law.

Therefore, the supremacy of the *public* interest, precisely linked to the ideals of the *common good* reinforces the protection of the *res publica*, that is, of a public law that is focused on the public and not on the private interest.

On the other hand, it is important to emphasize that one cannot correlate public interest with the authority of public power[736], since these are bound to the modern machine, and, unlike the *res publica*, are bound to the state and source its legitimacy from authority, beyond its unique and centralist legitimacy.

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[733] *Ibid.*

[734]Gunther Teubner in this way, posits that: "*Systems theory asks a different question: is it the internal division of society that creates such injustice that inequality between individuals is not just a secondary phenomenon? The internal divisions of society should be understood differently, that is, as the result of the interrelationship of communication networks with their environment. Individuals are not the center of these networks, nor can they return to them. Individuals are the environment of these communicative networks, to whose operations they are exposed, without being able to control them.*. G. TEUBNER, « La "matrice anonyme" : de la violation des droits de l'homme par des acteurs "privés" transnationaux », *Revue critique de droit international privé*, 2016, vol. 4, n° 4, pp. 591-613, disponible sur https://www.cairn.info/revue-critique-de-droit-international-prive-2016-4-page-591.htm.

[735] D. PIETRO et M.S. ZANELLA, « ZANATTA », *Direito administrativo e interesse público : estudos em homenagem ao professor Celso Antônio Bandeira de Mello*, 2010, disponible sur https://repositorio.usp.br/item/002424292 (Consulté le 11 février 2024).

[736] It means that the Public Power is in a position of authority, of command, concerning private parties, as an indispensable condition for managing the public interests put in confrontation. It comprises, because of their inequality, the possibility, in favor of the Administration, of constituting private parties in obligations through a unilateral act of the Administration.

In sum, it is from this reading that it is possible to argue that supremacy can be considered as the provision of the primacy of the public, and the preference for the realization of the common good (political sense a materialized at Brazilian Federal Constitution with the republic as the prime value at Article 1[737]).

On the other side, that does not mean an aprioristic authority of the state over the individual, nor the sole legitimacy of and for the common good. Indeed, as observed, the concept of *res publica* is linked to practical sense and, thus, is not bound to any aprioristic entitlement of agents, but rather to the relationships established in a context of community well-being. In this vein, if the common good does not represent a prior and unique entitlement of the state, this interpretation can only be realized in the legal field of this discipline, as a science, follows the elements that compose the architecture of this imaginary. In this context, the law needs to be viewed as a relational discipline to support the idea of *res publica* and the common good of the community as its substance. This characteristic is reinforced by the very nature of the ecosystem under study: a data-dependent society tied to the cybernetic imaginary. Then, it is necessary to revoke the ancient ontology of law, the relational turn.

§2 The public law of the common good, a relational turn

One primary demarcation, is that public law, is distinct to private law, from the standpoint of the *res publica*. Therefore, public law is not a *state law*, but a law for the ensuring of the common good. Hence, Law can draw from ideas of the *res publica*, however not remain merely inside its structure. It is necessary to adjust to contemporary circumstances, where a subject exists (which does not cease to be present, merely is not the initial framework for designing the model), as well as the ecosystem, the data, and the whole holistic complex of a society the nature of which is dominated by interconnectedness. Thus, these elements must be considered within the reality being examined.

Accompanying the definition of the common good as the good of the collectivity, a conceptualization which is the consensual result of a common construction process, it is also

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[737] « *Art. 1 The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal District, is a Democratic State governed by the rule of law and has as its foundations* ». Original : » Art. 1° *A República Federativa do Brasil, formada pela união indissolúvel dos Estados e Municípios e do Distrito Federal, constitui-se em Estado Democrático de Direito e tem como fundamentos* ». R.F. BRASIL, *Constituição da república federativa do Brasil*, s.l., Senado Federal, 8 décembre 2015.

important to take into account the nature of law itself, the modernity of which is evident given its autonomy and subjectivity.

The network dimension of the network governance model also supports a re-reading of the legal discipline.

On the other side, by recovering the relational conceptualization of law, one can conceive of an alternative for examining legal relations in the public law of the common good. Although it cannot be said that there is an accurate theory, relational law has been progressively developed, to the point that a ***relational turn*** is in order. In a broad sense, it refers to the relationship as the *medium,* the *process,* the intersection where fact becomes law, in this intersection[738].

Concerning the Brazilian frame, one can identify a legal relationship doctrine from private relational contracts[739], proposing a model of "*administrative contracting*"[740].

It's worth noting that relational approaches often emerge from the private perspective, which, as seen, can lead to the substitution of public interest for private interest. Furthermore, as the state sphere is often treated as a subsidiary of the private sphere, its provisions may result in technicist foundations. Thus, not rarely, they are focus on the search for the primary preservation of the guarantees of the subject (and his autonomy), linked to a technicist proposition. This latter aspect can be attributed to its diffusion in the Brazilian legal regimes, especially those inspired by the law and economic theory[741].

Taking these considerations into account, the present research aims to pursue a relational approach ***starting from*** readings of law that seek to escape this scheme, especially by employing state action itself as a starting point, a defining element of public law. For instance, in a foundational work of French administrative law, Jacqueline Morand-Deviller states that the first delimitation of administrative law lies in being a "*law applied to administrative action,*

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[738] E. JEULAND, *Théorie relationiste [sic] du droit : de la French theory à une pensée européenne des rapports de droit*, Issy-les-Moulineaux, LGDJ-Lextenso éditions, 2016.
[739] J. VAN MEERBEECK, « Relation et confiance légitime ou la face cachée du contrat », *op. cit.*
[740] Ian MacNeil's analyses of the relational contract show the reductionism of limiting the center of gravity of the contract to the moment of its conclusion, particularly given the duration of certain contracts and the limited rationality of the participants. *Ibid.*
[741] As well remembered by Emerson Gabardo and Pablo A. de Souza, there is a wide range of authors who defend the "importation of consequentialism to the Brazilian reality as a panacea for the problems of legal security and efficiency of the system". E. GABARDO et P.A. de SOUZA, « O consequencialismo e a LINDB : a cientificidade das previsões quanto às consequências práticas das decisões », *Revista de Direito Administrativo e Constitucional*, 2020, vol. 20, disponible sur https://dspace.almg.gov.br/handle/11037/39149 (Consulté le 4 novembre 2023).

a material approach that highlights its dynamic and evolving nature" [742].Using this observation, the author indicates that the material criterion of this discipline rests ***on the action*** of the agent, not on its ownership. She also emphasizes the omnipresence of the general interest, whether through "*puissance publique*", or public service[743].

Therefore, starting the analysis from state action, aligned with the network governance model and the approach of good government, this research explores how to establish relational criteria within the scope of public law.

A. The context as a legal criterium

Until the 17th century, when law was a practical science, the *relational*, *casuistic,* and *uncertain* triple dimension of law was employed. When remembering this core characteristic of law, a defense of these concepts 'rehabilitation arises, rather than new configuration. This is because these concepts in fact are inseparable from the legal phenomenon. Law has no reason to exist *without a relationship* or without trust and cannot avoid reflecting on such cases[744].

As Massimo Vogliotti explains, the new legal paradigm that is slowly taking shape, conceives the object of legal knowledge to be sub-*specie relationis*. Law no longer appears as a more or less ordered whole, but as a *web of relations*, as a *social practice* that develops within a positive legal framework that conditions it and, simultaneously, is conditioned by it. Norms are no longer conceived as a primary legal definition, but are a result of the *process of* becoming. This result is dependent on the connections that all legal actors - in different ways and with different means according to the role they play - possess within the fabric of law[745].

In this appraisal, the emphasis is not on institutions, norms, individuals, or legal entities and their subjective rights, but *on* "*what exists between the poles of the relationship*"[746]. Since it is

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[742] Original: "*droit appliqué* ***à l'action*** *de l'administration,* ***approche matérielle*** *qui met en valeur son caractère dynamique et évolutif*" . J. MORAND-DEVILLER, *Cours de droit administratif: cours, thèmes de réflexion, commentaires d'arrêt avec corrigés*, Paris, Montchrestien, 1989. p. 9.
[743]. *Ibid.*.
[744] J. VAN MEERBEECK, « Relation et confiance légitime ou la face cachée du contrat », *op. cit.*
[745] M. VOGLIOTTI, « De la pureté à l'hybridation : pour un dépassement de la modernité juridique », *op. cit.*
[746] E. JEULAND, « L'école relationnaliste du droit : la nouaison? », *op. cit.*

a paradigm that manifests itself through symbols, it will be a process of constant *emergence*[747], and crucially unstable, since it depends on the community's recognition for concretization[748].

Accordingly, the relational approach represents the method of operation of Cicero's *res publica* and *good government*. It was not a matter of establishing justice "*between individuals*", but rather of establishing justice "*between individuals and groups*". The imperative was not to decide against or in favor of a group or individual, as it was not be an *opposition* or a *thing to* be analyzed, but an *exchange*[749].

This reading fits within a networked paradigm, in which oppositions are inappropriate. Moreover, the code of *network governance*, data-dependent society, also draws from this practical inspiration. A perception of the legal order not as opposition between actors, but as a *process*, which has "*exchange*" at its core, may be adequate to contemplate public law, the legitimacy of which is given by the relations in a context, and not at aprioristic determinations of actors and their titularities. Thus, according to this understanding, in a public space, one will not be faced with *individuals x State*, but with actors who will *relate* to each other and hence interact. This *dialogic* bias also finds support in the relational approach.

Therefore, the relational paradigm harmonizes with the aesthetics of cybernetics, with the network paradigm and its reticular nature, and is further aligned with the political action model of governance, known as a *process*. The process, in this sense, is crucial to a relational view of law, as relational law finds it origin in uncertainty – not the certainty of the modern era. This focus is not on a risk emerging unexpectedly, but on acknowledging the *inherent uncertainty* and contingency of the world. Therefore, this uncertainty necessitates that law ensures mechanisms for review, evaluation, reconsideration, and discussion, which are better aligned to a relational perspective. This perspective emphasizes the need for a process that can facilitate the reexamination of natural contingencies. This process encompasses both a method and a *substance*.

While writing on a relational theory of law, Emmanuel Jeuland points out that the philosophical change in the perception of ***substance*** goes beyond the *linguistic turn,* coined by Richard Rorty, a legal pragmatist. For the author, it is a deeper revolution, called the *contextual turn.* One of the fundamental principles associated with the new logic refers to the "***context principle***", that

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[747] T.J. WATSON, « Organization and work in transition: from the "systems-control" logic to the "process-relational" one », *op. cit.*
[748] E. JEULAND, « L'école relationnaliste du droit : la nouaison? », *op. cit.*
[749] *Ibid.*

is, the meaning of a word is not an idea or a mental representation but is found in the *context of* the proposition in which it is embedded[750].

Then, concerning the *public law of the common good*, governed by the concept of *res publica*, the principles guiding relationships within a ***specific context*** are distinct to those in private law. Unlike the realm of private interactions, where individual autonomy prevails, the context of public law is shaped by values essential to the community. Here, the context is not defined merely by individual interests or satisfaction, nor solely by the democratic process, but by a *contextual perspective* that anchors relationships in public values.

The primacy of the public sphere stems from its focus on communal relations and the *common good*, rather than individual interests. In this setting, the paramount value is the well-being of the republic, reflecting a collective orientation towards the needs and interests of the community as a whole. This value, which emerges from a relational interpretation, results from the community's perception of actions aimed at its well-being.

Indeed, Hans Gadamer attributed a central role of the *context* principle to *understanding*[751]. One can also make the analogy that it is not concerned with *words*, but with *symbols*[752].Therefore, the *cybernetic* paradigm would harmonize with a *legal* pragmatic *relational paradigm*, , the roots of which lie in the *context* and *consensu*s established through *communication* and *feedback.* Cybernetics, being relativily pragmatic, is aligned with a *contextual* vision of law.

Therefore, the legal relational approach is the best way to employ the *common good* in practice, by establishing a legal relationship not of opposition, but of exchanges within a specific context,

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[750]This principle was developed and extended in the second half of the last century by philosophers of language such as Wittgenstein and Quine - according to whom, to understand the meaning of a word, it is not enough to take it only concerning a statement, one must, first of all, understand the whole of language. *Ibid.*

[751]As Hans Gadamer explains: "*Understanding is not a method, but a way of life in common of those who understand each other. This opens up a dimension that does not play a role alongside other possible areas of knowledge but constitutes the practice of life itself This certainly does not exclude the fact that the methods of science can also follow their path of objectifying their research objects. But this is also where the dangers of a limitation induced by the theory of science lurk, and which cause us to lose certain experiences, other people, other words, other texts, and their claim to validity when we entrench ourselves in methodical self-satisfaction. Just think of the considerable energies of research that allowed us to clarify a little the structural grammar of myth - and this certainly did not have the end, or the result, of the commitment to make myth speak better. (...) Hermeneutics does not aim at objectification, but at mutual listening, listening, for example, to someone who knows how to say something. This is where the immense begins, what is understood when people understand each other*". H.-G. GADAMER, « Préface », in *L'Universalité de l'herméneutique*, Épiméthée, Paris cedex 14, Presses Universitaires de France, 1993, p. V-VII, disponible sur https://www.cairn.info/l-universalite-de-l-hermeneutique--9782130455349-p-V.htm.

[752]Our Babel is not of languages, but of signs and symbols; without them, a shared experience is impossible. J. DEWEY et G. LEJEUNE, « De l'absolutisme à l'expérimentalisme », *Philosophie*, 2018, n° 3, p. 10, disponible sur http://www.cairn.info/revue-philosophie-2018-3-page-10.htm?ref=doi (Consulté le 30 octobre 2023).

based on the well-being of the community. These exchanges are examined when related to each other, hence its designation as *contextual*.

Thus, the recovery of relational law will imply a certain distancing from the method of theoretical sciences that reduces law to an object. In other words, by way of relational theory, the legal field moves back towards the practical sciences, "*where it had always been until the modern epistemological rupture*"[753].

After consideration of the relational method, the legal order is now considered ***as a relationship between*** legal texts and different applicative contexts. A tension between the *law* - lei *positum*, objectified in binding texts - that must be maintained in order to be fair[754] by the linguistic community of reference, and subsequently filtered by the *reasoning of* jurists[755]. The most important task of legal science - as a practical science - lies in ensuring that *legal action* tends towards the "*just*" and thus protects the second dimension of law, "*the indestructible core of all law against any destructuring normative activity*"[756].

The understanding of the relational view as a practical science does not mean complete and absolute pragmatism, without any rules of values. Instead, it stems from the nature of the relational–interactive–procedural – characteristic of law, which will be sustained by both a method and a substance. It is, therefore, a dual process.

B. A dual process

Relational law is defined by a ***dual process***, which is concretized in a *practical world*, but the process of which, however, depends on *objectified values* that ensure the order of the structure[757]. The relational process, itself symbolic, intersubjective, and in context, is formed ***from*** a *double process*. One corresponds to the relational nature itself, and the other to the "*core values*", dominant or consensual. Similarly, as an objective pole, law orders relations in a way

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[753] M. VOGLIOTTI, « De la pureté à l'hybridation : pour un dépassement de la modernité juridique », *op. cit.*

[754] In Emmanuel Jeuland's terms, *or reasonable, which is equivalent because practical reason is not instrumental and neutral like modern reason, but is teleologically value-oriented.* E. JEULAND, « L'école relationnaliste du droit : la nouaison? », *op. cit.*

[755] whose task is no longer to describe objectively and in the terms of the law, but to make the law as it is. This is why it is a mutation from the applicator to the interpreter.

[756] E. JEULAND, « L'école relationnaliste du droit : la nouaison? », *op. cit.*

[757] As Jennifer Nedelsky states, the relational view can provide « *a better framework for identifying what is really at stake in difficult cases and for making judgments about the competing interpretations of rights involved".* J. NEDELSKY, *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, *op. cit.*

that conforms with the legal system[758]. For Jennifer Nedelsky[759], the decision will be co-determined in a context of multiple configurations, where one must take into account not only aprioristic rules, but also a posteriori, dependent on the specific context necessitating the use concepts such as trust[760].

In the case of public law**,** the contemporary relational perspective makes use of the assertion that public and private legal power are restricted to their proper exercise *within concrete relationships*. This is a model of "*reciprocal administrative law*," in which public and private actors are not only bound by *abstract law*, but also - and more fundamentally - by the underlying principles of proper behavior. "*The principles of proper governance*" reflect a relationship between the government and its citizen distinct from how their ***positions concerning*** each other were generally perceived. It calls for a more horizontalized approach to public law, where public and private parties recognize each other as actors on a common stage, actively shaping the *public domain* through mutual interaction. Within this rationality, governments continue to bear the primary responsibility as guarantors of the general interest. However, private actors are expected to behave *appropriately, to the* extent their positions and responsibilities allows them to[761].

The public law of the digital state is a legal regime which protects the *res publica* because it is situated within a plural model of political action of network governance, public law is not, in that sense, the law of the state. As a general category, this implies a return to public law of the *common good*, instead of the protection of the individual, a condition of the modern dichotomy. In this sense, *the common good,* together with the legal relational order, reactivates the characteristics of the practice of law, which were erased by modernity. This is done, however, based on a code of society that depends on data, acknowledging diverse actors, respecting them, including their subjective rights, as these rights do not vanish, but only cease to be the center of the legal system.

In addition, it is important to mention that, although the scholarship of the relational school of thought strive to establish common principles and objective values, they do not ignore the guarantor function of the government. Therefore, despite the *relational* environment, in

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[758] E. JEULAND, « L'école relationnaliste du droit : la nouaison? », *op. cit.*
[759] J. NEDELSKY, *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, *op. cit.*
[760] J. VAN MEERBEECK, « Relation et confiance légitime ou la face cachée du contrat », *op. cit.*
[761] L. VAN DEN BERGE, « Rethinking the Public-Private Law Divide in the Age of Governmentality and Network Governance », *European Journal of Comparative Law and Governance*, mai 2018, vol. 5, n° 2, pp. 119-143, disponible sur https://brill.com/view/journals/ejcl/5/2/article-p119_119.xml (Consulté le 30 octobre 2023).

opposition to a vertical or oppositional model, the government occupies a distinct position, as a guarantor of the common good. As will become evident in the following chapter, this *common good* can be translated into the public interest, in such a way that the relational public law and the common good are not oriented to the state, but to an "*undivided public interest*"[762]. The relational theory will assert that public law is governed by principles that precede state commands, binding citizens and the government by prepositional law standards from which they cannot be artificially exempted[763]. This view of public law, corresponds, in effect to an alignment of what has been separated by the rule of law, into the branches of public law. A unitary perspective of public law can be useful in realizing the common good and its protection, notable for starting that its preservation is the milestone of public law[764].

Hence, common good, the relational, and network refer to an interweaving set of categories, which given their connections harmonize with each other. That is to say, they are correlations the concepts of which support categories, therefore, necessitating linkages.

Thus, by overcoming such opposition, as well as by the establishment of a *dialogue* scenario it is possible to guarantee the protection of individuals. Similarly, it is guaranteed that the result of this process is a consensus that is considered public, which will ensure the rights and duties of the related parties. Therefore, an alignment of these elements will depend on each other for the edifice of the imaginary to be maintained.

In short, relational theory can be apprehended here as an approach that supports a method to employ, in concrete cases, a new vision of law. Which, as can be observed, is aligned with the model of political action of network governance, that is, to the digital state, and especially, can give support to the perception of public law as public right of the *common good*. Hence, right refers to a *process,* the guarantee of the *public,* aligned to a practical vision of law. In this sense, the relational approach and the common good, more than a new construction or theory, merely recover notions and perceptions of the nature of law and public law, which modern law and modern state models had erased. Therefore, the public law of the common good and the

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[762] *Ibid.*
[763] *Ibid.*
[764] A third objective should be the reconstruction of an integrated view of public law. Within legal scholarship, constitutional law, administrative law, and the other branches of public law have progressively lost their unity: for instance, constitutional law is increasingly dominated by the institution and practice of judicial review; most administrative lawyers have been overwhelmed by the fragmentation of legal orders, which led them to abandon all efforts at applying a theoretically comprehensive approach. The time has come to re-establish a unitary and systematic perspective on public law in general.

relational reading of law are not original constructions, but reclamations of previous models, which were correlated to the political action model of governance.

C. The specificity of the common good at public law

Public law requires a doctrine of relativity that cannot merely mimic its private counterpart. It is understood that it is within administration that the application of its specific domain can be located[765]. Ian MacNeil's writings display that relational contract theory arose from the problems contractual relations exceeding the capacity of liberal law[766]. In public law, this has meant a shift from unilateral powers to diffuse powers, articulated in complex relationships. Power is no longer confined to a hierarchical mold from above but exists in all forms of economic and social relations.

In the context of contracts formed between the public and private sectors, Vivian Lima Lopez Valle emphasizes the significance of adopting the legal relation as a new central concept in administrative law. She asserts, "*Establishing the legal relation as the new central concept of administrative law allows for the explanation of consensual administrative contractual relations and the establishment of a distinct legal regime*"[767].

Furthermore, concerning administrative law, Vasco Pereira da Silva sought to demystify the aura surrounding administrative acts, highlighting their inability to capture the full range of legal situations in which the administration participates. To this end, the author fills the gaps left by the theory of administrative acts through the concept of administrative legal relations, which he sees as a more suitable way to frame relations between public administration and individuals. For Vasco Pereira, the legal relation emerges as a new central concept capable of replacing the administrative act in classical theories. Vasco's assertion aligns with the current definition of "*legal relation as the connection constituted by law between two or more subjects*"[768].

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[765] L. VAN DEN BERGE, « Rethinking the Public-Private Law Divide in the Age of Governmentality and Network Governance », *op. cit.*

[766] I.R. MACNEIL, « Reflections on Relational Contract », *Zeitschrift für die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics*, 1985, vol. 141, n° 4, pp. 541-546, disponible sur https://www.jstor.org/stable/40750802 (Consulté le 23 janvier 2024).

[767] V.C.L.L. VALLE, *Contratos administrativos e um novo regime jurídico de prerrogativas contratuais na Administração Pública contemporânea. 2017. 265 f*, *op. cit.*

[768] V.M.P.D.P. da SILVA, *Em busca do acto administrativo perdido*, Colecção teses, Coimbra, Almedina, 2003.

According to Vasco Pereira, the relationships between parties (citizen, individual, state, market) do not have pre-existing power. The author mentions that the relationship between the state and the citizen is a legal relation, not merely a connection based on subjection, and furthermore that the constitution does not have preexisting power. Nonetheless, the author throws light on a general legal relation, involving any individual, characterized by the content of absolute rights, and a special legal relation, consisting of relative rights. Beyond special relations between individuals endowed with rights and duties, claims and obligations, there exists as well a general legal relation, binding the members of a legally organized society, in which no specific claims exist from one individual relative to another, but legal positions, especially absolute rights, in which injuries may give rise to special legal relations[769].

However, when utilizing aapproach that views law as a practical science and a relational ontology, some adjustments can be made to the above interpretation. ***Firstly,*** although there are indeed no a priori dispositions, the relational interpretation of law, based on the idea of the *res publica* and good government, posits that ***context*** and ***relationships*** prioritize the public interest and the collective over the private. **Second,** this approach does not engage in a debate on the state's prior position concerning its power and the individual as a subject with rights. From the perspective of good government and the common good, what is present is a relational ontology in which the core value is assessed within the context. If private relations are dominated by private interests, in the case of the public sphere, the relationships established in this context are based on the well-being of the community and the common good. This approach does not prioritize the power of the state or individual rights; rather, it formulates relationships in which the context brings forth the value of the community and the supremacy of the public interest. This does not negate individual and collective rights, nor the state as a guarantor. However, it is capable of reestablishing an interpretation that is based not on the agents (the state as public, the individual as private) but rather on the relationships in a context evaluated by the value of the community and the *common good.*

[769] V.M.P.D.P. da SILVA, *Em busca do acto administrativo perdido*, Coimbra, Almedina, 2003

Chapter Considerations: The public law of the *common good*, the collectivity, and the distinction between public and private

Section 2 suggested adapting public law to the digital state per the model of political action of *network governance* and situated within a data-driven society.

As for the digital state model, it is based on ***two fundamentals***: the *network paradigm* and *governance* (in the broad sense of postmodern political action), which conditions state public action and also reshapes the roles of actors within the network ecosystem. The code of this institution is crafted by a data-dependent society, while its purpose resides in the construction of public objectives and the pursuit of the well-being of the community.

From this standpoint, the study suggests ***re-envisioning*** public law, emphasizing the material criterion, the common good. The common good emerges ***as a value*** in a Republic the principle of which lies not only in the concept of good government (political action) but also in law itself, conceived here as a "*practical*" science.

The code governing ideal types refers to the data-dependent society. Data, ecosystems, cyberspace, and their correlates are better suited to a project designed not for a subject or substance but for a relationship. Furthermore, the network governance model aims to ensure the common good.

Therefore, *public law* situated within a *governance action model* must include ***a code*** the legal ends of which are not subject-based.

By placing data and information at the heart of the ecosystem, public law cannot be understood through the political action of a sovereign government, nor by way of a governance model based on hyper-individualist theoretical foundations. The alternative, based on the rediscovery of various concepts and notions, should be *good government* within the *res publica*. This approach seems suitable for the emerging network ecosystem and regime of law. The network paradigm marks a return to older concepts such as empire, diluting modern dichotomous models. This network represents a kind of re-feudalization, an interdependence, gradually restoring a legal order that is no longer scientific, objective, or substantial, enabling a reciprocal and common-purpose-focused relationship.

Beyond repositioning public law towards "*res publica*," and not the state, it's understood that the opposing dichotomous model also needs correction. As Alain Supiot notes[770], "*this distinction is now understood as an opposition between two different sets of rules, whereas it rests on the idea of different positions within the same set of rules*". The separation of public and private, the ideal of political modernity, revolves around a biphasic notion of autonomy.

However, the public's position is public because it resulted from a process that led to an agreement, not because it belongs to the state. This does not necessitate the exclusion of the public/private, but reflecting these concepts as distinct yet non-opposed poles.

Relationships — viewed as a paradigm — represent a phase of this transformation, but do not represent the only one. It's crucial to take note that modernity arose through the construction of dichotomous structures, ***codified based on the subject***. It is at this point that the second alteration lies, as this code was articulated to protect individual freedom. All institutional frameworks bear this code's imprint, including the state entity and, consequently, public law — which is not just a modern phenomenon, but also must be brought into the context liberalism. Due to liberalism and its quest to protect individuality, public law has been established for the individual. This is the second element justifying a structural reevaluation. Rather than establishing solutions to overcome disparities between the public and private through the lens of individual rights, it's necessary to consider a public law aimed at preserving the collective's enduring objectives.

In hybrid environments such as cyberspace, it has been already noted that the legal institutional order's public/private distinction does not exist. Conversely, one cannot accept the exclusion of these concepts, fundamental as the pillars of institutions and social relations. As examined, it's possible to consider the public and private, even public and private law, not as opposites, but as useful distinctions for categorization. This exercise is fundamental within cyberspace, as transcending dichotomous visions involves recognizing the relational perspective and surpassing watertight evaluations of verticality.

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[770] Alain Supiot highlights that since the Enlightenment, "*Western thought has claimed to be able to eradicate the dogmatic dimension of these legal and socio-political arrangements. Any consideration of "sacred things," that is, of the founding prohibitions based on "self-evident truths" which are the source of "unalienable and sacred rights," has been relegated to the private sphere of "religious feeling," leaving a purely instrumental conception of law*". The abandonment of any heteronomic dimension has reduced law to a simple tool. A. SUPIOT, « The public–private relation in the context of today's refeudalization », *op. cit.*

This allows a distinct examination of actions in the public space (the *common good*),as well as its legitimacy. The *common good* isn't limited to the state, one based on a vertical and pyramidal vision, but also includes the presence of other actors (to be detailed further in the next chapter).

All these arguments correspond to the ***republican*** tradition and perception of the *common good*, which focuses on the people and the society's consensus as perceived. Herein, the key that codified modern public law is reinforced, marked in an individualistic, proprietorial, and calculative nature, demanding a rearrangement to allow for postmodern logic, necessitating the idea of procedural relations. Finally, as one finds oneself embedded in the public sphere, one examines not the modern individual, but the community, i.e., the networked society and the data-dependent society.

Public law, thus, by resurrecting the ideal of the "*res publica*", repositions the ***material criterion*** towards the common good ***as a value of legitimization*** and material definition of public law. ***This definition of a public law regime the legitimization of which rests upon the guarantee of the public interest corresponds to the traditional perception of the legal regime.*** Indeed, public law is considered to be a discipline that deals with the necessary legal elements to preserve the community's interests.

Furthermore, a relational interpretation of law also welcomes a relational and pluralist interpretation of public law. As seen, such a relational understanding includes a "*dual scheme*". In this dual scheme there are two forms through which relational law manifests itself. The first, in which it is established concretely. This first option considers that the consensus-building process lies in a dialogue during which participants agree on a given point, giving a very concrete and communicative tone to achieving the common good of the community, public interest, and general interest.

However, the second form arises as the relational bias does not only sustain itself practically; it also has a substantial basis in the community, already objectified. Consequently, the constitutional command is one of its components. In turn, the Federal Constitution establishes itself as a Federal Republic, and in this sense, translates into the core of the common good as value.

Thus, it is understood that, through the employment of the cybernetic and relational approach, accompanied by the vision of the common good and "*res publica*," the substantive nucleus of public law is not identified through civil, individual, or social rights, nor even human dignity primarily. The first and most precious demarcations concern the very form by which the nation

itself establishes itself: it resides, before appearing as a democracy or an order protecting individual rights, "a republic," orientated towards the well-being of the community.

When taking this assertion into account, it's possible to argue that the Federal Constitution establishes the material criterion that supports the principal objective aspect of Brazilian public law, resting on the common good, guaranteeing the general interest, and consequently, the well-being of its community. The republic, let's reiterate, is a hierarchy and situated above individual and social rights. In other words, the Republic emerges even before the debate among rights, revealing that "***the duty of the common good***" appears a priori to individual and collective rights. Finally, it is nevertheless necessary to clarify that the constitutional legislator enumerated, even during debates on individual and social rights, the prevalence of the former over the latter when it expressly indicates "the social" before "the individual."

Hence, it is possible to substantiate that public law adapted to a digital state within a data-dependent society both relies on the relational conception of law and is founded on the approach of the common good together with cybernetics to obtain a legitimization of public law regarding its material criteria, which rests on the common good and the duties of the republic.

As will be shown in **Chapter 4**, it possesses a legal discipline that incorporates the legal concept of public interest (in the Brazilian discipline). This has been adapted to the notion of public management of public value, comparable to digital government as stated by the literature the field.

Thus, *the public law of the common good* does not refer to a new legal regime. The public interest remains its founding core. What is modified is the subjectivist conception of public law (*from the order of modern dichotomy*); the restoration of its purpose (*to guarantee the common good*); and the repositioning of actors and their legitimizations, which will guarantee of the purpose of public law, the common good.

.Chapter 4. Legitimizing Public Action towards the "*common good*" for the Digital State

> *"Until the Great Society is converted into a* ***Great Community****, the public will remain eclipsed. Only communication can create a Great Community. Our Babel is not of languages, but of signs and symbols; without them, a shared experience is impossible".*
>
> - John DEWEY[771]

Examining definitions elucidated in **Chapter 3**, namely, the digital state as a model of political action (*network governance*), this research probes the implications of the archetypal, with a particular focus on digital government public action. The purpose of this **Chapter** is to propose the *legitimization of public action*[772] and delineate its content. In addition, it examines its congruence with Brazilian public law's core notion: the public interest.

Consequently, the notion of "*public value*" undergoes exploration as a category, constituting: ***i)*** an alternative perspective to the *new public management* (NPM) and result-based managerialism models;

ii) a meta-legal concept that challenges legal perceptions predetermined for control-organization management systems that concentrate on the individual.

By demonstrating that public value is recognized as an approach inherently connected to digital government, a reorientation of the purposes of public actions (*transcending from a pursuit of results to a pursuit of public values*) and of interests (*evolving from the accumulation of*

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[771] J. DEWEY et J. ZASK, « Le public et ses problèmes: Extrait de *The Public and its Problems* (1927), repris dans *John Dewey. The Later Works*, vol. 2, édités par Jo Ann Boydston et associés, Carbondale, Southern Illinois University Press (1re éd., 1977), paperbound, 1983 », *Hermès*, n° 31.

[772] The analysis initially approaches public action as transversal concept, a category to be applied as such within the legal field, necessitating an appropriate validation process. This endeavor is articulated in the second part of the thesis, with particular focus on chapters five and six, where the enactment of public law within the digital state is critically examined.

individual values to the fabrication of public values) in accordance with this approach, is hereby proposed.

Section 1 examines public value nuances, specifically within public management. It also examines its relationship to digital government.

Section 2 examines and analyses it in relation to Brazilian legal principles and notions. The path from the perception of public management as public value to the legal concept of public interest is particularly relevant.

Section 1: Defining digital government as "*public value*" public action model

The evolution of digital transformation in the public sector is verified by stages[773] within which, the analysis of a government that shifts its focus from efficiency to public values is considered the criteria that reveals the spirit of a digital government[774]. There is relevant literature that identifies - and even places as a fundamental condition - for a true digital government, the concept of *public value*[775].

According to the Organization for Economic Co-operation and Development (OECD), fully digital government "*refers to the use of digital technologies as an integrated part of governments' modernization strategies to create public value*"[776]. Therefore, researchers of digital government place it as the foundation of a unique model. This can be observed both in the

[773] In e-government, public value has emerged as a new dimension. public value is defined as the value created by government through services, laws and regulations, and can play an important role in determining the performance of government programs and activities. I.K. MENSAH, G. ZENG et D.S. MWAKAPESA, « Understanding the drivers of the public value of e-government: Validation of a public value e-government adoption model », *Frontiers in Psychology*, septembre 2022, vol. 13, p. 962615, disponible sur https://www.frontiersin.org/articles/10.3389/fpsyg.2022.962615/full (Consulté le 17 octobre 2023).

[774] B. CHO, « Bibliometric Analysis of Academic Papers Citing Dunleavy et al.'s (2006) "New Public Management Is Dead—Long Live Digital-Era Governance": Identifying Research Clusters and Future Research Agendas », *Administration & Society*, mai 2023, vol. 55, n° 5, pp. 892-920, disponible sur http://journals.sagepub.com/doi/10.1177/00953997231157753 (Consulté le 17 octobre 2023).

[775] I.K. MENSAH, G. ZENG et D.S. MWAKAPESA, « Understanding the drivers of the public value of e-government: Validation of a public value e-government adoption model », *Front. Psychol.*, 13

[776] OECD, *OECD Digital Economy Outlook 2020*, OECD, 2020.

literature and in international institutions and organizations. The OECD, for instance, evaluates digital governments, including Brazilian ones, through their capacity to "*build public values*"[777].

Though it has been mentioned in the legal sphere, its implications have been neglected. Generally, in thinking about digital government proposals, transparency, participation, ***efficiency***[778], as well as logic of the outcome, are taken into account[779]. This has been reflected in the Brazilian Digital Government Law.

The meta-legal insistence of a process towards a digital government that produces and guarantees public values cannot pass unnoticed within the scope of Law. It must be understood both in terms of its meanings in the interdisciplinary sphere, and in its relationship with the perspective of network governance. Moreover, in addition to the approach comprising a novel vocabulary and constituting a key that alters public actions' purposes, it is also shaped from different perspectives. This makes a more detailed examination necessary.

Hence, the **Present Section** defines "public value" as a category capable of encompassing a list of concepts with meanings appropriate to a particular management model, in harmony with the network governance political action model and the public law of the common good

In achieving this end, a discussion of its principal aspects is imperative **(§1)**.

The research proposes, then, to examine the criteria for legitimating public action, taking into account the characteristics of the chosen approach **(§2)**.

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[777] OECD, *OECD Digital Economy Outlook 2020*, *op. cit.*

[778] M.A. RUESCH, S. BASEDOW et J.-H. KORTE, « From E to O: Towards Open Participation as a Guiding Principle of Open Government », *Advancing Democracy, Government and Governance*, A. Kő, C. Leitner, H. Leitold et A. Prosser (dir.), 7452, Berlin, Heidelberg, Springer Berlin Heidelberg, 2012

[779] L.B. de CARVALHO, « Governo digital e direito administrativo: entre a burocracia, a confiança e a inovação », *Revista de Direito Administrativo*, 279

§1 Public value, a paradigm of public management

The public value approach emerged from the seminal[780] work of public management professor Mark Moore, in 1994[781]. Moore emphasized that public managers should produce "*value for the public*". He pioneered an entirely novel managerial approach[782], emphasizing, at that moment, a perspective oriented towards the manager. This perspective operated within market logic, aiming to introduce a fresh perspective on organizational practices. For him, "*the objective of* ***managerial work*** *in the public sector is to create public value, in the same way that the objective of managerial work in the private sector is to create private value*" [783].

This viewpoint aimed to counterbalance the then-prevalent model, the new public manageament[784], derived mostly from rational choice theory[785]. Thus, one of the distinctive features of the approach is that it is an alternative to the latter.

The path of *public value*, however, is not linear. It evolved from the initial conceptualization **(A)** to become associated with digital government and take on other nuances[786] **(B)**, such that a

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[780] As Cordella and Bonina explain "*public value theory as in Moore's (1995) original work does not directly account for digital government but provides a solid foundation to study the transformation fostered by digital technologies in public management*". P. PANAGIOTOPOULOS, B. KLIEVINK et A. CORDELLA, « Public value creation in digital government », *Government Information Quarterly*, 2019, vol. 36, n° 4, p. 101421, disponible sur https://www.sciencedirect.com/science/article/pii/S0740624X19304101.

[781] Professor Moore is attached to the executive education program at Harvard University's Kennedy School of Government and released an article "public value as the focus of strategy" and a book "Creating public value: Strategic Management in Government" in M.H. MOORE, *Creating public value: Strategic Management in Government*, Harvard University Press, 1995.

[782] As Meynhardt, T. *et al.* show, since the publication of Moore's book, the research field has evolved: public value research appears frequently in the leading journals of public administration, and in a number of special issues. This approach has also been applied to public management practice, as the Germany's Federal Labor Agency (FLA). T. MEYNHARDT, S.A. BRIEGER, P. STRATHOFF, S. ANDERER, A. BÄRO, C. HERMANN, J. KOLLAT, P. NEUMANN, S. BARTHOLOMES et P. GOMEZ, « public value Performance: What Does It Mean to Create Value in the Public Sector? », *Public Sector Management in a Globalized World*, R. Andeßner, D. Greiling et R. Vogel (dir.), Wiesbaden, Springer Fachmedien Wiesbaden, 2017

[783] M.H. MOORE, *Creating public value: Strategic Management in Government*, *op. cit.*

[784] As well points Timo Meynhardt: "*The concept of public value (PV) would reflect an almost predictable revival of the motives and themes of the "collective" and a view of the public sector that cannot be reduced to individual cost-benefit analysis, customer orientation - or rational choice models*". T. MEYNHARDT, « Public Value Inside: What is Public Value Creation? », *International Journal of Public Administration*, mars 2009, vol. 32, n° 3-4, pp. 192-219, disponible sur https://doi.org/10.1080/01900690902732632.

[785]: T. MEYNHARDT, « public value Inside: What is public value Creation? », *International Journal of Public Administration*, 32

[786] There are scholars who understand public value as a new paradigm of public administration, others as a normative theory, and others who see it as an evaluation framework or simply as a perspective to be used in the actions and decisions of public managers. K. LOPES, E. M LUCIANO et M. MACADAR, « Criando Valor Público em Serviços Digitais: uma proposta de conceito », décembre 2018, pp. 207-221.

univocal concept is not possible. This trajectory is pivotal for determining the research approach **(C)**.

A. The management approaches

The literature points to three groups on the subject[787]. The public value creation model, the models on public values, and the one that relates them to the public sphere. Furthermore, the literature shows that it is possible to verify two ways of examining public value within management theory (the managerialist and the social).

The seminal Moore model focuses on the *creation of public value*. His approach is not concerned with disposing of managerial conduct or offering organizational solutions, but rather focuses on administrators' behavior[788]. By identifying the flaws that he understood to be the failure of NPM, and seeking to propose a way to establish a different way of acting in the public sector, Moore presents a "*proposed strategic triangle*" to be employed by managers[789]. As he himself points out, it refers to a business management model.

Despite its relevance, his approach has been criticized for focusing only on managers, rather than examining all stakeholders. Furthermore, Moore ties himself to market logic, which implicates research in individual values[790].

Distinct from Moore, German professor Timo Meynhardt believes that public value is constructed from "*values that characterize the relationship between an individual and a 'society', defining the quality of the relationship*" [791].

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[787] J.M. BRYSON, B.C. CROSBY et L. BLOOMBERG, « Public Value Governance: Moving Beyond Traditional Public Administration and the New Public Management », *Public Administration Review*, juillet 2014, vol. 74, n° 4, pp. 445-456, disponible sur https://onlinelibrary.wiley.com/doi/10.1111/puar.12238 (Consulté le 17 octobre 2023).

[788] T. MEYNHARDT, S.A. BRIEGER, P. STRATHOFF, S. ANDERER, A. BÄRO, C. HERMANN, J. KOLLAT, P. NEUMANN, S. BARTHOLOMES et P. GOMEZ, « public value Performance: What Does It Mean to Create Value in the Public Sector? », *Public Sector Management in a Globalized World*, R. Andeßner, D. Greiling et R. Vogel (dir.), Wiesbaden, Springer Fachmedien Wiesbaden, 2017

[789] Later, Rhodes and Wanna in attention to Moore's model, added other premises: 1) public servants as guardians of the public interest; 2) primacy of management; 3) relevance of private sector experience; 4) the view of large-scale organizations K. LOPES, E. M LUCIANO et M. MACADAR, *op. cit.*, décembre 2018

[790] M.H. MOORE, *Creating public value: Strategic Management in Government*, *op. cit.*

[791] T. MEYNHARDT, *op. cit.*, *International Journal of Public Administration*, 32

Meynhardt's work links behavioral perspectives from psychology and attempts related public value choice criteria within a procedural-dialogical management strand[792]. The author anchors public value ***in a relational approach***. That is, it reflects basic needs, and these form the foundation of public value. public value creation occurs through relationships (*values are created by relationships*), rejecting subjectivist or objectivist conceptions (*it is not about externally arranged values*)[793].

Another dimension of analysis can be identified in Bozeman et al. Their emphasis is on socio-political issues and outcomes. It moves from an emphasis on public managers to involving all stakeholders (managers, politicians, citizens, entrepreneurs, etc.). Barry Bozeman believes that public institutions are not the only actors in public policy[794].

In his view, individualism and market-centric values - which dominate policymaking and public management circles - stifle the public good and the general interest. This approach does not ignore the utility of the market, particularly when it comes to solving issues related to price efficiency and utilitarianism, as is the case with most approaches. However, it considers that this model fails as the primary vehicle for regulating public value creation. Bozeman advocates a mutation of public management, replacing managerialism[795].

Finally, authors examine public value within the public sphere. Benington's model, for instance, proposes to examine the "*public sphere as the place of public values*"[796]. Using John Dewey's pragmatic theory, the author emphasizes that the public must be created. According to him, in the public sphere there is no definitive definition of public value. There is a space of dialogue, even if it can be contested. Within these approaches, relational pragmatics entails a dialogic

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[792] It is even possible to identify that while Moore begins from a utilitarian individualistic logic, current in Anglo-Saxon literature, Meynhardt, as a researcher affiliated to a German current, will have a distinct perception not only of the public sector, but of management and society, which is visualized within a *ius societatis* distinct from that linked to a *ius proprietati*. On this distinction of utilitarian and German currents, check Alain Supiot. A. SUPIOT, « État social et mondialisation : analyse juridique des solidarités », *Annuaire du Collége de France, 2017-2018.*

[793] T. MEYNHARDT, S.A. BRIEGER, P. STRATHOFF, S. ANDERER, A. BÄRO, C. HERMANN, J. KOLLAT, P. NEUMANN, S. BARTHOLOMES et P. GOMEZ, *op. cit.*, *public value Performance*

[794] It is even possible to identify that while Moore begins from a utilitarian individualistic logic, current in Anglo-Saxon literature, Meynhardt, as a researcher affiliated to a German current, will have a distinct perception not only of the public sector, but of management and society, which is visualized within a *ius societatis* distinct from that linked to a *ius proprietati*. On this distinction of utilitarian and German currents, check Alain Supiot. A. SUPIOT, « État social et mondialisation : analyse juridique des solidarités », *Annuaire du Collége de France, 2017-2018.*

[795] J.-C. THOENIG, « XXV. Barry Bozeman. L'apport de la publicitude au management public », *Les grands auteurs en management public*, Caen, EMS Editions, 2021

[796] J.M. BRYSON, B.C. CROSBY et L. BLOOMBERG, « public value Governance: Moving Beyond Traditional Public Administration and the New Public Management », *Public Administration Review*, 74

character of joint constructions, in which individual values are not added together. In similar fashion, O'Flyyn is also concerned with the public sphere. He points out that the "*creation of public value is based on the politically mediated expression of collectively determined preferences, that is, what citizens determine is valuable*" [797].

This illustrates that within the public value approach, citizens collectively decide, both directly and through elected representatives, resulting in a more intricate and diffuse set of exchanges. This diverges from the direct economic exchange relationships observed in the private sector.

Upon examining this trajectory, it becomes apparent that initial works concentrated on public managers. A subsequent research study included other stakeholders and the public interest. In this instance, the connection between a governance model and public actions by public value is markedly evident, and affects their perception on digital transformation.

B. Public value in digital government and network governance

If, within the discipline of public administration, the literature initially addressed *"public value theory"* as a means to distinguish the public sector from private entities, in the context of digital transformation, it emerges as an indispensable segment. Indeed, *public value* emerges as a "*new dimension*"[798] of e-government. As the digital transition refers to the way of organizing and producing value, and in this sense, as technologies impact on the restructuring of the management structure itself, the benefit would lie in seeing public managers as catalysts and guarantors of public value creation[799], aligned with social expectations[800].

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[797] J. O'FLYNN, « From New Public Management to Public Value: Paradigmatic Change and Managerial Implications », *Australian Journal of Public Administration*, septembre 2007, vol. 66, n° 3, pp. 353-366, disponible sur https://onlinelibrary.wiley.com/doi/10.1111/j.1467-8500.2007.00545.x (Consulté le 17 octobre 2023).

[798] I.K. MENSAH, G. ZENG et D.S. MWAKAPESA, *op. cit.*, *Front. Psychol.*, 13

[799] For Panagiotopoulos *et al.,* public value creation means: *"the result of a process of producing different public services pursued by public agencies to fulfill the collective goals that citizens define in the democratic process of political elections - that is, that are politically legitimized and sustainable*". In:P. PANAGIOTOPOULOS, B. KLIEVINK et A. CORDELLA, « public value creation in digital government », *Government Information Quarterly*, 36

[800] P. PANAGIOTOPOULOS, B. KLIEVINK et A. CORDELLA, *ibid.*

1- Public value as the digital government

In the context of the digital transition, the approach would be consolidated, in this sense, as a model aimed at the production of collective preferences, having as a guarantor the public power[801]. Organizations such as the OECD[802], for instance, regard public value "*as the importance given for society to benefit from the 'common good'*" [803]. Also noteworthy is an objective intensely centered on citizen experience. Therefore, digital government is based on a type of public management opposed to managerialist models that emphasize *results.*

Digital government prioritizes citizen perception. Indeed, in digital government, public value "*is not only economic, but can refer to the importance that citizens have of the results of government policies and their experience of public services, as well as the ability to provide services that correspond to citizens' wishes"*[804]. This means, initially, that the proposal of a digital government extends beyond public efficiency performance.

In a digital government[805], the purpose lies in the construction of public values, which is the primary objective. Mensah IK, Zeng G, and Mwakapesa[806] have addressed this shift in public management. In furnishing an overview of studies on the topic, they demonstrate that public value is typically identified within three dimensions, predominantly related to services rendered. The initial concern pertains to the relationship between the private sector and the public sector. It focuses on the public value engendered by public services, which should always strive for high quality[807]. Moreover, quality of life emerges as another component, encompassing facets such as

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[801] B. RUKANOVA, S. VAN ENGELENBURG, J. UBACHT, Y.-H. TAN, M. GEURTS, M. SIES, M. MOLENHUIS, M. SLEGT et D. VAN DIJK, « public value creation through voluntary business to government information sharing enabled by digital infrastructure innovations: a framework for analysis », *Government Information Quarterly*, 40

[802] The OECD defines public value in several ways, referring to the benefits to society, which may vary by perspective or actor involved. These include: i) goods or services that satisfy the desires of citizens; ii) production choices that meet citizens' expectations of fairness; iii) properly ordered and productive public institutions that reflect citizens' desires; iv) equity and efficiency in distribution; v) use of resources for innovation and adaptability to changing preferences and demands. OECD et INTER-AMERICAN DEVELOPMENT BANK, *Broadband Policies for Latin America and the Caribbean: A Digital Economy Toolkit*, OECD, 2016

[803] I.K. MENSAH, G. ZENG et D.S. MWAKAPESA, *op. cit.*, *Front. Psychol.*, 13

[804] L. ANTHOPOULOS, C.G. REDDICK, I. GIANNAKIDOU et N. MAVRIDIS, « Why e-government projects fail? An analysis of the Healthcare.gov website », *Government Information Quarterly*, 33

[805] If private organizations serve people as customers, seeking to maximize profit, government serve people as constituents. In: J. TWIZEYIMANA et A. ANDERSSON, *ibid.*

[806] This is influenced by accessibility, satisfaction, perceived relevance and cost. I.K. MENSAH, G. ZENG et D.S. MWAKAPESA, *op. cit.*, *Front. Psychol.*, 13

[807] K. LOPES, E. M LUCIANO et M. MACADAR, *op. cit.*, décembre 2018 ; I.K. MENSAH, G. ZENG et D.S. MWAKAPESA, *op. cit.*, *Front. Psychol.*, 13

enhanced healthcare, poverty alleviation, and pollution reduction. The conclusive component is trust in public institutions, which is imperative to secure citizen support and engagement in governmental initiatives. Therefore, public value in digital government emphasizes citizens' perception of public services delivery[808].

Rather than focusing on how to produce public services most effectively, the theory focuses on how to provide them in a way that effectively satisfies the people who will use them and their perception is the purpose of public management.

Brazilian literature on the public value approach is scarce[809]. In the legal realm, few specific works[810] on the topic have been identified. Karen Lopes et al conducted a relevant study on public management[811]. The authors dispose that in the context of digital government, public value is delineated through three nuances: digital public services; the citizen's perspective; and the perception and creation of public value. The author engages with public value explicitly in digital governments and public services[812]. He considers the distinction between public value perception and creation. In addition to emphasizing collective preferences, the concept must also encompass the perception of society's perception of the collective benefits, which might not necessarily be linked to self-interest, of the service/activity.

2- Public value and network governance

Gerry Stoker correlates public value with the governance paradigm, outlines the elements that highlight the compatibility of this approach with the network governance paradigm, arguing that public value corresponds to the adapted narrative for a new governance model[813].

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[808]When applied to e-Government, the concept of public value provides the following basic criteria: the delivery of widely used services, higher levels of satisfaction, better information, superior accessibility to users, relevant services, reduced costs in accessing services, improved delivery outcomes, and greater trust in interactions between citizens and government. K. LOPES, E. M LUCIANO et M. MACADAR, *op. cit.*, décembre 2018 ; I.K. MENSAH, G. ZENG et D.S. MWAKAPESA, *op. cit.*, *Front. Psychol.*, 13

[809]Survey conducted by Lopes et al in 2018 identified only three articles on the topic at the national level, even within the discipline of public management. K. LOPES, E. M LUCIANO et M. MACADAR, *op. cit.*, décembre 2018

[810] J.S. DA SILVA CRISTOVAM et T. MEINHART HAHN, « Administração pública orientada por dados: governo aberto e infraestrutura nacional de dados abertos », *Revista de Direito Administrativo e Gestão Pública*, août 2020, vol. 6, n° 1, p. 1, disponible sur https://indexlaw.org/index.php/rdagp/article/view/6388 (Consulté le 17 octobre 2023).

[811] K. LOPES, E. M LUCIANO et M. MACADAR, *op. cit.*, décembre 2018

[812]P. PANAGIOTOPOULOS, B. KLIEVINK et A. CORDELLA, *op. cit.*, *Government Information Quarterly*, 36

[813] For Gerry Stoker, "*It is argued the public value management paradigm bases its practice in the systems of dialogue and exchange that characterize network governance (...) Building successful relationships is the key to network governance and the core objective of the management needed to support* it". G. STOKER, « Public Value

By merging the two elements, Stoker highlights that public sector governance should involve deliberation and delivery networks that pursue public values. He encapsulates the principal characteristics of an approach grounded in interactive systems and exchanges, which, owing to their location within the public sector, aim at the delivery or production of public values. This underscores that public values are not confined to government. The core resides in the delivery — that is, the perception, and the construction, that is, the purpose, of public values. Stoker delves deeper and highlights "*the question to be answered is: does advancing services value social or economic outcomes?"* [814]. According to the author, this reflects the fact that more recognition must be given to the legitimacy of a wide range of stakeholders. The integration of the public value model with a governance model directly influences legitimacy. Public actors, such as politicians and managers, possess a specific form of legitimacy. However, additional valid claims exist, including those from business partners and neighborhood leaders, among others[815]. The core idea postulates that for a decision to be deemed legitimate, or for a judgment to be enacted, all stakeholders must be involved. The concern is not merely the potential for participation but actual, engaged involvement[816].

With Stoker's analysis, the essential prerequisites of political and public actions are scrutinized and aligned with the logic of public value management, providing an interdisciplinary application. In essence, it establishes a foundational criterion, which aligns the 'public value' perspective, that is, public action, with a governance model, that is, political action. This implies legitimacy that does not solely reside in the government, despite its dominant position[817].

Management: A New Narrative for Networked Governance? », *The American Review of Public Administration*, mars 2006, vol. 36, n° 1, pp. 41-57, disponible sur http://journals.sagepub.com/doi/10.1177/0275074005282583 (Consulté le 17 octobre 2023).

[814] G. STOKER, *ibid.*

[815] G. STOKER, *ibid.*

[816] Barry Bozeman points out that, a model of network governance and public values involves: i) a culture of performance, with a commitment to community service; ii) commitment to accountability; iii) universal access; iv) Responsible employment practices; v) Contribution to *community well-being*. *In*: B. BOZEMAN, « Public-Value Failure: When Efficient Markets May Not Do », *Public Administration Review*, 62

[817] J. O'FLYNN, *op. cit.*, *Australian Journal of Public Administration*, 66

C. The approach adopted

Public value has emerged in public management as a type of management that starts with the assumption that "*buying is different from governing*" [818].

However, its development - in the literature - has been done through approaches that diverge from each other. Thus, it is imperative to delimit those that are more in line with the digital state's political action models. As a consequence, proposals that privilege the individual and its rational choices in the public space are not appropriate, since they reinforce the managerialist logics of the market[819] in the public space[820], and thus persist in the shiftiness of the good governance that it is intended to replace.

Furthermore, the cybernetic imaginary introduces pragmatism and relational theory, yet acknowledges that it operates within a public space. In this regard, even if the construction is tangible, it does not evade the pursuit of society's values. This logic does not replace the public space with methods that introduce private interests within it.

Consequently, within the approaches to public value, it becomes imperative to identify those that advocate for: ***i)*** a managerial perspective, devoid of managerialism; ***ii)*** a focus on collective values and the pursuit of the common good, avoiding entanglement with individual interests (which might be identified through terms such as efficiency and/or results); ***iii)*** engagement with the interactive and networked nature of the scrutinized space, viewing stakeholders as architects of public values, coupled with assurance of management by the state.

Throughout the preceding conversation, it has been demonstrated that the approach relates to citizen perception and marks a turn away from the result-oriented managerialist approach that is currently prevalent in digital governments. This line is perceived as optimally congruent with the digital state's political action style, network governance, and also with a public right to the common good. Carla Bonina and Antonio Cordella contribute significant work, dissecting the

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[818] M.B.S. BOJANG, « Appraising Public Value in the Public Sector: Re-evaluation of the Strategic Triangle », *SEISENSE Journal of Management*, février 2021, vol. 4, n° 2, pp. 1-10, disponible sur https://journal.seisense.com/index.php/jom/article/view/551 (Consulté le 17 octobre 2023).

[819] A. DAHL et J. SOSS, « Neoliberalism for the Common Good? Public Value Governance and the Downsizing of Democracy », *Public Administration Review*, juillet 2014, vol. 74, n° 4, pp. 496-504, disponible sur https://onlinelibrary.wiley.com/doi/10.1111/puar.12191 (Consulté le 17 octobre 2023).

[820] Mark Moore himself emphasizes that his theory is "*a **business style of** management*". M.H. MOORE, « Creating public value: The Core Idea of Strategic Management in Government », *J. Professional Business Review*, 6

primary characteristics of the model while contrasting it with the corporate public managerial models.

The following table provides a comparative view, instrumental in identifying the peculiarities of each, as well as pinpointing the elements that constitute the approach to digital government. This can be utilized to explore the legitimization of digital government public action within the perspective of a network governance model, that is, the digital state:

	Public value	**New public management**
Logic	Public Administration	Business Management
Dominant Focus	Relationships	Administrative rationalization, result
Public interest	Collective Preferences	Aggregated individual preferences
Performance	Multiple goals, changing all the time	Management of inputs and outputs to ensure economy and responsiveness to customers
Accountability	Multiple	Increasing via performance contracts
Delivery System	Pragmatically selected alternatives	Private sector defines the modes of competition
Purposes	Fulfilling social expectations	Government that works better and costs less

Table 2: Public actions models. Source: Cordella and Bonina[821]

[821] A. CORDELLA et C.M. BONINA, « A public value perspective for ICT enabled public sector reforms: A theoretical reflection », *Government Information Quarterly*, octobre 2012, vol. 29, n° 4, pp. 512-520, disponible sur https://linkinghub.elsevier.com/retrieve/pii/S0740624X12001001 (Consulté le 17 octobre 2023).

For the authors[822], and differently from Moore's approach, public value is a ***management model,*** but it is ***not managerialist***[823]. It is a fundamental element, because it reconditions the key. There will be repercussions for all the other elements.

In contrast to managerialism[824], which is business-oriented and based on control logic, management originates ***from operations*** and concerns ***dialogue***. It is an interactive model, which matches, as noted, the cybernetics imaginary. The approach translates the mutation from rationalist perspectives (*dichotomous and pyramidal*) to a relational approach[825].

Here, it is evident that managerialist models are still linked to a perspective of rationalization through an organizational system of control, individualistic, of the machine. It is a model of public value that emphasizes relations, which shows an ontological leap and harmony to the cybernetic imaginary, as well as to the ideal type of digital government and state that seeks public values.

Among the identified variables, a stipulation concerning public interest perception emerges. While NPM addresses individual interests, public value alludes to the outcome of collective creation, aligning with network governance (as per the approach of Digital Era Governance, Government as a Platform, and the public purpose). The shift in this approach bears significance within the managerial theory. In this context, public content is viewed within public spaces, counteracting theoretical perspectives that prioritize optimal outcomes. Individual rights are perceived as a guiding principle, but not the delimiting boundary of the public.

The term employed by the authors to contrast managerialism lies in focusing on *collective preferences*[826], as a metric of social values. The NPM approach prioritizes efficiency. The public value paradigm involves the pursuit of multiple objectives by public administrators. This encompasses narrow service objectives, broader outcomes, and the establishment of trust and legitimacy. The change of "interest" is therefore relevant, because it also represents a change in the legitimacy of state action. It is about redesigning and optimizing these services and

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[822] Antonio Cordella states that "*public value is the value that results from the balance of multiple public services that are consumed collectively rather than as individual units*". A. CORDELLA et C.M. BONINA, *ibid.*

[823] P. PANAGIOTOPOULOS, B. KLIEVINK et A. CORDELLA, *op. cit.*, *Government Information Quarterly*, 36

[824] J. O'FLYNN, *op. cit.*, *Australian Journal of Public Administration*, 66

[825] B. BOZEMAN, « Public-Value Failure: When Efficient Markets May Not Do », *Public Administration Review*, 2002, vol. 62, n° 2, pp. 145-161, disponible sur https://www.jstor.org/stable/3109898 (Consulté le 17 octobre 2023).

[826] B. BOZEMAN, « Public-Value Failure: When Efficient Markets May Not Do », *Public Administration Review*, 62

processes to integrate them into the digital environment, focusing on collectivity. In summary, this is where efficiency logic is replaced by public value.

Another pertinent aspect is that ***collaborative models*** (*denoted by the prefix-co*) underscore the multitude of objectives surfacing in a digital government, which cannot be compartmentalized into a singular specific goal.

In this regard, even a public value approach, grounded in quantitative analyses, will deviate from this core task. This proves unsuitable for digital government public management. Indeed, as observed, the NPM managerialism is flawed due to its individualistic, state-centric nature, and its failure to leverage the potentials enabled by a networked and digital environment.

Therefore, it can be defined that a model - in an ideal type - of digital government builds public values by the preferences of the community, moving away from efficiency and result criteria, considered insufficient in the face of the potential and nature of a government whose focus is to produce public values. Therefore, within the realm of public management, that is, a meta-legal definition, public value can be envisioned as an ideal type model of public action within digital government.

§2 The legitimacy of public action through the public value approach

Legitimacy can be defined as the basis upon which a state claims to exercise power or control over society[827]. It is also instrumental for maintaining a democratic regime. Michel Foucault defines legitimacy in his governmentality definition. He recognizes three elements: structural (*institution*), functional (*procedure*), and cognitive (*analyses, reflections, calculations, tactics*).

Foucault also points out the teleological aspect of administering society. In addition, states use their security apparatuses (legitimate force) to ensure legitimacy. The concept of legitimacy is at the core of any claim to authority[828]. If the traditional model of government had a flawless and precise delimitation of public action legitimacy, linked to authority and in the guarantee of the public interest, the postmodern state modifies legitimacy as society becomes autonomous.

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[827]Foucault, distinctly from Weber, uses knowledge to declare power, as a mode of control perpetuation by the normalization proces. R.A. ASTORE, « Defining the Legitimacy and Power of the State Through Weber and Foucault », *Inquiries Journal/Student Pulse*, 2016, vol. 8, n° 05, disponible sur http://www.inquiriesjournal.com/a?id=1410.

[828] J.G. MARCH et J.P. OLSEN, « The New Institutionalism: Organizational Factors in Political Life », *American Political Science Review*, 78

Finally, the network governance model needs to align with a society that depends on data. This is so that legitimacy needs to be properly identified, not as an object, but within the framework of a relationship, an exchange.

This means that it is a legitimation that must take into ***account society*** + ***dependency*** + ***and data*** in order for itself to be legitimate. It is a process, coupled in cybernetics, because it is communicative and involves people and machines. Thus, in Foucault's division, in a digital state action political model, institution refers to relation; procedure refers to consensus; and cognition points to the communicational/interaction.

Jacques Chevallier explains that the legitimacy of modern authority, considered as an "*extrinsic legitimation"* (of artificial will) changes in the postmodern state to an "*intrinsic legitimation*"[829]. In the case of the *good governance* model, this legitimation becomes the performance of efficiency in public management[830]. This elucidates that within a governance model, legitimacy shifts from an extrinsic orientation, associated with the *voluntarist* state apparatus, to an intrinsic orientation. While the validity presumption was once negative, in the postmodern state, it is positive.

Within the framework of *good governan*ce, this corresponds to the demonstration of outcomes by the public sector. The government manifests its performance through outcomes since the common interest is mythological. For this purpose, metrics and vocabulary of business management are integrated to evaluate the government's proficiency in this venture (public management pivots towards risk management).

As observed, a results-oriented system, despite derived from a behavioral and pragmatic realm, originates from an individualistic and technical means viewpoint. Moreover, as previously noted, the *good governance* model is antithetical to digital government and substantiates the discrepancies identified in Brazilian digital transformation.

Consequently, an alternative requires exploration. public value emerges as an approach more congruent with digital government and the *network governance* of the *digital state*. Accordingly, it becomes pertinent to decipher how this approach operates within the realm of legitimation, considering both actors and content, namely, the ***foundational nucleus***.

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[829] J. CHEVALLIER, *L'Etat postmoderne*, 5e éd., *op.cit.*

[830] J. CHEVALLIER, *ibid.*

Indeed, in juxtaposition with the managerialist model, which proffers a perspective centered on efficiency in public management, the public value model repositions the public interest, previously bound to the authoritarian model of sovereign government.

In this context, it not only aligns with theoretical perspectives of public management and administration exploring digital government (as previously envisioned) but also adheres to constitutional directives.

Therefore, in alignment with the adopted perspective on public value and the notion of *network governanc*e, the objective is to conceive a legitimacy model for public action within digital government.

This model should be outlined according to specific criteria, derived directly from the approach itself. It should also be in harmony with the definitions of governance's political action and the public law of the common good.

Firstly, as a model of network governance of the digital state's political action and of a public law of the common good, the legitimacy imaginary should be that of cybernetics, which will demand foundational guidelines concerning the remaining legitimation criteria.

Secondly, this legitimation will be communicational in essence, and being a network governance model, it will be plural and relational, demanding the repositioning of the legitimacy of the parties to cater to all the entities in their multifaceted interactions, which transcends the dichotomous division of state/Society/Market.

Thirdly, such a transformation of legitimation will imply that the criteria for verifying its agreement will mutate, whether through reasons aligned with the imaginary (communicative consensus and contextual pragmatism); or through varied actions and interactions (shared responsibilities).

Fourthly, legitimation will also hinge, to be valid, on the examination of its content, which needs to consider values, which will be scrutinized not through the logic of good governance, quantitative and individualistic, but through the approach of public values, network governance, and the public law of the common good.

Fifthly, with respect to values, they redirect the content of public action. The path will allow contemplation regarding how the concept of public value fits into the legal realm. According to Brazilian law, as will be explored, postulates that the notion that better adapts is that of *public interest.*

A. The imaginary, the pragmatism of public value

The primary element scrutinized in the validation procedure of public action legitimation, is embedded in its imaginary foundation. It diverges from both the authoritative public law model, which is tethered to mechanistic frameworks. It also diverges from the public law of good governance, which is centered on instrumental – and individualistic – reasoning. It is imperative to recognize that the cybernetic imaginary encapsulates elements of communication.

Network governance emerges as the political action model that epitomizes ***pluralism*** and ***relationality.*** The public law of the common good is inherently relational. public value seamlessly integrates with these constituents. Primarily, this is attributed to the innately pragmatic nature of public value.

Alford and Hughes define **public value pragmatism**[831] as a new approach to public administration to address previous problems[832].

Public value pragmatism[833] is a method that employs principles in its aims and objectives, but is pragmatic in its methods. In other words, public value does not discard basic principles, on the contrary, it employs them, but understands that the definition of what is public value must be made in practice. This implies the performance of management as a whole. The strategy, for instance, is conditioned on the specificities of the concrete case. There is not, according to the authors' understanding, a single universal solution, hence it is pragmatic. The management perspective modifies the managerial model, since it turns to a dialogical process in which the perception of the public by the participants is sought (and here it includes the individual, society, and government)[834].

If the managerialist model has its origins in market logic, in a system-organizational, which leads to a control perspective, the model of organization.

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[831] J. ALFORD et O. HUGHES, « Public Value Pragmatism as the Next Phase of Public Management », *The American Review of Public Administration*, juin 2008, vol. 38, n° 2, pp. 130-148, disponible sur http://journals.sagepub.com/doi/10.1177/0275074008314203 (Consulté le 17 octobre 2023).

[832] The authors consider public value as a pragmatic approach as an alternative to the NPM model and also network governance, which for them are unidirectional.

[833] For the authors "*Pragmatism simply refers to an approach in which the organization is open to using any of a variety of means to achieve program objectives, with the choice of those means focused on what is most appropriate in the circumstances, consistent with the important values at stake".* J. ALFORD et O. HUGHES, *op. cit.*, *The American Review of Public Administration*, 38

[834] J. ALFORD et O. HUGHES, *ibid.*

In explaining their differences, Tony Watson relates the control perspective to modernist, universal rationality, suitable for mechanical and result-oriented systems. This means that the business management model would actually have its structure related to a mechanistic structure. This is aligned with the development of companies in the industrial period of the 1900s[835].

The author mentions that a system-controller management model is distinct from the dialogic-processual model. They are distinct ontologies. In the former, the logic of control and competition is established, whose effects condition the administrative and bureaucratic business management models. It is a code, therefore, that involves not only the individual's value, but also the insertion of quantitative calculations[836]. It is the art of calculation, aligned to a controlling system.

Watson's explanation clarifies why trust discourse has difficulties materializing when aligned with bureaucratic or managerialist models. Although the doctrine defends transparency, trust, and results, they are actually opposed, since they belong to distinct imaginary vocabularies. That is, while the result aligns with control, trust is linked to relationships and interaction. Because they belong to different families, it is inappropriate to defend trust based on results[837].

Watson contends that management that emphasizes procedural reality visualizes organizational issues by focusing on ***the relationships*** between people and social environments[838]. It is, therefore, a vocabulary that correlates. That is, ***pragmatism, relational, and dialogue.***

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[835] Tony Watson explains that the logic of the result derives from the Weberian rationalist model of efficiency. One can say that the key principle of modernism is the application of rational or scientific analysis to social, political and economic affairs: "*It is possible to note the emphasis on rationalization, control, and technical knowledge that characterizes the systemic-controlling form of structuring organization and management, emerging from the Enlightenment and the Industrial Revolution in Europe (...) rational managerial and administrative practices, once divorced from ethical issues, can quickly lead us to the construction of extermination camps or weapons of mass destruction just as much as they can lead us to the general development of health, well-being, and happiness*". T.J. WATSON, « Organization and work in transition: from the "systems-control" logic to the "process-relational" one », *RAE - Revista de Administracao de Empresas*, 45

[836] Neoliberalism can be called a new model of governmentality (in Foucaltian terms), and sees managerial norms and other performative injunctions penetrating the organs of institutions and individuals. The fundamental principle is competition, which should be promoted by its members and the state itself. *In*: N. MATYJASIK et M. GUENOUN (dir.), *En finir avec le New Public Management*, Institut de la gestion publique et du développement économique, 2019

[837] A.P.P.D. PAULA, « Em busca de uma ressignificação para o imaginário gerencial: os desafios da criação e da dialogicidade », *RAM. Revista de Administração Mackenzie*, avril 2016, vol. 17, n° 2, pp. 18-41, disponible sur http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1678-69712016000200018&lng=pt&tlng=pt (Consulté le 17 octobre 2023).

[838] Management requires creation and dialogue to change reality. The English word management, derives from the Latin *manus agere* (to do with the hands, to handle), and comes from the Italian word *maneggio,* which was used in the 16th century to describe the taming of a horse and later came to mean to manage and control people. A.P.P.D. PAULA, *ibid.*

Another key element of public value is that its definition ***depends on context***. This means that a management based on public value does not have the immediate impact on efficiency[839].

Therefore, as the control-organizational system is distinct from the process-logic system, the use of the latter in fact means a re-signification of the management imaginary, in which creation and dialog represent a distinct dynamic.

This model is aligned with the public value and political action of governance. This is because it focuses on dialectics, which is considered the essence of administration and its challenge is to use dialogue[840] to face contradictions[841]. As a social and dialectical practice[842], managerial dynamics also represents a challenge: the search for dialogue. Dialog fosters a sense of community that promotes mutual learning and encourages deliberative decision-making[843]. Ana Paula Paes de Paula explains the possibility of examining management through lenses other than market logic. This is accompanied by a very specific grammar: control, results, competition. Management perspective, in turn, is related to a dialogical paradigm, that is, communication, interactivity, sharing[844]. This rationality impacts the parties[845], especially because interaction and contextualization will require their identification according to their relationships and positions.

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[839] G. STOKER, « public value Management: A New Narrative for Network governance? », *The American Review of Public Administration*, 36

[840]According to Omar Aktouf in the animal world, *cooperation* is more common than *competition*. The author also questions the naturalization of efficiency, profit maximization, and managerial power. O. AKTOUF, « Management et reconnaissance », *Éthique publique*, janvier 1999

[841] A.P.P.D. PAULA, *op. cit.*, *RAM. Revista de Administração Mackenzie*, 17

[842] Omar Aktouf argues that profitability can be achieved through alternative channels, such as humanistic theories. É. BOUCHARD, « Le management entre tradition et renouvellement de Omar AKTOUF, Montréal, Gaëtan Morin éditeur, 1989, 492 p. », *Politique*, 1991

[843] A.P.P.D. PAULA, *op. cit.*, *RAM. Revista de Administração Mackenzie*, 17

[844] In the author's terms: *The empirical conception of management allows us to perform the necessary shifting of meanings, abandoning the notion that management is necessarily linked to key-words derived from market logic and control ideals, such as optimization, productivity, competitiveness and results, in order to renew the lexical field, bringing it closer to the dialectical* and dialogical *nature and essence of* management: communication, creativity, collaboration and human development. A.P.P.D. PAULA, *ibid.*

[845]A trust model is sought, but the logics and mechanisms of the market are employed. Therefore, for a dialogic model to effectively take shape, one must be careful not to soak the approaches of a digital government with the logic of the market. It is therefore aligned with the model that prioritizes *dialogical and relational* dynamics. Indeed, through the public value proposition, it is possible to think about interactivity, in a pragmatic way, but in attention to social values, and not private ones.

B. The legitimization of the actors

The *ontological* turn **from substance to relation** - which is the mark of the cybernetic imaginary, and which places *intersubjectivity* overcoming tight dichotomies between market and state - is able to establish a new glance about legitimacy, since it leads to a repositioning of the actors and departs from a vision of the authority figure of the modern machine.

Authority and power are not necessarily at the same poles in a relational and cybernetic reading, which brings to mind a model of political action based on network governance. Public and private positions coexist within the same space and must be examined as such. Civil and political spheres as well. And it is not only necessary, but fundamental to identify them.

In a public law reading of the digital state, state and market are not opposites or public and private, ***but distinct***. This means that one does not exclude the other, but they can and should interact.

This initial dichotomy - the rule of law - established opposition between civil and political spheres, and thus between man and citizen, public and private, and market and state. Just as the market is in the sphere of freedom, of its autonomy, when the market acts in the public sphere, its position must be taken into consideration in the proper graduation of its legitimacy, not as an actor in the private sphere of autonomy, but as an actor in the public sphere.

In this way, the participation of actors other than the state is not denied, but neither is the market's logic allowed to enter a space that must define what is public, which is, in fact, what happens with the reading of the efficiency of results, since the market is allowed to act in its position - of profit and autonomy - in the public/political sphere, when, in reality, this position was built for the private sphere and not for the public/political sphere.

Thus, in a network governance environment, the state cannot be considered the sole legitimator of the public interest, although it is its guarantor.

In this sense, Jose Van Dijck's plan about the networked space is utterly useful[846]. She explains that normative constructions were all built by dichotomies, which have been modified in the

[846] The author explains that the ecosystems of corporate and state-controlled platforms have shattered the idea of a global, neutral Internet. It has also weakened the distinctions between state, market and civil society, which are still important in defining government. Even if the platform crosses legal structures and continents, national and supranational regulatory frameworks (such as the EU) usually focus on one governance issue, such as market concentration, freedom of information, or privacy rights. J. VAN DIJCK, « Seeing the forest for the trees: Visualizing platformization and its governance », *New Media & Society*, 23

networked space[847]. But she also explores that state, Market, Individual and Citizen are still fundamental. In the face of a hybrid environment, they need to be repositioned, for correct identification of their legitimacy, rights, obligations and responsibilities. This is a fundamental task for the law.

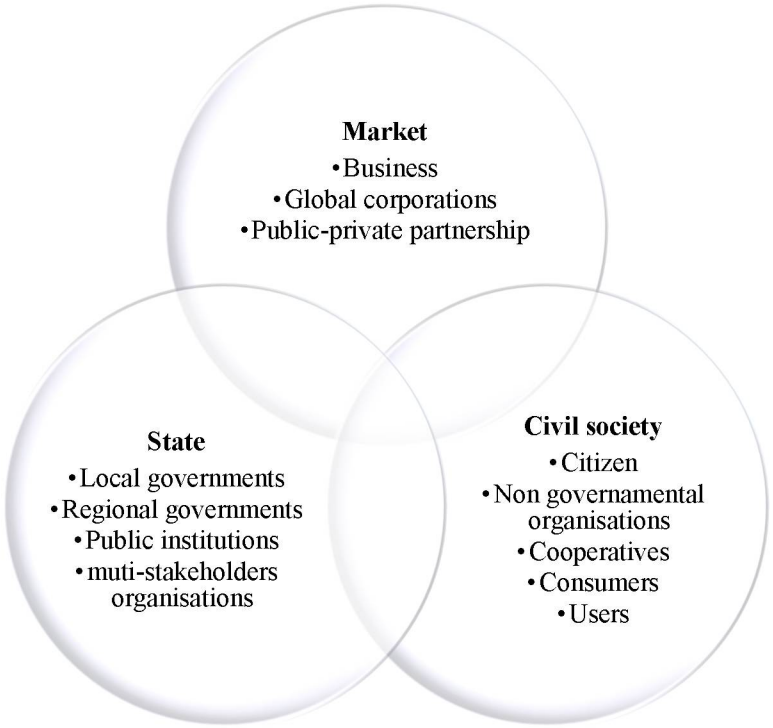

Table 3: Network frame. Source: José Van Dijck[848]

As can be seen, in a platform ecosystem, there is a diversity of actors that participate in different relationships. Literature classifies relations with the state, under two aspects.

The first, from a democratic perspective (the public sphere) through a political lens, from where the idea of societal relations is examined.

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[847] ***Platformization*** implies a sharp shift from the industrial mode to an environment that calls into question the social/economic and political relations that have been established for the modern state world within the framework of static separations between state/market/society. As Jose Van Dijck explains, the process of platformization ***breaks*** this distinction, which is still employed in the normative sphere. As visualized, not only the legal sphere, but also the state figure was developed under the figure of the "individual" and on an idea of objective scientificity. On the other hand, there is an important mutation in social relations, which impact the digital state and contemporary public law. First, because relations take place in a networked environment, which brings in its own reticular and horizontal nature. Second, because not only new elements emerge (such as data), but above all because of the effects of the datification process of the society that is platformized. About: J. VAN DIJCK, *ibid.*

[848] J. VAN DIJCK, *ibid.*

The second is the way in which multiple ways of state, society, and market relations (management, public action) are visualized as collaborative spaces through the governance action model.

Additionally, as visualized, a data-centric government adds more sophisticated interaction models, here already called as the ***prefix-co***. Indeed, if participation is naturally taken as the social position of the citizen, and collaboration is taken - traditionally - as the user/consumer/private actors, or as an autonomous actor, the new interactions at the cyberspace implies reshaping the actors in relation to their positions and means.

Moreover, it is crucial to distinguish between the individual, understood as a person exercising autonomy, and the citizen, who engages in a participatory and deliberative role within the decision-making process.

Considering that this distinction arose from modern dichotomies, one should not ignore it. The individual acts by and for his own rights within their realm of autonomy. The citizen acts in a function within the political and public arenas of democratic engagement. In the context of digital government, there is literature that places relations with citizens as spaces of citizenship. This would attract the democratic bias and seek to bring the guarantee of the social bias in public spaces, which, as seen, are not infrequently simulacra. This occurs, as will be examined in full detail in the second part of the thesis, not only in respect of the good governance logic. However, digital government literature has difficulties distinguishing the individual/user and the citizen.

Although in the political and legal sphere, man (*individual*) and citizen make up two categories with distinct positions and rights (*autonomy-freedom; function-democracy*), in the sphere of digital public administration, citizen is treated more broadly. Academics define citizens "*as people in their different stakeholder roles, that is, as policymakers, public servants, users or customers of public services, participants, tax-payers or entrepreneurs, and citizens as such*" [849].

Nevertheless, the standardization of different roles in one single position (citizen) presents challenges in legitimization, particularly due to the different values assigned to each role. The legitimation of responsible parties and their roles also changes and cannot be ignored in a digital

[849] J. TWIZEYIMANA et A. ANDERSSON, « The public value of E-Government – A literature review », *Government Information Quarterly*, février 2019, vol. 36.

government whose action is rooted in a process whose end is public values. In summary, allocating all social roles to a single role is not feasible.

Hence, recognizing the legitimacy of many parties in their positions is a key factor. By using a public value approach, one can place citizens, users, consumers, and stakeholders in their specific positions in society. As Jerry Stoker points out, "*politics and management come hand in hand*"[850].

The legitimation process therefore requires observation of both management and political actors. Within this scenario, one can also analyze that definition in legal matters.

This will deepen participatory and collaborative logics. Also, it illustrates a novel conception of cyberspace relations. It is worth examining each of these criteria for the positions held - essential for determining the legitimacy of the positions held.

1- The public/political sphere and the Societal bias

The emergence of the postmodern governance model inaugurates a repositioning of legitimacy within the Brazilian political sphere. As already stated, the Constitution, by establishing participatory ways of democracy as a facet of the democratic design, materialized the societal instruments in the legal system. In other words, the Brazilian framework is sufficiently legal. Moreover, public governance policy measures encourage participation models, although they are not prestigious. With the open government data, however, the use of data and the character of centralization over data dynamics, make democratic positions deeper, in the sense that their positive validation derives not only from technical instruments, but also from effective spaces for deliberation.

As Jose Cristóvam states: "*public governance has a variety of concepts and elements, but among them, society's participation stands out as a way to democratize public management and legitimize decisions/choices regarding public policies and relevant services*" [851].

The public sphere references the social space, both in terms of access to economic and political structures, and control. It is for this reason that societal bias can be examined both from the

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[850] G. STOKER, « public value Management: A New Narrative for Network governance? », *op.cit.*

[851] J.S. da S. CRISTÓVAM, L.M.S.M. DE CASIMIRO et T.P. DE SOUSA, « Política de governança pública federal: adequação, modelo de gestão e desafios », *Direito Administrativo em transformação*, 1, 1re éd., Florianópolis:, Habitus, 2020

perspective of access to these spaces and the control of these structures. Social issues are considered a citizen's right.

This societal perception of democracy and public space, analyzed with attention to the public value approach, and a network governance model, can be analyzed through a reading of pragmatism. This is coupled with the need for interaction and communication. This addition has a relevant impact, because in a cybernetic paradigm, communication is not reduced to technical instrumentalization.

In this sense, democratic positions, to be valid, will require deliberation. That is, in a model of public value legitimation, the validation process depends on the realization of a pragmatic consensus. This can be achieved through communication, since instrumental reason is insufficient.

Jurgen Habermas[852] structure consists of the private sphere of civil society, the public sphere, and two subsystems controlled by the media (the economic system and the administrative/state system), where its main social agents establish exchange relationships through money and power. In the face of the dichotomous structure that differentiates economy from politics, civil society from political society, administrative structure from capitalist structure, he proposes the public space as the middle way. It would be the place where the civil and the political would congregate[853]. Thus, the public sphere is understood as a middle-ground between civil society and the political-administrative realm (the societal space for democratic governance proposed in the Brazilian Constitution and duly established in law[854]).

Communication and online spaces have relevant implications for society. In defining public space, Habermas primarily emphasizes the natural condition of communication between people. For him, human learning occurs in a culturally stimulating public space. Habermasian

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[852]To demonstrate the functional and normative complementarity of popular sovereignty - a community of citizens who empower each other to pursue common goals - and the rule of law, which guarantees civil liberties, opinions, movements, etc., through a system of checks and balances, he proposed a reconstruction of modern political institutions J. HABERMAS, « Introduction au texte de J. Habermas »:, *Cités*, N° 89

[853]From now on, therefore, *private* autonomy and *civil* autonomy must be guaranteed at the same time. The institution of the democratic process must therefore ensure two things: political participation by citizens and the protection of private life by the rule of law. J. HABERMAS, « Trois versions de la démocratie libérale », *Le Débat*, 125

[854] Boaventura de Souza Santos and Leonardo Avritzer elucidate that Habermas enabled the comprehension of proceduralism as a social practice and not as a form of government, nor as a space of free market, proposing an openness that provides a societal grammar, a space where actors can debate a private matter in the public sphere. In: B. de S. SANTOS et L. AVRITZER, « Democratizar a Democracia: os caminhos da democracia participativa, Río de Janeiro », *citado por TATAGIBA, Luciana y TEIXEIRA (2006), Ana en Contraloría y participación social en la gestión pública, Caracas, Venezuela*, 2002

thought does not rest on instrumental or objectivist terms, but in communicative action. This aligns with Wiener's cyber imaginary purposes. Habermas emphasizes that online public space complements private spheres complement each other[855].

As Valery Pratt[856] explains, when explaining Jurgen Habermas' distinction, instrumental rationality excludes language and is concerned with the choice of effective means to achieve an end (the managerialist and hyper-individualist logic). Strategic rationality will mobilize language, but manipulate the interlocutor. Finally, communicative reasoning abandons instrumental goals for agreement through other instruments. It is here, therefore, that public value legitimations could lie in the societal environment. Therefore, the presupposition of positive validity must be relied at instrumental reason, but the concretization of this space.

This pragmatic and democratic approach finds support in Brazilian scholarship. Indeed, in the reading made by Vivian Lopez Valle and Emerson Gabardo about a cooperative state model in public contracts, the authors establish, through a relational reading, that the mode of political action is respected when democratic instruments are used[857].

That is, for the authors, the relational model finds support in the democratic space, where participation will be fundamental. And, although there is not much controversy in scholarship about the possibility of democratic instruments in public spaces (as already identified), it was also observed that participation in digital transformation is assumed more as a decorative figure than an effective instrument.

However, in public value readings, participation cannot be considered symbolic, but fundamental. According to Mariana Mazzucato, one way to prove the validity of this legitimacy

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[855]The global free communication zone, made possible by the invention of the technical structure of the *network*, presented itself as the mirror image of an ideal market from the start. This market did not even require deregulation. Meanwhile, this suggestive image is being disrupted by algorithmic control of communication flows, which is fueling the concentration of market power of large Internet corporations. The skimming and digital processing of customers' personal data is exchanged for free information provided by search engines. About: J. HABERMAS et C. BOUCHINDHOMME, *ibid.*

[856] V. PRATT, « Habermas : la démocratie au point de vue cosmopolitique: Pour une théorie radicale de la démocratie », *Cahiers philosophiques*, N°160

[857] E. GABARDO et V.L. LOPEZ-VALLE, « Característica relacional y mutabilidad de los contratos estatales: la concesión como herramienta de planeación (Relational Characteristic and Mutability of Public Contracts: Concession as a Planning Tool) », décembre 2020, disponible sur https://papers.ssrn.com/abstract=3749355 (Consulté le 17 octobre 2023).

criterion is through the requirement that systems are open to changes and adaptations based on the feedback[858].

This means discerning these instruments not as a space for discretion, but rather as a criterion for validation. The public value model will require a vision of effective participation. Therefore, a reading[859] that establishes the mere possibility of using these tools as sufficient for legitimacy, is at odds with the perspective of public value. It is also at odds with cybernetics' own imaginary. Such participation must be substantive rather than symbolic; otherwise, the entity in question is not a citizenry but a crowd, as outlined in the preceding Chapter. This requirement for communication will remain, by nature, also in other spaces of interaction.

2- Prefix-co interactions

If ***collaboration*** has emerged as a managerial facet of the good governance model, aiming to implement logic of results within the public sector, open government data facilitates multiple interactions among the state, society, and market. This interaction requires a reevaluation and redefinition of these relationships. In this context, public value approach contributes to the delineation of the various aspects that will shape the models for legitimizing relationships within the public sector.

Given that these spaces are constructed within a networked environment—an ecosystem centered around data—the focus is on the ecosystem itself, and all actors are expected to operate with consideration for this ecosystem. Occupying the public sphere, each actor's commitment should be towards the *common good.*

In this regard, the purpose of acting in this space aligns with the public value approach, accommodating the cybernetics imaginary and justifying public action. This is correlating to the governance model and ensuring the common good. Public purpose approaches, from the economic discipline, also reinforces this view. Rather than examining the relationships as a continuation of the collaborative models exhibited in forms of *good governance*, there is a leap and reset in the logic of these interactions, which take on a distinct vocabulary.

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[858] M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, 1re éd., Harper Business, 2021

[859]This is the case of the doctrine of Marçal Justen Filho, for whom the legitimacy and validity of state acts do not depend on the effective and real participation of each citizen, but on the existence of legal discipline that does not exclude this participation. The citizen is not a *subject*, an *inferior*, a *servant of* the State. The legal regime of public law. M. JUSTEN FILHO, *Curso de Direito Administrativo*, 1, 12e éd., São Paulo, Revista dos Tribunais, 2016.

A modification is related to the nomenclature itself. It is intended to replace the term *"partnership"* with terms linked to the ***"prefix-co"***. In effect, partnership refers to the parasitic concept of extraction. This is contrary to the logic of the network ecosystem in which public values are joint constructions and lead to rights and duties equitable[860].

Since collaboration, cooperation, and co-construction are regular and indispensable characteristics of a networked universe, the literature suggests theoretical repositioning of approaches dealing with these interactions. Interactions examined through good governance logic are result-oriented and considered parasitic partnerships. This is why it is proposed to replace the term partnership to reposition the interactions to joint constructions[861].

The ***prefix-co***, therefore, will allude to ***an alternative way*** - in general terms - of addressing at relationships in this space. It will encompass a varied complex of interactions, composed of different means and techniques. Its responsibilities, positions, roles, and rights will vary depending on the specific case. Hence, the prefix-co will signify an overcoming of good governance's partnership and collaboration mentality.

Reaching this first point, it is worthwhile to note how the literature views these positions. If in the NPM framework individuals were treated as consumers, in the public value approach they are seen as individuals, citizens and stakeholders.

There are spaces for collaboration, co-construction, co-analysis, co-decision, cooperation. And in this broad spectrum of possibilities, for actions to be given as valid, all actors must be involved[862]. In e-gov, collaboration is used to a great extent to distinguish itself from partnerships. Collaboration, then, means a designation of working together with others[863]. This distinction is important because it can help to identify, in a given case, the type of interaction

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[860] M. MAZZUCATO, *Mission economy: a Moonshot Guide to Changing Capitalism*, 1, *op. cit.*

[861] In this sense Mariana Mazzucato states: "*Parasitic partnerships are those in which one organization grows at the expense of the other. Symbiotic partnerships are those in which both prosper with a common goal*". M. MAZZUCATO, *Mission economy: a Moonshot Guide to Changing Capitalism*, 1, *op. cit.*

[862] There are schemes, however, that can give an initial distinction about them. Alain Supiot clarifies the distinction between cooperation and collaboration through etymology. To cooperate (from the Latin *operare*) means to work together, among free subjects in equality. In cooperation, one operates. Collaborate (from the Latin *laborare*) refers to collaborate, to work with something or someone. While the first has a sense of action and greater autonomy, the second is related to the contribution, in the face of work already done by others. That is, if as a collaboration (in which there is an actor, managing in a more original way), or in a cooperative model (in which the parties have the nature of operators). A. SUPIOT, « Aux origines des États : la souveraineté de la limite », *op. cit.*

[863] G. HUI et M.R. HAYLLAR, « Creating Public Value in E-Government: A Public-Private-Citizen Collaboration Framework in Web 2.0 », *Australian Journal of Public Administration*, mars 2010, vol. 69, n° s1, disponible sur https://onlinelibrary.wiley.com/doi/10.1111/j.1467-8500.2009.00662.x (Consulté le 17 octobre 2023).

established. Co-construction, in turn, is taken as a new way of looking at interactions, aimed at building common goods, given the potential of the networked ecosystem. The co-construction of public values is a nomenclature directly aligned with the digital government. It is considered the result of a set of deliberations between stakeholders, creating a dynamic that makes it possible to reach an agreement. It is defined as a voluntary and formalized process by which two or more actors agree on a definition of reality (a representation, a decision, a project, a diagnosis) or a way of doing things (a solution to a problem). The goal, the intention of the co-constructivist process, is to define, elaborate, construct a diagnosis, an analysis, a project, a change, a policy, a method, etc. The agreement reflects a commitment to which these actors agree and recognize each other. The notion "*serves to highlight the involvement of a plurality of actors in the development and implementation of a project or action*"[864].

Thus, if governance legitimacy in a broad sense is by consensus, in the case of digital government, public action is concretized by different kinds of arrangements. These arrangements will depend on the context, position and demanding processes that lead to collective action. In this sense, actors within this spectrum should be assessed in terms of collective action. This will be further detailed in the second part of the thesis.

3- The Role of Government

Given that the digital state's model of political action is naturally plural, since it is one of governance, there is an inescapable initial horizontal position in the relationships established. Accordingly, there is no aprioristic verticality, like in the machine model, in which the authority has legitimacy in the public interest and also has a manifestly unilateral legal relationship.

That is, in the machine, the guarantee of legitimization of its public act was extrinsic, without a need for positive validation, as it resulted from a unilateral legal relationship, arising from the will. Public interest, in this understanding, was a prior principle of public action and legitimation and ownership only by the state.

The postmodern model has already proven that the state is no longer the only holder. However, ***neither can*** one pretend ***to erase*** the strength or relevance of the state in digital government. There is a fundamental role for the organization in terms of leadership and management. As a

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[864] M. FOUDRIAT, *La co-construction. Une alternative managériale*, 2e éd., Politiques et interventions sociales, Rennes, Presses de l'EHESP, 2019, disponible sur https://www.cairn.info/la-co-construction--9782810908257.htm.

result, the public value approach and network governance are relevant because they not only reposition the interests but also illustrate the importance of the state's role as a guarantor of the common good.

Therefore, in the case of the public value approach, the government has a fundamental role as leader and driver. As O'Flyyn points out, this is a major change that has implications for both the public sector management and for those who manage it.

He explains, firstly, that politics is prioritized within the public value paradigm, unlike its representation as mere input in previous models. The proposed shift requires a fundamental reassessment of the responsibilities of government administrators, ***who would transcend their limited roles*** under the conventional administration framework (i.e., executing policy initiatives) and the new public management framework (i.e., striving for results and productivity improvements) to become "*proponents of the public value paradigm*"[865].

On the other hand, this leadership also poses the need for assessment and verification of responsibilities, which will change.

Section Consideration

The public value paradigm elucidates that within the *network governance* framework of the digital state, a ***proper vocabulary*** is upcoming. The binary distinction between state and Society, hence the public and private realms, is transcended by the literature on digital transformation, advocating a ***novel rationality*** attuned to the ***interconnected ecosystem***.

This shift signs more than a mere lexical change; it signifies the emergence of distinct notion of the categories, each meriting recognition in its singularity.

Furthermore, it symbols a paradigm shift in the conceptualization of management, departing from the underpinnings of corporate-derived theories to embrace approaches that foreground ***the processes*** and interrelations among parties.

Accordingly, some propositions are articulated:

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[865] J. O'FLYNN, *op. cit.*, *Australian Journal of Public Administration*, 66

i) in terms of legitimacy, it is imperative to contemplate diverse approaches and apprehend them in a manner that underscores the legitimacy conferred upon all participants in the interactive milieu, thus conferring not only rights but also obligations and responsibilities, with the state's role as a custodian and mediator being paramount[866];

ii) regarding objectives, the focus is on *collective goal*, thereby altering the conventional aggregation of individual interests and efficiency-centric rationale[867];

iii) concerning purposes, the emphasis shifts from economic achievements to the societal impacts envisaged, with the essence of the managerial philosophy in societal influence rather than fiscal gain (shifting from outputs to outcomes);

iv) for the management model, there is a transition from market-centric systematic logics to a dialogic and process-oriented model that resonates with the dynamic of interactive networks[868].

Moreover, it is essential to articulate that adopting the public value approach necessitates not merely the construction of public values but advocating the model as a dialogic and managerial form, distinct from market-driven paradigms focused on outcomes. Further, discerning the presence of pro-market terminologies within public discourses is crucial[869].

It is understood that the way to avoid this public/private hybridism resides in starting to examine the sphere as it is, public, and therefore, aiming to achieve collective preferences. The examination of the vocabulary can support in this identification, in which one should avoid proposals aimed at achieving "results", seeking approaches that emphasize the collective perception. This, harmonizes with the rationality of cybernetics (adapted to the interested parties), and also connects with the potentialities propitiated by the networked environment and a society that moves through data[870].

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[866] E. FUKUMOTO et B. BOZEMAN, « public values Theory: What Is Missing? », *The American Review of Public Administration*, 49

[867] Barry Bozeman understands it as: *The idea behind public value theory is to develop propositions, choice criteria, and ultimately indicators that shared values,* ***alternatively discussed as collective, communal, or public values****, appropriately to compete with the well-developed values, frameworks (e.g., market failure theory), and analytical tools (e.g., cost-benefit analysis) one finds in economics.* E. FUKUMOTO et B. BOZEMAN, « public values Theory: What Is Missing? », *The American Review of Public Administration*, 49

[868] A. DAHL et J. SOSS, *op. cit.*, *Public Administration Review*, 74

[869] B. RUKANOVA, S. VAN ENGELENBURG, J. UBACHT, Y.-H. TAN, M. GEURTS, M. SIES, M. MOLENHUIS, M. SLEGT et D. VAN DIJK, *op. cit.*, *Government Information Quarterly*, 40

[870] B. RUKANOVA, S. VAN ENGELENBURG, J. UBACHT, Y.-H. TAN, M. GEURTS, M. SIES, M. MOLENHUIS, M. SLEGT et D. VAN DIJK, *op. cit.*, *Government Information Quarterly*, 40

Consequently, it is posited that public value represents a managerial archetype predicated on the vision of governance as dialogic and interactive, fundamentally grounded in public values. These elements, therefore, interlace to delineate an ideal typology: ***i)*** a model of political action of the ***digital state of network governance*** (*plural and relational*); ***ii)*** a model of public action that will have as its purpose the preferences of the collectivities and the search for and production of public value[871]. Upon these considerations, it becomes feasible to scrutinize their application within the legal framework.

Section 2: Digital Government public action, securing the public interest

When the Brazilian legal system mutated from legality to legitimacy, Irene Nohara pointed out that, at the peak of positivism, legal content was restricted, as a rule, to legality. Post-positivism would inaugurate ***an axiological opening*** in the sense of legitimacy, "*supporting in the core of the interpretative process values whose significant content varies according to the characteristics of each concrete case*"[872].

The author clarifies, in this sense, ***that objectivity of a meaning*** is not given by logical or a priori criteria or by literal interpretations of legal texts. Instead, it is given by a dialectic pursuit of an "*intersubjective consensus as to the meaning referred to in reality, that is, contextualized*"[873]. In this statement, it is assumed that the author synthesizes the steps that consolidate public action legitimacy, particularly in the digital government system.

The public value approach, in communion with the concept of network governance and public law for the common good, aligns with this pathway.

Initially, it is crucial to determine the way the public value approach, both as a theoretical construct and as a practical category, contributes to this organizational framework **(§1)**.

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871 T. FISHER, « public value and the Integrative Mind: How Multiple Sectors Can Collaborate in City Building », *Public Administration Review*, 74

872 I.P. NOHARA, « Consensualidade e gestão democrática do interesse público no direito administrativo contemporâneo », 2013, disponible sur https://dspace.almg.gov.br/handle/11037/5795 (Consulté le 31 octobre 2023).

873 I.P. NOHARA, « Consensualidade e gestão democrática do interesse público no direito administrativo contemporâneo », 2013, disponible sur https://dspace.almg.gov.br/handle/11037/5795 (Consulté le 31 octobre 2023).

A subsequent analysis of legal values and concepts will be realized, observing the cybernetic imaginary and the digital state model **(§2)**.

§1 From public value to public interest

Public value has been highlighted as a fundamental criterion for digital government. It can be seen as *a management category*, capable of replacing the logic of efficiency and results, which are now materialized in the legal system and drivers of digital transformation **(A)**, and also represents a *concept,* capable of ensuring the principle of public interest, in its two-dimensional sense, political and public **(B)**.

A. Public value as a category

The insertion of the public management model of public value can bring significant impacts on the law, repositioning the purpose of the state and the government to the public interest (i.e., it *returns to ensure the public interest*), but within a reading of performance and governance, i.e., adapted to the model of political action of a digital state, but that does not take away he meaning of the public sphere through the logic of the market, which was inserted since the mutation of the legitimacy of the public interest to efficiency. Essentially, public value replaces performance efficiency with the pragmatism of public value. Thus, it may overcome issues encountered in public interest theory, still linked to the legitimacy of a pyramidal and dichotomous government model, as well as the inadequacies of governance theory with an emphasis on efficiency.

Indeed, ***public value as a category is a relational and contextual*** approach to building public values. This is done through the interaction - effective and not just instrumental - of the actors, each within its own position.

In the first step, public action achieves its ends. Through this approach, digital government public action is not focused on efficiency, but on the "*construction of public values*". This is relevant, since NPM and other managerialist logics constitute ideologies of their own. They are materialized in the legal system through specific principles and propositions. In the Brazilian case, this refers expressly to Article 37 of the Federal Constitution, to the changes brought to the Introduction Law to Brazilian Law Norms, and, notably in the case of digital government,

to the digital government law itself, which establishes the search for public efficiency as its foundation. In the public value management model, efficiency and the logic of the results can be replaced with public value management. public value legitimacy is naturally pluralistic. Managerialist practices are not concerned with value construction by diverse actors. Instead, they are geared to the logic of an efficient outcome for the construction of economic results. They are geared to quick services, cost savings, and economy in government activities[874].

At a different level, public value, by replacing market logic, re-emphasizes the interactive nature of networked space. That is, rather than refuting connection spaces, the public value approach recognizes multiple actors. They are not only users, but also participants, collaborators, and other players in a broader *"co"* of digital government and network governance.

Public value re-dimensions management logic by placing the interactive nature as a priority point in a management model. Technologies must be invested with this bias and not employed for more agile services for the public. Thus, the public value approach resizes the legitimacy of public action to include the *prefix-co* in the scope of public values construction, repositioning the logic of public interest in attention to the nature of connectivity. This will imply the use of instruments already available to governments for sharing.

Another significant consideration resides in the content of the notion of public value and its transposition into the legal universe.

Due to managerialist logic, efficiency was expressly incorporated into Brazilian legal system. In addition, the most recent managerialist practices emphasize the importance of distinguishing the practical consequences of a public decision. In addition, they condition public actions on ***"the result"*** of an instrumental model.

Therefore, it is essential to consider how public value might be embodied in the legal field. Thus, to enhance the utility and security of this thesis, it is more advantageous to employ a consolidated and mature legal concept. This is rather than introducing an anomalous and foreign notion.

The interdisciplinary study, in conjunction with its correlation to concepts and notions, reveals that public value – as a meta-legal concept – can be considered as the equivalent of public interest in legal terms, which will be explored in the next paragraph.

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[874] G. STOKER, « public value Management: A New Narrative for Network governance? », *op.cit.*

B. Public value as a concept

There is extensive meta-legal literature on public value. In the case of public value in digital governments, Mensah Isaac et al. define it as the value produced by government, by services, standards and regulation. It can determine the performance of government programs and activities[875]. Still, the authors provide a limited proposition, since, as seen, digital government brings multiple actors, beyond governments, duly legitimized in the pursuit and realization of values that are public, even though governments are responsible for their realization. public value is a concept whose characteristics warrant detailed elaboration.

1- A dialogical turn

Timo Meynhardt provides a more detailed explanation of public value construction in public management. The author proposes a behavioral view, without proceeding down a traditional utilitarian and rationalist path. Meynhardt considers constructing public values as a result of a dialogical process. This involves individuals, within their subjectivity, but also society, the market and the state.

To this end, he primarily employs Nicholas Rescher's definition of value. This refers to something that is emphasized in reality and desired by the evaluator. Value – in an evolutionary sense – would be interrelated to the relations and processes of subjective evaluations and revaluations[876]. The desire criterion resembles Cicero's feel (*sentire*) criterion, which displays a correlation between the construction of the common good, and that of public value.

Timo also points to the value creation process. For him, when different individuals share similar evaluations, value becomes objective. Thus, according to his understanding, value derives from the agreement shared by participants. For him, value results from a relationship between a subject who gives value to an object and the object validated[877]. In this context, Meynhardt also understands that value does not exist independently of a relationship. By valuation (or evaluation), value becomes an abstract entity of desire or preference. The theory emphasizes the idea of changes in relationships, considered, therefore, as a theory addressing relativity.

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[875] I.K. MENSAH, G. ZENG et D.S. MWAKAPESA, *op. cit.*, *Front. Psychol.*, 13

[876] T. MEYNHARDT, *op. cit.*, *International Journal of Public Administration*, 32

[877] T. MEYNHARDT, *op. cit.*, *International Journal of Public Administration*, 32

As such, it is a method, which besides recognizing the role of the parties in the construction of this value, recognizes that the object, which is the value, produces effects and relations for these parties, defined according to the context in which it is placed. In other words, it is an unstable phenomenon that is not always communicable. The author's understanding is that value means the expression of subjectivity linked to relations. The object is the product of these relations, shaped by their subjectivities. Therefore, objects are created and not found. Objectivity refers to shared values, linked to subjects. Value needs an object, which is achieved through relations[878].

Thus, one can ponder - following the author's propositions and in conjunction with the concept of the common good in public law, and the network governance that lies at *res publica* - on public value as an outcome of a process in which the parties have reached consensus. This evaluative process is, therefore, pragmatic, dialogical, and contextual. It can also be argued that this outcome is the arrangement resulting from the action. Considering the action, the concern lies less in the object itself but in the process — in the action — and in the disposition of the parties and their positions in this interactive plane.

In this perspective, public value theory possesses an essential ontological and relational character. Its content predisposes access to the collective construction of the common good.

2- Public value and common good

The digital government literature tends to hold that the common good is the notion that comes closest to public value, since the term originally meant "***common welfare***"[879].

In the United states, for instance, the term commonwealth means two things. First, it represents a republican or democratic government of equals, attentive to the general welfare and an active citizenry. Second, it refers to the common foundations of public life – the basic resources and public goods of a community[880].

As a concept, public value can be conceptualized as an idea similar to the latter's perception of the common good.

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[878] T. MEYNHARDT, *op. cit.*, *International Journal of Public Administration*, 32

[879] J. ROSE, L.S. FLAK et Ø. SÆBØ, « Stakeholder theory for the E-government context: Framing a value-oriented normative core », *Government Information Quarterly*, 2018, vol. 35, n° 3, pp. 362-374, disponible sur https://www.sciencedirect.com/science/article/pii/S0740624X17304872.

[880] J. ROSE, L.S. FLAK et Ø. SÆBØ, *ibid.*

The common good[881], in turn, is a central notion in political science, and, as seen, it has an intrinsic relationship with *res publica*. In the digital state political action model, network governance acquires its justification from the perception of the good government. This represents the idea of the common good in a *res publica*, by the consensus of the community.

In the legal field the common good as a concept it is often deprivileged[882]. Regarding the common good and public interest, Martin Haerblein, studying the Brazilian etymology of public interest's notion, indicates that the common good and public interest are analogous concepts. The former is employed more in political science, and the latter in law. By methodological distinction, the common good would be the concept employed in political science, and also in economics, as can be observed in the works of Mariana Mazzucato[883].

On the other hand, the public interest is employed in the legal universe, primarily in administrative law or state theory. According to Martin Haerblein, legal scholarship ignores the term common good. Despite this, "*there is no ontological difference between the common good and the public interest. This is because both are, in essence, the 'reason for the state'. As the reason for the State (not of the State), they are also the reason for the legal relations that involve it*"[884].

The explanation above provides insight into the fact that in the legal field, especially in Brazil, the concept that defines the basis for legal relations involving the public sector is the public interest.

The correlation between the perception of public interest and the public value theory is definitely transposable, notably that made by Timo Meynhardt, who highlights that the construction of public value is the objective result of subjective relations within a context in a relative manner. The similarity between the notions lies precisely in reason, which substantiates legal relations in public space[885].

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[881] It can be said that the concept of the common good known in contemporary times, has shaped itself on the border of religious and political spheres, as a result of institutionalization. M.P. HAEBERLIN, « Crítica da razão do Estado: uma (re) formulação do conceito de interesse público e a correlata construção de um Estado meritocrático de direito », 2014

[882] M.P. HAEBERLIN, *op. cit.*, 2014

[883] M. MAZZUCATO, « For the Common Good », *Project Syndicate*, janvier 2023, disponible sur https://www.project-syndicate.org/commentary/common-good-governance-key-elements-by-mariana-mazzucato-2023-01 (Consulté le 18 octobre 2023).

[884] M.P. HAEBERLIN, *op. cit.*, 2014

[885] T. MEYNHARDT, *op. cit.*, *International Journal of Public Administration*, 32

As observed, the perception of the theory of *res publica* of good government centers on the idea of community welfare. Therefore, it is possible to delineate that the pivotal point of good government (network governance), the public law of the common good (consensus), and public value, list the dialogical character of the collective construction of something directed towards the well-being of the community. This is, hence, the logic that is applied to the common good.

In the legal realm, Danielle Bourcier[886] explains that the *common good* emerges as an alternative to the vision that opposes private interests and "*general*" interests, that is, the separation in opposition of goods and values.

By identifying that the modern French construction of general interest results from the voluntarist idea and that it led to the perspective of an authority as legitimate to establish what the general interest is, the author highlights that the development of this notion ended up putting its validity in check, which ended up being visualized with the logic of managerialist performance that seeks a substitution of the general interest through private interests (the logic of efficiency). In this sense, Bourcier proposes the concept of common good as a transitional device, between the private interest and the general interest, in order to identify what is shared and should have a "*common*"[887] governance.

As can be noted, the author seeks a disassociation with the nineteenth-century notion of general interest, and as a way of establishing this distinction, she proposes the notion of common good. Still, the concept of common good can be a way to crystallize the conditions of legitimacy indispensable for any collective action and any global decision[888].

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[886]While in England the general interest has a utilitarian perception, at the intersection of private or particular interests. D. BOURCIER, « Le bien commun, ou le nouvel intérêt général », *Penser la science administrative dans la postmodernité : mélanges en l'honneur du professeur Jacques Chevallier*, Paris, LGDJ-Lextenso éd, 2013

[887]Between the utilitarian conception of public interest and the voluntarist notion of general interest, the notion of *common good* can conquer at least a transitional notion in institutional forms of coordination. It is about examining how common good initiatives can revive the emergence of social space from the *common management of* a quest, defined as institutional D. BOURCIER, *ibid.*

[888] O. DELAS et C. DEBLOCK (dir.), *Le bien commun comme réponse politique à la mondialisation*, *Country: BE24 cm. Notes bibliogr.*, Bruxelles, Bruylant, 2003

§2 The legal definition of public interest in Brazilian law

In Brazilian law, it is understood that the post-Constitution conception of public interest[889] informs the concept of the *common good* as the outcome of collective construction within a specific context, particularly distancing itself from the perspective intrinsic to eighteenth-century voluntarism[890].

There is indeed an extensive discourse surrounding the principle of public interest, with two major scholarly currents[891], engaging in a debate over its content. This is especially concerning the term "***supremacy"*** that pertains to the doctrine, as seen. Some argue that this term is unsuitable in light of the inherent horizontal nature of legal principles[892].

On the contrast, public interest is perceived as the pivotal legal notion in public law, and more specifically within administrative law, as previously mentioned[893]. In the Brazilian legal system, the public interest underpins public law. Hence, the public interest is a pivotal concept within the legal framework, driving public actions.

This characteristic - *that the public interest is the foundation of public law* - cannot be neglected. It is therefore necessary to examine how one can contemplate the public interest within the aforementioned framework. This is, namely, a network governance political action and a public action aimed at constructing public value.

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[889] The point of distinction of the present research with the social administrative law current, does not lie in the content of the public interest, but in the positions of the actors and their corresponding legitimations.

[890] E. GABARDO et D.W. HACHEM, « O suposto caráter autoritário da supremacia do interesse público e das origens do direito administrativo: uma crítica da crítica », *Direito administrativo e interesse público: estudos em homenagem ao Professor Celso Antônio Bandeira de Mello. Belo Horizonte: Fórum*, 2010

[891] The content of the arguments can be summarized in Emerson Gabardo's comments on the subject, which are based on two of the most important studies against the thesis of supremacy of the public interest: *"critics end up defending the idea that public and private interests are placed at an equal level of normative and axiological hierarchy; which is a mistake. The principle of supremacy of the public interest, for being a principle, stipulates an a priori established conditioning factor, but does not translate, as indeed happens with all other principles, into an invincible character.* E. GABARDO, « O princípio da supremacia do interesse público sobre o interesse privado como fundamento do Direito Administrativo Social », *Revista de Investigações Constitucionais*, 4

[892] E. GABARDO, *ibid.*

[893] As Daniel Wunder Hachem points out, "*An illustration of this assertion is the vast number of metaphorical expressions used to explain the relationship between the notion of public interest and this legal discipline.* D.W. HACHEM, « A dupla noção jurídica de interesse público em Direito Administrativo », *A&C - Revista de Direito Administrativo & Constitucional*, avril 2011, vol. 11, n° 44, pp. 59-110, disponible sur http://www.revistaaec.com/index.php/revistaaec/article/view/220 (Consulté le 17 octobre 2023).

A. Public interest as two facets

Within the Brazilian legal framework, it is discerned that the concept of public interest embodies ***two distinct dimensions***: one broad and general, and the other more specific and defined[894]. It is imperative to delineate these perspectives of public interest as they serve to illustrate what resonates with the concepts of the common good and public value.

As a result, the dual perspective can materialize public law in the context of the digital state. This includes both the political action model of network governance and the public action of digital government aimed at public value. Moreover, a lack of precise differentiation between public interest facets may result in misconceptions surrounding the topic.

Indeed, in the Brazilian legal context, the notion of public interest has been scrutinized for its supposed abstractness and questioned regarding its relevance to modern circumstances[895]. Additionally, as Jacques Chevallier articulates, the so-called myth of the general interest stems from the recognition that *"in a system involving multiple stakeholders, the State no longer holds the exclusive authority to define what constitutes the general interest*" [896].

This dilemma is one of legitimacy and content. In the age of globalization, abstract notions have been pushed back in favor of tangible, efficient outcomes. The rise of society's autonomy weakens the state's authoritarian power, thus altering the dynamic between public interest and state authority. In any case, there is scholarship that considers that in Brazilian law, the reference to the public interest "*is no longer a generic invocation, but rather the application of a legal rule that defines this general interest, attributing competencies, specifying its reach and limiting them"*[897].

Understanding the scope and maintaining the centrality of the public interest in public law are crucial. One of the key criticisms of the public interest—viewed as a mythological construct—

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[894] D.W. HACHEM, *ibid.* ; C.A. SUNDFELD, « Interesse público em sentido mínimo e em sentido forte: o problema da vigilância epidemológica frente aos direitos constitucionais », 2004 ; J.S. da S. CRISTÓVAM, « O interesse público no divã da psicanálise: para um conceito bidimensional de interesse público », *Revista Juridica*, 4

[895] D.W. HACHEM, *op. cit.*, *A&C - Revista de Direito Administrativo & Constitucional*, 11

[896] J. CHEVALLIER, *L'Etat postmoderne*, *op. cit.*

[897] D.W. HACHEM, *op. cit.*, *A&C - Revista de Direito Administrativo & Constitucional*, 11

stems from its supposed artificiality; that is, its foundation on voluntarism that might link it to a symbolic representation reliant on an external entity for its realization[898].

This entity is burdened with the responsibility not just to safeguard, but also to advance the public interest, which has led to stigmatization. In this sense, the ideal of the *common good* itself, "*for the individualistic viewpoint, is reduced to the protection of individual rights and interests, and to this the State's action is summarized*"[899].

Such a viewpoint reflects private interest as the mirror image of public interest. This underlines the authoritarian roots of the nineteenth-century concept of public interest, highlighting its bipolar and dichotomous relationship with individual autonomy and freedom.

However, the historical perspective of the public interest has been challenged by globalization and the attachment of intermediaries across diverse public domains. This has prompted a rethink of traditional market logic within public realms. In addition, the nineteenth-century notion of public interest is not only authoritarian, but also dichotomous in its conceptualization of authority and freedom. It is, therefore, pivotal to understand the public interest to navigate the current and future landscapes of public law effectively. The intent, however, is to move beyond the dichotomy, which entails authority and freedom, its antithesis.

As explores José Sergio da Silva Cristovam, the public interest has a legal political and public function[900]. Thus, in the Brazilian legal framework, two facets regarding the public interest can be discerned[901].

The first emphasizes the existence of a benchmark that necessitates respect for fundamental rights, which are viewed from a general perspective. **The second** dictates that its content definition is to be concretized in a practical manner within a contextual framework[902]. It

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[898] As Daniel Wunder Hachem and Emerson Gabardo observe: "*Respect for the public interest was in the absence of obstacles imposed by the Public Power to the exercise of freedoms, notably in the economic sphere, but not only. The private interest was placed before the public interest, since the common good was not something materially defined by the State or by the collectivity, it would be in the free development of individual wills*". E. GABARDO et D.W. HACHEM, *op. cit.*, *Direito administrativo e interesse público: estudos em homenagem ao Professor Celso Antônio Bandeira de Mello. Belo Horizonte: Fórum*, 2010

[899] E. GABARDO et D.W. HACHEM, *ibid.*

[900] J.S. da S. CRISTÓVAM, *op. cit.*, *Revista Juridica*, 4

[901] Carlos Ari Sundfeld adopts a bipartite concept of public interest in a "strong sense" (provided for in the legal system) and a "weak sense" (values spread throughout the legal system in general). C.A. SUNDFELD, *op. cit.*, 2004

[902] Daniel Wunder Hachem posits: "*it is possible to identify a structure of the concept of public interest, a general categorical notion of what should be understood as such, applicable to any legal-political system stripped of all contingent and variable elements, but lacking an objective content. In a second moment, this structure must be plunged into the legal system under examination, endowing it with a concrete content from the valorative system*

emphasizes that the two-dimensional concept of public interest incorporates the legal-administrative model, as well as a respect for fundamental rights and human dignity[903].

While the broad model may pertain to a political-normative perspective, thus to political action, the strict model pertains to its practical applicability, hence to public action. Governance precepts apply to all parties. Furthermore, the public interest, as a whole in its strict sense, also defines its content and depends on its legitimacy.

These are all elements that are now sought to be elucidated, with support both in the definitions of public law of the digital state, as a law of the common good, that is, of the "*res publica*", shaped within a model of network governance, and in this sense, a legitimacy that depends on the positions of the actors in a relational and relative mold; and finally, from the perspective of a public action model of a digital government model, in which the construction of public values is sought. With regard to the public interest itself, the foundation is notably derived from Brazilian doctrine.

B. Public interest dualistic legal notion

The first dimension of public interest, called broad, is granted to the comprehensive perception of public interest, establishing itself as an interest that carries a negative nature of validity. This refers to the public interest considered in a generic sense, encompassing all interests that are legally protected, that is, the interest of the community considered in itself (*general interest*), individual and collective interests (*specific interests*). It pertains to a negative assumption of validity because it prohibits contrariety to such interests. In other words, the public interest in a broad sense refers to the interest protected in the legal system, as the strict definition of public interest refers to specific concrete matters.

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plasmated in the normative order analyzes". *In*: D.W. HACHEM, *op. cit.*, *A&C - Revista de Direito Administrativo & Constitucional*, 11

[903]The supremacy of the Constitution and the binding nature of fundamental rights are founding characteristics of the constitutional state under the rule of law, a model guided by the force of constitutional principles and by the promise of consolidating a model of substantial justice. J.S. da S. CRISTÓVAM, *ibid.*

1- Public interest in a broad sense

In Brazilian law, the Constitution implies a reinterpretation of the principle of public interest, in which the necessity of its observance as a means of concretization – or alignment – with its values and the fundamental rights listed in the document it is set forth[904].

Beyond the change of the political action of a government model, from where the public interest is its corollary, to that of governance aimed at performance, it is understood that recognition of the public interest as a legal concept is fundamental. It is the instrument that will authorize an effective control of public actions and ensure that the exercise of public practices is carried out in accordance with the preferences of the community and not merely for the sake of efficiency performance[905].

The construction of the idea of the two-dimensional notion of public interest of Daniel Wunder Hachem was elaborated based on the distinction and scheme made by François Ost between interests and rights. This definition embraces a definition in distinct models of interest layers between broad and narrow. Ost points out that the legal phenomenon is permeated with distinct interests and countless formats that sometimes resemble a right. These formats may become subjective rights or otherwise protected interests. Thus, subjective rights are distinguished from legally protected interests, which are not yet recognized by the law norm as rights. Daniel Wunder Hachem's analogy refers to legitimate interests and public interest in the broadest sense. Its content is objective, that is, it differs from private interest that is a subjective right. Public interest in a broad sense is objective. The author also points out that in this aspect there is a whole range of rights, which are interests[906].

This association between legally protected interests is due to the fact that the public interest has an objective meaning distinct from the private interest. This is "*subjectively intended by any*

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[904] The parameter of normative validity lies at the Constitution, which condenses the social and individual values of Brazilian society. It also brings the constitutive principles such as sovereignty and human dignity, it lists the individual and social, political rights, besides establishing the economic order and naming the public services - of state ownership, among others. It must be observed throughout the entire legal system, abandoning the "reductionist" perspective of legal positivism, recognizing the norms and their values in the legal system. A.P. de BARCELLOS, *A eficácia jurídica dos princípios constitucionais: o princípio da dignidade da pessoa humana*, Rio de Janeiro, Renovar, 2002

[905] J.S. da S. CRISTÓVAM, *ibid.*

[906] The author understands that, in both notions, the public interest performs one of its most important functions for Administrative Law: to legally limit the exercise of administrative powers. It imposes itself as a condition for the validity of administrative acts. In: D.W. HACHEM, *op. cit.*, *A&C - Revista de Direito Administrativo & Constitucional*, 11

person, whether physical or legal, public or private, for personal convenience. The goal expressed in the normative system is public due to its universality[907].

Therefore, while the private interest may result in a subjective right for the private individual, ***the public interest is an interest and not a rights***[908], so that its condition of public interest in a general sense means that it is explicit in an objective manner in order to consecrate the general values of a given community, the precepts of which must be respected when strictly implementing what will be a public interest.

This configuration aligns with Tim Meynhardt's conception of public value, where value is an object, the outcome of an action. From this perspective, public interest as a general concept encompasses this result, already objective, as it has been valued by the community.

Nevertheless, and in this sense, José Sérgio da Silva Cristóvam points out, that when establishing the inherent practical nature of definitions about the public interest, that this does not eliminate the need to assess the "*rational and normative nature of the public interest, which currently resides 'in the framework of the principles that inform the social and democratic State of Law'*"[909].

The connection made between this view of the public interest and fundamental rights, as well as the principle of human dignity, is reasonably predominant in doctrine[910]. From this perspective, one would deal with a conceptual core of the public interest, which is based on agendas that ensure the primacy of the individual and/or human dignity[911].

Nonetheless, it is acknowledged that interpretations favoring individual primacy led to a privatized perspective within the public sector, justified apparently on the grounds of human dignity. Indeed, these perspectives could reduce the public interest to private interests, which is considered inappropriate in *public law for the common good.*

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[907] D.W. HACHEM, *ibid.*

[908] Between *interests* and *rights* and the differences see: E. GABARDO, *op. cit.*, *Revista de Investigações Constitucionais*, 4

[909] J.S. da S. CRISTÓVAM, *op. cit.*, *Revista Juridica*, 4

[910] As suggested by Marçal Justen Filho. M. JUSTEN FILHO, *ibid.*

[911] José Sérgio da Silva Cristóvam emphasizes that, it is possible to envisage a universal and abstract bias, which does not mean to be immutable or absolute, but rather a guiding principle in the order for a community. Besides, the author highlights, that this perception of public interest "*would necessarily pass through the recognition of the primacy of fundamental rights, values that must be placed above any occasional or contingent interests, above any governments and their rulers, above states and the very people whom it is intended to defend*" J.S. da S. CRISTÓVAM, *ibid.*

In opposition to the prevailing doctrine that predicates the public interest on the primordial observance of fundamental rights, it must be suggested that the *public law of the common good* necessitates a recalibration of this perspective. Indeed, as elucidated, the *common good,* serving as the principle of *good government*, constitutes the substance of public law. Furthermore, the concept of the *common good* and the public law of the digital state highlights the state's duties over rights.

By focusing on the public interest from the perspective of duties, the Republic's duties take precedence over individual and collective rights within public law. This interpretation aligns with a view of the duties and powers of the administration itself. Moreover, ***prioritizing the republic's duties*** over individual and collective rights aligns with the thesis's approach to discussing political and public actions before individual and collective rights.

By discussing state action, the focus is on duties over rights. In the case of state actions, the duties that precede rights are the republic's duties to ensure the common good. Therefore, this thesis advocates and proposes a public law for the digital state grounded in Republican duties. In the constitutional interpretation of public interest, these duties are derived from the republic's values (Article 1), preceding fundamental rights (Articles 5 and 6)[912].

Thus, a general reading of the public interest is proposed, primarily through the notion of the Republic's duties. This is followed by fundamental, individual, collective rights, and human dignity. Hence, to transcend the perennial dialectic that juxtaposes the state against society, thereby enshrining fundamental rights and human dignity, it must be recognized that within the ambit of public law of the common good, precedence is afforded to the canons of good government.

This principle encapsulates the essence of the *common good* and collective welfare, not just the fundamental right per se.

If public interest is envisaged as a general concept, there is no equivalent within the legal framework that supersedes the *common good,* as highlighted by Martin Haeberlin[913].

Thus, public interest in its broadest sense does not derive from fundamental rights but is justified by the *common good*, a core value of the Brazilian state as enshrined in the Constitution.

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[912] R.F. BRASIL, *Constituição da república federativa do Brasil*, *op. cit.*
[913] M.P. HAEBERLIN, *op. cit.*, 2014

It is possible to consider herein, migrating to the public interest and digital government, notably the principles established for the gearing of a digital government. This is so they could be considered legitimate interests, already objectified to.

These are the values that guide relations and interactions in a concrete case. The *"basic"* values should be those forming the vocabulary of network governance and public value.

Innovation, trust, and inclusion are fundamental elements of a digital government. In the second part of the thesis, it will be examined in greater detail. What is well-defined here, in any case, is the possibility of establishing values that condition and preserve the common good. This perspective does not affect the perception of relational or governance, on the contrary. It is about general norms that are established objectively, but condense interests, without correspondence with a duly subjectified right. General basic principles are recommended, even indispensable.

2- Public interest in a strict sense

Public interest, in a strict sense, cannot be defined aprioristically, since it is a situation that depends on the practical examination of a given situation. In fact, this perception of interest in the strict sense is quite consolidated. There is a certain consensus that - whether because it is an undetermined legal concept or a notion - there is a type of public interest that cannot be determined a priori. In this sense, public interest in the strict sense means the interest held by society.

This is what is called "*general interest*". Here, it is not a matter of negative validity, but of a positive validity assumption that depends on the performance in a given concrete case[914].

For Daniel Wunder Hachem, it is the interest of the collectivity itself considered (general interest), whose identification will be performed in the unique situation by the Public

[914]The example brought by Hachem corresponds in expropriation, that is, it is necessary to verify in the concrete case the situations that authorize the perception of a public interest to the act of expropriation. According to the author, this possibility occurs in two situations: **i)** to institute limitations, prohibitions to rights or coercion, resulting from unilateral impositions; **ii)** in the granting of authorizations; **iii)** to justify modifications or extinctions of acts or legal relationships already established (v.g. exercise of self-tutorship; unilateral modification and termination of administrative contracts). D.W. HACHEM, *op. cit.*, *A&C - Revista de Direito Administrativo & Constitucional*, 11

Administration, in which case "*its prevalence over individual and collective interests (specific interests) also protected by the normative system will be authorized*[915]".

The author concludes that, in the case of a public interest in the strict sense, an express motivation is indispensable, with its due justifications under the act[916]. As he explains, such provisions portray the prerogatives (in his reading, the public power) for the satisfaction of the general interest of the collectivity.

For this, it will be necessary: an adequate motivation for the acts that make up this nature; an exposition, in a detailed way, of the reasons that justified the choice of the act.

The Brazilian legal system has several laws that consolidate these processes for motivating acts. Its content also requires essential criteria for adequate definition just as its legitimacy requires essential criteria. Motivation is crucial in this regard. Due to relational space, the proportionality principle also emerges as a fundamental standard. In addition, the very concepts and basic principles of digital government, such as transparency and publicity, are placed as vital to the realization of this public interest in the strict sense.

However, the fact that this public interest takes place in a political action model of *network* governance and of a public action of public value requires a careful look at legitimacy (which cannot be restricted to public authority) and at the legal relationship itself, since the network model is naturally relational, which requires a relational and relative reading of legal relations. The law, which is no longer static, and becomes intersubjective, causes the theory of relations to deal with the definition of public interest in a contextualized and relative way. This result through interaction will bring a perception of interest that will be public, as a result of a joint construction of the interested community. It is a view from the actions of the agents, and not the agents per se. By applying this approach, the public interest, although representing a single interest, cannot be confused with the plexus of individual interests[917].

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[915] D.W. HACHEM, *ibid.*

[916] D.W. HACHEM, *ibid.*

[917] One cannot admit the belief that the public interest would have no relation to individuals or groups that make up the nation, a subtle error that ends up commonly populating the very state administrative behaviors. J. dos S. CARVALHO FILHO, « Manual de direito administrativo », *São Paulo: Atlas*, 2

C. The content of the notion of public interest

As to the nature of the public interest, it is considered, as a rule[918], that it is an undetermined legal concept[919]. In this vein, the doctrine frame three zones[920], that of positive and negative certainty, being the third one the penumbra, the uncertainty[921]. It is also distinguished what is considered as primary and secondary interest[922], being clear in the legal academia that the interest said to be secondary cannot be considered as public interest, but only the administration's one[923].

Regarding both the distinction (*primary and secondary*) and the definition of primary, the most traditional and fundamental literature is that of Celso Antônio Bandeira de Mello[924]. The first distinction that is drawn, therefore, resides in the interests considered as primary from the secondary ones, the former ***being*** considered as the *raison d'être of the State*, while the latter is not confused with a public interest, but refers to the state activities that are not considered as being of effective public interest[925].

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[918] Emerson Gabardo even showed that Eros Roberto Grau disposed that it is a notion and not an undetermined legal concept, which, according to his perception, because it is a legal notion, it *develops itself through successive contradictions and overcoming and that it is, therefore, homogeneous to the development of things.* GRAU, Eros Roberto. *O direito posto e o direito pressuposto.* São Paulo: Malheiros, 2005 But, according to Gabardo, to consider as concept or notion correlate, because "The legal system, in a Social and Democratic State of Law, shelters a plurality of interests that are sheltered within the expression "public interest". E. GABARDO et M.C. de M. REZENDE, « O conceito de interesse público no direito administrativo brasileiro », *RBEP*, 115

[919] In this sense: M. JUSTEN FILHO, « O direito administrativo de espetáculo », juin 2009 ; E. GABARDO et M.C. de M. REZENDE, *op. cit.*, *RBEP*, 115

[920] E. GABARDO et M.C. de M. REZENDE, *op. cit.*, *RBEP*, 115

[921] T.L. BREUS, « O governo por contrato(s) e a concretização de políticas públicas horizontais como mecanismo de justiça distributiva », Accepted: 2015-12-02T15:26:40Z, 2015

[922] C.A.B. de MELLO, *Curso de direito administrativo*, 32. ed. rev. e atual., São Paulo, Malheiros, 2015

[923]The scholarship has already clarified that pragmatic interests of the Administration that are not supported by the law *do not constitute public interest,* they are merely secondary, illegitimate interests. . E. TALAMINI et D. FRANZONI, « Arbitragem e empresas estatais », 2017.

[924] C.A.B. de MELLO, *Curso de direito administrativo*, *op. cit.*

[925] In Celso Antônio's structural reading of the public interest, the ***interests of*** citizens may be expressed in two ways: i) private, which corresponds to the exclusively personal conveniences of the individual, singularly considered; ii) public, which refers to the interest of the individual as a member of the collectivity in which he is inserted. According to the author, however, the public interest would not be something autonomous, existing by itself, but rather something that depends on the interests of individuals.

1- Public interest as a concrete definition

Its definition, repeated in works and jurisprudence is the following: "*the public interest must be conceptualized as the interest resulting from the set of interests that individuals personally have when considered in their capacity as members of the Society and by the mere fact of being so*"[926].

It is considered that such a conceptualization of public interest shows the inexistence of antagonism between individuals' interests and the public, since the public interest corresponds in one dimension to the individual's interest, but in its community perspective. Moreover, it would be clear to extinguish the correlation between public interest and the state, so as to delimit that the public interest is not the state's interest[927].

Conversely, the definition pronounces little about how the public interest is effectively constructed, and does not give details about what "*would, in fact, become the content*"[928].

As seen, the strict vision views that it is a definition *in concreto*. This means that after its definition, it will be considered public, because it resulted from the collectivity's interest. There is, in fact, certain acquiescence that public interest in the strict sense means the result of an interest that is considered public, because it resulted from something done collectively, or for the collective.

In this sense, José dos Santos Carvalho Filho emphasizes that the notion of public interest deals with the overcoming of the "*boundaries of individual interests and represents a demand for satisfaction on the part of the communities*", so that "*the public interest is not the sum of the individual interests of the components of the social group, but translates into its own interest, collective, generator of general satisfaction, and not individual; in short, it seeks the common good*"[929].

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[926] E. GABARDO et M.C. de M. REZENDE, *op. cit.*, *RBEP*, 115

[927] This elaboration defines that *(i) the public interest is not something antagonistic to the interests of individuals, (...) because it is formed by one of their aspects (public dimension, explained above); (ii) the public interest is not to be confused with the interest of the state apparatus, of the State as a legal entity, since this has, equally, a public and a particular dimension.* In this sense, the idea of the supremacy of the public interest does not seek to superimpose the interests of the State over the rights of *the* citizen, but "*the prevalence of the legitimate interests of the community over those that are exclusively private, and that the prerogatives attributed by the legal system to the public agent do not portray mere powers, but means that enable him to fulfill the duties established by the normative system.* C.A.B. de MELLO, *Curso de direito administrativo*, *op. cit.*

[928] E. GABARDO et M.C. de M. REZENDE, *op. cit.*, *RBEP*, 115

[929] J. dos S. CARVALHO FILHO, *Manual de direito administrativo*, s.l., Atlas, 4 février 2015.

Similarly, Maria Sylvia Zanella DiPietro refers to the public interest not to a French voluntarist notion of general interest, but to a Roman notion of common good. "*The public interest is identified with the common good. The public interest loses the utilitarian character acquired with liberalism and takes on axiological aspects again. The updated concept reveals concern for the dignity of the human being*"[930].

For his part, Marçal Justen Filho states that "*the public interest will only arise as a result of the decision intended to combine the conflict between several interests*"[931]. Along these lines are the conclusions presented by Floriano Marques Azevedo, about the content being defined in a concrete way, who highlights that "*the assessment of the public interest may be the result of a continuous process of comparison of values or principles that clash in the concrete situation and in which the State is, at the same time, mediator of relevant and colliding social interests, but also plays a role of implementer of meta-individual interests that are not sufficient in the social game*" [932].

These excerpts from Brazilian scholars highlight that the definition of public interest content, in a *strict sense,* can only be made in a concrete case, that is, in practice.

It is also understood that the result will be considered public. The public interest, in this understanding, is the collective interest, that which is collectively constructed in a process.

In other words, digital government is a model that pursues the public interest in the strict sense, in the same way that the public law of the common good has the public interest at its core, since there is no doubt about its shape and construction.

2- Public interest as a processes form of legal legitimation

How this process occurs is controversial. In addition, legitimacy and purposes also has its controversies. Not by chance, Jaime Rodríguez-Arana Muñoz notes that the difficulty of defining public interest lies in the fact that it is a concept that must be materialized in reality[933].

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[930] D. PIETRO et M.S. ZANELLA, « ZANATTA », *op. cit.*

[931] M. JUSTEN FILHO, *Curso de Direito Administrativo*, 1, 12e éd., São Paulo, Revista dos Tribunais, 2016

[932] F.P. de A. MARQUES NETO, « A bipolaridade do direito administrativo e sua superação », *Contratos públicos e direito administrativo*, 2015.

[933] J. RODRÍGUEZ-ARANA MUÑOZ, « El interés general en el Derecho Administrativo: notas introductorias », *Revista Jurídica de Canarias*, 2012

That is why he indicates that the materialization is done by the "*Public Administration in an objective, rational, reasoned, and motivated manner*" [934].

It is, in fact, the criteria that are already protected in the Brazilian legal system for the materialization of the public interest. In other words, for the consideration of public interest, it must comply with the validation criteria, which correspond to the objective and rational and motivated argumentation, in a reasonable manner.

As for the production of its content, Marçal Justen Filho understands that the public interest results "*from a long process of production and application of law*", involving a question "*ethical and not technical", so there would be demands directly aimed at the "realization of fundamental principles and values, especially the dignity of the person*" [935].

The author heads a scholarship that puts in evidence an application *by means of a process* – therefore, a dialogue, done by means of *an ethic and not a technique* – that is, values must be taken into account, and these reside in the fundamental rights and in human dignity, both nuclear concepts that are disposed in the Brazilian legal system in the Federal Constitution. That is, in this perspective *the content of the legal concept of public interest* would have an ethical nature which is linked to the values of the constitutional order, notably human dignity.

It should be noted, however, that this approach *does not mention interest as a collective result*. Public interest is not a public sphere in which consensus results from collective construction for the common good. Instead, it is seen as a product where fundamental rights must be guaranteed. As a fundamental trait, public law of the *common good* places proposes that the purpose of public law is to construct goods for the collective good.

As already pointed out, fundamental rights, although significant and indispensable institutes, cannot be placed as goals or objectives. This is simply because there is a strong danger of reducing, once again, public space to a place for guaranteeing individual rights.

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[934] J. RODRÍGUEZ-ARANA MUÑOZ, « El interés general en el Derecho Administrativo: notas introductorias », *Revista Jurídica de Canarias*, 2012

[935] For Marçal Justen Filho,: *(a) the consecration of fundamental rights by the Constitution as the foundation of the entire legal system, (b) the impossibility of identifying an abstract and general concept for the expression public interest, (c) the impossibility of unifying and simplifying the interests in conflict in society so that one of them may be qualified as the public interest, and (e) the configuration of administrative law as a set of legal norms geared toward the composition between the various interests (state and non-state) in order to ensure the promotion of fundamental rights. What is being combated is the undemocratic posture of promoting the sacrifice of non-state interests, without greater concern, through the mere and simple invocation of state convenience, with mention to the expression public interest.* M. JUSTEN FILHO, *Curso de Direito Administrativo*, 1, *op. cit.*

As already mentioned, public law advocates ***for the common good***, which is built in a common manner, with the various actors related. However, this does not mean the search for individual rights. As seen in the meta-legal literature, the construction of *"value"* derives from subjective relations whose results is objective, and is, therefore, considered valid. Consequently, even if the public interest is effectively ***defined by a process***, what is at stake is ***a collective construction***. This is not the protection of individual (fundamental) rights. Nevertheless, along similar lines to that of Marçal Justen Filho[936], are the works of Thiago Lima Breus, who emphasizes that "*the identification of the public interest is not enough in elements and technical criteria, but also in axiological judgments, since it has an ethical nature*". In the author's case, the principle of human dignity meets the ethical criterion and transcends the merely technical view, since it allows a constitutional reading[937].

Emerson Gabardo, in turn, understands that public interest ethics and content ***are not sufficient***[938]. The author believes that the fundamental rights, although necessary, are not enough. This is because one must respect the legal system as a whole, and its legal concept must find support in other constitutional articles.

The author mentions the Constitution's third article, which transcends beyond fundamental rights. In this sense, dignity is a starting point, since social needs must be satisfied beyond fundamental rights[939].

The provision of art. 3° is to "*build a free, just and solidary society; ensure national development; eradicate poverty and marginalization and reduce social and regional inequalities and promote the good of all, without prejudice of origin, race, sex, color, age and any other forms of discrimination*".

For him, maximum social needs satisfaction is imperative. It is understood, in fact, that this understanding that justifies public interest in wellbeing is more aligned with a *public value public action* and a *network governance* political action.

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[936] M. JUSTEN FILHO, *ibid.*

[937] T.L. BREUS, *op. cit.*, 2015

[938] E. GABARDO et M.C. de M. REZENDE, *op. cit.*, *RBEP*, 115

[939] Thus, "*the content of the public interest, therefore, is not restricted to the dictates inherent in fundamental rights, but is understood from the entire legal system established by the Constitution of the Republic of 1988 - which imposes a model of social State to Brazil guided by the general objective of the happiness of the people - that is, the maximum possible welfare*". E. GABARDO et M.C. de M. REZENDE, *ibid.*

As seen, their roots lie in the common good and not fundamental rights. In *the public law of the common good*, one emphasizes the collective construction of values, whose result depends on effective legitimation. Moreover, public value approach and *network governance* reject the protection and guarantee of individual interests. This leads to a single view of fundamental rights.

Therefore, one can conclude that the definition of public interest in the strict sense is concrete, pragmatic, and should take into consideration the objectives set forth in the Constitution for its construction. But, more than this, ***the public interest cannot be equivalent to fundamental rights. The public interest is equivalent to the common good***, and in this sense, this is the purpose of the common construction that will result in a public interest *(objective*), but the result of a process, of interested parties reaching a consensus, whose objectified public interest will be applicable to these parties (*relational, relative and contextual*). Private rights are not opposed to public rights, because there is no opposition, while the individual is not against the state, but in an interaction, establishing an exchange, whose result will be the public interest, or the common good, but not the fundamental right, which is an element in this process.

Thus, it is a matter of formal and broader criteria for the construction of public interest in the strict sense. This depends on the general instruments valued by means of the general perception of public interest, objectively molded in the legal system, notably in the Federal Constitution.

Similarly, ***network governance*** is founded on the principle of good government, which is related to the *res publica*. In this regard, it focuses on the community's welfare.

This justifies the use of the aforementioned concept. Therefore, in the context of public law of the common good, it involves considering public interest as a legal concept of *the common good, materialized as a value within the legal system through the Constitution.*

Section Considerations

Present Section identified public action in the digital government. Thus, in order to be able to deal with a notion in the legal sphere, **Proposition 1** presents, in an ideal form, *network governance* as a model of political action. This is done, as can be seen, within an interdisciplinary contribution that establishes the vocabulary of a network governance model. It points to its purpose.

The assumption is thus made that, while the nation-state was composed of the sovereign government model, ***the digital state has its form of network governance***, which is also distinct from the model of *good governa*nce that implies the substitution of public action logic from the public interest for efficiency.

This implies the non-application of a vertical and unitary reading of the sovereign government model, reinforcing that this model leads to the perception of a state model of authority and command power, implying its legitimacy as the guarantor of the public interest – and sole holder – and in a public right as state Law.

That does not mean abandoning verticality. Above all, *governance* means a return *to pluralism,* the existence of diverse actors in different poles/spheres/spaces. The expression *network,* on the other hand, supports the construction of an environment that deals not through dichotomous readings, *but through dialogical*, interdependent, and relational perspectives. This is given the reticular, hybrid nature of the networked space, in which oppositions are not compatible.

From a market rationalist governance model focused on efficiency and results, the network allows the use of a management approach ***focused on process and relationships***, aimed at collective constructions (notably for being within the public sector space).

In this sense, the *network governance* is useful in defining a political action model for the digital state.

In turn, as far as public action models are concerned, there is a relevant mutation in the reforms and a managerialist perspective towards a model of network governance. This model is defined as holistic, but has a significant difference from the NPM managerialism model.

In fact, as seen, managerialism has played a significant role in debureaucratization and governance, as well as the insertion of intermediary actors. But it is flawed, because it is individualistic, state-centered, and does not take advantage of the networked and digital environment's potential. Moreover, it also has a logic focused on individual interests, and the public value approach represents a relevant mutation.

Public value corresponds, in a synthetic way, to the perception of values constructed by a collectivity (an object).

Among the various concepts employed in the various disciplines, caution must be taken when using them in the legal field. This is especially relevant when defining a legal notion itself.

Therefore, what is understood as pertinent, as far as the public value is concerned, is to understand the logic of the mutation within the alien discipline. This represents the change of perspective from individual interests to collective construction.

The public value lens is above all a public management narrative for legitimizing public actions. This can be done with business notions, or as a mode of articulation among actors in contributing to and perceiving the common good. The present thesis adopts the latter.

Accordingly, **Proposition 2** establishes a model of public action for digital government, based on the public value.

In this sense, public value, as a perception of public management and public administration, can be conceived as a new management model. This does not emphasize the individual, but the collective construction of public values, interactively and with multiple responsibilities.

The relevance of the approach lies in the transformation of the very purpose of management practice. In this sense, in the legal system, this logic harmonizes with a conception of public law that overcomes the private/public dichotomy codified in the individual's autonomy.

But for this, firstly, it is fundamental to consider breaking bipolar perspectives (which means not only state and opposition with individual, but also authority and liberty, and in this manner the notion of fundamental rights as the basis of public interest), and contemplate consensus by establishing paradigms of legal relations that move towards the common good.

Additionally, it is also crucial to consider public law no longer as a state law or codified by and for the autonomy of the individual[940], but public law delimitated by the *res publica*, that is, the common good, in the construction of consensus by the community.

This is, then, the sense intended and understood of network governance, as a model of political action. It is also a logic that displays an overcoming of individual interests's perception within the public space.

Therefore, it seems necessary to examine in what context this rationality of the public law of the common good is applied, in accordance with these perspectives. This is, a model of *network governance,* in a public action focused on the interests of the collective.

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[940]As Bailleux points "*The separation of the public and private spheres corresponds to an ideal of political modernity, articulated around the two-faced notion of autonomy*". A. BAILLEUX, « Tensions autour du public et du privé – les enjeux d'un chiasme », *Distinction (droit) public / (droit) privé : Brouillages, innovations et influences croisées*, D. Bernard et J. Van Meerbeeck (dir.), Bruxelles, Presses de l'Université Saint-Louis, 2022.

SECOND PART

DATA-DRIVEN SOCIETY AS A VECTOR FOR THE APPLICATION OF PUBLIC LAW FOR THE DIGITAL STATE IN BRAZIL

Title 1 : Digital State public law : Shaping frameworks for data society's Institutional Realities

The **First Part** of this thesis aimed at conceptualizing a public law that aligns with the ***digital state*** ideal type, that of a model of political action operating in a data-driven society.

Part One provided an exposition on the lexicon accompanying the modern understanding of sovereignty, giving rise to concepts of authority, legitimization through control, bureaucratic organization, and rights framed within the individual's autonomy juxtaposed against authoritative control.

This vocabulary — *with its intrinsic notions*—resonates with the machine-like paradigm wherein its concepts are interlinked. As previously alluded to, the research draws *correlations* between *these categories* in terms of ideal types. In the context of *networked governance*, this requires a reexamination of the concepts of *sovereign government* and *good governance* through a fresh lens, tailoring them to a data-dependent society that inherently brings forth ***new concepts***.

If a data-reliant society materializes within a networked landscape, advocating a *relational* ontology observation, both political and public actions become framed around these configurations. Consequently, while political action entails scrutinizing the governance types emerging within a digital state framework, complete with associated *regulatory types* and *organizational models*, public action vindicates this schema.

In this context, legal principles undergo examination, not through the predominant dichotomous interpretations of *good governance* but through the prism of *networked governance*. Given the focus on the public sector and public law for the *common good*, this direction settles towards the collective well-being.

With this backdrop, **Part Two** of the thesis aims at pondering over the modes of conceptualizing the institutional configurations of this ideal type – ***specifically*** -, without excluding other structural compositions or advocating their replacement.

Title 3 scrutinizes these configurations concerning the organizational and functional aspects of the digital state's political action model and public action, pertaining to the aforementioned characteristics.

Chapter 5 underscores the structural facet, the architecture, and organization, emphasizing *political action*, while **Chapter 6** delves into the functions of a *public action model* aligned with previously outlined imaginaries and characteristics (in terms of consensus-building and accountability).

Chapter 5. Shaping organization in the Digital State political action model

"If the code is law, then architecture is politics"[941].

This **Chapter** attempts ***to discern*** the intricacies of political action and its pivotal role in shaping governmental architecture. This examination extents the range of governance as an *archetypical model*, interlacing information and data concepts, and measures the correspondences between the digital transformation trajectory and the political governance philosophy.

This analysis culminates in the proposal of a *data-centric approach* matching pre-established regulatory frameworks **(Section 1)**. Through such a lens, the objective becomes unveiling the organizational pillars of the digital state, focusing on the optimal facets and frameworks for digital governance, anchored in data-driven governance **(Section 2).**

Section 1: Network governance in the design of the Digital State's political action

The philosophy behind the governance model can be understood as a crucial factor for the architectural design of political and public actions in the cyberspace, guiding the interpretation of digital transformation and the application of concepts inherent to digital governance. While the *good governance* model steers the state's digital transformation with a user-centered focus **(§ 1)**, the *network governance* model emphasizes the techno-regulation of the *common good* **(§ 2)**.

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[941] N. COLIN et H. VERDIER, *L'âge de la multitude*, 2e éd., Hors collection, Paris, Armand Colin, 2015, disponible sur https://www.cairn.info/l-age-de-la-multitude--9782200601447.htm.

§1 Governance in the digital state's political action project

The political form of governance impacts infrastructure, architecture, principles, and perception of public action; and besides the dimensions of digital government **(A)**. From the perspective of *good governance*, this design is crafted with a user-oriented dimension in mind **(B)**.

A. Governance's types and digital government dimensions

The initial observation within the digital state framework revolves around conceiving *governance* as a unique approach, which subsequently drives and justifies a type of regulation tailored for the digital environment. As previously stated, governance is understood as an interdisciplinary, cross-cutting phenomenon[942]. However, this interdisciplinary approach doesn't entail abrupt shifts or radical transformations. Instead, it presents a "*syncretism for the legal professional*"[943].

In the realm of public law, such development proves crucial, as this domain of legal system stands to benefit from a deeper understanding through integration with other disciplines and diverse knowledge forms[944].

Alongside this backdrop, cross-sectional principles of governance in this study serve as a basis of analysis, especially within the broad context of a postmodern political action model. They intertwine with the *maturity levels* of digital government and a society anchored in data. Given the characteristics of a data-reliant society, such elements demand an exhaustive conceptual mapping.

Thus, it becomes imperative to *map and demarcate* the progression of elements used in this research segment due to their interconnected nature.

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[942] Governance extends the scope of its normative instruments beyond the legal field, establishing itself as a kind of *meta-law* that reconciles logics that would otherwise be deemed irreconcilable. J. PITSEYS, « Le concept de gouvernance », *op. cit.*

[943] D. MOCKLE, *La gouvernance publique*, 1re éd., *op. cit.*

[944] *Ibid.*

Firstly, governance extends beyond mere transversality, embodying *a multi-conceptual* and *multifunctional nature*. A *hierarchy* exists, indicating that governance first and foremost signifies its distinct model of rationality, with a philosophy that directs subsequent types[945]. Here, governance finds understanding and delimitation ***as a value/philosophy***, embedded within the architecture, and which conditions the performance of the entire networked ecosystem.

For instance, the model of *good governance*—deeply rooted in individualism—steers towards a political philosophy that assigns value to user experience on one side, and to the adoption of metrics for ethical conduct and risk management by the state on the other. Consequently, the institutional governance model attributes the values that the ecosystem must consider. Such potential intensifies in the digital environment, which, being inherently artificial, invariably embeds a value from its inception (the process of digitalization, transformation, datafication, commodification). Therefore, the philosophy of governance becomes a determining factor in the architecture of cyberspace, making the rest Its corollary[946].

A second notation, is that governance encapsulates both *infrastructural* and *organizational* mechanisms and strategic intents. Central to the organizational paradigm, these elements hinge on the political philosophy underscoring a predetermined governance trajectory. This presents a scope of governance models oscillating between managerial paradigms and more technical data governance frameworks, with the latter contingent on overarching strategies[947].

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[945] P. DESROCHERS, *Les données administratives publiques dans l'espace numérique*, Gouvernance de l'information, n° 2, Québec, Presses de l'Université du Québec, 2022.

[946] In Brazil, for instance, there is consideration regarding the digital government policy, which is posited as a determinant for information governance, data, and its management, guiding public policies and standards aimed at this purpose. F. FILGUEIRAS, « Indo além do gerencial », *op. cit.*

[947] P. DESROCHERS, *Les données administratives publiques dans l'espace numérique*, *op. cit.*

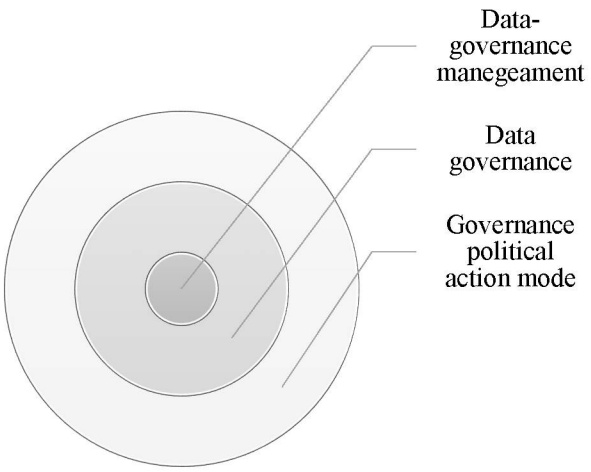

Table 4: Governance dimensions. Source: P. Desrochers [948]

In this manner, *technical questions* are contingent upon the political philosophy adopted by the political action model. One example resides in the consideration formulated within the Best Practices Manual of the Brazilian Federal Court of Auditors (Tribunal de Contas da União – in the Portuguese acronym TCU) regarding the policy of digital governance, which posits itself as a determinant of information and data governance, and their management, capable of directing public policies and norms toward this objective[949].

The Federal Court, moreover, decrees that principles and values are established with the aim of aligning public management with the *good practices*[950], thus giving rise to the definitions of the notions, concepts, and principles standardized within the legal framework. This is also evident from the considerations of the Brazilian Ministry of Planning[951] when distinguishing corporate governance from public and digital governance, highlighting the importance of the former as a guide. Consequently, governance policy converges on a philosophy that is crucial in shaping the further governance schemes of information, data, and in the management of public activities in Brazil as well.

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[948] *Ibid.*

[949] TRIBUNAL DE CONTAS DA UNIÃO, *Guia da política de governança pública*, s.l., Presidência da República, 30 novembre 2018.

[950]Decree nº 9.203/2017 lists the following principles: Responsiveness; Integrity; Transparency; Equity and Participation; Accountability; Reliability; Regulatory Improvement. S.-G. REPUBLICA (PR), Decreto nº 9.203, de 22 de novembro de 2017, *op. cit.*

[951] A.Gov. BRASIL, « Ministro da CGU: "politicas de integridade buscam garantir a confiança da população no Estado" », *Agência Gov*, 2023, disponible sur https://agenciagov.ebc.com.br/noticias/202312/ministro-da-cgu-201cpoliticas-de-integridade-buscam-garantir-a-confianca-da-populacao-no-estado201d (Consulté le 12 février 2024).

The third point consists in that *the types of governance* and management engage in dialogue with the criteria of digital transformation, which deal with assessments of digital government maturities, highlighted by international bodies, and which was adopted in Brazilian policy of digital transformation. For the Organisation for Economic Co-operation and Development (OECD), the transformation from an electronic government to a digital one is assessed through the ***examination of maturity dimensions***, alongside *governance competency principles* and *values.* That is, they are considered directors of public policies and justify the principles of governance, whether to remodel them with attention to the posited dimensions or to introduce new elements[952]. The framework devised by the OECD[953], herein adopted as a basis of digital transformation analysis, is appraised as a policy instrument, built to facilitate governments in the materialization of strategic undertakings within the public sectors. Moreover, its recommendations have been assiduously observed in Brazil[954], permeating the structure of its digital transformation policy. The aforementioned framework assimilates the following dimensions: *Digital by design, platform model, user-centric governments, data-driven governments, proactivity, and open governments by defaul*t.

Maturity government dimensions
Digital by design
Government as platform
User-centric
Data-driven
Proactivity
Open government by default

Table 5 : Digital government dimensions. Source: The Organisation for Economic Co-operation and Development[955]

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[952] By digital government maturity, it is understood as "*the degree to which governmental organizations are able to leverage digital technologies and data to enhance their performance. Six dimensions: digital design, platform model, user-centered and oriented, proactivity, open by default*". OECD, *The OECD Digital Government Policy Framework*, *op. cit.*

[953] *Ibid.*

[954]The Best Practices Manual of the Brazilian Federal Court of Auditors states : « The idea of creating a governance policy arose from the perception that there was a need for integrated and coherent management of the various isolated sectoral initiatives to improve governance. To give the policy support and unity, recommendations from specialized literature and international organizations were used, notably the Organization for Economic Cooperation and Development (OECD) ».

Original : « *A ideia de concretizar uma política de governança surgiu da percepção de que era necessária uma condução integrada e coerente das diversas iniciativas setoriais isoladas de aprimoramento da governança. Para dar sustentação e unidade à política, foram utilizadas recomendações da literatura especializada e de organizações internacionais, notadamente da Organização para Cooperação e Desenvolvimento Econômico (OCDE) ».* TRIBUNAL DE CONTAS DA UNIÃO, *Guia da política de governança pública*, *op. cit.*

[955] OECD, *The OECD Digital Government Policy Framework*, *op. cit.*

***Digital by Design*:** According to the OECD, it is about leveraging *"digital technologies to rethink and redesign public processes, simplify procedures, and create new channels of communication and engagement with stakeholders"*[956]. Digital by design involves the digitization of services to simplify procedures and expand communication channels. It is, as seen in the literature, a critical step in the digital transformation process[957]. While digital by design is crucial, the design demands analysis of the other dimensions for a proper understanding.

The user-oriented government places a central focus on people's requests and convenience in services, and policies, adopting inclusive mechanisms to facilitate this. In governments, technology streams processes and operations through a user-oriented approach[958]. These elements will be examined subsequently in the research, as it is through the user-oriented dimension that the elements of digital by design are observed.

Proactivity is considered when the government "*anticipates people's needs and responds to them rapidly, avoiding the need for complicated data and service delivery processes*" [959]. This aspect involves evaluating administrative decisions to guide the examination of accountability and responsibility in compliance with postulated standards.

Open governments by default occur when public access to governmental data and policy-making processes is provided within the limits of existing legislation and balanced with national and public interest. It is believed that open government data and opportunities for private actors to extract public value are essential[960].

Finally, ***data-driven government*** according to the institution refers to considering data as a strategic asset for proposing ways of, accessing, sharing, and reusing data. Data-driven, therefore, means recognizing data as assets[961]. As will be seen in **Section 2** and throughout the thesis, it is understood that this should be the guiding criterion for framing the other dimensions, as, for instance, digital by design.

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[956] *Ibid.*
[957] B.W. UBALDI Barbara-Chiara, « Digital Government: The Future Is Already Here, It's Just Unevenly Distributed », in *Pivoting Government through Digital Transformation*, s.l., Auerbach Publications, 2023.
[958] *Ibid.*
[959] OECD, *The OECD Digital Government Policy Framework*, *op. cit.*
[960] B.W. UBALDI Barbara-Chiara, « Digital Government », *op. cit.*
[961] *Ibid.*

These dimensions are assessed and benchmarked contingent upon the valuative perception of governance for their analysis and interpretation[962]. Then, one can conclude that these dimensions are fundamental in the analysis of a digital government, and their examination is conducted through the transversal principles of governance, which, in turn, are demarcated in observance of the politico-philosophical stance of a given governance model. Consequently, these indexes are constrained by the rationality of these interpretations[963].

In the case of digital governments, the principles of *good governance* are regarded as indispensable, leading, on one hand, to a *user-centered* government, and on the other, to the state's obligation to present results

B. Governance of the user-centered Government

Within the maturity dimensions of a digital government, those that are "*oriented*" articulate the direction to be taken in the employment and management of technologies[964]. Therefore, despite the indicated leveling among the dimensions, the aforementioned term translates into the fundamental stage of a digital transformation project. In this sense, the initial task lies in mapping the fundamental consequence of interpreting the principles and dimensions of digital transformation through the adopted model, which, in the case of good governance, is *user-oriented*[965].

The OECD defines that "*a user-oriented government is when a central role is attributed to the needs and convenience of people in the shaping of processes, services, and policies*"[966]. The

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[962] The valuation of the "user-oriented" dimension assumes a specific interpretation when examined under the principles of good governance.

[963] B.W. UBALDI Barbara-Chiara, « Digital Government », *op. cit.*

[964] It can be observed that these dimensions are taken as levels, in the following order: digital by design, data-driven government, platform model, open data government by default, user-driven, and proactivity. While digital by design, platform model, and open data government by default have a more instrumental character, proactivity offers an evaluation dimension of the government, whereas the data-driven government pertains to a foundational condition, a mode of being.

[965] OECD, *The OECD Digital Government Policy Framework*, *op. cit.* ; B.W. UBALDI Barbara-Chiara, « Digital Government », *op. cit.* ; « Governo digital e aberto como plataforma para o exercício do controle social de políticas públicas », *Cadernos de finanças públicas*, mai 2022, disponible sur https://publicacoes.tesouro.gov.br/index.php/cadernos/article/view/168 (Consulté le 27 juillet 2023).

[966] The OECD draws distinctions between the types of relationships between the government and the user. While the concepts of "user-centered" or "user-focused" suggest a more passive individual, engaged in a reactive manner, "user-driven" denotes a more active role. According to the OECD, it is the evolution of participation that places a central role on people's needs and convenience in shaping processes and policies. In this dimension, user needs should "form the foundation of the design and delivery of user-oriented digital services." Moreover, participation from the design phase is advocated to "allow for co-creation between the user and the government." It's worth

overarching understanding is that technology can be an enabler in digital transformation through a user-oriented and user-centered approach, precepts which are capable of reshaping the way governments operate and serve the public.

The World Bank presents a similar rationale. The GovTech Maturity Index[967] defines as an approach "*towards the modernization of the public sector that promotes a simple, efficient, and transparent government, with citizens at the center of reforms*"[968]. Along similar lines, the United Nations also advocates for administration action in the provision of services to the citizen[969]. Finally, the "*citizen-oriented*" direction is established as the priority of the Brazilian Digital Strategy[970].

As emphasized by the OECD, the linkage of the "***user***"[971] dimension with the others is not only fundamental but also foundational. The significance of this orientation is so substantial that the other dimensions, such as a data-driven government, must meet the needs and preferences of the citizen. This is evident, for example, from the open government concept, understood as a "*citizen-centered governance culture that utilizes innovative and sustainable tools, policies, and practices to promote government transparency, responsiveness, and accountability*"[972]. Digital government, henceforth, has implications for the entirety of the government, including the training of public servants, general culture, leadership philosophy and behaviors, and underlying organizational principles[973].

In summary, the dimensions are considered from the guiding thread of the "*user/citizen*". Indeed, this orientation modulates Brazilian digital governance policy.

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noting, from this perspective, that in Brazil, digital transformation is framed and regarded as "citizen-centered. OECD, *The OECD Digital Government Policy Framework*, *op. cit.*

[967] PSDI: The Public Service Delivery Index (nine key indicators, including two external indicators) measures the maturity of online public service portals, with an emphasis on citizen-centered design and universal accessibility. W. BANK, « GovTech Maturity Index, 2022 Update », *op. cit.*

[968] *Ibid.*

[969]It's worth noting that the organization generally uses the term "citizenship," but occasionally treats this term interchangeably with "citizen," indicating a focus on the individual in the context of digital transformation. "*Adopting an integrated and citizen-oriented approach may lead Governments to increase equal opportunities in the use of ICTs*". U. NATIONS, « The Role of e-Governance in Bridging the Digital Divide », s.d., disponible sur https://www.un.org/en/chronicle/article/role-e-governance-bridging-digital-divide (Consulté le 18 octobre 2023).

[970] *"Um Governo centrado no cidadão, que busca oferecer uma jornada mais agradável e responde às suas expectativas por meio de serviços de alta qualidade"* M. da E. REPUBLICA (PR), Decreto nº 10.332 de 28 de abril de 2020, *op. cit.*

[971] *"The establishment of this culture and set of expectations at the strategic level, among those who govern and lead digital government efforts, will aid in driving user-oriented approaches and in integrating user needs into policy processes"*. OECD, *The OECD Digital Government Policy Framework*, *op. cit.*

[972] *Ibid.*

[973] B.W. UBALDI Barbara-Chiara, « Digital Government », *op. cit.*

In the Public Governance Decree, the first guideline, in article 4, section I, is regarded as "*one of the most relevant*" for synthesizing "*a fundamental part of the policy: the focus on the citizen"*. Not coincidentally, the very concept of public governance is understood as an instrument to establish guidelines aimed at the needs of the citizen. The digital transformation policy is similar. The Brazilian Digital Strategy establishes that its purpose is *"a government centered on the citizen, which seeks to offer a more pleasant journey and responds to their expectations through high-quality services*"[974].

As noted, it involves the citizen in the singular[975], where the concepts of *citizen*, *user, citizens* and even *citizenship,* are employed indistinctly[976]. And, as already demonstrated, in the digital government literature, citizen/user are considered as equivalents, which, in the logic of good governance, refer to the individual, in their own interest, and not the citizen in the democratic/deliberative space. Hence, the objectives of the digital government are established, throughout the value of a citizen-centered policy[977], through a direction that focuses on the expectation of the individual's experience[978].

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[974] R.F. BRASIL, « Estratégia de Governo Digital 2020-2022 », *op. cit.*

[975]This is a recurring practice in Brazilian normative texts. The digital governance policy, for example, states that one of its objectives is "V - to promote social control and the development of new technologies aimed at creating a participatory and democratic public management environment and improving the provision of public services to the citizen. "*V - fomentar o controle social e o desenvolvimento de novas tecnologias destinadas à construção de ambiente de gestão pública participativa e democrática e à melhor oferta de serviços públicos para o cidadão*". M. da E. REPUBLICA (PR), Decreto nº 10.332 de 28 de abril de 2020, *op. cit.*

[976] Although they are not, particularly regarding modern dichotomous provisions that juxtapose society against the State and highlight the distinct positions between these entities.

[977]On the *federal government's page*: The Federal Government has consistently advanced towards digital transformation. The theme of digital transformation has gained significant political support and scale, marking a new mode of operation for the federal government concerning public services. (...) With this purpose in mind, always placing the citizen at the center of decisions about policies and services offered, this principle establishes objectives and initiatives that will transform the State into a service provider that continuously seeks to understand the needs of service users and that offers value and a good user experience for citizens and societal organizations. *O Governo Federal avançou de forma consistente em direção à transformação digital. O tema da transformação digital ganhou suporte político e escala importantes, marcando uma nova forma de atuação do governo federal em relação aos serviços públicos. (...) Dentro deste propósito, tendo sempre o cidadão no foco das decisões sobre políticas e serviços ofertados, esse princípio estabelece objetivos e iniciativas que levarão à transformação do Estado em um provedor de serviços que busca constantemente entender as necessidades dos usuários de serviços e ofereça valor e uma boa experiência de uso para os cidadãos e organizações da sociedade.* R.F. BRASIL, « Um Governo Centrado no Cidadão », *op. cit.*

[978]The objectives to be achieved through the Digital Government Strategy include: *Provide simple and intuitive digital public services, consolidated on a single platform with available satisfaction evaluation; Grant broad access to information and open government data, to enable the exercise of citizenship and innovation in digital technologies; Promote the integration and interoperability of government databases; Advocate for public policies based on data and evidence, and predictive and personalized services, employing emerging technologies; Implement the General Data Protection Law within the federal Government and ensure the security of digital government platforms; Provide digital identification for citizens; Adopt cloud technology for government processes and services as part of the technological framework of services and sectors of the federal public*

C. The Individualistic and dichotomous outcome

The interpretation of these devices, with regard to the logic of *good governance*, is bluntly highlighted in academia and institutions. It is understood "*as crucial to drive digital transformation and achieve greater digital government maturity*"[979]. It is conceived "*as crucial to propel digital transformation, attaining enhanced digital government maturity*". As observed, Brazilian public institution reports also reinforce this philosophy.

It occurs that, as previously envisaged, within the policy of *good governance*, ***managerial targets*** *publicize private interests*. They posit each individual's material prosperity as a factor corresponding to the success of a digital government, which, in turn, assesses this provision through procedural mechanisms, substituting end analysis with standardized means of verification[980].

This publicization of the private is dangerous, for it may incur in the "*logical extension of a reversed dynamic - the privatization of political ethics*" [981]. Indeed, it is possible to imply that in the logic of user-centered government (citizen, human)[982], what is noted is precisely the consideration that Alain Supiot reports about the privatization of the public, that is, individual interests do not subordinate to the *common good*, but the state transforms into a means of maximizing individual utilities[983].

This inversion can be explicitly identified in the very recommendations of Brazilian digital transformation, which seek a transition geared towards "*user experience*", their "satisfaction", in access, efficiency, and quality in service provision[984]. For instance, the updated Digital Governance Strategy stipulates that strategies are directed to offer "*public policies and services of higher quality, simpler, accessible anytime and anywhere, and at a lower cost for the citizen*".

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administration; Optimize information and communication technology infrastructures". R.F. BRASIL, « Estratégia de Governo Digital 2020-2022 », *op. cit.*

[979] B.W. UBALDI Barbara-Chiara, « Digital Government », *op. cit.*

[980] Example of the EGD objectives: "*Objective 2 - Satisfaction assessment in digital services. Initiative 2.1. Provide a standardized satisfaction assessment method for at least fifty percent of digital public services by 2023: Objetivo 2 - Avaliação de satisfação nos serviços digitais. Iniciativa 2.1. Oferecer meio de avaliação de satisfação padronizado para, no mínimo, cinquenta por cento dos serviços públicos digitais até 2023".*

[981] C. MUELLERLEILE et S.L. ROBERTSON, « Digital Weberianism: Bureaucracy, Information, and the Techno-rationality of Neoliberal Capitalism », *Indiana Journal of Global Legal Studies*, 2018, vol. 25, n° 1, pp. 187-216, disponible sur http://www.jstor.org/stable/10.2979/indjglolegstu.25.1.0187 (Consulté le 18 octobre 2023).

[982] A. BAILLEUX, « Tensions autour du public et du privé – les enjeux d'un chiasme », *op. cit.*

[983] A. SUPIOT, « The public–private relation in the context of today's refeudalization », *op. cit.*

[984] R.F. BRASIL, « Estratégia de Governo Digital 2020-2022 », *op. cit.*

Citizen, it is worth repeating, ***in the singular***, for the maximization of this individual's utility, that is, of the one who is "*eager for simple and secure solutions*[985].

In fact, in summary, the policy of good governance has been successful in establishing the prevalence of individual – private, interests in the public sphere, as well as imposing the progressive extraction of collective interest from public discourse, especially within the realm of digital government.

Consequently, the interpretation of the dimensions of maturity and the state's digital transformation, done through the logic of good governance, places society vis-à-vis the state, the latter acting as the protector of individual (*fundamental*) rights, in a perspective that turns towards being user (*individual*) centered, as well as free data exploitation (*market)*, that is, in the civil sphere of freedom on one side; on the other side is the state, which subjects itself to risk assessment and auditing, as well as to the provision of quality services to citizens. In this, the governance sought through digital government does not result from the interdependence and interaction between actors in a space, but from the assurance of individual utility and standardized verification of state action. The logic, therefore, remains dichotomous.

Within the digital government context, foundational bureaucratic principles such as efficiency are reshaped, subordinating public ends to their technical versions[986]. This adjustment prompts these principles to condition further concepts, interpreted through an economistic lens[987]. At the same time, the state evolves from a guardian of public interest into an executor of quantitative objectives. Thus, beneath the guise of a user-oriented transformation, the transition is enacted, focusing on the individual and enhancing its institutions with a humanistic logic while veiled in an exploitation reality.

Thus, in the legal sphere, a "*user-centric*" government demands a reorientation of governance and public action models. Personalization of social and legal relations locates validation within the process of individualization. On one hand, hyper-individualism enables self-regulation, signifying an exploitation of extraction. Conversely, it seeks to ensure maximal utility, gauging the user experience. Governance principles and guidelines are employed alongside constitutional principles, such as dignity and civil and political rights, to fulfill this rationality,

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[985] *Ibid.*

[986] C. MUELLERLEILE et S.L. ROBERTSON, « Digital Weberianism: Bureaucracy, Information, and the Techno-rationality of Neoliberal Capitalism », *op. cit.*

[987] One can observe that the definition of corporate governance, which alludes to the creation of sustainable value, concerns the economic-financial equilibrium of the organization.

steering their applicability[988]. Consequently, citizenship adheres to market logic, emerging as a user with rights against the state, from which "*republican duties are eradicated from discourse*"[989].

Therefore, the supposed *democratic society*, while assuming collective responsibility for individual well-being and facing the challenge of enhancing individual control and comfort, finds itself constrained by the tradition that puts individual autonomy against collective power[990]. This conflict continues to warp perceptions of social relations and inherent legitimization positions.

Such considerations merit a reevaluation, initially attempting to perceive this arena not through dichotomous provisions (state versus individual or private actors, with pre-determined, distinct duties and rights for each) but as an *interdependent space*. Moreover, it should be recognized as an interaction venue, inherently geared towards collective well-being.

§2 Techno-regulation of *the common good* as the design of the architecture of the digital state's political action

As observed, digital transformation in Brazil is instrumentalized by the good governance model, which leads to a directed interpretation of the mechanisms of maturity dimensions and inherent principles of a digital government. Law, in its turn, also conducts its readings through these orientations—directives—examining the space to be regulated, starting from an initial lens. From this succeeds dichotomous legal applications to governance perceptions in opposition. Meanwhile, as a political action model, governance implies a regulatory state function[991], redirecting the shaping of power legitimation. Regulation and governance are of a

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[988]The indication of open elements to assist public action is part of the Brazilian normative tradition. Such is the case, for instance, with the constitutional principles guiding administrative activity—legality, impersonality, morality, publicity, and efficiency. "*In this regard, the primary intended function of the principles and guidelines for governance is to serve as a connecting element between these constitutional principles and the actions of the public agent. Accordingly, the aim is for the latter to have more practical precepts so that their actions remain centered on the citizen and increasingly faithful to the fulfillment of their public mission*". TRIBUNAL DE CONTAS DA UNIÃO, *Guia da política de governança pública*, *op. cit.*

[989] E.D. SALGADO, « Princípios constitucionais eleitorais », in, s.l., Editora Forum, 2010.

[990] J. NEDELSKY, *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, *op. cit.*

[991] J. CHEVALLIER, « L'état régulateur », *Revue française d'administration publique*, 2004, vol. 111, n° 3, pp. 473-482, disponible sur https://www.cairn.info/revue-francaise-d-administration-publique-2004-3-page-473.htm.

procedural nature, whose schema is absorbed by the law, addressing digital transformation from a governance standpoint.

In the first part of the thesis, notions of the precepts of political action models and public action aligned with a data-dependent society were delineated, grounded on the *cybernetic imaginary.* Currently, the aim is to investigate *how to apply* them to concepts, categories, and dimensions that are already inherent to types of public and digital governance, through this lens, which is understood here through a relational (sociological and legal) reading.

In this vein, it is worthwhile to re-delineate:

i) the political action of *network governance* as a category, and its impacts on the definitions and principles of public and digital governance in Brazil;

ii) the importance of examining these mechanisms in consideration of the Brazilian state and the code of social relations to be correlated—which corresponds to the object of study—that is, a society and a public sector dependent on data;

iii) the plexus of governance mechanisms, corollaries of the values and ontology proposed in the network governance model, and adapted to the Brazilian Federative state, specifically regarding these correlations, especially in the techno-regulation of the network environment.

Additionally, within the scope of *public law of the common good* through a network governance model, some particular characteristics to be considered in this exercise are identified.

Initiating with a *form of regulation* – a technical-architectural precedent – inherent to an artificial environment such as the cyberspace, a new regulatory model comes into play. Legal application of governance in digital realms demands primary scrutiny of antecedent technical regulation (*techno-regulation*) perspectives.

Following this examination, contemplation on the shapes and maturities of various dimensions, founded upon network governance values, facilitates a pivot in the fundamental orientation of digital transformation from user-oriented to data-oriented strategies, marking a phenomenon awaiting legal identification.

Secondly, the legal system will validate the legitimization of actions, accompanied by their respective responsibilities and value-protective mechanisms, through a foundational base and a framework that avoids dichotomous philosophy. Here lies a pivotal task for the legal field, where transplants of transversal concepts (such as governance mechanisms and dimensions of maturity) cannot be placed without thorough refinement.

This endeavor should be constructed based on the *relational nature* of the studied environment, overcoming the autonomous interpretation of law. Consequently, a relational approach is sought, synchronized with a cybernetic paradigm, to vindicate both *ex ante* and *valuative* mechanisms in accordance with a common good.

Thus, within the scope of *network governance*, ***two fundamental alterations*** materialize: one pertinent to ***the values*** of political and public action (i.e., its content), and the other within the ***process of legitimization*** through law.

While good governance accentuates results and *ex post* evaluations, deeply entrenched in individualistic frameworks, network governance will advocate for *ex ante* designs. Accordingly, the proposition within the milieu of a political action model of plural and relational ontology establishes a preceding design, where its value prescribes a clear architecture.

Legitimization, also, is modified from inception, embodying the common good, indicating a general principle that finds its regulatory justification (*in the instance of techno-regulation*) and legal interpretation (*relational*).

It becomes paramount to establish and recognize necessary differentiations between regulation, its disposition, its implication, and legal interpretation. As regulation, in function, aligns with governance, thereby translating into a transversality, the relational legal approach aims to incorporate regulatory models, attentive to a distinctive nature, accommodating necessary values – those emanating from the premises of good government (instead of good governance) within a relational ontological frame. The subsequent examination thus unfolds.

A. Techno-regulation as a design

Regulation is regarded as a function. As previously observed, in the networked environment, alongside state regulation, mechanisms of self-regulation and co-regulation are present, founded on the joint intervention of public and private actors, or even on co-production and cooperation[992]. Beyond this, it is crucial to pinpoint that the logic of regulation operates within the architecture of the state, which must be scrutinized with regard to the type under study, and

[992] J. CHEVALLIER, « La gouvernance, un nouveau paradigme étatique ? », *op. cit.*

interactions that emerge in cyberspace and its nature. At the same time, cyberspace also embodies a *design* of architecture. Consequently, it is this architecture, this design, that will condition the more instrumental, technical, and intermediary governance models[993]. This architecture will also exert its impact on mechanisms of digital transformation and, in this regard, on the dimensions of digital government.

According to the philosophy of technology, *design* in any setting, including society, is never ethically neutral and invariably embodies values, whether implicit or explicit[994].

Network neutrality is deemed a myth, as is the neutrality of technology[995]. In light of this, the managerial model and its governance philosophy are paramount as they condition political and public guidelines, exerting direct influence on information governance, public management, and data administration.

Thus, the artificial nature of cyberspace introduces a new mode of regulation, techno-regulation, manifested in the *principle of design*, or in the concept of infra-ethics within an infosphere. Since the architectural code of cyberspace is inherently political, its environment and laws are subject to direction, modulation, and alteration[996]. Techno-regulation is understood as a form of regulation that shapes and conditions the performance of actions in cyberspace.

The notion of pre-emptive protection embedded in design can be interpreted as a form of regulation. Primavera de Filippi and Daniele Bourcier specify *three models of regulation* in cyberspace[997]. Each will involve distinct intervention from actors and purposes.

Techno-regulation refers to a mode of regulation through codes, serving as a regulatory instrument founded on technology. It involves the direct incorporation of rules into the technical

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[993]The topic can be analyzed through two distinct movements. The first, named the "Propelling State", underscores the concept of regulation via intervention, characteristic of a Social State. The second pertains to the response to the regulatory conception of the welfare state, a notion that faced criticism in the 1970s, leading to a favoring of market regulation. In conclusion, pragmatism results in a continuous process of norm adaptation: regulation necessitates that, based on outcomes, corrective measures are implemented to make required adjustments; regulatory law thus becomes a "reflective law" J. CHEVALLIER, « L'état régulateur », *op. cit.*

[994] L. FLORIDI, « Infraethics–on the Conditions of Possibility of Morality », *Philosophy & Technology*, décembre 2017, vol. 30, n° 4, pp. 391-394, disponible sur https://doi.org/10.1007/s13347-017-0291-1.

[995] C. O'NEIL, *Algorithmes, la bombe à retardement*, Paris, les Arènes, 2018.

[996]Luciano Floridi addresses the networked environment as an infosphere that leads to infra-ethics, an ethical design model from inception for the participants involved. The author elucidates: "By placing informational interactions so significantly at the core of our lives, ICTs have unveiled something that, while always inherently present, was less evident in the past: the fact that moral behavior is also a matter of 'ethical infrastructure', or what I simply termed infra-ethics. L. FLORIDI, « Infraethics–on the Conditions of Possibility of Morality », *op. cit.*

[997] P. DE FILIPPI et D. BOURCIER, « Réseaux et gouvernance. Le cas des architectures distribuées sur internet », *Pensée plurielle*, 2014, vol. 36, n° 2, pp. 37-53, disponible sur https://www.cairn.info/revue-pensee-plurielle-2014-2-page-37.htm.

architecture of networks to facilitate certain activities or impose restrictions on particular behaviors. This model can be employed by governments[998], the private sector[999], or civil society[1000].

A salient feature is its performative nature; it has the capacity to guide the actions of participants, actively and immediately influencing their decisions[1001]. In essence, it concerns the explanation of models arranged "*by design*". whose architecture is oriented towards a specific directive that conditions actions to immediately conform to the design. The term "*oriented*" in this context takes on significant meaning as it delineates the value that conditions the network's architecture[1002].

The distinction from legal rules lies in their mediation by normative texts that operate *ex-post.* Moreover, these "*design principles*" are autonomously listed by institutions. Examples of this model include *privacy by design* and *democracy by design*, which highlight processes where these values are considered in the project, meaning that both the development and implementation of a device are directly incorporated into the technical infrastructure[1003].

Hence, technology has the capability ***to predetermine how*** certain values can be applied, by programming contracts and legal rules within the software itself. Techno-regulation emerges as a pre-emptive, inexorable modality of behavioral governance, anchored profoundly in technology's essence[1004]. Specifically, it encompasses the direct incorporation of regulations within the network's technical architecture, either to streamline specific actions or to impose circumscriptions on certain behaviors.

Techno-regulation is not a novelty and is employed by the private sector, as Laurence Lessig has already demonstrated. Moreover, it is worthwhile to reiterate that digital technologies already produce *ad hoc*, personalized decisions based on standards in the public sector. However, these are conducted through mercantile bases and codifications. Generalizable principles are not considered feasible, as they would bring a certain obstruction to autonomies

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998 (e.g., national firewalls or filtering technologies)
999 (e.g., technical protection measures for copyrighted content)
1000 (Developing alert or filtering tools to protect privacy or evade government censorship)
1001 P. DE FILIPPI et D. BOURCIER, « Réseaux et gouvernance. Le cas des architectures distribuées sur internet », *op. cit.*
1002 For instance, a user/citizen-oriented government will have its devices, instruments and techniques codified and treated for this purpose.
1003 P. DE FILIPPI et D. BOURCIER, « Réseaux et gouvernance. Le cas des architectures distribuées sur internet », *op. cit.*
1004 *Ibid.*

and thus, freedom would be infringed[1005]. In summary, the architecture of digitalism incurs the privatization of authority, through its "*elective affinity*" with market logic[1006].

In the case of governments, the "*oriented*" dimensions end up carrying crucial importance, as they will overdetermine and "*e-dictate*" the very activity and behavior of the various forms of regulation in cyberspace, in the construction of software, and behaviors of actors by the public sector. This architecture also arises from dichotomous dispositions that mine the state against society and lead to spaces of hyper-individualism while annihilating the public and social sphere. Hence, it is highlighted that the question of power does not necessarily depend on who regulates the network, but on who will decide on the organization of its architecture and *"how"* it will be done[1007].

Consequently, it is imperative to deliberate on the conceptualization of the architecture within the cyberspace of a digital government ***from a publicist perspective***. This invites a decisive departure from the private and individualistic norms. The significance of such design, in this context, is paramount within a digital government and stands as an integral component of the governance mechanism.

This positions techno-regulation not merely as a tool but as the prerequisite directing the modus operandi of state political action and defining its *raison d'être* as an institution. Furthermore, the state undertakes a pivotal techno-regulatory role, making the scrutiny of values poised for techno-regulation of utmost importance. Besides, techno-regulation comfortably aligns with the political action paradigm of network governance, particularly given that the pragmatic model of public value and the cybernetic ethos are adept at preemptively integrating values. Such integration is not a mere accommodation but a requisite.

Additionally, it is salient to note that the relational view of law augments this regulatory potential. Owing to its dual mode of realization, it ensures a designed techno-regulation, steering actions towards a predetermined objective. This accentuates the cruciality of dissecting the *orientations* posited for the architecture of a digital government. These orientations are far

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[1005] J. COHEN, « Internet utopianism and the practical inevitability of law », *op. cit.*

[1006] C. MUELLERLEILE et S.L. ROBERTSON, « Digital Weberianism: Bureaucracy, Information, and the Techno-rationality of Neoliberal Capitalism », *op. cit.*

[1007] De Filippi and Bourcier exemplify the project through democratic values, incorporating these principles in a process. *"This makes it possible to create a network that obeys these principles and whose rules are applied automatically by the underlying architecture of the network (technoregulation). These new decentralized communication platforms make it possible to experiment with new decentralized governance models based on coordination between peers*". P. DE FILIPPI et D. BOURCIER, « Réseaux et gouvernance. Le cas des architectures distribuées sur internet », *op. cit.*

from being superficial; they act as the true compass guiding the entire spectrum of political and public actions in the digital realm.

In its disquisition, the OECD[1008] elucidates "*digital by design*" as an expansive structural framework encompassing training, determination apparatuses, and infrastructural conduits, all culminating in the incorporation of digital transformation models within state public policy paradigms. Yet, the basis of this undertaking should be an intrinsic value, as previously alluded to. Thus arises the exigency to recalibrate the project's orientation—to reimagine it for the collective welfare. Hence, the thesis herein advocates network governance—a model propped by ideals of common good and public value—as an alternative lens through which governance can be discerned. The aspiration is to institute a techno-regulation form that, while not alienating the citizen or user, is anchored in objectives aligned with the *collective good.*

In this sense, an adaptation of the *orientation projects* of the digital government is proposed, so that they be reoriented, without implying neglect to the user/citizen, but repositioning the orientations to be techno-regulated, as conductors of performances in a certain rationality.

It is understood that, in the case of the public sector, it is common good that should be considered, and not individual utility, since the objective of the state is to promote the well-being of the population and the community, as well as social development, which must be established as a priority before economic development. That is, it also involves a repositioning of the order of priorities, not only in the values to be substituted.

This approach proffers two profound shifts. **Initially**, it amplifies the collective, relegating the individualistic perspective. **Subsequently,** it is manifested through a relational ontology, avoiding notions of the individual autonomy. Contrasting traditional digital transformation narratives that oscillate between citizen experiences and managerial evaluations, *network governance* advocates for a relational ontology rooted in the principle of the common good. This ethos endorses social development over economic, turning attention towards the collective rather than the individual.

[1008]The activities and practices that contribute to decision-making regarding the design and delivery of public services focus on leadership and vision, as well as on approaches to the design and provision of the services themselves. OECD, *The OECD Digital Government Policy Framework*, *op. cit.*

B. Techno-regulation for the common good

As affirmed, regulation possesses a transversal character, which should not be conflated with the legal bias, entailing its own distinctive interpretation. However, it is paramount to underscore the fundamental role that law has in enumerating the essential values of a community, which will guide the architecture of cyberspace in relation to it.

In the relational law approach, Jennifer Nedelsky defines value as "*any of the large abstractions used to articulate what a particular society deems essential for humanity or for a good life for its members*". Value can encompass fundamental attributes, such as equality, dignity, and security. However, they may be "*understood differently by different people and societies, and may conflict with each other in practical implementation. Different societies will prioritize some values over others*"[1009].

Therefore, according to the author, it is through "law" – a specific institutional and rhetorical medium –that such values may be expressed, consented, and implemented[1010].

Thus, if the common good is considered a value, law is the institution capable of expressing, consenting, and implementing it[1011]. In Brazil, the argument for this value can be derived from the Federal Constitution. As Eneida Desiree Salgado aptly highlights, the common good, expressed in the preamble, manifests as a constitutional[1012] value[1013]. Constitutional values are condensed into constitutional principles, attributing a specific meaning to ends. In the case of the *common good* approach, this is the meaning given to *public purpose*.

As seen, traditionally, in Brazil, the legal system of public law is geared towards safeguarding the public interest. This represents the ***purpose of government*** (a type of modern political action of sovereignty) and the legitimacy of public action.

[1009] J. NEDELSKY, *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, *op. cit.*
[1010] *Ibid.*
[1011] *Ibid.*
[1012] "*Although values manifest in rather open and fluid terms, this does not result in their superfluity; rather, their ends are translated into constitutional principles that define action or judgment. Constitutional values condense into constitutional principles, imparting a specific sense to ends, presenting a range of possibilities, and excluding certain means. Values and principles operate distinctly in the realization of Law. While values serve as beacons for the interpretation of a norm and for legislative development, principles are accessible to the legislator and the judge, should there be no specific rule. It falls to the legislator to convert the value into a norm, a "normative projection," with a wide margin of freedom; to the judge, only the interpretive efficacy of the positivized values remains*". E.D. SALGADO, « Princípios constitucionais eleitorais », *op. cit.*
[1013] According to the author: Constitutional values are evident in the preamble and the opening articles of the Constitution, encompassing justice, freedom, equality, dignity, security, the common good, development, solidarity, pluralism, and the guarantee of the exercise of social rights...". *Ibid.*

It's worth recalling that, in the public law of authority, "*the individual's freedom against the power of the State is the justification for the rule of law and the foundation of the principle of legality*"[1014]. That is, the *raison d'être* of the public function finds its foundation in the public interest, a structural idea "*that guides the logical unity of public law (...), an abstract category that expresses the foundation, ends, and limits of the order*"[1015].

Thus, if good governance obfuscates the states purposes on the collective well-being (which was the raison d'être of the modern state), network governance aims to reestablish this principle through a techno-regulation oriented by this value, which will direct the other guidelines, dimensions, and principles (of competence and value) in the rationality of digital governance.

The common good, as seen, is a constitutional value.

In turn, the Constitution declares the Brazilian state as a Federative Republic, hence[1016], a *res publica*, that is, of the common good, codified in art. 1°, as such, comprised of the union of states, municipalities, and the federal district. This shows that the primary denomination of the Brazilian state, even before the term democracy, resides in the republic, a constitutive character of the state. Not coincidentally, the principle of the republic is considered capitular, of "*the most transcendental importance",* capable of determining, including, how to interpret the others. As Geraldo Ataliba encapsulates, it configures itself as a rigid nucleus of the Constitution, influencing the others, and dispersed in various provisions in the Constitution[1017].

Geraldo Ataliba's evaluation about the importance of this principle is relevant because it evidences and even enables the interpretative exercise of the disposition of the *common good,* as value of the *republican principle*, fundamental and nuclear to the point of influencing the others. This quality of the nature of the *common good* not only justifies but truly mandates that, within the scope of the Federative Republic of Brazil, its techno-regulation be oriented towards the common good, and not in the individual evaluation of the "citizen's" experience.

[1014] G.J. DE OLIVEIRA, « Ponto 2: regime-jurídico administrativo », Faculdade de Direito da Universidade de São Paulo, São Paulo, 2021.
[1015] *Ibid.*
[1016] Precise Terms of the Denomination of the Brazilian State C.C. REPUBLICA (PR), Constituição da República Federativa do Brasil, *op. cit.*
[1017]The author states that the principles of the Republic and the Federation "perform a capitular function of the utmost importance, even determining how to interpret the others", are reiterated by numerous other constitutional provisions and form a very rigid core of the Constitution. G. ATALIBA et R.M. FOLGOSI, *República e constituição*, São Paulo, Malheiros Editores, 2011.

Moreover, the well-being of the population appears codified as a fundamental objective of the Brazilian state, from which it is inferred that the insertion of the aim of the *common good,* as an objective, a project, to guide digital transformation and digital government aligns with the presuppositions, values, and constitutional norms[1018].

By being in art. 3° as an objective, it constitutes itself as a form of legitimation and legitimacy. Not least, the STF establishes that "*The promotion of the well-being of all, moreover, without prejudices of origin, race, sex, color, age and any other forms of discrimination constitutes one of the fundamental objectives of the Federative Republic of Brazil, listed in art. 3rd of the Federal Constitution of 1988*"[1019]. The Constitution is clear, therefore, in establishing the *primacy of the republican principle*, thus requiring that public governance be fundamentally oriented towards the common good, at its base, and from there, other principles, dimensions, and concepts be structured.

Moreover, the argument of the impossibility of establishing aprioristic moral truths does not prevail in the case of techno-regulation. The network environment is mandatorily coded, from which its architecture is promoted by a value[1020]. If in the scope of good governance, it is

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[1018]« *V - to promote the common good, without prejudice of origin, race, sex, color, age or any other form of discrimination. To promote common good, without prejudice of origin, race, sex, color, age or any other form of discrimination ».*
Original : « Art. 3°: IV - promover o bem de todos, sem preconceitos de origem, raça, sexo, cor, idade e quaisquer outras formas de discriminação. To promote common good, without prejudice of origin, race, sex, color, age or any other form of discrimination ».

[1019]« 1. *The construction and effective achievement of a fraternal, pluralistic and unprejudiced society, as provided for in the preamble to the Federal Constitution, unequivocally involves breaking with the praxis of a society based on the constant exercise of domination and disrespect for the dignity of the human person. 2. The promotion of the good of all, without prejudice of origin, race, sex, color, age or any other form of discrimination is one of the fundamental objectives of the Federative Republic of Brazil, listed in art. 3 of the Federal Constitution of 1988. ».*
Original »1. *A construção e o efetivo alcance de uma sociedade fraternal, pluralista e sem preconceitos, tal como previsto no preâmbulo da Constituição Federal, perpassa, inequivocamente, pela ruptura com a praxis de uma sociedade calcada no constante exercício da dominação e desrespeito à dignidade da pessoa humana. 2. A promoção do bem de todos, aliás, sem preconceitos de origem, raça, sexo, cor, idade e quaisquer outras formas de discriminação constitui um dos objetivos fundamentais da República Federativa do Brasil, elencados no art. 3º da Constituição Federal de 1988.* S.T.F.S. BRASIL, Recurso Ordinário em Habeas Corpus: RHC 222599, 23 mars 2023, disponible sur https://www.jusbrasil.com.br/jurisprudencia/stf/1793547466 (Consulté le 3 novembre 2023).

[1020]According to the Brazilian institute of corporate governance, *corporate governance* is a system by which organizations are directed and monitored, aiming at generating sustainable value for the organization, its partners, and society at large. (...) The institute understands that Sustainability is: "*ensuring the economic and financial viability of the organization, reducing the negative externalities of its business and operations, and enhancing the positive ones, taking into consideration various capitals (financial, manufactured, intellectual, human, social, natural, reputational) in its business model in the short, medium, and long terms*". In other words, although corporate governance seeks to integrate models of sustainability and social responsibility, its ultimate goal and purpose are profit, where its understanding of value refers to the economic and financial viability of the organization.IBGC, « conhecimento: governança corporativa », *IBGC-Instituto Brasileiro de Governança*

economic, in *network governance*, starting from the idea of the common good, this is placed in the center, in the way that Mariana Mazzucato suggests: "*currently, the principle of the common good is seen only as a corrective for the excesses of the current system, but it should be the main objective of the system*"[1021].

Thus, the techno-regulation of the digital state has as its value the common good, a principle enshrined in the Constitution, guiding policies, technologies, and digital government models. It is from this base and these values that the other principles of governance should be condensed and examined. It is worth reinforcing that in the Brazilian legal system, the Constitution occupies a higher valuative level[1022], being a criterion for infraconstitutional validity. The constitutional principles guide and condition the interpretation of legal dispositions. In this sense, the Public Governance Decree, specifically regarding the type of digital state, as a model of political action, can be interpreted in accordance with the Constitution, which establishes the primacy of the Federative Republic[1023]. Although it is inspired by the rationality of corporate governance, it is defined as an instrument, a model for management strategies.

Navigating through the concept of network governance, the decree under discussion may be interpreted towards the collective good, in adherence to the Constitution. While the decree envelops regulations pertinent to corporate governance, its framework also accommodates the spirit of network governance. The initial article, elucidating its definition, allows such an inference, dissociating itself from individual or citizen-specific ties, and instead, tying itself to social matters. Moreover, the decree stands as Brazil's formal documentation that delineates and introduces the concept of public value.

From this perspective, it becomes plausible to envisage a justification within the legal framework grounded on the common good, thereby assuring the collective welfare as a value, subject to techno-regulation. In essence, it is feasible to discern within the regulatory

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Corporativa, 2023, disponible sur https://www.ibgc.org.br/conhecimento/governanca-corporativa (Consulté le 1 novembre 2023).

[1021] M. MAZZUCATO, « For the Common Good », *Project Syndicate*, janvier 2023, disponible sur https://www.project-syndicate.org/commentary/common-good-governance-key-elements-by-mariana-mazzucato-2023-01 (Consulté le 18 octobre 2023).

[1022] As explained by Roque Carraza: The legal system is comprised of a set of norms, structured in a hierarchical manner. Within this set, the Constitution occupies the highest level, providing the basis of validity for the other norms, as it "represents the highest tier of positive law". R. ANTONIO CARRAZZA, « Princípio republicano », *Enciclopédia Jurídica da PUCSP*, 2017, disponible sur https://enciclopediajuridica.pucsp.br/verbete/93/edicao-1/principio-republicano (Consulté le 1 novembre 2023).

[1023] *Ibid.*

environment, the justification for network governance, directing towards the *common good* and ensuring it as a techno-regulated value, juridically materialized as a constitutional principle and anchored in articles 1 and 3 of the Constitution. The resonance of this value and direction, through a relational paradigm, is expansive, embodying a method through which the idea of collective (citizenry) protection is prioritized over the individual.

C. From Citizen to Citizenship

Understanding contemporary public law as a functional law, a toolkit, does not imply embedding the individual, their freedom, and their self-interest into its design. Gunther Teubner, leaning on Talcott Parsons, underscores that in classic functionalism, equilibrium emerges from exchange relations among distinct spheres that perform disparate functions, and stability is achieved through compensatory mechanisms in the event of occasional disturbances, irrespective of the fruits of growth[1024]. Hence, if good governance focuses on the user/citizen, placing the individually-oriented dimension at the center and the state as responsible through risk management, network governance leans on the common good, public value, citizenship and the actions of the actors, instead of the actors per ser.

A first and pivotal distinction between these interpretations is that while the former is relational, the latter is instrumentally rational. Rationality, although relevant, is insufficient for the good government ideal, which requires and is constructed through consensus (the "*sentire*", as expressed at **Chapter 3**)—a distinctly relational character, as it establishes itself from exchanges, from a minimum unit, and not by the individual manifestation of self-interest[1025]. Thus, the interpretation through a relational view implies repositioning the concept of citizenship, of collectivity, replacing it with the individualistic perspective of the citizen/individual, which results from autonomous and dichotomous biases, typical of subjective law that proposes the prevalence of the private over the public. In the case of the relational approach, the focus is not on the individual, or the citizen, but on *citizenship*.

This distinction is well demarcated by Luciano Floridi, who, when working with what he precise as "*the infosphere*" (aiming to overcome dichotomous propositions), highlights a

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[1024] G. TEUBNER, « La "matrice anonyme" : de la violation des droits de l'homme par des acteurs "privés" transnationaux », *op. cit.*
[1025] L. FLORIDI, « Infraethics–on the Conditions of Possibility of Morality », *op. cit.*

political focus attentive to relationships, as opposed to autonomous dispositions. The author exemplifies this distinction with a shift in cyberspace "*from the primacy of the concept of 'citizenship' instead of the concept of 'citizen'*"[1026]. The author emphasizes that such an approach modifies the concern for *good management*, to deal with "*the nature and healthy growth of the relational network that constitutes a society, its members, and its environment*". In other words, through relational ontology, the focus shifts towards collective well-being, towards the protection of the community, and not merely on the individual satisfaction of a private interest[1027].

From this Perception to the Advocacy of Social Good, Floridi contends that, within the framework of the digital revolution, the purpose of *social good* should be established in the design, the development, and the promotion of technology. The orientation is no longer directed towards an individual, an institution, or a thing, but towards a relationship, interactions, and society — the collective.

This orientation, indeed, can be interpreted alongside the recovery of the ideal of good government within political science, general state theory, and also at public law. Although it has been eclipsed by the quantitative ideal of good governance[1028], as seen in **Chapter 3,** *res publica* proposes a material observation of public law, where the very core is the common good.

In short, the perspective *of citizenship*, in this view, by substantiating a *consensus-exchange*, incorporates and signifies the valuative bias of relations, conferring a collective substance to the previously empty disposition of the orientation of digital transformation (sometimes individualistic, sometimes extractivist, sometimes technical, sometimes economic).

A similar support can also be identified in the field of public management, through the literature on public value, as seen in **Chapter 4**, and in public purpose theories. At this point, it is crucial to recall that digital government maturity is posited when a government that produces public value is achieved. In this sense, O'Flynn[1029] succinctly posits that "*public value is something*

[1026] L. FLORIDI, *Il verde e il blu: idee ingenue per migliorare la politica*, s.l., Raffaello Cortina editore, 2020.
[1027] *Ibid.*
[1028]Floridi here makes reference to 'thing' in the sense of a tangible asset, a perception distinct from the design proposed for common good in the first part, which corresponds to the product of consensus, the materialization and arrangement of what belongs to the collective, the common good, thus considered, because of the common unity, in a consensus. *Ibid.*
[1029] J. O'FLYNN, « From New Public Management to Public Value: Paradigmatic Change and Managerial Implications », *Australian Journal of Public Administration*, septembre 2007, vol. 66, n° 3, pp. 353-366, disponible sur https://onlinelibrary.wiley.com/doi/10.1111/j.1467-8500.2007.00545.x (Consulté le 17 octobre 2023).

delivered by governmental organizations to their citizens, not to individuals" [1030]. That is, the author clarifies that theories (such as public choice) that mention economic efficiency derive from perceptions of human behavior focused on individualism and individual instrumentality and rationality.

Similarly, when working with the governance approach of the common good, Mariana Mazzucato argues that public purpose should not only be placed in redistribution (i.e., ex post) as established by the corporate governance model but must be in pre-distribution[1031]. It deals with an *ex-post* and *ex ante* criterion, therefore, of design. Borrowing from Mazzucato's economic discipline approach, in a network environment all stages of the process are relevant, not only the result. Thus, the design establishes that the common good must be drawn from the conception, through the treatment and subsequent manipulation. This process is set from the beginning and not as a corrective means. Through this logic, emphasis is placed both on "*what*" and equally on "*how*"[1032], that means, the action in the context, and not the actor.

Section Considerations

The scrutiny of governance and its apparatus through the prism of network governance triggers *two significant* transmutations. Initially, the rationality diverges from the logic intrinsic to good governance, centered around the amplification of individual satisfaction. In the confines of network governance, principles and dimensions are crafted through lenses that are ontologically relational, firmly set upon the collective welfare. Consequently, governance will be navigated, not via autonomous and institutionalist examinations, which institute oppositions, but through a relational law. The proposal thereby seeks to mull over the digital transformation through these optics.

From this vantage point, one may analyze the dimensions, mechanisms, governance strategies, infrastructure, and principles through this schema, which is *innately relational* and aspires towards the common good. For this endeavor, the governance philosophy, hitherto presented as a value, is articulated as a distinct type of regulation— a techno-regulation— which is

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[1030] *Ibid.*
[1031] M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, 1re éd., *op. cit.*
[1032] M. MAZZUCATO, « For the Common Good », *op. cit.*

instantiated as design, yet does not avoid the examination of the entire ecosystem, nor of all stages and dimensions of the network universe attentive to this value. It serves as the guiding thread conditioning the rest. It is worth noting, it encapsulates the architectural project of the network, of cyberspace, drawn from an intrinsic value, finding shelter in the concept of general principles.

Governance, thereby, in its pursuit to transcend the limitations of centralized government, requires an examination in harmony with the emergent social and institutional reality. From this inaugural definition of techno-regulation, grounded in the value of the *common good* and justified in the legal order by the republican principle and in the political action model of network governance, it becomes plausible to ponder and observe how governance, in its capacity as a strategy, instrument, and technique, consolidates itself within the legal framework, as well as within the technical and instrumental architecture, emanating from the format of government as a platform, one of the instrumental dimensions of digital government.

This shall be undertaken, in the ensuing Section, from the perspective of data flow, and not through the user at the center. This is premised on the understanding that the latter conduces to gaps, as it does not underscore data or its circulation, but rather the individual rights in a reticular space. Consequently, the dimensions of maturity warrant repositioning and examination in adherence to the network governance approach.

Section 2. Network governance as a data-driven political action project

The Preceding Section illustrated that a governance approach towards "*user-oriented*" frame leads to individualistic interpretations.

Conversely, the *network governance* model seeks to examine governance strategies from the common good, positioning it as the architectural project of digital government and encoding not the individual, but the "*data-driven*" dimension.

Through this, it becomes feasible to contemplate principles, values, and governance tactics that encompass data flows as an essential phenomenon for network connectivity, which, in turn, is fueled by usage and reuse feedbacks, providing nutrients for value creation. And, as established

in the previous section, in the public sector, the architectural project is executed for the creation of value for the community.

To navigate through this context, namely**: *flow* + *connectivity* + *value production***, it becomes imperative to ponder on ***the form***, disposed by governance, within values in the *design*, architecture, infrastructure, and organization, to subsequently deal with the production that occurs in this flow. In this sense, instead of proposing an examination of governance mechanisms and digital government organization from the reading of *good governance* and the "*user-oriented*" dimension, an examination through the data-driven dimension is proposed, through the reading of network governance. The OECD defines a government as data-driven "*when it values data as a strategic asset and establishes governance mechanisms, access, sharing, and reuse to improve decision-making and service delivery*" [1033].

This orientation presents data ***as an asset***, an element of value, addressing a chain, highlighting how digital technologies conduct different mechanisms from data collection to control over its use[1034]. Herein, the initial demarcation concerns itself with data (in a broad sense) and its circulation, phenomena interpreted through the lens of value generation, specifically within the scrutiny of a data-oriented dimension.

The conception of data-driven finds adoption in several international reports. Nevertheless, in Brazil, it does not manifest within the "*oriented*" facet, neither in the Digital Strategy[1035], being peripherally acknowledged in the Law of Digital Government[1036]. This conveys that the recognition of data as a value is not esteemed with due relevance by the government. Contrarily, the Brazilian Digital Governance Policy is navigated through *taxonomies*. However, examining data governance through the perception of data as a *chain* and a *resource* demand transcends taxonomies.

[1033] OECD, *The OECD Digital Government Policy Framework*, *op. cit.*

[1034] F. FILGUEIRAS et B. SILVA, « Designing data policy and governance for smart cities: theoretical essay using the IAD framework to analyze data-driven policy », *Revista de Administração Pública*, juillet 2022, vol. 56, n° 4, pp. 508-528, disponible sur http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-76122022000400508&tlng=en (Consulté le 18 octobre 2023).

[1035] At Brazilian's site: Citizen-centered, Integrated, Intelligent, Trustworthy, Transparent and open, Efficient. R.F. BRASIL, « Estratégia de Governo Digital 2020-2022 », *op. cit.*

[1036]Specifically, the part relating to innovation laboratories. VIII - support for data-driven, evidence-based public policies to support decision-making and improve public management. S.-G. REPUBLICA (PR), Lei nº 14.129 de 29 de março de 2021, 30 mars 2021, disponible sur https://legislacao.presidencia.gov.br/atos/?tipo=LEI&numero=14129&ano=2021&ato=d7cMTSE5UMZpWT475 (Consulté le 3 novembre 2023).

In addressing data governance in a data-oriented government, the OECD[1037] establishes its own framework, highlighting its direction towards the generation of public value, which should be accomplished through apt planning, delivery, and monitoring of public policies.

To ensure this scheme, ethical rules and principles are adopted. This framework is segmented into three major facets: public value (*value, orientation*), governance (*the strategies*), and trust (*the principles*). In the present research, this scheme can serve as a support for analyzing digital transformation, designed to supersede the good governance's approach.

In this instance, public value—adopted as philosophy—is already delineated ***in the design of*** governance policy (as seen in the previous section), while the principles accommodate the interpretations for the legal examination of the validation process of a digital state's public action[1038] (to be examined, in **Chapter 6**).

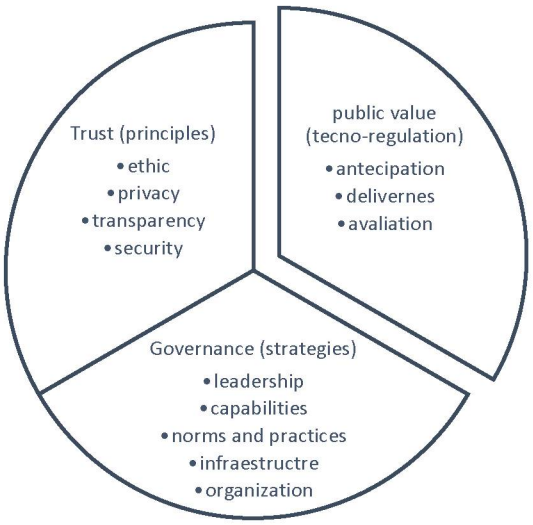

Table 6 : Facets of data-driven government governance. Source (adapted from the OECD model) [1039]

This distribution clarifies that governance, as an institutional model type, is a precursor conductor of schemes to reflect on the facets of data governance[1040]. It has already been

[1037] OECD, *Going Digital Guide to Data Governance Policy Making*, 2022, disponible sur https://www.oecd-ilibrary.org/content/publication/40d53904-en.
[1038] OECD, *The OECD Digital Government Policy Framework*, *op. cit.*
[1039] OECD, *Going Digital Guide to Data Governance Policy Making*, *op. cit.*
[1040] F. FILGUEIRAS et L. LUI, « Designing data governance in Brazil », *op. cit.*

mentioned that the philosophy of governance is a conductor – it comprises the design of the code – and impacts the other types, governance strategies, and data management. In the managerial scope, information governance, data governance, and data management serve different functions and responsibilities within an organization. In fact, *information governance* and *data governance* can be understood as a ***strategic framework***, while *data management* focuses on *providing technology* and services[1041].

Thus, governance refers to the initial stage in creating a structure based on management and governance policy, solidifying an overall organizational vision (the definition of purpose)[1042]. *Data governance* situates itself at an intermediate level, presenting as a system of management processes and controls, administrative policies, decision-making rights, and responsibilities aiming to ensure the implementation of formal management controls[1043]. This, in turn, relies on information technology to manage architecture systems, data catalogs, practices and procedures to manage data effectively. Thus, management models, even when isolated, are integrated into a full organizational movement, where *data management* is the ***most technical*** aspect level and, to materialize, it must be aligned with the philosophy oriented from governance[1044].

In the Brazilian case, if, on the one hand, digital transformation materializes under a specific logic, on the other, there is a lack of strategic, instrumental, and technical standardization of governance models. There is, indeed, a value that conditions and directs the other schemes, bringing to light what is called a "*silent reform of political and public action*", a factor especially seen in digital transformation, as already mentioned in the First Part of the thesis and the previous Section. This silent reform leads to a scenario of increasing algorithmization of public administration, where the potential to overcome past patrimonialism by removing human intervention in public organizations is suggested[1045].

Thus, this movement unfolds through the transversal principles of governance, in the logic of *good governance*[1046]. The Federal Court of Accounts - TCU, for instance, disposes for the

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[1041] P. DESROCHERS, *Les données administratives publiques dans l'espace numérique*, *op. cit.*
[1042] *Ibid.*
[1043]The establishment of an environment conducive to data exploitation, the implementation of clear rules and guidelines, the assignment of decision-making powers, and the obligation of accountability are fundamental elements to effectively realize data management *Ibid.*
[1044] M. KITAYAMA et B. BIONI, « A Governança de Dados como Política Pública: perspectivas da cooperação entre Defensorias e sociedade civil », *Cadernos da Defensoria Pública do Estado de São Paulo*, novembre 2021, vol. 6, n° 31, pp. 74-92.
[1045] F. FILGUEIRAS et L. LUI, « Designing data governance in Brazil », *op. cit.*
[1046] F. FILGUEIRAS, « Indo além do gerencial », *op. cit.* ; F. FILGUEIRAS et L. LUI, « Designing data governance in Brazil », *op. cit.*

establishment of "*minimum levels of good governance and the creation of a flexible institutional arrangement that would allow adjustments and particularizations*". The institution also emphasizes that Decree No. 9,203/2017[1047], provides tools to implement coordination and coherence of governance models, which is considered a milestone and a director of the values to be pursued.

This only reinforces that, in Brazil's case, *information* and *data governance* are designed with attention and within the policy of *corporate governance*. This model conditions strategies and policies to align with the desired outcomes and addresses the involved risks[1048]. Furthermore, an ambiguous governance model is observed, in which hierarchical formats, based on bureaucratic organization, converge with less hierarchical and more interactive ones, which involve relationship formats with markets – as a result of administrative reforms –, or with societal spaces, as previously well evidenced[1049]. The federal government presents an imprecise framework, with fragmented and pulverized provisions and mechanisms[1050].

In addition, there is no centralized strategy in Brazil directed at the entire public sector, which means that adaptability and learning about the handling and application of technologies are sectorial[1051]. Ultimately, it is a scenario that creates "*situations of conflict and inefficiency in the data policy design*"[1052].

This framework brings difficulties to the Brazilian digital transformation because, even though there are mechanisms and policies for public governance and management, they are not linked, limiting the success and application of the maturity dimensions and stages of a digital government, both in its infrastructure and technical concepts. As seen, the maturity dimensions are interrelated and depend on the value of the established governance model. That is,

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[1047] TRIBUNAL DE CONTAS DA UNIÃO, *Guia da política de governança pública*, *op. cit.*

[1048] P. DESROCHERS, *Les données administratives publiques dans l'espace numérique*, *op. cit.*

[1049]In Decree 8.638/2016 – which has since been repealed, digital governance was conceptualized as: the use by the public sector of information and communication technology resources with the objective of improving the availability of information and the provision of public services, encouraging societal participation in the decision-making process, and enhancing levels of accountability, transparency, and government effectiveness. S.-G. REPUBLICA (PR), Decreto n° 8638, 18 janvier 2016, disponible sur https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/decreto/d8638.htm (Consulté le 3 novembre 2023).

[1050] And, as has already been observed, within the context of a digital state, governance and its philosophy acquire significant value, which is why there is a pursuit to adopt a different approach.

[1051] F. FILGUEIRAS et L. LUI, « Designing data governance in Brazil », *op. cit.*

[1052] *Ibid.*

organization, architecture, and infrastructure depend not only on technical measures but on a complex arrangement guided by a certain philosophy.

As the philosophy of governance conditions data governance and management, influencing emergent challenges, especially within the Brazilian framework of digital transformation **(§1)**, its elucidation proves fundamental when contemplating a strategy for digital public governance aptly suited to a data-oriented government **(§2).**

§1 Governance model as a director of data governance and data management

Due to the employed governance philosophy and the reality of the Brazilian institutional design, the maturity devices of the digital government, in its architecture and axes, **(A)**, face challenges, especially in tactical and delivery criteria **(B)**.

A. Government as a platform

In addressing data governance, the OECD points to a broader aspect of design and infrastructure (digital by design and platform model as architecture and organization) and an architecture that sets the standard of rules to be observed in all others. It is divided into different axes, termed strategic (*leadership*), tactical (*implementation*), and delivery (*architecture, infrastructure, platform, and interoperability*)[1053]. The competencies are interrelated and fundamental in

[1053]Governance: Ensuring leadership and vision to secure the strategic direction and purpose of data-driven dialogue across the public sector. Encouraging the coherent implementation of data-oriented framework. Developing data. Ensuring the existence of a data architecture that reflects standards. OECD, *Going Digital Guide to Data Governance Policy Making*, *op. cit.*

identifying the projects to be employed, in the gaps and needs of a government that digitizes and is data-oriented[1054].

Regarding the infrastructure and organizational architecture of a data-oriented government, it is indicated that the appropriate format is the platform model[1055]. In cyberspace, the platform is the usual format by which the network ecosystem operates. In the public sector, according to Jacques Chevallier, its aim is to transform the government into an open model, which enables transparency and use of these potentials by citizens[1056].

Antonio Cordella, in turn, enhances the reading by establishing the platform as the mechanism by which a digital government may be instrumentalized in order to seek the construction of public values. According to Cordella, this model has the following facilities: ***i)*** it allows the participation of external agents in the co-production of public services, which collaborates in providing value with fewer investments; ***ii)*** it is based on modular structures formatted in essential services to allow the creation of third-party applications to support the evolution of service provision and reduce the complexity of coordination; ***iii)*** it is easily accessible and simplifies the modification and creation of services[1057].

Therefore, the platform model prioritizes promoting data circulation, which is done through several mechanisms and standards of its own. Thus, if data circulation becomes a priority, the governance vocabulary gains new concepts.

One of them *is interoperability.* This is a basic element, which in general terms can be understood as the possibility of exchanging information between databases with interpretive capacity. Interoperability[1058] has been treated as a concept of public management in Brazil since 2012, by the Interoperability Management Manual prepared by the Ministry of Planning, Budget, and Management[1059]. Its definition comes in three dimensions, communicable and

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[1054]*Strategic Axis*: Leadership and Vision: data policy, openness, access, sharing, security, and levels; Tactical Axis: coherent implementation capacity: task force, funds, experimentation, innovation; Regulation: rules, manuals, guides. Finally, the Delivery Axis corresponds to architecture: data reference, interoperability, infrastructure, records, catalogs; API; value creation cycle: actors, managers' skills, management, validation, sharing and opening process, use, ownership. *Ibid.*

[1055]The first refers to greater coordination and integrative operation, the second through design, and finally, delivery refers to materialization, implementation. *Ibid.*

[1056] J. CHEVALLIER, « Vers l'État-plateforme ? », *op. cit.*

[1057] *Ibid.*

[1058]Interoperability is the ability of services and systems to exchange information from different databases in a way that makes it possible to interpret them UNITED NATIONS, *The future of digital government*, *op. cit.*

[1059]Organizational interoperability pertains to the collaboration between organizations wishing to exchange information while maintaining different internal structures and varied business processes. On the other hand, semantic interoperability is the ability of two or more heterogeneous and distributed systems to work together. In

complementary to each other (*organizational, semantic, and technical*[1060]) and aims to provide service management focused on exchanges[1061]. Moreover, they are management criteria, that is, technical, modulated for the federal government.

However, as observed, the technical interoperability of data management relies upon the realization and efficacy of instrumental models and data, as well as information governance strategies, which in turn, are shaped in accordance with the established governance philosophy. As noted, technical and managerial levels correspond in a governance chain, which hinges not only on the technical elements available to data/information managers but also on the philosophy that drives it, and necessarily on the strategies of information and technical governance. Thus, the technical models and their provisions are significant, but they become inefficient if considered in a segmented, isolated manner, or through individualistic interpretations. It is here, therefore, where the challenges of materializing the platform model lie.

B. Interoperability in a federal model

In the realm of data governance, interoperability serves as a means to foster sharing, which, in turn, can be a source of value. Therefore, a pivotal factor is the ability to interact among agencies and institutions, in other words, connectivity made through flows to construct values. Without such rationale, the potentials of the digital revolution are reduced. The pursuit of integration among agencies and entities has been a recurring topic within public management, emerging as a central concern. Along these lines, the Brazilian General Data Protection Law

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terms of technical interoperability, it is defined as the connection between computer systems and services through the use of standards for the presentation, collection, exchange, processing, and transportation of data. M. do P. BRASIL orçamento e gestão, « Guia de Interoperabilidade Manual do Gestor 2012 », 2012.

[1060]Since the manual was published in 2012, the terms addressed still refer to personal and confidential information, which can currently be considered synonymous with personal data. Additionally, the manager's responsibility is highlighted in the Manual regarding these criteria, indicating the concrete mechanisms for managing information and data. According to the manual: I. Check the issues of protection of confidential information and personal information. A. The information manager is responsible for protecting confidential information and personal information, even if these pieces of information are passed on to third parties. B. Check if there are any restrictions on the information. They may involve personal secrecy, state security, etc. It is the manager's responsibility to ensure the protection of information in accordance with the LAI - Access to Information Law (Law No. 12.527, of November 18, 2011). C. If there is confidential or personal information, it is important to define and control: i. who can access it, including identification procedures; ii. what each person/organization can access;
iii. what are the criteria for using the information that this person/organization must follow. *Ibid.*

[1061] The e-PING Architecture – Standards for Electronic Government Interoperability defines a set of techniques aiming to enable interoperability. The interoperability manual provides criteria for its implementation, from which the emphasis on privacy and confidentiality as an indispensable element to be considered is observed *Ibid.*

(Lei Geral de Proteção de Dados - in the Portuguese acronym – LGPD) facilitates interoperability among federative entities through the National Base of Public Services. However, the federative structure and the autonomy of federative states make the implementation of the digital government policy more intricate than in unitary states, posing one of the barriers to Brazil's digital governmental policy[1062].

Indeed, the overall institutional configuration of the federal model[1063], combined with scattered legislation, signifies that Brazilian public and digital governance policies lack coordination and coherence[1064]. This poses challenges for the adaptability of institutions and organizations to digital transformation, a factor noted by the OECD[1065].

As previously mentioned, Brazil's digital government strategy targets the federal government[1066], with its adoption being voluntary for other federative entities[1067]. Its application to the direct and indirect administrations of other federative entities happens as long

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[1062] Single paragraph. Each federated entity may make information about the provision of public services available, as set forth in its User Service Charters, in the National Public Services Base, in an open and interoperable format and in a common standard for all entities.

[1063] Public governance, regulated by Decree No. 9,203 from 2017, is expressly applied at the federal level, just as the digital government law. Furthermore, mechanisms and platforms are also aimed at federative integration. The difficulty increases when we observe that the federal policy for digital transformation itself is fragmented and not coordinated, which brings challenges for the federative entities in adapting to digital transformation, a factor also observed by the OECD.

[1064] Currently, the principal norms guiding digital transformation and governance in Brazil include: Decree n. 10.332/2020, which establishes the Digital Government Strategy from 2020 to 2022; Decree 10.046/2019, dealing with data sharing governance at the federal level; Law 14.129/2021 on Digital Governance; and Law 12.507/2011. Additionally, Decree 9203 outlines the federal governance policy, and the LINDB modifies Brazilian public law norms. The administrative procedure law and the constitution also contribute to the legal framework. Furthermore, the LGPD (General Data Protection Law) and the MCI (Civil Rights Framework for the Internet) are significant normative milestones. It is important to note that these were initially crafted for civil relations and were not explicitly designed for data governance, although data governance should comply with them. These models vary and are primarily aimed at the federal public administration, meaning they are not universally applicable to the State at large.

[1065] However, the presence of multiple policies may negatively impact the availability of a clear and integrated governmental vision capable of guiding the actions to be executed by public entities, private sector, and civil society. The proliferation of strategies might obscure institutional governance (refer to Section 2.2), and limit the efficient allocation of resources to support the implementation of effective public policies.

[1066] The Digital Government Law, No. 14,129/2021, establishes in its Article 2nd its application to bodies of the federal direct public administration (Executive, Judicial, and Legislative branches, the Federal Court of Accounts, and the Federal Public Prosecutor's Office), as well as entities of the federal indirect public administration, including public companies and mixed economy companies, their subsidiaries and controlled companies providing public services, as well as autarchies and public foundations.

[1067]The Digital Government Law also has a federal scope. The Access to Information Law is the document that has national coverage, across all spheres of the federation, in the same way as the LGPD (General Data Protection Law). Finally, it should be considered that the Constitution must be regarded as a fundamental benchmark for examining norms, decrees, and resolutions, both in terms of the possibility of extending interpretative normative application and regarding violations. S.-G. REPUBLICA (PR), Lei nº 14.129 de 29 de março de 2021, *op. cit.*

as they embrace the law's commands through their regulatory acts[1068]. This approach extents to all digital transformation policies in the country.

For instance, the delivery of public services is centralized on the Digital Citizenship Platform, granting citizens access to digital public services, established by Decree No. 8.936/2016. The platform consists of a federal government service portal, serving as the official channel. It also addresses a single digital access mechanism for public service users, allowing the initiation and tracking of public services. Included are a service portal to serve as a communication channel for citizen requests and the delivery of public services, all within a federal scope[1069].

In turn, the National Digital Government Network (RNGD) anchors the "*Gov.br"* portal through Article 7 of Federal Decree No. 10.332/2020. Its core objective revolves around amplifying the exchange of information and orchestrating collaborative efforts to bolster the Digital Government Strategy. The Network Platform, an integral component of National Digital Government Network[1070], proclaims its mission on its official page: "*forge collaboration, stimulate exchange, steer coordination, and pioneer digital government initiatives within the public sector*"[1071]. By June 2023, all 27 federation states, including the Federal District, had aligned with this network. Yet, a mere 287 municipalities, from 18 capitals, pledged their commitment[1072].

[1068] Therefore, there is a discretionary and non-binding criterion of the law's terms to the other political entities. It is worth noting that the Brazilian strategy for digital transformation is assembled in accordance with the structure of the Federation, including its entities, direct bodies, but within the competencies and attributions of the Federal Union.

[1069] R.F. BRASIL, « Estratégia Brasileira para a Transformação Digital », *op. cit.*

[1070] An initiative of the Secretary of Digital Government from the Ministry of Management and Innovation of Public Services (SGD/ME). According to information on the official page, "The Secretary of Digital Government (SGD) provides platforms and shared services in the federal public administration and promotes the prospecting, design, and improvements of architectures, methodologies, processes, applications, platforms, and technological bases to be adopted by the agencies that are part of the Sisp (Information System of Public Administration)." M. do P. BRASIL orçamento e gestão, « Secretaria de Governo Digital (SGD) », *Governo Digital*, s.d., disponible sur https://www.gov.br/governodigital/pt-br/sisp/guia-do-gestor/seguranca_e_privacidade/orgao-que-atuam-com-privacidade-e-seguranca/secretaria-de-governo-digital-sgd (Consulté le 1 novembre 2023).

[1071] The Rede.br platform was designed by Macroplan Analytics, through a partnership between the Ministry of Management and Innovation of Public Services and the Inter-American Development Bank (IDB).M. do P. BRASIL orçamento e gestão, « BIDTD », *Plataforma Rede GOV.BR*, s.d., disponible sur https://bidtd.validaproj.com.br (Consulté le 1 novembre 2023).

[1072] P. BAPTISTA et L. ANTOUN, « Governo digital: política pública, normas e arranjos institucionais no regime federativo brasileiro: a edição da lei federal n. º 14.129/2021 e o desenvolvimento da política nacional de governo digital », *RFD- Revista da Faculdade de Direito da UERJ*, octobre 2022, n° 41, pp. 1-34, disponible sur https://www.e-publicacoes.uerj.br/index.php/rfduerj/article/view/70724 (Consulté le 18 octobre 2023).

Article n.7° emphasizes National Digital Government Network's voluntary and collaborative nature, a reason for its limited uptake by many municipalities. Municipalities also underutilize the potential of Intelligent Systems (IS)[1073] in enhancing their services[1074].

Such observations underscore another Brazilian institutional nuance. The Federal Constitution entrusts state and local governments with delivering the most basic public services[1075]. These entities predominantly shape public services, especially in goods and infrastructure investments. Over five thousand municipalities, serving as Brazil's primary public service channels, amplify the complexity of interoperability premises. The asymmetric and decentralized federative structure grants municipalities significant autonomy, leading to fragmented governance policies and barriers to digital transformation. The real challenge lies in optimizing policies where they can most impact society[1076].

Furthermore, a robust government-as-a-platform policy, targeting process unification and simplification, hinges on adept tools capable of weaving state and municipal services seamlessly. Mere development of policy directed solely at the Federal Administration won't suffice. Brazil's digital transformation must incorporate the entire federative spectrum and prioritize institutional integration[1077].

One route forward involves platform-centric policies designed for service unification through advanced digital technologies. Yet, the centralization versus fragmentation debates persist, especially concerning integration limits of government platforms across the Union, states, Federal District, and Municipalities — a task in a federalist nation like Brazil. Radical decentralization, thus, often meets skepticism[1078].

[1073]In 2019, only 11% of municipalities had operation control centers. Furthermore, 6.70% had municipal buses with GPS; 4.18% had sensors for monitoring risk areas; 2.75% had smart lighting systems, and 2.59% had smart traffic lights. M. LAFUENTE *et al.*, *Transformação digital dos governos brasileiros: Satisfação dos cidados com os serviços públicos digitais*, Inter-American Development Bank, février 2021, disponible sur https://publications.iadb.org/pt/node/29788 (Consulté le 1 novembre 2023).

[1074]Those employing these technologies in greater proportions are located in the South and Southeast regions, in contrast to those in the North and Northeast of the country. Additionally, deployment is concentrated in metropolises *Ibid.*

[1075] J.R.R. AFONSO et B.M. MONTEIRO, « Do governo eletrônico à governança pública digital: muito por fazer (e ganhar) no Brasil », *Revista Conjuntura Econômica*, juin 2022, vol. 76, n° 06, pp. 22-24, disponible sur https://periodicos.fgv.br/rce/article/view/86085 (Consulté le 18 octobre 2023).

[1076] *Ibid.*

[1077] P. BAPTISTA et L. ANTOUN, « GOVERNO DIGITAL », *op. cit.*

[1078] CYBERBRICS, « Cibersegurança: uma visão sistêmica rumo a uma Proposta de Marco Regulatório para um Brasil Digitalmente soberano », *CyberBRICS*, 15 juin 2023, disponible sur https://cyberbrics.info/ciberseguranca-uma-visao-sistemica-rumo-a-uma-proposta-de-marco-regulatorio-para-um-brasil-digitalmente-soberano/ (Consulté le 23 juillet 2023).

Data management, in its essence, relies heavily on information technology. In this context, Federal Decree No. 10.332/2020 promotes a data-driven culture, outlining objectives such as system integration and crafting data-based public policies[1079]. Yet, in practice, management teams often deploy their methodologies in silos and remain disconnected[1080]. This demonstrates a fragmentation in management approaches among federative entities. The evident lack of intra-governmental cooperation, the dispersed administrative nature of agencies, coupled with limited outreach in municipalities and their notable non-participation, impose constraints. Such obstacles are particularly pronounced in the pivotal phase of digital transformation, especially concerning interoperability and interaction among federation entities.

Expanding on this landscape, within public management, to analyze, assess, discern causality for specific issues, or for other objectives, understanding strategies focused on data utilization becomes vital to enhance services. Even though public organizations generate vast data volumes, numerous challenges and barriers surface beyond mere integration. These often pertain to a knowledge and expertise deficit on the subject, leading to frequent debates on these methodologies and on data and information governance strategies. Contrary to leading digital technology corporations, public organizations regularly grapple with outdated tools, processes, and methodologies. In essence, data quality suffers, stored on obsolete hardware and software platforms[1081].

All these elements converge into the quandary surrounding the integration between systems and the canons of interaction and interoperability mechanisms[1082]. Consequently, despite there being norms on data governance, these provisions lead to ineffective outcomes partly due to "*instrumentation misaligned with the data policy objectives*"[1083]. As previously discussed, the debate framed from a private perspective obstructs the transition aimed at data circulation, shifting the narrative more towards personal data protection and corruption control. These instances underscore the need for a strategic approach with a clear data governance structure in place.

[1079] P. DESROCHERS, *Les données administratives publiques dans l'espace numérique*, *op. cit.*
[1080] M. KITAYAMA et B. BIONI, « A Governança de Dados como Política Pública », *op. cit.*
[1081] P. DESROCHERS, *Les données administratives publiques dans l'espace numérique*, *op. cit.*
[1082] V.M.C. DO NASCIMENTO JUNIOR, *Administração pública brasileira no novo contexto tecnológico: a caminho de um governo 4.0*, Monografia, Recife, Faculdade Damas da Instrução Cristã, 2020, disponible sur https://admpg.com.br/2020/anais/arquivos/08142020_110857_5f36a4d17a49c.pdf (Consulté le 1 novembre 2023).
[1083] CYBERBRICS, « Cibersegurança », *op. cit.*

§2 The Digital Public Governance Framework

The narrative underscores that Brazilian data and information governance requires what might be termed an "*adaptation project*"[1084]. This could manifest as a state policy or even as a "National Digital Public Governance Framework"[1085]. Indeed, in the realm of public governance programs, a data governance program stands as a vital "*public policy ensuring fundamental rights and refining organizational structures of institutions*"[1086]. The OECD posits that a governance project should address both the security of services and data and pursue system integration. This aligns with Bruno Bioni's notion of an adaptation project. Such a project evolves from institutional structures shaping actor interactions concerning massive data for public policies. This evolution demands the "*adoption of a myriad of measures*" by the public sector. Implementing and executing such an adaptation scheme proves intricate, particularly in a context where the public sector often garners scant attention[1087].

These measures extend far beyond mere adaptation to private law norms, such as the LGPD. Hence, a paradigm shift is imperative: moving away from private perspectives on data strategies and pivoting toward a public sector-centric viewpoint. The transformation this shift puts forward is profound. A private perspective predicates a "*procurement mindset*" for the state concerning technology utilization. In contrast, a "*policy mindset*" engages more holistically with government digital transformation, transcending mere service digitization[1088]. Through this lens, the government reshapes its identity as a steward of public-interest technology. The focus is prioritizing the public, emphasizing project relevance and strategy, moving beyond the constraints of data protection discourse and delving into data utilization and exploitation.

An initial consideration lies in rethinking an organization's strategic approach to data, acknowledging the interdependence of data management and data governance. Strategies need

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[1084] M. KITAYAMA et B. BIONI, « A Governança de Dados como Política Pública », *op. cit.*
[1085] F. FILGUEIRAS et L. LUI, « Designing data governance in Brazil », *op. cit.* ; V. ALMEIDA, F. FILGUEIRAS et F. GAETANI, « Digital Governance and the Tragedy of the Commons », *IEEE Internet Computing*, juillet 2020, vol. 24, n° 4, pp. 41-46, disponible sur https://ieeexplore.ieee.org/document/9195909/ (Consulté le 18 octobre 2023).
[1086] F. LEFEVRE, « A dependência digital do Brasil \textbar Blog da Flávia Lefèvre », s.d., disponible sur https://flavialefevre.com.br/pt/a-dependencia-digital-do-brasil (Consulté le 18 octobre 2023).
[1087] B. BIONI *et al.*, « The digitization of the Brazilian national identity system: A descriptive and qualitative analysis of its information architecture », *Data & Policy*, 2022, vol. 4, p. e22, disponible sur https://www.cambridge.org/core/article/digitization-of-the-brazilian-national-identity-system-a-descriptive-and-qualitative-analysis-of-its-information-architecture/9383EF02D1892A5581D93F40348ABD16.
[1088] F. FILGUEIRAS et B. SILVA, « Designing data policy and governance for smart cities », *op. cit.*

to encompass not only the possibility of apt internal and technical management but also integration – a critical yet challenging factor in a vast and unequal country like Brazil.

A secondary consideration hinges on discerning the intricacies of this structuring, from data infrastructure to fundamental issues in a governance model (data storage management, leadership, qualification, integration). The task ahead involves an examination of governance approaches and how they might underpin the emergence of a distinct Brazilian digital public governance framework. This framework should aim at uniformity without infringing on federative autonomy and address the asymmetries of Brazilian decentralization. Such an endeavor must emanate from a public-centric perspective, rooted firmly in public law of the common good.

Approaching from the vantage point of network governance political action, contemplation can revolve around: ***i)*** viewing the platform model not just as infrastructure but as a deliberately orchestrated structuring, adept at offering support; ***ii)*** instituting a digital public governance framework through an adaptation project that upholds protection and confidentiality standards (without being solely confined to them). This would aim at bridging entities while honoring their autonomies and investing in national infrastructures and apt qualifications and capabilities.

A. The government as a platform, the architecture

Digital government literature underscores the platform model's suitability for governments in digital transition, given its design focused on informational infrastructure. Moreover, viewing it not merely as infrastructure but as a framework, it has the capacity to support a centralized, unified standardization environment while preserving individual ecosystem autonomies. Jacques Chevallier elucidates that "*government as a platform*"[1089] emerges from a strategy to adapt the state to digital age challenges. It delves deep into government architecture, signifying a political structure within a governmental design tailored to modernize government management, enabling it to be open and harness the potential of a data-driven, networked ecosystem[1090].

[1089] J. CHEVALLIER, « Vers l'État-plateforme ? », *op. cit.*
[1090] *Ibid.*

In this context, the platform ***relates to a structure*** specifically designed for a data-centric society and networked environment, encompassing both architecture and organization[1091]. A digital government grapples with a unique infrastructure. Information infrastructures represent "*shared, open-ended, heterogeneous, and evolving sociotechnical systems*"[1092]. Termed as *'rank2'* structures, they rely on *'rank 1'* infrastructures[1093] for realization while possessing their distinct characteristics. Given the nature of these infrastructures, their evolution trajectory and value can only be discerned through the interdependence of their developments. Hence, the shift from an infrastructure mindset to a platform-centric one becomes crucial[1094].

"*Government as a Platform*"[1095] embodies the creation of a standardized ecosystem conducive to the growth of entire product and service ecosystems. Through *Government as a Platform*, product and service development come under control, enabling public sector organization to better align with the value of the products and services brought forth within these ecosystems. Instead of a monolithic setup, it represents "*a suite of platforms deployed to coordinate and oversee service production across varied governmental domains*"[1096]. In essence, " *Government as a Platform operates as a platform of platforms*". Summarizing, literature indicates that government as platform "*relies on a centralized stable core (i.e., the platforms) integrated with its peripheral components, also defined as ecosystem modules"*[1097].

Reflecting on this context and adapting it to the Brazilian scenario, the *"Rede Nacional de Governo Digital – **Rede*** GOV.BR*"*, seems to align with Government as a Platform's features. It might signify more than just the Union's foundation. The "Rede" definition emphasizes its collaborative nature, aiming to foster innovation and collaboration around the Digital Government theme in the public sector. Essentially, the "Rede" can function as the central

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[1091] Traditionally, the public sector has developed its infrastructures, such as roads, sanitation, and port systems, upon which third parties have developed business proposals and services.S. SORIANO, *Un avenir pour le service public*, *op. cit.*

[1092] A. CORDELLA et A. PALETTI, « Government as a platform, orchestration, and public value creation: The Italian case », *Government Information Quarterly*, novembre 2019, vol. 36.

[1093] S. SORIANO, *Un avenir pour le service public*, *op. cit.*

[1094] A. CORDELLA et A. PALETTI, « Government as a platform, orchestration, and public value creation: The Italian case », *op. cit.*

[1095] Fostering infrastructure is not the concern at hand.

[1096] A. CORDELLA et A. PALETTI, « Government as a platform, orchestration, and public value creation: The Italian case », *op. cit.*

[1097] *"The centralized platform encompasses regulations, policies, services (e.g., payment, identification, and security), and infrastructures (both tangible and intangible) necessary to foster generative ecosystems where public bodies, as well as external actors, can co-produce public services. A public administration organized as a platform, akin to intricate platforms like Apple, Amazon, or Google, facilitates various ecosystems that are diverse in nature but coexist and interact effectively". Ibid.*

platform, creating a standardized environment for nurturing diverse ecosystems. This alignment emerges from the Platform's proposed goals and objectives. The network proposes diagnostic tools and situational analyses to gauge a municipality's status, facilitating inter-municipal comparisons. Furthermore, it offers guidelines on best practices for digital transformation and formulates distinct projects[1098].

Surveying Brazil's organizational landscape suggests drawing inspiration from the Government as a Platform idea. The Digital Strategy Decree bolsters this perspective. As per article 6, the Digital Government Secretariat holds the responsibility to approve Digital Transformation Plans of bodies and entities, coordinate digital transformation initiatives, and oversee the Rede Nacional de Governo Digital[1099].

Moreover, achieving Digital Strategy's objectives, especially those related to data integration and interoperability, demands a national integrative vision. Hence, it's imperative to evaluate Brazil's institutional arrangements, ensuring that integration and interoperability aren't confined solely to federal entities. A comprehensive approach, integrating diverse ecosystems, both in terms of federative entities and service sectors, is vital.

Thus, envisioning the Rede Nacional as a "*mother platform*"—not as a monolithic infrastructure but as a guiding standard—can pave the way for the development of fully interoperable ecosystems. This approach merges leadership with tangible strategy (in line with OECD's governance pillars). However, it's essential to note that Law No. 14,129 upholds the autonomy of federal entities, requiring explicit adherence by these entities. In this context, both Patrícia Baptista and Vanice Valle observe that this principle dampens the potential of digital governance[1100]. However, they also point out that any explicit counter-reference would be unconstitutional, infringing upon the autonomy of federal entities.

Nonetheless, understanding the Rede Nacional not as a unified platform infrastructure for all entities but as the central architecture of a digital transformation strategy (*the platform of platforms*) respects the constitutional design of federal autonomy.

[1098] The platform offers practical guides, establishes forums and lectures for collaborative engagement, and positions itself as the central mechanism for the integration of digital transformation.

[1099] As observed, the article, however, stipulates the competence for the formulation of guidelines for the accession of interested parties, but on a voluntary basis, which aligns with the perspective of the non-mandatory implementation of the RNGD.

[1100] V.R.L. do VALLE, *Governo digital e a busca por inovação na Administração Pública*, *op. cit.* ; P. BAPTISTA et L. ANTOUN, « GOVERNO DIGITAL », *op. cit.*

Firstly, conceiving it as ***an integration tool***—for oversight and collaboration—that offers mechanisms for exchange and standardization without being infrastructure per se allows it to be viewed as a state policy respecting federal autonomy. Viewing *Government as a Platform* as an orchestrating structure upholds each federal entity's self-administration while enabling standardization. In doing so, the desired ecosystem integration can be achieved, not through a hierarchical structure, but through autonomous ecosystems. This interpretation aligns with the Constitution's provision of the Republic's sovereignty[1101], making it plausible to suggest a Government as a Platform model as an architectural structure, not as a platform infrastructure for other federal entities[1102].

Furthermore, the Brazilian program as a directed, orchestrated structure, aligns with a state policy, safeguarding institutional designs without infringing on federal autonomy.

In this perspective, Government as a Platform operates through various ecosystems—a fundamental condition. Given that the state organizes itself in a decentralized political manner, and public administration spans various domains like health, transportation, education, and defense, each ecosystem presents unique characteristics. Consequently, they demand distinct resource boundaries, which are the software tools and standards that serve as an interface for the relationship between the platform owner and the application developer.

This system can address some of the challenges of Brazil's digital transformation. As Patricia Baptista rightly points out, "*one of the bottlenecks to implementing the policy at the local level, especially in municipalities, is its costs*"[1103]. The digital government law stipulates technical support, specifically for federal entities that join the project. Article 5, III, of Ordinance No. 23/2019 guarantees entities that join the Network access to financing programs for this purpose, but without further details. In other words, there's no clear guidance on how to proceed with financing, limiting it to entities that adopt the "Rede Nacional" as a platform[1104]. On the other

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[1101] The Federative Republic of Brazil, formed by the indissoluble union of the States and Municipalities and the Federal District, constitutes itself as a Democratic State of Law and has as its foundations: I - sovereignty.

[1102] U. NATIONS, *Digital Economy Report 2021*, Digital Economy Report, septembre 2021, disponible sur https://unctad.org/system/files/official-document/der2021_en.pdf (Consulté le 18 octobre 2023).

[1103] P. BAPTISTA et L. ANTOUN, « GOVERNO DIGITAL », *op. cit.*

[1104] *While the possibilities facilitated by the Network are valid, the restriction of implementation solely to adherents ends up limiting and harming the Brazilian digital transformation itself An examination of the platform's page shows that in the case of municipalities, most cities that have joined the project are those with better economic conditions and reasonable technologies. As Patrícia Baptista points out, this reflects a lack of clear goals regarding the implementation of digital transformation at the municipal level, reinforcing the need for a holistic promotion of the ecosystem, rather than a sectoral approach, which has been the hallmark of Brazilian digital transformation. The United Nations shows that regional initiatives demonstrate the value of inter-regional*

hand, considering integration and coordination for all federal bodies, this criterion can be relaxed to contemplate a project aimed at identifying the gaps in specific localities[1105]. Furthermore, the focus shifts to the unique ecosystem and its attributes, structuring it based on its characteristics rather than a standardized and voluntary approach.

Brazil's digital governance strategy, through the platform approach, can accommodate the various levels and governmental units. It not only addresses federal internal governance but also a federation employing a decentralized perspective, intrinsic to the constitutional design. This represents a governance framework that can be understood as a type of orchestrated governance.

B. Government as a platform: orchestrated governance

The preceding narrative underscores that in the realm of digital platforms, governance assumes a new structure. This observation extends to the public sector when pondering on organizational architecture, implying a targeted – rather than general – application of the digital state model. It calls for envisioning a specific governance tailored for the platform.

Orchestration involves a control mechanism that shapes both the technological and institutional configuration of government to deliver public value[1106]. These governance mechanisms require harmonizing regulatory regimes embedded within technological architectures with those embedded within government as a platform's institutional frameworks. This refers to the axis of coordination and implementation, setting out the incentives and strategies to be incorporated into the governance approach as a distinct policy.

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cooperation and the applicability of digital transformation projects in addressing specific regional issues and the shared global development goals emphasized in the 2030 Agenda for Sustainable Development Ibid. ; OECD et INTER-AMERICAN DEVELOPMENT BANK, *Broadband Policies for Latin America and the Caribbean: A Digital Economy Toolkit*, s.l., OECD, juin 2016, disponible sur https://www.oecd-ilibrary.org/science-and-technology/broadband-policies-for-latin-america-and-the-caribbean_9789264251823-en (Consulté le 17 octobre 2023).

[1105] P. BAPTISTA et L. ANTOUN, « GOVERNO DIGITAL », *op. cit.*

[1106] First, the orchestrator (OIG) acts as a conductor of a model in which the performance is carried out by intermediaries. Second, the orchestrator does not have authoritative control over the intermediaries. This orchestration setup reflects a shift from governance systems to dynamic models that display several degrees of non-hierarchical relationships and functional differentiation in a system with multiple actors. Global Human Rights Governance and Orchestration: National Human Rights Institutions as Intermediaries.T. PEGRAM, « Global Human Rights Governance and Orchestration: National Human Rights Institutions as Intermediaries », *SSRN Electronic Journal*, 2014, disponible sur http://www.ssrn.com/abstract=2470499 (Consulté le 18 octobre 2023).

Therefore, orchestration stands out as a public sector governance tool, delineating the government as a platform configuration that pivots towards enhancing public value creation. The technological organizational architecture classifies platforms based on three primary traits, capturing the essence of orchestrated governance: ***1)*** authority and power center around the platform's orchestrator, with activity-related authority residing chiefly among actors; **2)** actor motivation is steered by a diverse set of incentives, curated by the orchestrator; and ***3)*** both governance and orchestration fuel independent decisions within the platform's rules and boundaries[1107]. Adopting Cordella's orchestrated governance model[1108], one can envision the Rede Nacional as an orchestrated platform model. It proposes centralization oriented towards control and standardization without necessarily constituting its infrastructure, thereby accommodating various ecosystems, each within its autonomy. The objectives of the Rede indicate that its rationale aligns closely with a platform-of-platforms model[1109].

[1107] O. BLACKBURN, P. RITALA et J. KERÄNEN, « Digital Platforms for the Circular Economy: Exploring Meta-Organizational Orchestration Mechanisms », *Organization & Environment*, juin 2023, vol. 36, n° 2, pp. 253-281, disponible sur http://journals.sagepub.com/doi/10.1177/10860266221130717 (Consulté le 18 octobre 2023).

[1108] A. CORDELLA et A. PALETTI, « Government as a platform, orchestration, and public value creation: The Italian case », *op. cit.*

[1109] According to Resolution n. 23, April 4, of 2019: *The scope of the RNGD, lies in: "Integrate and coordinate common digital transformation initiatives in the public sector. Enhance the connection between the State and its citizens, businesses, and civil society by prioritizing the provision of digital public services based on societal interests and needs. Encourage cost reduction and increased agility in the delivery of public services. Promote and articulate the development and reuse of collaborative solutions and digital platforms. Advocate for training programs and the development of skills related to digital transformation for public servants".*
Original: "*Art. 2º Compete à Rede Gov.Br: I - integrar e coordenar iniciativas comuns de transformação digital no setor público; II - promover a aproximação do Estado com o cidadão, as empresas e a sociedade civil, por meio da priorização da oferta de serviços públicos digitais de acordo com interesses e necessidades da sociedade; III - estimular a redução de custos e o aumento da agilidade na prestação de serviços públicos por meio digital; IV - promover e articular o desenvolvimento e o reuso de soluções colaborativas e de plataformas digitais; V - acompanhar o avanço da transformação digital no setor público em todo país; VI - fomentar o intercâmbio de experiências e de boas práticas; e VII - promover a realização de programas de formação e de desenvolvimento de habilidades relacionados à transformação digital para servidores públicos".* R.F. BRASIL, « Rede Nacional de Governo Digital », août 2023, disponible sur https://www.gov.br/governodigital/pt-br/transformacao-digital/rede-nacional-de-governo-digital/rede-nacional-de-governo-digital (Consulté le 18 octobre 2023).

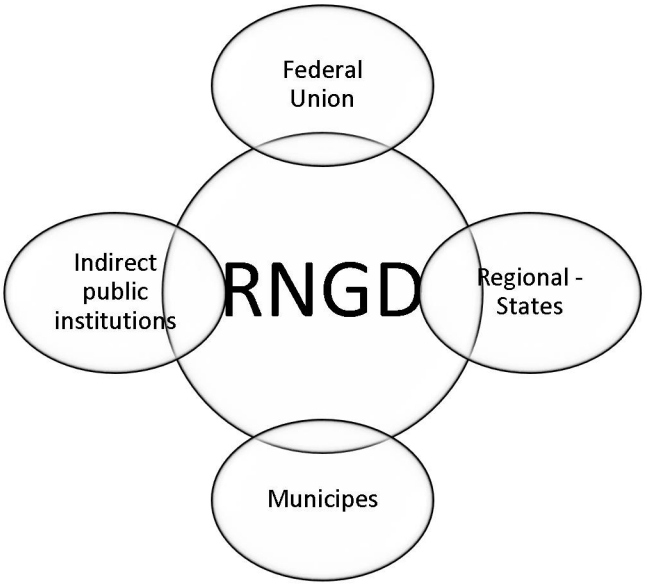

Table 7 : Internal Interoperability in Brazil

In contemplating internal interoperability, one might envision the government as a platform model as the archetypal *"platform-of-platforms*". It functions not merely as an infrastructural platform, but rather as a centralized coordinating mechanism aimed at promoting standardization, all the while safeguarding the autonomy of individual ecosystems. Such an approach venerates the autonomy of each federative entity and accentuates the necessity for a centralizing platform that formulates foundational standards. Moreover, it adeptly pinpoints asymmetries and disparities within each ecosystem.

Yet, it remains imperative to underscore that Brazil's current initiative does not mirror this concept. The "Rede Nacional" posits that its formation is rooted in the federative entities through a Membership Agreement, the execution of which is tethered to Initiative 4.2 of the Digital Government Strategy. Moreover, it primarily outlines a policy tailored for the public sector, delineating its governance spectrum. There's a pressing need to expand the Rede Nacional's scope beyond internal entities, incorporating external actors through an external interoperability lens. Should the Rede Nacional's primary mission be integration, its platform design must facilitate the harmonious integration of diverse ecosystems and ensure seamless inter-operation amongst them.

In essence, digital transformation within the platform framework signifies not only an internal restructuring but also a gateway for the platform to foster the construction by external actors of public value. To realize this, the digital transformation strategy must be envisioned as a state

plan encompassing all federative entities. In other words, it ought to be perceived as a governance framework for data and information, formulated as a state policy.

Such a proposition highlights ***two cardinal needs***: first, the imperative for a leadership equipped with new competencies, and second, the necessity for proper information management, encapsulated within the adaptation project.

C. Leadership and skills

Transitioning to the digital realm requires the enhancement of digital skills[1110] within the public sector[1111]. Both governance and administration must grapple with this transformation, ensuring that their personnel are fortified with the requisite knowledge for such evolution. This demands appropriate expertise, replete with skills and qualifications. Data governance hinges on a policy rooted in theoretical instruments and leadership within the public sector[1112]. Consequently, any information and data governance project require, foremost, robust leadership. Such leaders bear the responsibility for the creation, organization, security, maintenance, utilization, and disposal of information and data in a manner congruent with organizational objectives and conducive to the attainment of its goals. Leadership is pivotal not only in precisely delineating and identifying roles but also in strategizing and addressing potential liabilities. In this context, leadership embodies an adept capability for coordination and organization, which is paramount[1113].

This framework underscores that the structure introduces a renewed vocabulary, encompassing functions and skills. In this vein, Mariana Mazzucato[1114] highlights that skills encompass more

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[1110] As Pedro Luis do Nascimento highlights about Brazilian data digital public policy: "*There are three main challenges: access to data from many of the new organic sources; training staff to deal with data from the new sources, (...) and the need to produce statistics that meet the demanding quality requirements imposed on "traditional" statistical production*. P.L. DO NASCIMENTO SILVA, « Big Data e a produção de estatísticas », *Panorama Setorial da Internet*, Ecossistema e produção de dados, 2023, vol. 1, n° 1, p. 9, disponible sur https://cetic.br/media/docs/publicacoes/6/20230522114832/ano-xv-n-1-ecossistema-e-producao-de-dados.pdf (Consulté le 3 novembre 2023).

[1111] J. CHEVALLIER, « Vers l'État-plateforme ? », *op. cit.*

[1112] M. KITAYAMA et B. BIONI, « A Governança de Dados como Política Pública », *op. cit.*

[1113] In this perspective, the OECD has proposed a guide "for Digital Talent and Skills in the Public Sector" aimed at helping governments to identify and address needs. There are three pillars: i) creating an environment for actors working with digital governance; ii) identifying the skills required for a digital government in a given location; iii) implementing specific actions to create a workforce with digital skills. B.W. UBALDI Barbara-Chiara, « Digital Government », *op. cit.*

[1114] M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, 1re éd., *op. cit.*

than mere technical knowledge; they embrace an integrative dimension. A second insight from the author concerns the vision of leadership, requiring an exploration of "*non-financial assets, such as training, knowledge, networks, and access to digital expertise*". While these might not be direct economic solutions, they epitomize, in the author's words, "*genuine efficiency*". As such, the government requires distinct capabilities spread across diverse departments and specialized agencies[1115]. Nevertheless, a critical cornerstone involves conceptualizing the design of targeted actions and training activities to forge a workforce endowed with digital competencies.

Within Brazil, there is a discernible lack of investment in training and qualification[1116]. The Federal Court of Auditors has specifically pointed to gaps in the successful implementation of public governance, attributing it largely to the insufficient training of managers and public servants[1117].

Alternatively, conceiving the government as a platform suggests a structure aptly configured to house a governance paradigm steered and informed by data. There is an implicit demand to incorporate a qualified contingent that grasps the core tenets of such governance. The digital transformation narrative is hollow without the requisite technical qualification. While it remains unreasonable to expect the entire populace to possess data expertise, it becomes paramount to equip the governmental machinery with adept and informed personnel.

As Barbara Ubaldi elucidates, governments ought to pinpoint areas within their competency and skill models that necessitate enhancement to bolster digital governance maturity. Each nation, in turn, experiences unique contours in this realm[1118]. Brazil, acknowledged as a contrasting reality and needs. Given the broad spectrum of diversity and expansive needs, initiatives should skillfully account for nuances, be they sectoral, regional, or local. Technical qualification, coupled with the design of skills and competencies, should be tethered to multidisciplinary projects rooted in diversity and aimed at integrating sectors through nuanced recognition.

[1115] *Ibid.*
[1116] F. FILGUEIRAS et L. LUI, « Designing data governance in Brazil », *op. cit.*
[1117] Federal audit court states that*: "Public servants are perhaps the greatest resource of a government, but they need to be trained for the task, adequately rewarded, and effectively supervised. This does not always happen, and good governance requires trained, educated, and motivated civil servants to work in public service".* TRIBUNAL DE CONTAS DA UNIÃO, *Guia da política de governança pública*, *op. cit.*
[1118] B.W. UBALDI Barbara-Chiara, « Digital Government », *op. cit.*

Beyond the overarching public purpose, sector-specific objectives warrant consideration. It demands attention to the fundamental need for team diversity, ensuring that the ensemble encompasses, in its broadest sense, the multiple intricacies of the state, ranging from intersectional issues to regional imperatives and distinctions of class and gender[1119].

In the context of Brazil, recognizing the state's constraints and its subordination to programs and partnerships with foreign companies, it is posited that one avenue to reclaim digital sovereignty lies in contemplating qualification and leadership within an interdisciplinary training program, tailored for the conception and realization of digital solutions[1120]. Consequently, emphasis is laid on the potential collaboration with the Ministry of Education (MEC) to foster human resources equipped to pioneer mechanisms of digital sovereignty and to mitigate Brazil's reliance on major digital corporations[1121]. Such an endeavor does not solely aim at delivering more efficient services that cater to user expectations. On the contrary, the mission of a public digital governance policy should be adept at engaging with diverse sectors, encompassing the myriad nuances and idiosyncrasies of a given region, with the overarching objective being the development of Brazilian society itself.

Therefore, it becomes pivotal to align and synchronize digital governance strategies with other sectoral initiatives, such as those focused on equality, developmental promotion, and public service policies[1122].

In essence, the contemplation revolves around devising integrated strategies, not restricted merely to one sector or federal entity. The prevailing landscape underscores the imperative of envisioning institutions equipped with the requisite tools for such orchestration, ensuring that the development remains congruent with overarching strategies, as well as synchronized with technological investments and their deployment across varied public sectors and domains[1123]. As a corollary, digital transformation, when conceived as a policy, cannot be pigeonholed into sectoral, federal, or isolated perspectives. Instead, it ought to be sufficiently comprehensive to manifest as a national policy, encompassing various sectors and federal entities, both from

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[1119] *Ibid.*
[1120] F. LEFEVRE, « A dependência digital do Brasil \textbar Blog da Flávia Lefèvre », *op. cit.*
[1121] *Ibid.*
[1122] OECD, *The OECD Digital Government Policy Framework*, *op. cit.*
[1123] *Ibid.*

direct and indirect administration, underpinned by the orchestration model[1124]. The focus thus shifts towards conceptualizing a tailored structure and policy for this objective, culminating in a request for a national public digital governance framework. Such a framework should instigate administrative reforms, potentially leading to the establishment of a specific institution dedicated to this purpose.

D. The adequation project

The Governance program modifications manifest either as an adequation initiative or as an autonomous framework, which predicates an administrative overhaul. Viewed through the lens of the adequation initiative, they pertain to the evaluation of norms tethered to the cyberspace realm, mainly pivoting around personal data protection. Conversely, the exigency for systemic integration posits these strategies within the ambit of administrative reform, thereby unearthing the inherent managerial governance and philosophical underpinnings of such measures. An initial observation, thus, pivots on the imperative to analyze governance policy more expansively than merely as a compliance action to private and individual legal standards. Not least because a mere transplantation in alignment with the LGPD remains unfeasible, given the contrasting legal cultures at play (commercial/private versus public), further underscored by entrenched dichotomies[1125].

Regardless, an integral component of the adequation initiative rests upon conforming data governance to the stipulations of the General Data Protection Law (Law 13.709/2018). Brazilian legal scholarship accentuates that the adequation process must encompass: ***i)*** a thorough understanding of personal data flows within an organizational purview, ***ii)*** the identification of purposes deemed legitimate for data utilization, especially since the LGPD establishes this as a requisite criterion, and ***iii)*** the examination of the legal foundations that validate data processing (the legal basis[1126]).

[1124]While Brazil does not yet have a specific policy in this regard, examples can be identified in the United Kingdom and Canada. An example of a government adopting a strategic approach to developing digital talents and skills is the United Kingdom. In 2016, the UK government launched the Digital, Data, and Technology (DDaT) Profession. B.W. UBALDI Barbara-Chiara, « Digital Government », *op. cit.*

[1125] M. KITAYAMA et B. BIONI, « A Governança de Dados como Política Pública », *op. cit.*

[1126] B. BIONI *et al.*, « The digitization of the Brazilian national identity system: A descriptive and qualitative analysis of its information architecture », *op. cit.*

Moreover, it remains significant that the public sector data and information management strategies are not insensible to the imperative of safeguarding personal and confidential information[1127]. This technical criterion, though previously acknowledged, assumes a renewed dimension by compelling observance and discernment of legitimate purposes in compliance with the LGPD[1128].

The adequation initiative also requires the establishment of specific communication channels with the citizenry concerning data utilization and mandates the appointment of a dedicated personal data officer, as stipulated by the LGPD[1129].

The Adequation Initiative contemplates a structured approach as the platform. Through such a platform, emblematic of orchestrated governance, one envisions the digital transformation not merely as a means of adapting the public sector to personal data protection standards but as an evolution toward a comprehensive public digital governance policy. Thus, crucial elements of the platform's structure can be understood in a coordinated and integrative manner. For instance, the matter of data storage becomes paramount. In a recognized hybrid environment, effective governance becomes critical for data flow identification. Within the realm of cloud computing, a significant segment of the public sector has contracted Google[1130]. Beyond mere storage, the relationship encompasses the broader scope of cloud computing. The Gov.br Platform operates under the company and supports data interactions with the government, even integrating artificial intelligence technologies used to tailor digital public services within the Brazilian platform[1131].

[1127] This is what was observed in the interoperability manual of the Ministry of Planning. The Access to Information Law (LAI) also highlights, in the criteria for active transparency, that this only occurs after respecting information protections and confidentiality.

[1128] In the case of legitimate purposes, as will be seen later, this may lead to discussions about the data circulation process.

[1129] M. KITAYAMA et B. BIONI, « A Governança de Dados como Política Pública », *op. cit.*

[1130] In the case of the Brazilian public sector, there are numerous partnerships established between agencies and institutions with Google. One example is the G-Suite platform from the state of Amapá, introduced during the COVID-19 pandemic in 2020, and defined as "a collection of communication, storage, collaboration, and management applications, developed and made available by Google.C. de G. da T. da I. PRODAP -, « Governo do Amapá através do Prodap firma parceria com o Google », 27 mars 2020, disponible sur https://www.prodap.ap.gov.br/noticia_ler.php?slug=2703/governo-do-amapa-atraves-do-prodap-firma-parceria-com-o-google (Consulté le 1 novembre 2023).

[1131] F. FILGUEIRAS, P.L. DE MOURA PALOTTI et M. ISAIRA BAIA DO NASCIMENTO, « Policy design e uso de evidências: o caso da plataforma gov.br », *Livros*, avril 2022, pp. 521-550, disponible sur https://portalantigo.ipea.gov.br/portal/images/stories/PDFs/livros/livros/220412_lv_o_que_informa_miolo_cap16.pdf (Consulté le 1 novembre 2023).

Such a scenario prompts scholarly critiques highlighting the potential compromise of Brazil's digital sovereignty through data storage privatization. The imperative then is to re-evaluate data hosting and utilization strategies[1132]. A proposed solution entails establishing an infrastructure dedicated to governmental hosting, potentially conceptualized as a "*national data archive*". Such an institution could serve as a mediator between data owners and users[1133]. This structure might benefit from the establishment of data centers fostering collaborative initiatives between federal entities, other agencies, and institutions, facilitating data use and maintenance on both federal and local levels.

Therefore, the focus shifts toward developing a dedicated data storage and operation structure, transitioning from an acquisition mindset to a policy-oriented approach.

The rationale of orchestrated governance can address uniformity challenges, emphasizing not a singular environment but adherence to general *Government as Platform* standards, while respecting the autonomy of each unique ecosystem and its inherent challenges. Such considerations span integration, cooperation, and financing. Thus, normative cooperation, complemented by resource allocation, becomes paramount. The World Bank has highlighted the correlation between income and GovTech maturity, underscoring that financial commitment to digital transformation remains a pivotal factor in its successful realization. The government as platform model offers a potential solution to identify gaps, shortcomings, and objectives within each agency or entity[1134].

By viewing the Rede Nacional through the lens of government as platform, such a transition would become more transparent, enabling a clearer identification of the nuances inherent to each federal entity. Even if infrastructure adoption remains optional, aligning all entities at a national level to the Network's standards and mechanisms proves crucial for recognizing the unique characteristics of each ecosystem.

For instance, through the Network, one can provide digital access for municipal managers to discern the primary challenges their cities face in digital transformation. As widely recognized, digital transformation demands investments not only in data collection and processing but also in material aspects (like sensor installation, computational systems, and their integrations) and in the human technical sphere (such as skill profiles of government employees, where data

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[1132] B.W. UBALDI Barbara-Chiara, « Digital Government », *op. cit.*
[1133] F. LEFEVRE, « A dependência digital do Brasil \textbar Blog da Flávia Lefèvre », *op. cit.*
[1134] W. BANK, « GovTech Maturity Index, 2022 Update », *op. cit.*

analysts become indispensable)[1135]. However, rather than considering the subcontracting of external suppliers, which would introduce another variable to the transformation of the economic and organizational model, the focus should be on internal qualification without resorting to outsourcing[1136].

Utilizing the Network enables the formulation of action plans and preliminary financing projects[1137]. Through the government as platform framework, one can conceptualize incentives and funding for local technological arrangements to propose diverse solutions, whether to provide more efficient services in a specific locality or to address the job precariousness introduced by Big Techs. Furthermore, resources can be allocated to support cooperatives that might develop and control digital service platforms and other arrangements to prevent technological power concentration in both foreign and national enterprises[1138].

Regarding digital transformation policies, the OECD has already highlighted the void stemming from the absence of a specific sector to manage Brazil's digital government. The establishment of a council or a ministry for digital transformation emerges as a recommendation within academic circles[1139]. Currently, digital transformation resides within a Secretariat; however, its scope remains federal, not mandatorily impacting all federal entities. The apparent neglect of a national data governance space or structure requires reevaluation, aiming at introducing a scheme supportive of a national model. Such a perspective can be justified by the sovereignty of the federal republic, combined with the orchestrated governance platform model, embodied in the Rede Nacional. It should not be perceived merely as a federal infrastructure that municipalities can optionally join. Instead, it ought to be seen as a state policy of national scope, underscored by the orchestrated governance concept.

Consequently, the public digital governance framework in Brazil should encompass all federal entities, adopting an orchestrated stance. This approach establishes governance standards,

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[1135] E. GROSDHOMME LULIN, « Gouverner à l'ère du Big Data \textbar Institut de l'Entreprise », s.d., disponible sur https://www.institut-entreprise.fr/archives/gouverner-lere-du-big-data (Consulté le 18 octobre 2023).
[1136] M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, 1re éd., *op. cit.*
[1137] These are some of the solutions proposed by the Network, which are indicated within various dimensions that were established with the aim of preparing a diagnosis and observing the most suitable plan for each adhering entity.
[1138] J.R.R. AFONSO et B.M. MONTEIRO, « Do governo eletrônico à governança pública digital: muito por fazer (e ganhar) no Brasil », *Revista Conjuntura Econômica*, juin 2022, vol. 76, n° 06, pp. 22-24, disponible sur https://periodicos.fgv.br/rce/article/view/86085 (Consulté le 18 octobre 2023).
[1139] J.R.R. AFONSO et B.M. MONTEIRO, « Do governo eletrônico à governança pública digital: muito por fazer (e ganhar) no Brasil », *Revista Conjuntura Econômica*, juin 2022, vol. 76, n° 06, pp. 22-24, disponible sur https://periodicos.fgv.br/rce/article/view/86085 (Consulté le 18 octobre 2023).

derived from the network governance model, aiming to address the needs arising from a data-driven government. Specifically, this includes data flow and circulation, data governance and management, the requisite interoperability for sharing, the pursuit of collective values, and the protection of confidentiality and individual/personal data rights. All while complying with data norms and concurrently equipping and qualifying with adequate materials and skilled technicians to handle this distinct realm. Adherence to regulations will not materialize without appropriate technical knowledge, proper materials, and the necessary infrastructure.

Section Considerations

The current Section highlighted the significance of governance philosophy in guiding the mechanisms of digital governance and how the models of data governance and management hinge upon the underlying philosophy. The ensuing framework of governance, rooted in the digital state's political action model, encompasses organizational boundaries, structural delineations, architectural designs, infrastructure, and regulations pertinent to an ideal type of digital state political action.

Political action model- digital state	Network governance
Techno-regulation	Common good
Orientation	Data-driven
Architecture	Platform
Infrastructure	Orchestrated governance

Table 8 : Framework of the network governance and regulation model: Compiled by the author

Firstly, techno-regulation is directed toward the *common good* endeavors to forge collective values and activities enhancing societal well-being, embodying a philosophy divergent from models extolling the satisfaction of individual/private interests within the public sector. Whereas good governance orients itself toward the user, network governance leans towards the common good and the collective welfare.

Secondly, such a philosophy shapes the design of a data-driven government, whereby the governance and management of information and data navigate through an adequate infrastructure (the platform), entwining delivery processes and strategies to concretize the duty of digital government - its dimension of public value.

Thirdly, amid the fragmented, asymmetrical, and federative institutional configuration, adoption of the government as platform model emerges as a pivotal architecture within a typology of orchestrated governance. Attentive to the Brazilian institutional design, such an approach can nestle within the Digital Strategy and the "Rede Nacional do Governo Digital", aiming to envision a national digital public governance framework that orchestrates patterns, incentives, and ensures the cultivation of leadership, skills, and technical qualifications in an integrated manner, respectful of federative autonomies yet vigilant of localities. This perception aligns with a network governance model and divorces itself from viewing public governance as subsidiary to privates' perspectives, presenting itself as a model that transcends a project of public sector compliance to LGPD norms and utilizes this as one constituent element of a unique public governance framework, which contends with the peculiarities of a data-oriented state and aspires to forge values for the collective.

Thus lies the intended purpose. Whereas the good governance model heralds a reduction of state action, the emergence of the platform model does not signify the obliteration of the state. government as platform does not signify "*the end of the state, but rather, the personification of a rediscovered sovereignty at the digital game's epicenter*"[1140]. Within the public sector, platformization is, hence, the platform of platforms, which, ultimately, leans toward an exercise of control - external - materialized in the idea of orchestrated governance, posited as an efficacy model for a multiple ecosystem of ecosystems. Sovereignty, therefore, is repositioned toward an orchestrated governance model, wherein the public sector operates as an orchestrator, monitors, introduces overarching standardized regulations, and facilitates the development of various ecosystems.

As indicated previously, the political action of governance secures its validation through the efficacy of public action. Therefore, the ensuing chapter must contemplate public action and the core mechanisms and values aligning with this schema, while also dealing with the unique nature of a data-dependent society.

[1140] J. CHEVALLIER, « Vers l'État-plateforme ? », *op. cit.*

Chapter 6: Adapting the functions of the digital state to the data society

Chapter 5 proposed regulation by techno-regulation and governance instruments suitable for a data-driven government model, i.e., a platform infrastructure from the network governance political action model.

Chapter 6 analyzes these schemes, especially concerning their impacts on *public action*. As explained, one identifies these connections from the viewpoint of governance as an ideal type of state action (postmodern). This choice imposes exploration of cyberspace, data-driven governments and legal tools alongside a perception of the limits and foundations of power (instead of fundamental rights).

As stated, the observation of the relationship between political action (governance) and public action (*consensus*[1141]) is of paramount importance for the establishment of a digital state model aligned with a data-driven society.

First, as seen, these categories are intrinsically related. If the modern state ideal type had a composition in which political action *conditioned* public action and the construction of its elements within the ideal of legality and an extrinsic validity, the postmodern governance model carries different characteristics. Moreover, this arrangement between political/public categories of action shapes the understanding of public law, and its joint examination justifies a more unified view of public law itself[1142], as stated in the Introduction of the research. Then, such a view can assist in justifying the legal regime process of state actions validations with both its legitimacies and values.

Nevertheless, as exposed in **Chapter 5**, both the interpretation but especially the application of governance legitimacy differs across knowledge domains, despite its transversal nature[1143]. In the legal context, the validation process of governance (as a form of political action) cannot be equated with its counterpart in social sciences, for instance. Given this perspective, it becomes

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[1141] In Brazilian law, according to Vivian Lima Lopez Valle, consensus is much more than a source of legitimacy. It is the essence of the contract and is revealed in its planning, in the definition of the economic equation, in the discussion of the risk matrix, and its execution. In: V.C.L.L. VALLE, *Contratos administrativos e um novo regime jurídico de prerrogativas contratuais na Administração Pública contemporânea. 2017. 265 f, op. cit.*

[1142] L. CASINI, « Down the rabbit-hole », *op. cit.*

[1143] D. MOCKLE, « Le principe général du bon gouvernement », *Les Cahiers de droit*, 2019, vol. 60, n° 4, pp. 1031-1086.

imperative to chart this course within legal boundaries, which invariably will encompass the scrutiny of public action[1144].

According to Jacques Commaille[1145], the rise of governance ushers in a new rationality regime for public power, governability, and the foundations of political power. In this framework, political action pivots on the efficacy of public action, no longer solely reliant on a prior normative disposition – emerged from an artificial will. That is, governance garners its legitimacy *through* the execution of public action. Commaille[1146] posits that this interplay requires an examination of *public action* from the vantage point of *political power*, ensuring their mutual alignment.

Thus, in a governance model, both political and public actions integrate into an interdependent juridical legitimization process. As they are naturally relational, both dimensions are uncertain and contingent[1147]. Still, the explanation of legitimacy cannot be confined to the legal system alone. As these concepts gain recognition in the normative-legal realm, they cannot be considered "*extra-systemic*" [1148].

In this regard, in studying state actions by governance means in the legal realm, Daniel Mockle[1149] emphasizes that they are normative, dogmatic, and deontological principles. That means, in fact, a demarcation in the legal discipline regarding the principles of governance, that is crucial at this stage of the research.

Additionally, political and public actions cannot be scrutinized without considering the study's ***focal code,*** namely, the *networked nature of cyberspace*, the *relationships* established therein, and the *prevailing value-creation* modalities. These considerations dictate and justify the arrangements to be instituted in the networked governance model of the digital state.

[1144] In Brazilian law system, José Cristovam and Ligia Casimiro state that "*The governance does not overcome all the characteristics of administration that can be attributed to other theoretical models. The coexistence of paradigms is inherent in institutional complexity*" J.S. da S. CRISTOVAM, L.M.S.M. DE CASIMIRO et T.P. DE SOUSA, « Política de governança pública federal: adequação, modelo de gestão e desafios », *op. cit.*
[1145] J. COMMAILLE, « Sociologie de l'action publique », *op. cit.*
[1146] *Ibid.*
[1147] *Ibid.*
[1148] D. MOCKLE, *La gouvernance publique*, Droit et société, Paris-La Défense, LGDJ, 2022.
[1149] *Ibid.*

Hence, if information technologies mark the initial phase of informationalism, showcasing the cybernetic imaginary, the digital turn amplifies the proliferation of structures that not only interact but also converge[1150].

Pierre Beckouche, when referring to what he describes as an anthropological mutation, lists several elements constituting this phenomenon: ***i)*** the exponential production of information; ***ii)*** the unified circulation of data and its dual accessibility: user access to information and digital operators' access to users' data; ***iii)*** data storage and processing capacities that surpass human comprehension; and ***iv)*** the multiplication of applications addressing societal needs, whether in the domestic, economic, administrative, or cultural realms[1151].

Such shifts influence the public sector. Governments harness data for day-to-day activities, both internally and externally, for predicting demands and determining the services to be rendered[1152]. Within the public sector, these digital communication capabilities and computerized managerial oversight trigger profound transformations in the structure and operation of regulatory and governance institutions[1153].

Thus, discerning changes requires an examination of the state's organizational and institutional concerns. It's posited that, regarding the rationalization space of functionalities, the impact of emerging technologies prompts discernible shifts within the public sector: ***i)*** in organizational structures, architecture, and operations; ***ii)*** in cultural and management changes, tied to the ideal political-type model; ***iii)*** in the interactions between the state and society[1154].

Within this scenario, the following fundamental elements characterizing the "i*nformationa*l" paradigm emerge, centered on an interactive nature to be explored within the public sector framework at legal realm:

[1150] P.H. DIAMANDIS, « The Future is Faster Than You Think », s.d., disponible sur https://www.diamandis.com/blog/future-is-faster-than-you-think (Consulté le 17 octobre 2023).
[1151] P. BECKOUCHE, « La révolution numérique est-elle un tournant anthropologique ? », *Le Débat*, 2017, vol. 193, n° 1, pp. 153-166, disponible sur https://www.cairn.info/revue-le-debat-2017-1-page-153.htm.
[1152] UNITED NATIONS, *The future of digital government*, *op. cit.*
[1153] C. COHN, « Inventing the Future: Barlow and Beyond », *Duke law & technology review*, 2018.
[1154] J. CHEVALLIER, « Vers l'État-plateforme ? », *op. cit.*

Categories	Digital Framework
Technologies	Information Technologies
Paradigm	Cybernetics
Ecosystem	Cyberspace
Nature	Network
Product	Knowledge
Organization/Administration	Platform
Element	Data
Politic action	Governance
Public action	Responsibility
Purpose	Common Good

Table 9: Categories of the digital state model

In the current research, these impacts are not perceived as a mutation, but rather as a fundamental and necessary starting point for *correlations* codified by data society. It represents the vocabulary to be attached.

This, in turn, highlights new dimensions of value production analysis, communication spheres, and power spaces. These dimensions demand exploration, laying the foundation for governance strategies and the emergence of not only legal protections and rights, but also ***duties***. As these new realms surface, rights and duties must evolve, aligning with their distinct characteristics. So, while governance crafts a new lexicon, digital transformation amplifies intricacies by embedding values, principles, and renewed perspectives awaiting legal examination. It is important to consider, then, governance legal vocabulary alongside digital transformation concepts. In legal terms, consensus embodies public action as a concept correlated to the governance, and it has been increasingly recognized as a new paradigm[1155]. In this context, if governance is a type of political action, public action materializes in the paradigm of consensus, thus corresponding to its form.

With these considerations in mind, the process of validating the legitimacy of public action of a digital state is framed. **Section 1** observes the elements of validity, while **Section 2** deals with the instruments for verifying these legitimacies.

[1155] G.J. de OLIVEIRA, « Os acordos administrativos na dogmática brasileira contemporânea », *op. cit.* ; H. BOUILLON, *Le droit administratif à l'ère de la gouvernance*, *op. cit.*

Section 1. The legal validation process of public action in the digital state, Responsibility

In a regulatory state, public action presents novel forms of *legitimizing power*[1156]. As exposed, in the legal realm, governance as a category is operationalized by ***consensually***, and its accompanying principles (responsibility, transparency, accountability), guide the examination of the legitimacy presuppositions[1157]. Consensually, as exposed in **Chapter 2,** materializes through "*agreements among various actors*"[1158]. In turn, in the public law of a postmodern state model, ***responsibility*** as the concept of legitimation of state actions in the legal realm, finds its justification and value in the models of political action. Thus, while the political action model forms the bases and orients the perception of the principle of responsibility, it is the public action – as responsibility – that will confer the legitimacy of political action in a postmodern state model.

That is, it is through responsibility that the political and public legitimacy of a digital state model is conferred. Like other principles of governance[1159], it has a contemporary application derived from other disciplines. Accountability, for instance, is typically recognized as an "*icon of new public management*"[1160]. It also possesses a democratic governance perception, constituting the mechanism of horizontal accountability[1161].

In the realm of legal governance, these concepts are understood as principles that encompass both renewal and continuity, grounded in fundamental legal presuppositions such as the rule of law, separation of powers, protection of rights and freedoms, and the independence of the

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[1156]For Egon Bockman Moreira, the foundation of the Brazilian state as a regulator is materialized in articles 173 and 174 of the Constitution. E.B. MOREIRA, « Qual é o futuro do Direito da Regulação no Brasil », *Direito da regulação e políticas públicas. São Paulo: Malheiros*, 2014, pp. 107-139, disponible sur https://scholar.google.com/scholar?cluster=8257039287459127 90&hl=en&oi=scholarr (Consulté le 15 novembre 2023)..

[1157] D. MOCKLE, *La gouvernance publique*, *op. cit.*

[1158] J. CHEVALLIER, « L'état régulateur », *op. cit.*

[1159]Thus, while accountability, transparency, and participation are predominant elements, other included principles/elements are efficiency, effectiveness, openness, predictability, rule of law, coherence, justice, integrity, due process, proportionality, protection of human dignity, and simplification of procedures. All these concepts will compose the vocabulary of governance in the digital environment D. MOCKLE, *La gouvernance publique*, *op. cit.*

[1160] *Ibid.*

[1161] G.A. O'DONNELL, « Horizontal Accountability in New Democracies », *Journal of Democracy*, 1998, vol. 9, n° 3, pp. 112-126, disponible sur http://muse.jhu.edu/content/crossref/journals/journal_of_democracy/v009/9.3odonnell.html (Consulté le 31 octobre 2023).

judiciary[1162]. Daniel Mockle[1163], in studying *governance* as a legal principle, posits that its transposition into legal instruments can be likened to the insertion of similar references in a constitutional text to formulate fundamental principles. Hence, responsibility can be considered a justifying principle akin to freedom and justice, which should be interpreted in light of the validity presuppositions of the discipline.

Thus, while *governance* introduces a new vocabulary, its incorporation into legal scholarship does not occur without adhering to concepts delineated within the institutional arrangements of the rule of law. Therefore, these requirements continue to be fundamental and must be examined, while contemporary thoughts on governance also emphasize the manner of governing.

Thus, in **legal governance**, legitimacy is primarily translated into a general precept under the rule of law. The rule of law contemplates norms and actions ***in conformity***, generally leading principles and norms related to an order that follows the principles of a rule-of-law state. According to Jacques Commaille, governance, focusing on how to govern, is inherently unconfined, geared towards the capacity to act (political power finds its legitimacy in what it does, and in the effectiveness of what is produced by public action, a technical expression rather than a prior will[1164]).

In turn, the consensual paradigm, has the concept of *accountability* that can be observed in the public sector through ***two perspectives***. While good governance views accountability linked to a management model originating from corporate management models, another proposition of control lies in the perception of democratic governance within models of participation in state actions and in the means of evaluating state activities. Besides, in good governance, *accountability* is validated through the demonstration of efficiency and results, while democratic governance does so through democratic control and participation[1165].

Although these concepts embody public *accountability*, in the context of digital transformation, their denomination as a value or principle, and even its correlation, does not always occur

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[1162] For Daniel Mockle : *This legal governance is now more composite, combining the classic components of public action with dimensions that, without being radically New*". Original : « *Cette gouvernance juridique est désormais plus composite en associant les composantes classiques de l'action publique à des dimensions, qui sans être radicalement Nouvelles"* D. MOCKLE, *La gouvernance publique*, 1re éd., *op. cit.*, p. 20.
[1163] D. MOCKLE, *La gouvernance publique*, *op. cit.*
[1164] J. COMMAILLE, « Sociologie de l'action publique », *op. cit.*
[1165] D. MOCKLE, *La gouvernance publique*, *op. cit.*

uniformly[1166]. Moreover, as seen, digital transformation introduces new dimensions and concepts, and, is driven by mechanisms geared towards a data society in a data-driven government. Therefore, for research purposes, it is crucial to establish a delimitation regarding the understanding and meaning of the concepts to be used. As such, the aim is to examine traditional principles of public governance, in conjunction with the drivers of digital public governance policy.

This will lead to the delineation of the digital state's political action model, which finds the validation of its acts through *accountability*, ascertained from the guiding principles that comprise consensualism (transparency), followed by evaluation/audit. These principles are studied (as ideal models) based on criteria outlined by institutions.

Thus, if *accountability* is the mode of legitimation of governance par excellence, it behooves inquiry into its analysis within the legal domain through a data-driven government, aiming to highlight how its nuances have been established from the perspective of good governance and democratic governance, and then to suggest how network governance (plural and relational) implies modifications in notions and interpretations.

§1The principles of justification

The basic and traditional principles of public governance, specifically transparency, accountability, and participation[1167], considered in the context of guiding principles for digital public governance policies[1168], indicate that responsibility is evaluated with respect to principles ***of competence*** and ***values***. Principles such as *responsiveness* and reliability fall

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[1166]For the United Nations, *Responsibility* is constituted by integrity, transparency, and information. Meanwhile, Luciano Floridi identifies *four ethical concerns of network society*: network infrastructure, post-political governance, social inclusion, and sustainability, incorporating within the first concerns about control, surveillance, data privacy, and security. According to the *Brazilian Institute of Corporate Governance*, ethics validates the principles of corporate governance - integrity, transparency, equity, accountability, and sustainability. Thus, although most follow the broad vocabulary of governance in the digital environment, there is no uniformity about the concepts and notions which can differ.

[1167]Along these lines, Daniel Mockle. Gustavo Justino de Oliveira, in Brazilian doctrine, also defines the basic assumptions of public governance and democratic participation. D. MOCKLE, *La gouvernance publique*, 1re éd., *op. cit.* ; G.H.J. de OLIVEIRA et R.O.M. WANIS, « "Estado pandemia" e "Estado pós-pandemia": ensaio sobre influências do desenvolvimento e da nova governança pública para a emergência de modelos de Estado e de gestão pública mais eficientes e inclusivos », *op. cit.*

[1168] OECD, *The OECD Digital Government Policy Framework*, *op. cit.* ; B.W. UBALDI Barbara-Chiara, « Digital Government: The Future Is Already Here, It's Just Unevenly Distributed », in *Pivoting Government through Digital Transformation*, s.l., Auerbach Publications, 2023.

under the category of competence, whereas *integrity* and ethics are categorized as value principles[1169]. Transparency, in the context of digital transformation, is seen as a mechanism dimension, linked with elements like digitization and data openness. Hence, examining the essence of accountability involves looking at its principle of competence, responsiveness, and its foundational value principle.

A. Responsiveness of good governance

Within public governance, the principle of responsiveness is recognized as a defining element for the objectives of activities in the public sector. This principle justifies the structure of the political action model. Being a principle of competence, it influences evaluations and sanctions in the exercise of power. The principles of legality and juridicity, along with their corollary principles (regularity, validity, coherence, stability)[1170], remain fundamental in the legal framework. However, in the context of responsibility as a legal concept for public action, the ends of responsiveness gain significant importance.

In the Brazilian system, Decree No. 9,203 of 2017 is understood as a foundational instrument for examining public governance, from which guiding principles can be derived. The Brazilian Federal Court of Auditors (*Tribunal de Contas da União* - in the Portuguese acronym - TCU)[1171] emphasizes the importance of these principles[1172], considered as the "*main normative framework for the development of governance policy, in defining competence, structure, and coordinated, contextualized coordination*"[1173]. In this rationale, the entity highlights that "*responsiveness is linked to trust in government*" and constitutes an *"essential cross-sectoral enabler for a country's development*". The institution concludes that responsiveness is "*perhaps the most important principle among those established by the governance policy*"[1174].

[1169] Barbara Ubaldi suggests that competencies (responsiveness and reliability) and values (integrity, openness, and fairness) are vectors capable of boosting trust in public institutions. B.W. UBALDI Barbara-Chiara, « Digital Government », *op. cit.*

[1170] D. MOCKLE, *La gouvernance publique*, *op. cit.*

[1171] Original: "*principal arcabouço normativo-prescritivo para o desenvolvimento da política de governança", na delimitação de competência, estrutura e coordenação coordenada e contextualizada*". TRIBUNAL DE CONTAS DA UNIÃO, *Guia da política de governança pública*, *op. cit.*, p. 38.

[1172] 1. Responsiveness; 2. Integrity; 3. Transparency; 4. Equity and participation; 5. Accountability; 6. Reliability; 7. Regulatory improvement. S.-G. REPUBLICA (PR), Decreto n° 9.203, de 22 de novembro de 2017, *op. cit.*

[1173] Such trust represents the fundamental element of the legitimacy of public action. TRIBUNAL DE CONTAS DA UNIÃO, *Guia da política de governança pública*, *op. cit.*

[1174] *Ibid.*

Therefore, in Brazil, it is the responsiveness that sets the tone for its direction. For the Federal Court, the principles established in the decree serve as connectors between constitutional principles and the actions of public actors. For instance, an analysis of these principles is indicated in light of the Brazilian Introduction to the Rules of Law, Decree nº 4.657/1942 (*Lei de Introdução às Normas do Direito Brasileiro,* in the Portuguese acronym – LINDB) as well as an examination of the practical consequences[1175] of public decisions[1176]. In the Brazilian framework, by the disposition of the Decree No. 9,203 of 2017 Government and public managers, under this context, adhere to directives outlined in sections I and II of Article 4, focusing on directing actions towards result-oriented outcomes and promoting administrative simplification along with public management modernization[1177].

This illustrates that, in the context of responsibility, the logic of good governance underpins the interpretation of Brazilian public governance, which is also evident in the perception of principles, not by designating responsiveness as a primary guideline, but by equating it with outcomes.

In the interpretation of *good governance*, responsiveness assumes a dichotomous nature, with distinct rights and obligations, as well as values. Good governance principles define responsiveness as a public institution's competence to efficiently and effectively address citizens' needs, foresee interests, and anticipate aspirations. Responsiveness represents a citizen-centered perspective, highlighting essential management vectors in public administration: integration, simplification, and innovative management[1178].

Thus, in the context of good governance, responsiveness encompasses ***two distinct dimensions***. The first addresses citizen satisfaction, focusing on delivering outcomes beneficial to the population. The second dimension requires the administration to demonstrate efficient public

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[1175] Article 20, of the Decree nº 4.657/1942: *Art. 20. In administrative, supervisory, and judicial spheres, decisions shall not be made based on abstract legal values without considering the practical consequences of the decision.* Original: Art. 20. "*Nas esferas administrativa, controladora e judicial, não se decidirá com base em valores jurídicos abstratos sem que sejam consideradas as consequências práticas da decisão.*

[1176] "*The institution responsible for these functions is urged to avoid decisions based on abstract legal values and, where appropriate, to consider the practical consequences of these deliberations*". TRIBUNAL DE CONTAS DA UNIÃO, *Guia da política de governança pública, op. cit.*

[1177] B.P. da REPUBLICA (PR), « Decreto n. 9.903, de 8 de julho de 2019 », *http://www.planalto.gov.br/ccivil_03/_Ato2019-2022/2019/Decreto/D9903.htm*, juillet 2019, disponible sur https://repositorio.cgu.gov.br/handle/1/64735 (Consulté le 2 novembre 2023).

[1178] For Barbara Ubaldi: "*Responsibility refers to the provision of efficient, quality, accessible, timely, and citizen-centered public services, which are coordinated across government levels and which satisfy users. Furthermore, these services should be innovative, efficient, and meet the needs of the users*". B.W. UBALDI Barbara-Chiara, « Digital Government », *op. cit.*

sector management. Therefore, in the realm of good governance, responsiveness manifests through two contrasting poles, each directed towards distinct actors: the citizen, concerned with satisfaction, and the public manager, dedicated to efficiency.

Such an approach reinterprets the traditional concept of governmental competence, which traditionally centers on ensuring public interest. Under this new perspective, the legitimacy of public managers' actions derives not from public interest alone, but from citizen satisfaction. This shift introduces a dual role for the individual: as a beneficiary seeking satisfaction and as an efficient actor in the public sector[1179].

In the governance context, responsiveness aligns with this concept, emphasizing the provision of innovative, efficient public services tailored to user needs. For the manager, responsiveness in digital governance entails embracing innovation, visible through networks of best practices for effective arrangements in open systems[1180]. The state enters the realm of responsive governance, characterized by proactive[1181], innovative servants focused on citizen needs[1182]. As observed, there is a dichotomy between individual satisfaction and obligations of the state through standards. A clear separation of functions and expectations is evident, as the state is not positioned as a guarantor of public interest but rather as a vehicle for satisfying individual needs.

Nevertheless, the combination of *"citizen expectation"* and *"innovative management"* forms a model evaluated through mechanisms assessing the outcomes of policies and public actors' actions[1183]. This relationship between the state and society manifests under the "*banner of trust*" a principle of a *"new collective action*". This trust, derived from the state, inclines citizens to reciprocate, potentially bridging the legitimacy gap in public action[1184].

[1179]For public services, accountability means providing efficient, quality, accessible, timely, and citizen-centered public services that are coordinated between levels of government and satisfy users. They must be innovative, efficient, and meet users' needs. In: OECD, *The OECD Digital Government Policy Framework*, *op. cit.*

[1180] *Ibid.*

[1181]The Federal Court Auditors Manual states that: *"Responsiveness represents the ability of a public institution to efficiently and effectively meet the needs of its citizens, including anticipating interests and anticipating aspirations". "A capacidade de resposta (do inglês, responsiveness) representa a competência de uma instituição pública de atender de forma eficiente e eficaz às necessidades dos cidadãos, inclusive antevendo interesses e antecipando aspirações".*TRIBUNAL DE CONTAS DA UNIÃO, *Guia da política de governança pública*, *op. cit.*

[1182]The Federal Court Auditors Manual states that: *"'With Decree No. 9.203 of 2017, Brazil began to be part of this select group and continued a process of rapprochement with the citizen that will especially affect the way leaders act in the federal public service."* Original: "*Com o Decreto no 9.203, de 2017, o Brasil começou a fazer parte desse seleto grupo e deu continuidade a um processo de aproximação com o cidadão que afetará".Ibid.*

[1183] B.W. UBALDI Barbara-Chiara, « Digital Government », *op. cit.*

[1184] J. CHEVALLIER, « Vers l'État-plateforme ? », *op. cit.*

The problem, however, is that "***trust***" cannot materialize in dichotomous environments. Trust is a component of a relational environment, established through a bond. The aspiration for trust through the lens of good governance remains elusive, as it reduces responsiveness to mechanisms not only confined to individualistic perceptions but also places the state in opposition to society for personal gain and guaranteed benefits through standard compliance. Thus, the essential relational bond for achieving trust remains absent. Therefore, a result-oriented system places individual value on one side and calculative measures in a controlling system on the other[1185].

The managerialist logic, characterized by its vocabulary of control, results, and competition, diverges from the vocabulary of trust. Trust emerges in a different context. In managerial models, as Ana Paula Paes explains, management relates to a dialogic paradigm, involving communication, interactivity, and sharing[1186]. Trust is achievable only within an interactive model, dependent on established relationships and interactions. Accordingly, in the interpretation of good governance, responsiveness alters governmental objectives, positioning on one side individualistic expectations centered around the user, and on the other, risk management and state evaluation.

Still, responsiveness as a competence principle, depends on the value assigned to it. Then, it becomes possible to examine this principle with a new perspective.

B. Responsiveness of network governance

Although the principle of responsiveness originates from corporate governance, it can be applied in the realm of public governance and digital transformation with different perspectives. As Viktor Mayer-Schonberger emphasizes[1187], the data protection and governance community

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[1185] M. GUENOUN et N. MATYJASIK, « La fin de l'histoire du NPM ? », in *En finir avec le New Public Management*, Gestion publique, Vincennes, Institut de la gestion publique et du développement économique, 16 mai 2019, pp. 1-26, disponible sur http://books.openedition.org/igpde/5790 (Consulté le 28 octobre 2023).

[1186] According to the author: "*The empirical conception of management allows us to make the necessary shift in meanings, abandoning the notion that management is necessarily linked to keywords derived from market logic and the ideology of control, such as optimization, productivity, competitiveness, and results, to renew the lexical field, bringing it closer to the nature and dialectical and dialogical essence of management: communication, creativity, collaboration, and human development*". A.P.P.D. PAULA, « Em busca de uma ressignificação para o imaginário gerencial: os desafios da criação e da dialogicidade », *RAM. Revista de Administração Mackenzie*, avril 2016, vol. 17, n° 2, pp. 18-41, disponible sur http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1678-69712016000200018&lng=pt&tlng=pt (Consulté le 17 octobre 2023).

[1187] V. MAYER-SCHÖNBERGER et T. RAMGE, *Access rules : freeing data from big tech for a better future*, Oakland [California], University of California Press, 2022.

has developed processes and structures, institutions, and networks of specialized knowledge, offering useful mechanisms for accountability and responsibility; for assessment, balance, and risk mitigation; and for establishing effective control and enforcement instruments. Therefore, it is not appropriate to dismiss such concepts but rather to shift the focus of the analysis[1188].

Therefore, established principles are not ignored, particularly because "*laws and norms are not about speed, but about direction (...), as they should guide the proper development of a society*"[1189].

Additionally, if good governance implicated indirect privatization with the establishment of compliance and accountability regulations with a lack of responsibility, the answers lie not in erasing these concepts, but in an interpretation that posits the public interest on the center[1190]. Consequently, if trust is a conditional factor underpinning *responsibility*, its effectiveness can only be achieved through a process that ensures transparency and connectivity, aimed at the collective, the community, and their well-being, thereby placing responsibilities within their appropriate measures.

1- The process, the code

In this vein, the network governance approach is pertinent, viewed as a process with regulation sensitive to the reticular nature of the ecosystem.

Governance, in this regard, represents a plural and processual type, characterized by its network-like, relational structure. The "network" aspect offers an alternative to the dichotomous model by fostering a relational perspective. In this framework, while political action might have been autonomous, responsibility, alongside governance, is plural, adhering to the logic of an ideal government's pursuit of the common good.

Understanding that principles should be examined not in light of an individualistic orientation of positions, but from a data-driven perspective, one thinks of a process. The rationale lies in

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[1188]In the author's case, he mentions the limited literature on the protection of personal data, arguing that moving from data protection to accountability can ensure that this latent knowledge about privacy can and is applied in the context of data-driven machine learning. *Ibid.*

[1189] L. FLORIDI, « Infraethics–on the Conditions of Possibility of Morality », *op. cit.*

[1190] C. GOANTA et J. SPANAKIS, « Discussing The Legitimacy of Digital Market Surveillance », *Stanford Journal of Computational Antitrust*, avril 2022, n° 2, pp. 44-55, disponible sur https://law.stanford.edu/wp-content/uploads/2022/04/goanta-spanakis.pdf (Consulté le 16 novembre 2023).

the procedural nature itself, from which robust legal and principled instruments are derived in the legal order, particularly procedural statutes. In this vein, recognizing that a data-driven government is not about individualistic satisfaction or control, but rather about a process, the developed instruments of a procedural nature are set as conditioners of how relationships are established, and how the purposes, and criteria, and guidelines are consolidated in the Brazilian legal order.

Thus, instead of public governance arising from corporate justifications, governance can be justified on the premises of an administrative process, *as* network governance is coded in *interdependence,* dialogical nature, not being limited to an object (individual), but to the relationship.

Hence, it is established that not only does administrative law have an instrumental function, as a tool, but the law itself in this sense will be functional, meaning a *functional law* of rights and responsibilities paying attention to its relationship, in the context,. The mutation is important as it stems from the codification itself, which moves from the individual to the process, the relationship.

Initially, from the standpoint of network governance, the analysis of *accountability* principles takes into account a data-dependent society, a data-driven government, and consequently, the paradigm of information flow. This contrasts with the individualistic interpretation of good governance focused on individual satisfaction and control. The plural and networked nature establishes that the structure of the digital state model primarily centers on society's data dependence. In a hybrid, complex, multidimensional, and constantly emerging environment, contemplating a regulatory model for the information flow process appears more practical.

Furthermore, perceiving information flow as a process allows for the application of normative instruments through legal frameworks, guided by the procedural perception of information circulation intrinsic to a data-driven government.

This support is identifiable in a perception of law as a relation, as seen in **Chapter 3.** Legal relations and procedures are legal categories absorbed by the doctrine of legal relations, with the procedure serving as a tool for legal relations and their regulation, where participants are called to act. In this vein, Vasco Pereira explains that "*individuals*" and "*group subjective rights*" contain substantive aspects and procedural dimensions, which translate into the power of the holders to intervene and influence the administrative procedure. Indeed, for him, the

procedural dimension constitutes the structuring principle of the constitutive legal-administrative relation, acquiring distinct configurations[1191].

Therefore, through the lens of network governance and public law of the common good, the code is neither individualistic nor dichotomous but *relational*, stemming from an understanding of a data-oriented space, thus a process. This implies a renewed consideration of what constitutes a government's digital responsiveness.

Thus, moving away from the state vs. individual/citizen dichotomies, the analysis shifts towards a data-driven government perspective. This shift has significant implications for how *accountability* materializes, particularly as it transforms the accountability process, both in terms of timing and legitimate parties involved. Additionally, it alters the criteria for evaluating responsiveness (of both managers and citizens) and their objectives.

2- Oriented for the common good

In this context, if responsiveness in *good governance* arises from individualist and dichotomous interpretations, the network governance perspective implies a unified understanding. In network governance, responsiveness is directed towards the common good, the well-being of the community, whose sole purpose is established throughout the entire process, ensuring the bond that allows for the emergence of trust among actors. Therefore, instead of establishing aprioristic and dichotomous purposes of competencies based on the positions of agents, in network governance, the competence of responsiveness is evident in its singular purpose: the common good.

Hence, a fundamental repositioning to consider in this principle, through the lens of network governance, is that the purpose and goal of responsiveness do not center on disparate and dichotomous objectives (user satisfaction vs. control of public manager activities). Indeed, the principle of good government[1192] reposits the core and end goal of state actions, serving as the directing and guiding factor, akin to the process of techno-regulation indicated in **Chapter 5**. This demonstrates that the design, and implementation of political/public action, and its

[1191] V.M.P.D.P. da SILVA, *Em busca do acto administrativo perdido*, *op.cit.*
[1192] L. FLORIDI, *Il verde e il blu: idee ingenue per migliorare la politica*, *op. cit.*

philosophical-political value orientation are directed towards the common good, through an interpretation of interdependence.

As observed, the common good, as a value, finds support in the Federal Constitution, in the republican principle, and also in Article Three, which establishes the well-being of the community. Additionally, further normative support can be considered in the Federal Administrative Procedure Law (LPAF - Law 9784.1990[1193]), which has subsidiary application to the legal system and establishes the process as a mechanism for protecting individuals and ensuring the ends of administration, listed in its second article as serving the general interest.

Upon examining the terms of the Federal Administrative Procedure Law[1194], it is apparent that the ends of administration do not reside in individual satisfaction, but in serving the general interest. It is this general interest that is valued and maintained.

The legislation also stipulates several procedural mechanisms to be established following the law and the necessary respect for dialogical and constitutional principles, including public interest and efficiency. Thus, through network governance lectures, *responsiveness* maintains the purpose of achieving the general interest, subject to the precepts of the Constitution and the law governing administrative processes.

In this way, re-examining the public governance decree, the definition of public governance allows for the repositioning of the concept of responsiveness not towards the result, but towards service provision for the interest of society[1195], that is, the collective. Moreover, the decree

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[1193]The law also distinguishes between the general interest and the public interest, placing the latter as a correlate of private interest, linking it to a probity bias. C.C. REPUBLICA (PR), Regula o processo administrativo no âmbito da Administração Pública Federal., 9.784 de 1999, disponible sur https://www.planalto.gov.br/ccivil_03/leis/l9784.htm (Consulté le 19 novembre 2023).

[1194]Art. 2 The Public Administration shall obey, among others, the principles of legality, purpose, motivation, reasonableness, proportionality, morality, broad defense, adversarial proceedings, legal security, public interest, and efficiency. Sole paragraph. The following criteria, among others, shall be observed in administrative proceedings: I - acting following the law and the law; II - serving purposes of general interest, with total or partial renunciation of powers or competencies being prohibited unless authorized by law. *Ibid.*

[1195] *"I - public governance - a set of leadership, strategy, and control mechanisms put in place to evaluate, direct, and monitor management, to conduct public policies and provide services of interest to society; II - public value - products and results generated, preserved or delivered by the activities of an organization that represent effective and useful responses to the needs or demands of the public interest and change aspects of society as a whole or of some specific groups recognized as legitimate recipients of public goods and services";* Original: "*I - governança pública - conjunto de mecanismos de liderança, estratégia e controle postos em prática para avaliar, direcionar e monitorar a gestão, com vistas à condução de políticas públicas e à prestação de serviços de interesse da sociedade; II - valor público - produtos e resultados gerados, preservados ou entregues pelas atividades de uma organização que representem respostas efetivas e úteis às necessidades ou às demandas de interesse público e modifiquem aspectos do conjunto da sociedade ou de alguns grupos específicos reconhecidos como destinatários legítimos de bens e serviços públicos".* S.-G. REPUBLICA (PR), Decreto nº 9.203, de 22 de novembro de 2017, *op. cit.*

contemplates the objective of responsiveness for public value, as stated in section II of Article 1 of the Decree. public value, although underexplored in the realm of Brazilian public management, can be employed to justify government acts in public management, directing the purpose of responsiveness towards projects that enhance the construction of public values, as opposed to individualistic responsiveness.

In the case of *public value*, it has, as previously seen, a connection with public management and can be examined through perspectives distinct from individualistic positions. From the network governance perspective, *public value* is the measure evaluating the performances of public managers (although, as will be seen later, this is not limited to them). Through the *public value* of *network governance*, performance is not measured in response to the consumer, but by objectives that are multiple and constantly changing, specifically because it is a relational model, attentive to the procedural aspect, as opposed to administrative rationalization focused on the result. Thus, government performance resides not in the capacity of response to work less and cost less, but in meeting social expectations. Through *public value*, therefore, responsiveness means the relational performance of multiple objectives directed toward the community[1196].

This situation highlights that network governance entails a proper perception of *responsiveness*. It is not assessed based on the position of the agents, but rather on the objective. Moreover, this changes the legitimization of the parties, which cannot be considered in a dichotomous manner (society vs. state). In this approach, there is no user's right on one side and risk assessment by the public manager on the other. Certainly, the criteria for examination will vary, to be examined according to the actors, and agents, in their respective positions and actions. However, network governance will enable *accountability* to be examined in the context of the process, such that it can be diversified, identified, and placed at different moments.

Indeed, in *network governance*, the governance of the digital world has a polycentric nature, with various actors and users and processes that encourage collaboration and the implementation of actions leading to the resilience and adaptability of the involved institutions[1197]. This exposition, therefore, reveals that in the context of *network governance*,

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[1196] A. CORDELLA et C.M. BONINA, « A public value perspective for ICT enabled public sector reforms: A theoretical reflection », *Government Information Quarterly*, octobre 2012, vol. 29, n° 4, pp. 512-520, disponible sur https://linkinghub.elsevier.com/retrieve/pii/S0740624X12001001 (Consulté le 17 octobre 2023).
[1197] V. ALMEIDA, F. FILGUEIRAS et F. GAETANI, « Digital Governance and the Tragedy of the Commons », *op. cit.*

responsiveness has a singular purpose, assessed through a code that is established not with a focus on or directed towards the individual, but towards the process. This purpose is justified and finds reinforcement in the values established in the understanding of *responsibility*.

§2 The values of accountability

In public governance, the principles of competence (responsiveness and reliability) are weighed against value-based principles, particularly ethics and integrity, from which their interpretation is inextricable from the adopted governance model. If the ethics of *good governance* are individualistic and dichotomous **(A)**, the ethics of *network governance* will be relational and oriented towards the *common good* **(B).**

A. The ethics of good governance

Ethics and integrity are terms that form part of the governance imagination within an informationalist paradigm. They are concepts employed in both public and corporate governance, as well as in the digital revolution, where the ethical use of technologies is considered. That is, if efficiency, effectiveness, efficacy, technique, management, and participation already constituted a new set of principles brought by the logic of good governance[1198] and democratic governance, the digital revolution is accompanied by an even broader set, including ethics, ecology, and communication, for instance[1199].

Therefore, it is crucial to establish minimum guidelines to delineate their notion within a *network governance* model, identifying their perception of public governance derived from corporate governance of *good governance*, and in the employment of the digital revolution, especially in the interactive use of information technologies.

In the context of the digital transformation of governments and public governance[1200], as seen, the dimensions of transformation are based on the recommendations of international

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[1198] D. MOCKLE, *La gouvernance publique*, *op. cit.*

[1199] E. JEULAND, « Theories of Legal Relations », *op. cit.*

[1200] The Federal Court Rapport on the decree states: "*Decree No. 9.203, of 2017, presents a synthetic list of governance principles and guidelines, defined based on: i) the most current recommendations from international organizations specialized in the subject, especially the OECD and the World Bank; ii) governance benchmarks from the Federal Court of Auditors; and iii) a review of specialized literature*". TRIBUNAL DE CONTAS DA UNIÃO, *Guia da Política de Governança Pública — Casa Civil*, Brasília, 2018, disponible sur

organizations and institutions. Brazilian public policies, projects, and standards are aligned with these dimensions. It has been established that the model of *good governance* addresses corporate governance, intended to impose performances of "*good behavior*", measured through the adoption of "*best practices*" that demonstrate compliance with ethical conduct. In the sphere of public governance, ethics originates from corporate governance, and in the disposition of public ethics, as an instrumental element to ensure good governance.

In the realm of public management, *ethics* emerges as a mechanism to evaluate the conduct of public managers, through the verification of the adoption of best practices. The OECD, for instance, can legitimize a country's internal management approaches, even for non-members (like Brazil), and, in fact, it suggests the content of best management practices. This includes all practices, from combating corruption to proposals for ethical infrastructure or strategies for monitoring public procurement, based on good governance[1201].

As a driving force, ethics stands out as a complementary mechanism in anti-corruption strategies, directly targeting the conduct of public employees (preventing misconduct). The aim is to curb and minimize problematic behaviors in public organizations. Ethics, thus, is an instrument for regulating the behavior of public managers[1202].

Generally, in corporate governance, ethics is understood as the foundation of other governance principles and also as the direction of the standards to be stipulated[1203]. Corporate governance has evolved in recent years to *include integrity* and fairness, concepts also aligned with the good individual behavior of the agent, quantified through standards, i.e., calculations and metrics, of compliance with models that guarantee public interest over private, again guaranteed through ethics, that is, compliance with standards (risk management).

It is worth mentioning that, generally, *"protection of integrity*" refers to measures aimed at strengthening the primacy of public interest. However, this public interest is quite precise[1204]. It involves a culture of integrity protection to shield public interest from the encroachment of

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https://www.gov.br/casacivil/pt-br/assuntos/governanca/comite-interministerial-de-governanca/arquivos/guia-da-politica-de-governanca-publica_versao-defeso.pdf/view (Consulté le 1 novembre 2023).

[1201] A. LACROIX (éd.), *Éthique et intégrité du service public*, Administration publique et gouvernance, n° 10, Québec (Québec), Presses de l'Université du Québec, 2022.

[1202] *Ibid.*

[1203] According to the Brazilian Institute of Corporate Governance, ethics validates the principles of corporate governance - integrity, transparency, equity (accountability), and sustainability. There is therefore no uniformity, although the most follow the broad vocabulary of governance in the digital environment. IBGC, « conhecimento: governança corporativa », *op. cit.*

[1204] A. LACROIX (éd.), *Éthique et intégrité du service public*, *op. cit.*

private interests seeking to hijack public decisions for personal benefit. In this sense, integrity is understood as the practice and enhancement of an "*ethical culture in the organization,*" which means avoiding "*decisions influenced by conflicts of interest, maintaining coherence between discourse and action, and preserving loyalty to the organization and care for its stakeholders, society in general, and the environment*"[1205].

In this logic, the proof of ethical behavior is *through the evaluation of good behavior*, measured by metrics of best practices. Thus, in public management, ethics is an instrumental (*not finalists*) concept whose intention (*of individualistic origin*) refers to *a technical* demonstration of the public manager's performance, who must prove that they acted following best practices, condemning conflicts of interest, that is, pursuing the adoption of metrics in opposition to personal interests. Towards an integrity structure, governments strive to multiply norms, structures, and mechanisms in the field of governmental ethics to adapt and present a good impression for obtaining a good score in the next governance reports, as exemplified by Brazil[1206].

This rationale extends to the examination of digital governments. In line with the OECD's understanding, integrity means aligning public institutions with values, principles, and ethical norms to protect the public interest. Furthermore, the integrity of a digital government is the ability to share services and prioritize their digitalization. For this, public managers must make decisions and use public resources ethically, that is, promoting public interest over private interests. To achieve this, mechanisms of accountability between public institutions at all levels of governance should be established, along with the promotion of a neutral service whose values and standards of ethics are respected and which defend and prioritize public interest[1207].

These standards, in the context of good governance, correspond to the demonstration of responsible action, which in the digital government is linked to purposes of monitoring and probity[1208].

Generally, in public governance, the behavior of the public manager is weighed by the term *"ethical"*, which incorporates or merges with integrity. The content does not diverge from that outlined in responsiveness. Like the corporate vision of ethics, integrity is contextual, rational

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[1205] IBGC, « conhecimento: governança corporativa », *op. cit.*
[1206] A. LACROIX (éd.), *Éthique et intégrité du service public*, *op. cit.*
[1207] OECD, *The OECD Digital Government Policy Framework*, *op. cit.*
[1208] Lobbying records, independent audit, Budget transparency.

behavioral, and based on risk management through metrics[1209]. In the world of good governance, ethics originates from an individualistic/moral view. It is the "*bad behavior*" that is examined, which belongs to the public agent (political actor or public manager).

Hence, despite highlighting a supposed openness to corrupt acts and the pursuit of public interest, corporate ethics remain individualistic and directed towards the public manager. Ethical action is created by the opposition between private interest and public interest, the latter signifying the adoption of performance metrics. Performance metrics, which prove ethical behavior, are justified based on the manager acting efficiently, that is, reducing costs and seeking cost reduction, while being efficient and yielding economic results[1210].

The problem with this reading, however, is linking proposals that *oppose public interests to private interests.* Thus, while public interest is still treated as an abstract and generic concept (in which one cannot decide with abstract values), ethics, on the other hand, is accepted as the basis of a value defined as "*acting correctly*". Ultimately, however, ethics and integrity in corporate governance end up with the same objective: the good behavior of the manager, measured by metrics and standards originating from the corporate world, is concerned with immoral management.

Hence, if, on the one hand, common good and public interest are still treated as generic and abstract concepts (from which one cannot decide with abstract values), on the other hand, ethics is accepted as the foundation of a value that defines itself as "acting correctly". However, ultimately, ethics and integrity of corporate governance end up with the same objective: the good behavior of the manager, measured by corporative metrics. The reading, as is noticeable, is tied to proposals in which public interest and private interests are opposed[1211].

In the case of the public sector, the public manager does not act in their private interest, but, instead, with public interest in view (therefore, public interest is opposed to private interest). Public interest is not a general interest, but rather a demarcated interest aimed at making the

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[1209] *There is an effective system for managing and controlling integrity risks in public sector organizations. Corruption and other integrity violations are detected, investigated, and sanctioned. Supervisory bodies, regulatory compliance agencies, and administrative courts carry out external control. Transparent and open government allows for the meaningful participation of all stakeholders in the development and implementation of public policy."* B.M. do PLANEJAMENTO et D. e GESTÃO (MP), « Manual de Gestão de Integridade, Riscos e Controles Internos da Gestão », août 2017, disponible sur https://repositorio.cgu.gov.br/handle/1/74041 (Consulté le 13 novembre 2023).

[1210] OECD, *The OECD Digital Government Policy Framework*, *op. cit.*

[1211] Framework da OECD

public manager understand that it is not about their personal interest, which is to be evaluated when the management manual metrics are shown to have been carried out. In summary, the ethical reading of good governance reproduces the dichotomous logic which opposes state and society, and which, ultimately, inserts hyper-individualism into the public sector.

Several public governance documents stem from the scenario mentioned thus far. The LINDB is one such case, beyond doctrinal interpretations of the constitutional text, which privileges fundamental rights and human dignity. This is, for instance, what Mateus Bertoncini notes, stating that Law 13.655/2018 alters the foundations of public law "*through an unequivocal private and neoliberal view, which subjects the State and collective interest to individual aspirations*"[1212].

In this vein, attention must be paid to the meaning underlying the use of these concepts. The purpose of good governance is to control and fight corruption, which, in this sense, also expresses the role of efficiency[1213]. In the case of digital transformation, the phenomenon becomes even more complex. As stated, ethics is a frequently used word[1214], often resulting in a true Black box[1215]. However, the ethics of the "*average American*" is the ethics of modern exploitation, of hyper-utilitarian individualism, as Norbert Wiener recalls[1216]. Therefore, it is necessary to be cautious of the meaning of the term. The recurrent use allows for the establishment of an "*ethics market*"[1217], where those principles that seem most convenient are

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[1212] M. BERTONCINI, « A suposta alteração dos fundamentos do direito administrativo pela nova redação da lei de introdução às normas do direito brasileiro (lindb) », *Revista Juridica*, juillet 2021, vol. 4, n° 66, pp. 367-388, disponible sur http://revista.unicuritiba.edu.br/index.php/RevJur/article/view/5506 (Consulté le 15 novembre 2023).

[1213] D. MOCKLE, *La gouvernance publique*, *op.cit*, 324 p.,

[1214] As a shift from data protection to the ethics of data use

[1215] V. MAYER-SCHÖNBERGER et T. RAMGE, *Access rules*, *op. cit.*

[1216] "*In ethical terms, those who defend the idea of progress consider this unlimited and almost spontaneous process of change to be a good thing and the basis on which they guarantee future generations a Heaven on Earth. It is possible to believe in progress as a fact without believing in progress as an ethical principle; but in the catechism of the average American, one goes hand in hand with the other. It would be equally true to say that the modern period is the era of consistent and unbridled exploitation*". N. WIENER, *The human use of human beings*, *op. cit.*,p.38.

[1217] Luciano Floridi et al. report that in 2019, in the case of AI alone, there were more than 70 lists of principles on AI ethics. Such declarations end up generating confusion and inconsistency, as it is not clear which document to use and which direction to take. This leads to governments seeking to implement their declarations to adapt, creating a "supermarket of principles and values, in which public and private agents can look for the most appropriate type of ethics to justify their behavior, instead of revising them to make them consistent with a socially accepted ethical framework". Thus, understanding the basic orientation - the value to be applied - is fundamental, because it is from there that a frame of reference is proposed. L. FLORIDI *et al.*, « An Ethical Framework for a Good AI Society: Opportunities, Risks, Principles, and Recommendations », *in* L. FLORIDI (éd.), *Ethics, Governance, and Policies in Artificial Intelligence*, 144, Philosophical Studies Series, Cham, Springer International Publishing, 2021, pp. 19-39, disponible sur https://link.springer.com/10.1007/978-3-030-81907-1_3 (Consulté le 19 novembre 2023).

chosen. Moreover, alternatives should be sought to the rhetoric of ethics, which in reality correspond to the expansion of the individual in the public sector.

B. The ethics of digital public governance

In this study, the focus is not to follow the prevailing *"ethical" trend.* It is understood that through the ideal type of network governance, the approach to ethics in digital public governance should not stem from the individualistic and instrumental perspective of corporate ethics. Instead, it should arise from a principled view of good government, where the public sector is examined not through the lens of the modern individual's autonomy but justified based on the legitimacy of political and public actions in governance. The singular, unified purpose for all actors and users in this network is the common good. By revisiting the principles of good government, public law is not just adapted to the nuances of the data-driven society but is rooted in a value system unequivocally aimed at collective well-being, rather than market exploitation and personal satisfaction.

In this context, it is crucial to note that the discourse on good governance ethics, which emphasizes individual protection and user satisfaction, does not aim to curtail the public sector's authority.

Traditionally, authority was seen as opposed to freedom. In the governance environment, the counterbalance to individual protection is not authority, but the expansion of individual satisfaction – an imaginary concept – in the growth of autonomy and self-regulating markets. This represents an extension of the private realm into the public domain and the annihilation of the latter for the insertion of private interests. Furthermore, it's worth reiterating that a data-dependent society grapples with the flow of data circulation. Governance aimed at countering poor governance is not only insufficient but stems from a logic that authorizes economic and mercantilist exploitation in public spaces.

On the other hand, as a type of political action, governance is not based on authority but on consensus, which is composed of accountability. If accountability relies on ethics as its justifying principle, then it must stem from the perception of its own space, that is, good government.

In this perspective, Luciano Floridi highlights that *ethics in design* is a facet worked within the digital revolution, bringing principles that can assist managers and other actors participating in data and information governance, as well as data management. In this view, ethics is considered an element that corroborates and aids legislation (established autonomously but also identified in the public sector)[1218]. Additionally, the ethical perspective interprets existing legislation and norms.

Therefore, it's not about creating new mechanisms but establishing new interpretations. It represents a new viewpoint. In the realm of network governance, *two fundamental considerations* are emphasized, specifically impacting the ends of action (*the common good, justifying good government*) and *legitimacy*, which is relational. By understanding the code of network governance as an interdependent society, the procedural character of the code rests not on the individual (*be it the citizen or the public manager*), but on the process, which, in turn, demands that this very process, as a whole, be directed towards a single purpose.

The procedural nature establishes the need for a relational view of law, placing general guiding principles – the purpose of the common good – to be respected by all. As a relational reading of the law, it is positioned at the center (*not peripherally*)[1219] as a conditioning approach in cyberspace, dealing with the public purpose (the common good)[1220], which is the value of network governance and the material criterion of public law in the digital state.

This is the idea behind the proposition made in Part 1 of the thesis[1221]. The application of these elements means that ethics, positioned as the justifying principle of responsive and reliable action (the criteria for legitimizing the category of legal accountability), are these competencies, taken from values (*purposes*), that achieve trust, which results from the *bond* established in the process. Therefore, through network governance, the interpretation of notions of responsiveness and ethics in the Brazilian framework can be adapted.

[1218] L. FLORIDI, « Infraethics–on the Conditions of Possibility of Morality », *op. cit.*
[1219] J. NEDELSKY, *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, *op. cit.*
[1220] L. FLORIDI, *Il verde e il blu: idee ingenue per migliorare la politica*, *op. cit.*
[1221] Especially in **Chapter 3.**

C. The ethics of network governance

In the technological revolution, ethics take on a deeper aspect. In Luciano Floridi's bioethical perception, ethical principles do not originate in an autonomous space and do not perceive the individual within its purely rational spectrum. For him, ethics is relational, implying new ways of viewing ethics, which, according to him, are opportune for a networked, informational society. In this sense, instead of abandoning the concept of ethics/integrity, it is essential to understand it in a way that aligns with the particularities of the correlated object. In Floridi's case, the ethical approach involves striving for preferable social developments. The author presents several justifications for this use, such as the AI Principles of Asilomar, where one principle emphasizes that artificial intelligence should be developed only for the common good[1222].

The common good, in turn, finds its justification in good government, an ideal revived in network governance and obscured by good governance. In this sense, it is possible to determine that in the case of digital government, ethics as a value principle, once interpreted through the network governance approach, rescues the notion of the common good itself, replacing the personalistic notion of good governance, and repositioning the common good and well-being of the community at the center of action. Indeed, Bioethics deals with the idea of creating technologies beneficial to society, and to humanity. According to Floridi, one can consider a dual design of the common good in the digital environment[1223].

The most significant design principle, according to Luciano Floridi, mentioned in related documents[1224], refers to what he calls "Beneficence". In the digital revolution, beneficence equates to promoting well-being, preserving human dignity[1225], and sustaining the planet. In the technology sector, therefore, the concern lies in thinking about its design in a way beneficial

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[1222] It consists of 23 guidelines describing development and ethical issues. On the Common Good. Superintelligence should only be developed in the service of widely shared ethical ideals and for the benefit of all humanity, not one state or organization. *In:* A. GILLIS, « What are Asilomar AI Principles? | Definition from TechTarget », *Tech Target*, s.d., disponible sur https://www.techtarget.com/whatis/definition/Asilomar-AI-Principles (Consulté le 15 novembre 2023).

[1223] L. FLORIDI, « Infraethics–on the Conditions of Possibility of Morality », *op. cit.*

[1224] L. FLORIDI *et al.*, « An Ethical Framework for a Good AI Society », *op. cit.*

[1225] R.L.C.J. TEIXEIRA, « Diretrizes Ético-Jurídicas para o Design e Uso de Inteligência Artificial na Administração Pública », in *Anais do Workshop sobre as Implicações da Computação na Sociedade (WICS)*, s.l., SBC, 6 août 2023, pp. 123-130, disponible sur https://sol.sbc.org.br/index.php/wics/article/view/24835 (Consulté le 19 novembre 2023).

to humanity, although with different nomenclatures, the purpose is the same (common good or well-being).

There is a collective character to this disposition, transcending an individualistic logic. That is, "*collectively, the prominence of beneficence underscores the central importance of promoting the well-being of people and the planet with AI*". Thus, beneficence is summarized as doing good, with the other point being not to cause harm[1226].

However, it is important to reinforce the distinction between the humanistic ethical perspective and corporatist ethics, which originates in individual rights, maximizing their utility, while not being centered on collective well-being. Furthermore, the use of human rights, particularly human dignity, as a mechanism to ensure rights and responsibilities has proven flawed. It has been absorbed by the model of good governance with an extractivist logic that employs its concepts for continual extraction[1227].

Therefore, given the abstract nature of ethics and its ordinary linkage with an individualistic perspective (when mentioning user, citizen, and even citizens), it is more appropriate to delimit ethics – in the model of network governance – as linked to the principle of *good government* and the common good, and in this vein, to the well-being of the community[1228]. As already examined in the previous chapter, this approach finds its justification in the Brazilian legal system. Thus, the research justifies the employment of ethics with the common good as a value outlined in the Constitution, and not human dignity as a justifying principle[1229].

In the case of digital and intelligent technologies, accompanying the idea of the common good (beneficence), ethics also materializes through what Floridi calls non-maleficence, which refers to a design principle encompassing privacy, security, and precautionary capacity. That is, both well-being must be positioned, and mechanisms for the protection of personality and its security must be established.

[1226] L. FLORIDI *et al.*, « An Ethical Framework for a Good AI Society », *op. cit.*

[1227] J. COHEN, « Internet utopianism and the practical inevitability of law », *op. cit.* ; C. COHN, « Inventing the Future: Barlow and Beyond », *op. cit.*

[1228]Floridi also proposes this when he says that social ethics are necessary. In this way, ethics takes on a collective and social facet, an essential characteristic that cannot be confused with a hyper-individualistic approach. L. FLORIDI, « Infraethics–on the Conditions of Possibility of Morality », *op. cit.*

[1229] As proposed at **Chapter 3** and **Chapter 5.**

Thus, in the ethical principles by design, a whole set of elements is listed. Therefore, ethics in the digital environment implies both thinking collectively and establishing mechanisms for the protection of people. It is a dual design, therefore[1230].

The Brazilian legal system encounters no normative problems in establishing the need for protection and security[1231]. The Law on Access to Information, through the general principle of active transparency, establishes publicity as a guiding principle and rule, while expressly imposing the need for confidentiality protection. Similarly, the LGPD is considered a milestone in the protection of personal data, so that, in general terms, the normative structure in this regard is delineated[1232]. Thus, while the ethical values to be weighed in the digital space imply the motive of the common good, it is not concretized if not accompanied by the necessary protection of people.

Therefore, ethics, in the context of a digital state's public law and network governance political action, is composed ***of two precise elements: the common good and the protection***. These two values guide and validate the principles of competence of responsiveness, now linked to the public value, as well as the need for individual protection. Such values, in turn, although still within a spectrum of protection, are not at the center of ethical orientations, which in the context of a data-driven digital government, focus on the production of public values.

These are not, however, the only principles established within the "*ethical*" envelope in the context of digital transformation. In the case of Brazil, it is essential to add diversity, also a constitutive element of an ethical design, which will be examined in more detail in the final part of the thesis.

[1230] L. FLORIDI *et al.*, « An Ethical Framework for a Good AI Society », *op. cit.*

[1231] R.L.C.J. TEIXEIRA, « Diretrizes Ético-Jurídicas para o Design e Uso de Inteligência Artificial na Administração Pública », *op. cit.*

[1232] Art. 3 The procedures provided for in this Law are designed to ensure the fundamental right of access to information and must be carried out following the basic principles of public administration and the following guidelines: I - observance of publicity as a general precept and secrecy as an exception; II - disclosure of information of public interest, regardless of requests. C.C. REPUBLICA (PR), Lei nº 12.527 de 29 de março de 2011, *op. cit.*

Section Considerations

In an ideal governance model, responsibility emerges as a key element of legitimacy, serving as the concept enabling the assessment of public action's validity. Its in-depth examination, with attention to its unique characteristics, is essential.

Broadly speaking, the principle of competence, namely responsiveness, within network governance, is grounded in a singular purpose. This stands in contrast to the traditional model of good governance, which advocates a dual mechanism, focusing not on objectives but on the roles of agents. Hence, the insertion of private principles in public spaces leads to an indirect privatization of public law. Despite imposing compliance and accountability norms, they lack substantive responsibility[1233].

Therefore, the government should be considered as a conductor of technology in the public interest[1234]. Henceforth, in the context of network governance, *two fundamental* precautions are prioritized, specifically influencing the ends of action (the common good, as opposed to the individual interest of good governance) and legitimization, which is relational as opposed to the autonomous and dichotomous nature of traditional governance interpretations.

The application of these elements ensures that *ethics,* as a value, incorporates distinct principles in the digital realm, conditioning actions, and related principles. This ethics, as seen, is positioned as a justifying principle for responsive and reliable action. These competencies, derived from values (*purposes and protections)*, achieve trust, examined not from a control-result perspective but from a relational and dialogical one. This approach is capable of providing a guarantee of process validity, thus giving normative concretization to the axis of governance principles in the context of a digital government.

Consequently, through network governance, the interpretation of notions like responsiveness, ethics, and reliability is adopted. This approach goes beyond adding aprioristic principles to the project/design, justified by the artificial nature of cyberspace and the cybernetic imaginary.

project/design, justified by the artificial nature of cyberspace and the cybernetic imaginary.

[1233] C. GOANTA et J. SPANAKIS, « Discussing The Legitimacy of Digital Market Surveillance », *op. cit.*
[1234] *Ibid.*

Section 2: Verifying the legitimization of public action in the digital state

Section 2 examines the process of verifying political and public actions, specifically the necessary criteria to achieve the validity of its legitimations. In the public law of the digital state, it is argued that these provisions stem from the demonstration of compliance, responsiveness, and adherence to its guiding principle, including the control and evaluation of the aforementioned procedures. In fact, as seen, *governance* (as an ideal type of political action), depends on the efficacy of public action. The latter, in turn, relies on the value of political action for its realization.

In the postmodern model of political action, the validation of political/public acts is grounded in a process of legitimization that moves away from the modern extrinsic legal character of "*a will*" that granted the government's authority that ensured public interest. In fact, in the legal context, public action will materialize in "*the consensus*". This one consists of a basic procedural element (*transparency*) and a broad principle, responsibility (*encompassing responsiveness, reliability, participation/collaboration*). This framework depends on evaluation and control mechanisms.

In this context, it is pertinent to examine how the process of verifying the validation of the legitimization of political and public actions in the digital state's public law takes place, which stems from demonstrating compliance with responsiveness and the employment of guiding principles. For this, an assessment of *reliability* as a principle of competence of responsibility, as well as of transparency and accountability, is required.

§1 Principles of verification of legitimization

As seen, in general terms, responsibility is composed of *two mechanisms* of competence: *responsiveness* and *reliability*, guided by the values of *ethics*[1235].

Accompanying responsiveness (saw at **Section 1**), reliability represents "*the ability of institutions to minimize uncertainties for citizens in economic, social, and political*

[1235] *Ibid.*

environments"[1236]. According to the Brazilian Federal Court of Auditors understanding, an institution is "reliable" when it remains faithful to previously established objectives, providing security from assessment[1237].

There are *two essential* mechanisms to achieve reliability. That is, reliability consists of defining an objective, that should be pursued, and the desired trust stems from the conducted evaluation. It is a set comprised of the delimitation of purposes and their evaluation. These, in turn, depend on transparency, as without it, it is impossible to examine the purposes, or assess whether they have been fulfilled or not. Therefore, reliability materializes through a combination (*objective + evaluation + transparency*). Purposes are set for evaluation to be conducted, and thus a control exercise, with such schemes only materializing in a transparent environment. These risks are measured through auditing, a crucial control in examining the motivation of decisions (explainability). Auditing, in turn, is only realized in a transparent environment[1238].

Reliability thus deals with both a principle that establishes post-control/evaluation and incorporates an *ex-ante* evaluation, a perception of risk management, which can also be seen as the materialization of the precautionary principle[1239], or an *ex-ante* responsibility[1240]. All these elements are fundamental for a model of political action in a data society.

However, similar to other principles, reliability can lead to different outcomes, depending on the value placed. If good governance follows its empty quantitative extractive logic (**A**), network governance will suggest a substantive glance, focused on the common good (**B**).

A. Reliability of good governance

In the realm of public governance, reliability is the principle of competency that instills self-reliance in public management among citizens, which is achieved through demonstrating

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[1236] OECD, *Modernizando a avaliação dos riscos para a integridade no Brasil: Rumo a uma abordagem comportamental e orientada por dados*, s.l., OECD, 10 mai 2022, disponible sur https://www.oecd-ilibrary.org/governance/modernizando-a-avaliacao-dos-riscos-para-a-integridade-no-brasil_61d7fc60-pt (Consulté le 13 novembre 2023).

[1237] TRIBUNAL DE CONTAS DA UNIÃO, *Guia da Política de Governança Pública — Casa Civil*, *op. cit.*

[1238] *Ibid.*

[1239] V. MAYER-SCHÖNBERGER et T. RAMGE, *Access rules*, *op. cit.*

[1240] B.M. do PLANEJAMENTO et D. e GESTÃO (MP), « Manual de Gestão de Integridade, Riscos e Controles Internos da Gestão », *op. cit.*

adherence to the purposes indicated in the response capacity, evaluated via postulated ethical mechanisms.

In the case of good governance, this framework is set as a result of the evaluation of the public manager's risk management together with transparency of governmental actions. Reliability is linked to *risk management*, involving monitoring and evaluation of public managers' actions, and the achieved results.

Through the lens of good governance, the perception of reliability is marked by a very precise direction. If the response capacity represents the individual satisfaction of the user, reliability will primarily mean the appropriate use of resources by public managers. In other words, it is a principle directed at the public actor and the state[1241]. Besides, the public's trust is achieved through accountability mechanisms. This, in turn, will be designed to monitor government action, which will be done through devices, agencies, and control institutions. In this manner, risk management will be central to evaluating conduct and establishing audits (external and internal), being at the core of integrity reports in the public sector. The legal mechanisms of risk management are consolidated in the figures of compliance and standardization. Here, codes of conduct are fundamental instruments[1242].

In the Brazilian framework, the Federal Court of Auditors and the Office of the Comptroller General (*Controladoria Geral da União* - in the Portuguese acronym - CGU) established a risk management guide for integrity. The document highlights the relevance of risk management, providing guidelines for implementation, with concrete steps. It expressly set the risks by the institution for integrity that are all linked to the misconduct of the public manager[1243].

Indeed, the research reveals that the reality of contemporary Brazilian public governance ties integrity and risk management with measures to mitigate corruption. Besides, the very use of risk management is seen as synonymous with cost reduction. The general disposition of governance is that policies should aim for economy, economic advantages for private parties, and savings for the government[1244]. The institution should be able to assess the performance

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[1241] A. LACROIX (éd.), *Éthique et intégrité du service public*, *op. cit.*
[1242] *Ibid.*
[1243] i.e. abuse of a position of power, nepotism, conflict of interest, internal pressure, undue advantage, or use of resources for personal gain.B.M. do PLANEJAMENTO et D. e GESTÃO (MP), « Manual de Gestão de Integridade, Riscos e Controles Internos da Gestão », *op. cit.*
[1244]ii) establishing a system of "checks and balances" for government decisions on technology spending to increase the level of public responsibility and trust and to improve decision-making and management to minimize the risks of project failures and delays. Strengthen international cooperation with other governments to better serve citizens

and outcome of policies, as well as a plan for budget execution[1245]. The quality of public spending and its budget is the central concern.

This line of reasoning, it is worth recalling, leads to the digital transformation of the Brazilian government. The World Bank[1246], in its report on GovTechs, illustrates that the primary concern of governments in the digital transition rests on cost reduction and savings. In a similar vein, the OECD[1247] advocates for a reliability bias tied to public spending and budgets. For the institution, a government should be capable of evaluating the performance and outcome of policies, as well as planning budget execution.

Moreover, the direction of public service delivery related to monetary issues is also the tone of the method for evaluating the maturity of a digital government, from which Brazil is also not exempt. Thus, good governance places audit evaluation directed at the public manager. This is done by proving that their actions were aimed at savings and cost reduction. In this respect, reliability, in this perspective, is supported by a principle (ethics or integrity), which is in truth instrumental, with empty content.

B. Reliability at network governance

Arising from rational choices, the model of risk management for public managers has been established by the results purposes, as a direct influence on the belief in the predictability of behavior and market outcomes[1248].

However, as already stated, the contingency of reality is a hallmark of contemporary society and data-oriented models, as well as of postmodernism, where absolute truths and certainties are anomalies. Thus, within the ideal type of governance, risk management assumes an essential character in the blueprint of accountability. The procedural nature and dialogic status of

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and businesses across borders and maximize the benefits that can arise from sharing knowledge in advance and coordinating digital strategies internationally. OECD et INTER-AMERICAN DEVELOPMENT BANK, *Broadband Policies for Latin America and the Caribbean*, *op. cit.*

[1245] As stated by TCU: *Thus, the institution's priority policies and actions must be guided by the establishment of planning methodologies, the monitoring of budget execution, the development of methods for evaluating processes and achieving results, the appropriation of costs, and constant concern for the quality of public spending* TRIBUNAL DE CONTAS DA UNIÃO, *Guia da Política de Governança Pública — Casa Civil*, *op. cit.*

[1246] W. BANK, « GovTech Maturity Index, 2022 Update », *op. cit.*

[1247] OECD, *Modernizando a avaliação dos riscos para a integridade no Brasil*, *op. cit.*

[1248] W. JANEWAY, « What to Do About Radical Uncertainty by William H. Janeway - Project Syndicate », s.d., disponible sur https://www.project-syndicate.org/onpoint/radical-uncertainty-how-to-think-about-market-risk-innovation-and-efficiency-by-william-h-janeway-2023-07 (Consulté le 19 novembre 2023).

governance demands that the capacity of responding by actions must been measured. Thus, the fulfillment of the objectives proposed by the institutions can be verified, according to their guidelines. Therefore, it is an indispensable element of the legitimization of governance's political action, which, being intrinsic and inconstant, depends on these instruments. Namely, they cannot be denied.

As previously highlighted, by Michel Foucault, governability consists of institutional, functional (*procedure*), and cognitive (*value)* elements. Legitimization is calculated from these elements. In a reticular environment of hybrid relationships, proceduralization becomes a tool to enhance the efficacy, responsibility, and legitimacy of forms of public and private interactions. This means that here, procedures represent a means of improving connections between the public and private spheres[1249].

As observed, the legitimacy of regulatory authorities in the logic of *good governance*, is technocratic (based on expertise and not on collective representation)[1250]. Consequently, the tendency is to subject their functioning to the respect of fundamental procedural principles. The problem, however, with governability and *technical art,* specifically in the realm of *good governance,* does not lie in its proceduralization (an approach already postulated by, for instance, by Habermas in establishing the communicative sphere[1251]).

One understands that the problem in the case of *good governance* is that the proceduralization is empty, without purpose (the financial goal and profit), extractive, which is potentiated in the digital space[1252]. The instruments are evaluated in a quantified manner for the automatic adoption of established standards, lacking substantive finalist purposes. Proof of this is the ethics of good governance, established *as a mechanism* and *not a value* in itself[1253]. As exposed,

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[1249] L. CASINI, « Down the rabbit-hole », *op. cit.*

[1250] A. SUPIOT et A. FOUILLEE, *La force d'une idée*, Paris, Éditions les Liens qui libèrent, 2019.

[1251] B. de S. SANTOS et L. AVRITZER, « Democratizar a Democracia: os caminhos da democracia participativa, Río de Janeiro », *citado por TATAGIBA, Luciana y TEIXEIRA (2006), Ana en Contraloría y participación social en la gestión pública, Caracas, Venezuela*, 2002.

[1252] C. MUELLERLEILE et S.L. ROBERTSON, « Digital Weberianism: Bureaucracy, Information, and the Techno-rationality of Neoliberal Capitalism », *op. cit.*

[1253] E. PAPADIMITROPOULOS, « Beyond neoliberalism: Digitization, freedom and the workplace. », *ephemera: theory & politics in organization*, 2019, vol. 19, n° 3, disponible sur https://www.researchgate.net/profile/Vangelis-Papadimitropoulos/publication/346656109_Beyond_neoliberalism_Digitization_freedom_and_the_workplace/links/5fcca844a6fdcc697be4bb98/Beyond-neoliberalism-Digitization-freedom-and-the-workplace.pdf (Consulté le 13 novembre 2023).

good governance has a dichotomous proceduralization, in which the exercise of control is directed at the public manager, and not the actors participating in a given process.

In this context, this research proposes to consider that the elements of proceduralization deserve to be repositioned and read *from other* governance models.

Firstly, through the reading of data-driven governance, of *data-flow* as a *process*, the focus is not on the individual, or the state, or the market, but on the relational ontology of this process. In this vein, the aim is to delimit the purpose of this process, examining *the competence* of those participating in it *in the context* they act, ensuring their rights, and defining their duties and responsibilities.

Thus, instead of a user-oriented model (which appears in the *good governance* approach), a data-oriented model will have a system guided by data as a legitimation condition. The modification of the traditional model, whose code is based on the individual, to a model which establishes a government guided by data places the "*process*" as a legitimation criterion. Hence, aprioristic conditions are not established to the agents as in autonomous models. On the other hand, within the good government logic, a prior criterion (or aprioristic one) is encompassed. Therefore, the matter at hands is not the agents' position, but rather the values for aprioristic common good. Such an approach may be an alternative to deal with the several dimensions of a data-dependent society.

Furthermore, the aforementioned approach may present itself as a means to fill in the gaps in which good governance seems insufficient to fill, considering that the latter is aimed at individuals and their respective titles, and not the process itself. Secondly, from the idea of procedure, the relational ontology allows public and private actors to be seen as such, within a process whose purpose is the well-being of the community, not an empty procedure (as in good governance).

In this sense, the perception of value will underpin and modulate data policy and management practices, so the idea of a social value must be guided and established from the outset, implying that value is not correlated with an economic phenomenon, but that its social duty is considered, weighing towards the realization of the general interest.

The third point is that by moving from the user (*in the case of guarantee*) and the state/manager (*in the case of evaluation*), and placing the purpose as the benchmark for reading *network governance*, the foundational mark resides in the *common good* and *protection* (the values of ethics, as view at Section 1).

The legitimization of competence is not placed from the *a priori* position of the actors but in the identification *of the actors' competence* within the process, which must be transparent, and will equally imply the principles that define an adequate administrative process and respect constitutional principles. This implies the need for justification, motivation, disposition of purpose, as well as attention *to due process*.

The evaluation of risk management, in this view, is not a priori directed at the public manager but at verifying the compliance with procedural requirements by the actors participating in the process. Then, in the context of a digital government process, the evaluation that brings reliability cannot be limited to verifying the integrity risk management but should be directed at the verification of governance and information management.

That means that in the case of network governance, reliability is composed *of purposes + evaluation of actors/users/participants + transparency of the ecosystem as a whole*. The modification, therefore, is relevant in the sense that it repositions legitimations and also the objective.

Additionally, reliability has its verification orientation - not for cost reduction or control of improper public action - but for the well-being of the community (which constitutes the principle of the common good alongside protection*)*. This means that the empty procedure of *good governance,* listed to stamp or verify individualistic behavior seals, has an altered risk management evaluation. Hence, controls and audits must adhere to the transparency of actions and decisions, motivations, and explainability that justify the political and technical decisions not aimed at cost reduction, but at the *well-being* of the community and *their protection*.

Thus, through *network governance*, the vocabulary of public governance is not altered. What changes is that by this perspective, the criteria for examination reposits the purpose of the state, its *raison d'être* (public interest). Thus, it is also attentive to the positions occupied by the actors in this scheme, considering that in the governance model, it is not the empire of authority, but of relations with various actors with powers of action, where responsibility is not only fulfilled in action but in the evaluation of each actor in their compliance when they act.

That interpretation affects both the mechanisms for risk evaluation, and its management, as it should start to establish its guidelines not from models and standards of cost reductions and directed to the individual behavior of the public manager but to consider reliability as a mechanism that enables the evaluation, monitoring, explanation of the acts carried out within a

process. Rather, it ensures that the code - a data-dependent society - is placed as a point of direction.

With this, *risk management* will allow a broadened perception of the principles already set out in the Brazilian legal order.

§2 Risk management in network governance

In the context of digital governments, *integrity,* underpinning the assessment of reliability, is indicated when aligned with a government those values sharing and digitizes its services. According to the United Nations[1254], integrity relates to independent auditing but also ties to lobby registries. The OECD[1255], in turn, lists the necessity of information about the project and public service delivery. Moreover, it emphasizes the guarantee of ethical and useful provision of digital tools. For this, the perception of reliability and risk management needs to expand to encompass other aspects.

Thus, it is understood that the assessment of risk management, in the case of a digital state and a data society, should not be confined to integrity coupled with the public manager's morality or the digitization of services.

It's essential to consider risk management and reliability from the perspective of governance and the management of *governance and information*, mechanisms that can provide more security and bring reliability to the system[1256]. This is because the management and control of information in a data-oriented ecosystem reside in those who generate, store, and analyze information flows on their digital platforms, requiring an understanding of how they do this[1257].

Accordingly, data are not examined based on their taxonomy, as they are more variables than conductors. This shifts the debate from an individual examination to considering the system as a whole. Thus, data governance (understood here in its transversal sense) should address this chain, its management, and how it is conducted. That is, more important is understanding how value is created from various types of data, how they are captured by various entities, and how they are distributed.

[1254] U. NATIONS, « The Role of e-Governance in Bridging the Digital Divide », *op. cit.*
[1255] OECD, *Going Digital Guide to Data Governance Policy Making*, *op. cit.*
[1256] F. FILGUEIRAS et B. SILVA, « Designing data policy and governance for smart cities », *op. cit.*
[1257] P. DESROCHERS, *Les données administratives publiques dans l'espace numérique*, *op. cit.*

Therefore, instead of establishing a direction of risk management towards the public manager, in the case of network governance, through the relational code, which binds to the process, the direction of evaluation shifts towards risk management relative to the management and governance of information and data[1258].

Understanding the information flow as a process, normative instruments can be employed through procedural disposition. Its design is made to consider the exchanges in the ecosystem (data-driven).

It is worth noting that governance as a philosophy refers to the first stage in the structure of a data-oriented government, which bases management and a governance policy, consolidating the organization's vision. Current literature often treats information and data as synonyms. Law, too, often overlooks these distinctions. The same applies to information governance, data governance, and information and data management[1259]. However, the boundaries between these concepts are essential.

In this sense, through this approach, the focus is on:

A data policy that brings rules and principles of governance (supported by the disposition discussed in Chapter 5), capable of providing direction to actors in data collection, storage, processing, treatment, disposition, and sharing, thereby ensuring appropriate use of information. The data policy observes criteria for access, security, privacy, usage, and the value of design to be allocated. These are the guiding principles and directives[1260].

A data governance that will have the role of distributing and redistributing resources, competent to examine the responsibilities and accountability of the guidelines and norms established in the policy. It refers to the consistent, constant, and contextual treatment of accountability[1261].

Therefore, risk management governance is achieved both by laying down its principles and guidelines and by effectively verifying compliance with them.

[1258] F. FILGUEIRAS et L. LUI, « Designing data governance in Brazil », *op. cit.*
[1259] P. DESROCHERS, *Les données administratives publiques dans l'espace numérique*, *op. cit.*
[1260] F. FILGUEIRAS et B. SILVA, « Designing data policy and governance for smart cities », *op. cit.*
[1261] *Ibid.*

A. Risk management governance

Beyond its regulatory function, the government also acts as a collector, producer, provider, and user of information. In this role, the government treats information as a tool for policymaking. In doing so, it makes decisions about whether and how to collect, develop, disseminate, analyze, and preserve information in support of other policy principles (such as transparency, accountability, or social equity), or to achieve specific goals in areas like public health, environmental quality, or economic development[1262]. This is usually fixed in ***three ways***: collecting data expressly for publication, requiring private entities to publish certain types of information, or disclosing to the public information collected during governmental program operations and regulatory activities[1263].

In this manner, the literature points to the tensions that arises from these performances, including in the Brazilian open data policy framework.

The first comes between the scope of data and its comprehensibility by non-technically oriented citizens. **The second tension** is between ensuring the utility of detailed data while simultaneously protecting the confidentiality of data subjects. **The third tension** involves the public need and desire to analyze and understand data sets, contrasting with the reality that government data are not maintained as a global resource but are distributed among various entities and organizations at all levels of government[1264].

In addition, a data-driven government requires administration that extends beyond governmental boundaries. Data is collected and maintained by numerous public and private organizations and is necessary for government decision-making and policy formulation. Thus, in data ecosystems involving government and businesses, data governance should be expanded to include governance (*allocation of responsibilities and decision-making rights*) and system quality assurance from an end-to-end data exchange perspective[1265]. This expansion is necessary because an ecosystem itself does not have a common goal, while individual actors have specific objectives[1266].

[1262] *Ibid.*
[1263] *Ibid.*
[1264] *Ibid.*
[1265] P. DESROCHERS, *Les données administratives publiques dans l'espace numérique*, *op. cit.*
[1266] F. FILGUEIRAS et B. SILVA, « Designing data policy and governance for smart cities », *op. cit.*

Therefore, a data-driven government demands new management strategies, involving institutional, organizational, and responsibility dimensions. It must deal with rules and responsibilities where a data policy is identified that justifies decision-making and enables accountability, focusing on data as resources. Thus, in the management sphere, clear standards and protocols can be defined for data sharing and interoperability. It is understood that an effective management presupposes a sequential value chain that includes governance mechanisms and controls to ensure data quality, confidentiality, and security, as well as the use of metadata. Ultimately, as with all programs, these mechanisms must ensure that data usage continuously improves service delivery[1267].

In this way, understanding the data chain remains crucial in the project, as it enables the establishment of strategies and the application of standards based on the project's value. This chain also allows for the identification of the various roles of people interacting with the data, facilitating the identification of responsible parties[1268].

In addition, in the principle of data management, the focus is on accuracy, integrity, and preservation of maintained information. Thus, instead of fixed responsibility, information is acquired and managed according to organizational value for different purposes. This approach protects government information from misuse and ensures it is "*fit for use*"[1269].

In this way, adopting a procedural-relational approach implies the possibility of rethinking the distribution of responsibilities. As such, both public and private organizations should fulfill data management responsibilities, as both can collect and process data. Through this interpretation, data governance should align with objectives and the determination of involved risks. This framework is generally managed by data controllers[1270].

Besides, responsibility is not centralized but decentralized, as activities can be carried out by different entities. For Fernando Filgueiras[1271], this model is particularly relevant in settings where public and private entities share information voluntarily, with distinct objectives and responsibilities.

[1267] P. DESROCHERS, *Les données administratives publiques dans l'espace numérique*, *op. cit.*
[1268] *Ibid.*
[1269] F. FILGUEIRAS et B. SILVA, « Designing data policy and governance for smart cities », *op. cit.*
[1270] *Ibid.*
[1271] *Ibid.*

This approach defines which organizations are responsible for the data, which manages its quality, and how it can be employed[1272]. All must act in compliance with legal norms (protect by design), including ensuring confidential data is not shared or misused. Additionally, they must respect the principles of ethical risk management to ensure reliability, which in the case of *network governance* refers to an ethic of the common good, comprising principles of beneficence and non-maleficence.

Examining the data governance, information, and management chain in these ecosystems, actors are coupled at levels, allowing both their arrangement and a system in several levels. For Fernando Filgueiras, the experience of Data.gov indicates that the two fundamental principles of information policy, management, and utility, can guide and evaluate efforts to achieve information-based transparency[1273]. Moreover, they find support in information management, as outlined in the Access to Information Law.

B. Information management as a legal principle

The principles of information management, though not new[1274], emerged within the realm of information policy and the open government initiative launched in the United states, of which Brazil was a signatory. Notably, Brazil was the first country to regulate information policy in open government matters[1275]. In this regard, it's observable that the Law of Access to Information (*Lei de Acesso a Informação*, - LAI, in the Portuguese acronym, Law n. 12.527/2011), accommodates the fundamental principles of information management. If the Constitution guarantees the right to information, the LAI regulates and provides several criteria for ensuring this right.

Eneida Desiree Salgado[1276] highlights that the law contains provisions on the fundamental right to access information, as well as aspects concerning access procedures, and the responsibilities of public agents and institutions. This application is understood to extend to all entities within the federation.

[1272] P. DESROCHERS, *Les données administratives publiques dans l'espace numérique*, *op. cit.*
[1273] F. FILGUEIRAS et B. SILVA, « Designing data policy and governance for smart cities », *op. cit.*
[1274] *Ibid.*
[1275] A.J. POSSAMAI et V.G. DE SOUZA, « Transparência e Dados Abertos Governamentais: Possibilidades e Desafios a Partir da Lei De Acesso À Informação », *Administração Pública e Gestão Social*, janvier 2020, vol. 12, n° 2, disponible sur https://periodicos.ufv.br/apgs/article/view/5872.
[1276] E.D. SALGADO, *Lei de acesso a informacao (LAI)*, *op. cit.*

According to Article 6, a vision of management in a digital economy is apparent, applying its principles to data and information management. This encompasses governance, surrounding truthfulness, transparency, trust, and technological equity. The LAI not only delineates information management but also details the fundamental ex-ante elements for information protection, corresponding to availability and integrity, as well as confidentiality protection.

Regarding competency, Eneida Desiree Salgado advocates the existence of authors within a bolder view of the right to access information, asserting that "*private for-profit entities should disclose and publicize resources received,*" not as an extensive interpretation, but "*to achieve the fullest realization of the principle of publicity, coherently with an extensive interpretation of the fundamental right*" [1277].

Thus, the law allows for the extension and application of a management and governance model that repositions responsibilities for all those involved in the management, use, and treatment of data. The law can be perceived not just as an instrument for oversight but also as a means of fostering "*dialogue and access to rights*" [1278].

Furthermore, transparency[1279] is prescribed in the LAI[1280]. This involves a responsibility for proper information management, a requirement of the Law, providing a basis for standardizing procedures related to data management and governance. Eneida Desiree Salgado[1281] emphasizes that this duty finds a republican interpretation of public duties. It's not about reducing the public character to the state, but about a vision of the common good, attracting respect for other public administration principles. The author also posits that the discipline of information management in Brazil is established both in the Federal Constitution and detailed in the Access to Information Law, reflecting the legislator's choice to treat publicity as the rule and secrecy as the exception, with stipulated reasons for access denial[1282].

[1277] *Ibid.*
[1278] *Ibid.*
[1279] That will be seen with more details in **Chapter 8**.
[1280] B.R. BIONI, P.G.F. da SILVA et P.B.L. MARTINS, « Intersecções e relações entre a Lei Geral de Proteção de Dados (LGPD) e a Lei de Acesso à Informação (LAI): análise contextual pela lente do direito de acesso », *Cadernos Técnicos da CGU*, mars 2022, vol. 1, disponible sur https://revista.cgu.gov.br/Cadernos_CGU/article/view/504 (Consulté le 21 juillet 2023).
[1281] E.D. SALGADO, *Lei de acesso a informacao (LAI)*, *op. cit.*
[1282] According to the author, "*The duty to provide access and disclosure demands a stance in line with the spirit of the 1988 Constitution and a republican administration. An authentic vision of public affairs, which understands that transparency, motivation, impersonality, morality, publicity, efficiency, and legality are essential components of public activity. Reductionist readings of the duty of active transparency and the right of access to information are therefore unacceptable. On the contrary, the presupposition is disclosure - secrecy is the exception.*" *Ibid.*

Further, according to Bruno Bioni, regarding data protection legislation, it emphasizes concepts of risk and responsibility, highlighting that the responsibility for personal data "*must be shared among all actors, and not restricted to individual management by the holder through exclusive consent.*" This also implies considering a prior risk analysis, introducing not just risk analyses but also the idea of precaution, in adopting "security measures compatible with the degree of probability related to the occurrence of 'impacts, threats, or damages' to rights and freedoms"[1283].

In sum, that leads to a ***distribution of responsibility*** among involved actors.

In the context of Brazilian legislation, Laura Schertel Ferreira Mendes emphasizes that the General Data Protection Law *(Lei Geral de Proteção de Dados* - LGPD in the Portuguese acronym) provides the preparation of a data protection impact report in cases that may "*pose risks to civil liberties and fundamental rights*" (Article 5, XVII)[1284].

This concerns data processing. The role of the controller, the competent agent to make decisions about data processing, and to develop these processes, as well as to measure risks, is underscored. Thus, responsibility refers not only to rights but to conditions that provide guarantees through the actions of various actors.

Therefore, through an interpretation of the Brazilian public law system, *information management* can be understood as *a constitutional duty*. Information management is thus allocated as an instrument to be supported by the logic of risk management.

This approach shifts from an analysis of corporate risk management, tied to an empty precept of integrity, to justify management and, thereby, reliability within the scope of information management as a principle.

From this point, in conjunction with the understanding that the code in question is a procedural bias, the normative provisions of the Law of Access to Information and the Administrative Procedure Law (Law. n. 9.784/1999) framework provide a set of elements and principles that must be observed in information management. The first application lies in Article 37 of the Constitution with its elements, where efficiency is one criterion but not the ultimate value.

[1283] B.R. BIONI, P.G.F. da SILVA et P.B.L. MARTINS, « Intersecções e relações entre a Lei Geral de Proteção de Dados (LGPD) e a Lei de Acesso à Informação (LAI) », *op. cit.*

[1284] L. SCHERTEL FERREIRA MENDES, « Autodeterminação informativa: a história de um conceito », *Pensar - Revista de Ciências Jurídicas*, décembre 2020, vol. 25, n° 4, disponible sur https://ojs.unifor.br/rpen/article/view/10828 (Consulté le 26 novembre 2023).

Furthermore, it is through the principles of the Administrative Procedure Law that the evaluation and control of information are respected and ensured. From it, it is examined that one must observe the principles of legality, purpose, motivation, reasonableness, proportionality, morality, broad defense, contradiction, legal certainty, public interest, and efficiency[1285].

In this sense, it can be stated that, broadly, from the Administrative Procedure Law itself, there is a need to elaborate on the purpose, motivation, broad defense, and also transparency. In turn, by understanding the principle of information management as a principle of risk management, there is a determination and demarcation at levels regarding the responsibilities and obligations of the actors. That is, it involves examining not just from the perception of the public manager as a singular figure, but arranging so that such principles are applied to the extent of their responsibility.

Therefore, it is feasible to consider the principles that govern data regulation and to recognize that, in a data-driven society, responsibility shifts from a unidirectional approach to one that encompasses the responsibility of various actors, whether they be providers, controllers, or processors. This can be identified starting from the principle of information management, and the policy and management of information and data, following the approach proposed by Fernando Filgueiras in his examination of data governance design in Brazil.

Section considerations: from dichotomous opposition to relational coding and repositioning of legitimations

The Chapter highlighted that a fundamental problem identified in the mechanisms of public action legitimation process within digital transformation is its dichotomic perception. While accountability constitutes a facet for verifying the legitimacy of governance, aligning with the ideal of cybernetics and relational views, in practice, accountability in public policies and legal instruments still manifests in dichotomous models.

[1285] Which will be delineated at **Chapter 8**.

As observed, there are two prevailing perspectives on governance (in a broader sense): democratic governance and good governance. While the former seeks to deepen social participation by controlling political acts, the latter aims to monitor these acts through metrics of good behavior.

Both approaches, focusing either on citizen-centric transformation or public manager control, present issues. The citizen can be limited as an individual, while the state is perceived as an authority, materializing in the individual. This approach is not rarely individualistic, focusing on the rights of the citizen on one hand, and monitoring the behavior of those in public function on the other. In this logic, the citizen is indistinctly viewed as a bearer of rights and guarantees for the protection and satisfaction of their interests[1286].

Regarding private actors collaborating with the public sector (in public-private partnerships), their accountability considerations are secondary and milder than those imposed on public actors. Despite the increasing authority of private actors in these spaces, their politicization is minimal. Discussions are also framed in terms of good governance, focusing on management responsibility. Unlike states, these actors are expected, not obliged, to present evidence by good governance standards. They are held accountable, while the state bears responsibility, interacting with stakeholders, not citizens, and are evaluated by their self-referential efficiency assessment mechanisms[1287].

In this vein, although it is the primary category of governance, accountability is chiefly aimed at the public manager, maintaining the dichotomy established in the era of solid modernity.

Then, despite the premises of governance being increasingly established in law, an adjustment in the other elements of the modern public/private dichotomy is necessary, as relations continue to be framed dichotomously in expectations, functions, and responsibilities. Jennifer Nedelsky points out that the opposition between society and state, autonomy/freedom, and interest/state is not just illusory but constructed. Thus, employing governance models which are not set forth through dichotomies may be considered, and, in this sense, even those dichotomies set between the individual's autonomy, freedom and the state with its control and legitimation of public interest.

[1286] G. STOKER, « Public Value Management: A New Narrative for Networked Governance? », *op.cit.*
[1287] S. BESSON, « Democratic Representation within International Organizations », *op. cit.*

Instead of removing the public interest from public law (as done in the logic of *good governance*), the legitimations are repositioned, ***maintaining the material criterion of public law to guarantee the public interest***. Similarly, if governance is represented by consensus and responsibility, this responsibility should be repositioned to reach all legitimate actors of power, not just those in their rights (citizen and market) and the state in its duties (accountability and auditing).

Essentially, the aim is to remodel the repositioning of responsibility to fit within the logic of network governance, which changes the legitimations of the actors. In the model of political action of the digital state, the proposition seeks that the process of validation, whose justification of accountability, does not rest primarily on efficiency or democracy, but on the common good.

The fundamental factor lies in repositioning the direction to be established in the principles, surpassing the individualistic and dichotomous reading that permeates the logic of good governance and public law, to bring about the idea of public law of the common good.

The first point is that legitimation does not fall solely on governments but on multiple parties involved, specifically those interested. These parties, therefore, being legitimate, should also be responsible. However, as this is not a static and universal definition, it is suggested that in the logic of public values, responsibility is achieved through the definition of negotiated goals and supervision.

This does not mean abolishing the responsibility of the public manager. On the contrary, the intent is to highlight the impossibility of limiting accountability solely to the public manager. In a networked environment of multiple interactions, accountability cannot fall only on the state and public manager.

This first note already reveals that accountability cannot be limited to horizontal accountability. Social control, meanwhile, is considered indispensable to be examined through substantive and democratic responsibility. It is feasible, however, to go further and emphasize that instead of focusing on the individual unit (where autonomy and private position in private relations still prevail in a private view), the focus should be on the plural, on citizenship, on the collective, and the consensus established not for the citizen or user, but for citizenship, a concept of

collectivity[1288]. The concept of collectivity does not reactivate democracy but reinforces the idea of the *common good*, which should be the defining criterion.

Moreover, the government no longer focuses on meeting the individual satisfaction of a person but is directed towards society's dependence on data and how its use is optimized, not to optimize it but to produce values for the community. The change in logic is profound.

As several actors participate in new positions, the literature suggests that in the realm of public value, responsibility emerges as a core category for the digital state.. This implies obligations for the parties, determined by interactions, through a relational view of law and institutions.

Thus, in the environment of the public space and through the reading of public value, shared responsibility stems from values, rights, and duties, which should be distributed equitably, and will be better examined in **Chapter 7 and Chapter 8.**

[1288] B. BOZEMAN, « Public-Value Failure: When Efficient Markets May Not Do », *op.cit.*

Title 2. The public law for the Digital State, a legal confrontation with the challenges of the data society

Title 2 proposes to discuss *responsibilities* and *rights* linked to a public law for the digital state, proposing the interpretation of both *freedoms* **(Chapter 7)** and *equalities* **(Chapter 8)**, by *state actions* and a *data-driven* society. Freedom is the "*jewel*" of modern society. Through freedom, one contemplates rights, institutions, and spheres of communication. As observed, the digital revolution marks a complex period of change in social relationships and institutions, as well as in perceptions of freedom as a concept. On the one hand, law aims at establishing itself as an instrument of regulation within cyberspace. Normative instruments are employed for protection and private regulation (the market and the individual), with the notions of freedom and citizenship as starting points. On the other hand, these instruments (freedom and citizenship) are also employed in state actions (*political and public*).

Nevertheless, as seen, the process of autonomy of society and the arrangement of legal instruments, reflecting the dichotomous and autonomous perceptions of modernity, impact the digital public sphere and shape public institutions in their organization (including Brazil), thereby intensifying the guarantee of individualistic and autonomous perception of freedom in society.

Thus, the last part of the research seeks to demonstrate how the perspective of individualistic freedom of autonomy, negatively impacts the public space and public institutions, extending its private freedoms rationale into the public sphere. In other words, the private interpretation of law, prioritizing individual rights of freedom based on autonomy, impacts and dictates regulation in the network space, including the public sector, as it is through individualistic and autonomous freedom that oppositionist logic is consolidated and perpetuated within the Brazilian political and legal framework.

Within this scenario, it shall be stated that the *common good* linked to the public sphere in a network governance model, could consider a perception of freedom adapted to a network space in the public sector. Therefore, the proposition involves thinking, in the wake of a public law of the common good, about an analysis of rights of data flow freedom and data sharing, from a relational reading of the law, where freedom is not centered on the individual, as this is not the code of the network system.

To do so, initially, the aim is to illustrate how the logic of individualistic freedom impacts the dimensions of data flow freedom, dictates the way value is produced within the public sphere and how data must be open and shared. Afterwards, the aim is to investigate how to interpret legal instruments for data sharing and data as public value in the public sector, in a way that respects not only individual freedoms and their personality, but also orients towards collective well-being and seeks equality of rights.

Whereas **Chapter 7** focuses on the freedom of data flow, investigating its perception in the private sphere (market and individual) and highlighting its functional legal nature, **Chapter 8** explores the instrumental dimension of the freedom of data flow in order to outline a vision of due process and its regime, based on the legal regime of public law, supported by *governance* (the digital state as an ideal category) and *responsibility* (the concept related to freedom and the guarantee of equality).

Chapter 7. Upholding freedom in the Digital State and the data society

Society has quickly become a data society. In 2024, what activities were not "*datified*"? Alarm clocks in smartphones Daily email exchanges. Conversations over social networks. Shopping *on* and *off lines,* bank accounts, market bills, and restaurant bills. Practically all activities leave traces of data. The conversion from physical life to the online world, the process of datification, is considered a constitutive element of a new civilization. The increasing digitalization of human life and the exponential volume of digital data radically change the perception of cultural, political, and social phenomena. Their accompanying debates represent a social phenomenon to be studied and a paradigm shift factor in legal research.

Today, virtually every act in society can be digitized[1289]. In technical terms, ***data*** is described as a binary element. It represents a sequence of bits, which can circulate, be stored and analyzed[1290]. In a first step, ***digitization*** involves converting analog information into binary code for computer manipulation. Digitizing any event involves converting or encoding it into a binary language of "*zeros*" and "*ones*". The translation of real-life events into machine-readable code is performed using software[1291], and the encoded events transmitted through and stored in hardware (e.g., undersea cables and data centers)[1292]. Thus, at first glance, data can be identified as units of information or pieces that, when combined, form the basis of modern policy decisions made by government and non-governmental organizations.

The digitalization of society[1293], however, is progressively being replaced by ***datafication***, which involves converting life into digital data that is traceable, quantifiable, analyzable, and performative[1294]. Digitalization transforms all actions into traceable data, allowing diagnoses

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[1289] L. GITELMAN (éd.), *« Raw Data » Is an Oxymoron*, s.l., The MIT Press, 25 janvier 2013, disponible sur https://direct.mit.edu/books/book/3992/Raw-Data-Is-an-Oxymoron (Consulté le 27 octobre 2023).

[1290] A. COURMONT, *Quand la donnée arrive en ville : open data et gouvernance urbaine*, Libres cours, Fontaine, Presses universitaires de Grenoble, 2021.

[1291] Each zero or one represents a bit of machine-readable information and the smallest digitally readable piece. It is the "*virtual*" representation of "*real*" life.

[1292] U. NATIONS, *Digital Economy Report 2021*, *op. cit.*

[1293] Which began in the second half of the 20th century,

[1294] Performance is about processing and analyzing data for inferences, recommendations, and decision making, in addition to digitization. Although digitization processes are still present, such as creating a website, a printed book's transformation into an e-book is embedded in algorithmic data processing and capturing procedures (*Big Data*, *machine learning*).

and inferences in any domain[1295]. The concept[1296], developed by Viktor Mayer-Schönberger and Kenneth Cukier means the process of digitizing "*life*." It distinguishes itself from the physical universe of matter since "*correlations construct the digital*" and "*probabilities*". According to the authors, datafication is not about training a computer to ponder equally as a human being, but about applying mathematical rules to data collection to estimate probabilities. Consequently, the capacity of systems to yield optimal outcomes resides in their *predictive abilities* concerning the exploration of substantial data volumes[1297].

Considered as a *predictive system*, through innovative technologies and data volume, it is estimated that a particular event may occur[1298].

To do so, datafication captures and ***circulates*** data. These elements are commodified and require new commerce models and social relationships[1299]. This process also consists of other factors, such as the "*selection*"[1300] of actors, objects, services, personalization, reputation and molding[1301]. In short, *data* are elements that need to be "*read*" [1302] for their *utility* to be understood and used for innumerable purposes. Furthermore, datafication comprises stages of data collection, storage, and management. It is placed, thus, as fundamental elements that characterize the "*informational*" civilization. This informational civilization, therefore, relies

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[1295] A. LEMOS, « Dataficação da vida », *Civitas - Revista de Ciências Sociais*, août 2021, vol. 21, n° 2, pp. 193-202, disponible sur https://revistaseletronicas.pucrs.br/index.php/civitas/article/view/39638 (Consulté le 27 octobre 2023).

[1296] Social networks, apps, and commerce, have contributed to the vast collection of data that is now a part of everyday life. Hence, the existence of *Big Data* is fundamental to the phenomenon of "*datafication*".

[1297] The authors explain that most institutions were founded on the principle that human decisions are supported by a relatively insignificant amount of causal information. However, things change when data becomes massive, since it can be processed quickly and has a certain tolerance for irrationality. V. MAYER-SCHÖNBERGER et K. CUKIER, *Big data : la révolution des données est en marche*, Paris, R. Laffont, 2014, p. 14.

[1298] Within proper estimation. The weather forecast can be a simple example of such a system.

[1299]These practices impact people's subjectivity, the mode of social relations in the online world, and government actions. *Platformization, datafication and algorithmic performative (PDPA) convert any form of expression into operationalizable data (datafication), stimulate the production, capture and delivery of this data (data and captures) to hardware and software mega-structures, and project current and future scenarios of action and induction* A. LEMOS, « Dataficação da vida », *op. cit.*

[1300]Predictability is accomplished by *data mining* in a probabilistic way. It is an inductive correlation made from a subject's database. It is the knowledge of the person's personality that provides predictive power. The calculation is unknown, that is, little is explained about the reason for the predictions. What is known are a set of probabilistic predictions. Despite this, this logic of predictability leads to manipulation. It directs the individual, through the combination of databases for manipulating decision making, into a personalized set. A.C.A. VIANA, « Vigilância híbridas: identificando desafios jurídicos », *Interesse Público*, 2021, pp. 34-60, disponible sur https://dspace.almg.gov.br/handle/11037/40511 (Consulté le 27 octobre 2023).

[1301] J. VAN DIJCK, *Platform Mechanisms*, 1, s.l., Oxford University Press, octobre 2018, disponible sur https://academic.oup.com/book/12378/chapter/161973335 (Consulté le 18 octobre 2023).

[1302]The process of datification involves steps and has a "journey" beyond nomenclatures that distinguish not only its functionality but also its quality. A. BEAULIEU et S. LEONELLI, *Data and society: a critical introduction*, London, Sage Publications Ltd, 2022, p. 143.

on *the circulation* of data in order to employ its methods, in conjunction with its technology, to generate new values. It's no coincidence that digital media professor José van Dijck explained that platform-mode technologies with user practices create new *social interactions*. That is to say, datafication leads to a "***platform society***"[1303]. Thus, understanding society as a platform involves apprehending how ***social practices*** occur in the online universe[1304].

These scenarios and the new social and mercantile practices – in new dimensions and spaces - hold a fundamental significance, yet they remain peripheral in Brazilian data law discourse, especially in relation to the public sector. In the realm of political theory, Brazilian literature views data as an asset and through data flow, emphasizing sharing. Fernando Filgueiras[1305] notes that in the case of the public sector, organizations transform the structure and the public services they provided. In terms of management structure, they alter procedures and the work of managers, introducing new capabilities in the public sector. Transformations in the political structure are also examined with attention to the modification in communication between government and society. This approach includes considerations about data exploitation and the fragmentation of governance structure and policy within Brazilian policy framework[1306].

On the other side, the legal debate surrounding data rights, as data flow, data protection, individual rights, as well as data-driven government, stems from a private rationale, whether in the context of ***enabling*** market exploitation by cross-border of data flows or ***safeguarding*** individual/collective rights, through the idea of human dignity and the principles of personal data protection. Moreover, data as a modulable phenomenon and as an asset are usually not taken into consideration, which results in legal gaps both in protection and regulation matters, especially in the way data is handled in the public sector.

In this context, **Section 1** reports the disposition of data rights by the logic of an autonomous right of freedom of data flows and limited data sharing in the public sector, to then, in **Section 2** highlight, from the course of data circulation as an instrumental and positive facet of data

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[1303] J. VAN DIJCK, *Platform Mechanisms*, 1, *op. cit.* ; J. van DIJCK, T. POELL et M. de WAAL, *The platform society*, *op. cit.*

[1304]The way they present themselves makes look natural. The information that arrives on the screen is personalized. Amazon estimates that 40% of its sales are generated by recommendation mechanisms. P. BECKOUCHE, « La révolution numérique est-elle un tournant anthropologique ? », *Le Débat*, 2017, vol. 193, n° 1, pp. 153-166, disponible sur https://www.cairn.info/revue-le-debat-2017-1-page-153.htm.

[1305] A. BEAULIEU et S. LEONELLI, *Data and society*, *op. cit.*

[1306] S.A. SILVEIRA, « Responsabilidade algorítmica, personalidade eletrônica e democracia », *op. cit.*

protection law, how data flow, as fundamental right of freedom, has a *functional* nature that must be engaged as such in the public sector.

Section 1. The individual autonomy as the design of freedom of extraction at the digital state and the data society

Private sector views data as a valuable asset, exploiting it, grounded in the principles of individual autonomy and property rights in a new economic model. This private perception dictates both data flow, and data sharing. Hence, the current **Section** emphasizes data flow, its openness in the public sector, and the policy of Brazilian data sharing, to illustrate some emerging gaps from the non-apprehension of data as a value, both in terms of the sharing paradigm and the guarantees of privacy and security.

§1Data as a private value

In private manners, data flow is considered an economic freedom **(A)** conversely, the public sector approaches data flow by open data and data sharing, both in a more subsidiary custom, conforming to the private sector, as well as implementing standards and directives originating from it **(B)**.

A. Data flow as a freedom of circulation

Data come in numerous forms and can be classified by taxonomies. The three categories that are often addressed are trade, business, and personal. Research mostly focuses on the exchange of products, services, and digital services, frequently attempting to quantify the data flows. Several studies attempt to quantify current data flows as service components in trade or estimate the effects of data flow restrictions or their removal[1307]. Legal studies in this domain are divided into three broad, non-exclusive data categories: trade, personal vs non-personal data, and

[1307] U. NATIONS, *Digital Economy Report 2021*, *op. cit.*

examinations of alternative data-flow regimes. The lack of accountability of personal data by third parties is frequently brought up as a defense against open data flows. As a result, research examines various global data limitation regimes[1308].

Accordingly, the European Union treats data flow as an economic freedom, aiming to forge a unified digital market. As a supranational body, it engages in geopolitical actions, setting forth reglementary tools to safeguard and competitively position the Union, defining regulations concerning data flow and freedom of cross-border data flow[1309]. Notably, the General Data Protection Regulation (GDPR) explicitly endorses freedom of data flows, titled "*Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data*"[1310].

Therefore, data flows emerge as a prerequisite of personal data protection under European Union legislation. The progression towards a single data market in the European Union follows certain requirements, including transnational ones. It is stated that "*the General Data Protection Regulation, like the Regulation establishing a framework for the free flow of non-personal data, enshrines this free flow of data*"[1311]. As a result, circulation constitute the fifth freedom of union European[1312]. The Digital Single Market is positioned as a necessity stemming from the adoption of legislation aimed at eliminating borders while ensuring the security of data circulation. The desired legal structure lies in the consolidation of common data spaces within the European Union. In the Data Governance Act, the free and secure flow of data with third countries is advocated, subject to exceptions and restrictions in the interest of public security, public order, and other legitimate objectives, in compliance with international obligations, including fundamental rights[1313].

In relation to trade, data flow is treated according to the perception of cross-borders, consisting of the "*movement or transfer of information between computer servers across national*

[1308] U. secretariat UNITED NATIONS, « The value and role of data in electronic commerce and the digital economy and its implications for inclusive trade and development », 2019.

[1309] W. GILLES et I. BOUHADANA, « The Free Circulation of Data: Between the 5th Freedom of the Single Market and the Revival of Open Data », in, Paris 1 Panthéon-Sorbonne, 7 novembre 2023, disponible sur https://site.imodev.org/nos-activites/europe/france/acadays-2023 (Consulté le 26 novembre 2023).

[1310] *Ibid.*

[1311] J.-F. HENROTTE, « La libre circulation des données électroniques consacrée comme cinquième liberté du marché unique », *Pin Code*, 2019, vol. 2, n° 2, pp. 11-17, disponible sur https://www.cairn.info/revue-pincode-2019-2-page-11.htm (Consulté le 19 novembre 2023).

[1312] *Ibid.*

[1313] W. GILLES et I. BOUHADANA, « The Free Circulation of Data: Between the 5th Freedom of the Single Market and the Revival of Open Data », *op. cit.*

borders"[1314]. The Zurich group, for instance, sets data flow principles by default, as the respect for consent and transparency, portability, security, accountability, trust and interoperability. In the digital economy, while two countries hold technologies and knowledge, that is, the capacity to create value, the European Union considers that its market is sufficient to impose its own rule, especially in the digital field. Consequently, data protection and commercial data regulation are established by the European Union itself [1315].

In turn, GDPR states, in article 46, that a processor can transfer personal data to third countries in case the controller or processor has provided appropriate safeguards, based on the respect of data subjects and adoption of legal remedies. Hence, as data protection imposes as a fundamental human right, the elaboration of mechanisms for its protection is seen as an indispensable circumstance for the very viability of international trade. These methods are resonated as means of compliance and adaptation to systematic approaches[1316].

In the case of Brazil, a study prepared by Milieu Consulting[1317], for the benefit of the European Data Protection Board, highlights the main characteristics of Brazil in terms of governmental data access, evaluating legal structures and practices in this regard, especially in terms of cross-broader data transfers. It pointed out the legal structure of data protection, highlighting the recent foundation of data law. The identifiable instruments in the policy are directed towards the General Data Protection Law (Lei Geral de Proteção de dados – LGPD, in the Portuguese acronym), enacted in 2018, the creation of an autonomous entity, the National Data Protection Authority (Autoridade Nacional de Proteção de Dados – ANPD, in the Portuguese acronym), alongside the enshrinement of data protection as a fundamental right, accession to the Budapest Convention, as well as a culture of protection disseminated from judicial decisions and public institution documents.

Indeed, concerns about personal data protection in the Brazilian legal framework are more recent than in the European Union. In the Federal Constitution of 1988, the primary right appointed is the concept of privacy, delimited as a fundamental right in Article 5, items X and XII, which aim at protecting intimacy, private life, honor, and the image of individuals. The

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[1314] V. ARROYO *et al.*, « What specific measures could the US, the EU and China take in order to foster and facilitate cross-border data flows? », s.d.

[1315] W. GILLES et I. BOUHADANA, « The Free Circulation of Data: Between the 5th Freedom of the Single Market and the Revival of Open Data », *op. cit.*

[1316] A. LATIL, « Le droit du numérique. Une approche par les risques », 2023, disponible sur https://hal.science/hal-04317004/ (Consulté le 12 décembre 2023).

[1317] Under Contract No 2022-0716 (EDPS/2019/02). MILIEU CONSULTING SRL, « Government access to data in third countries II », 2023.

first legal provision for data protection can be found in the Consumer Defense Code, Law No. 8.078/1990, Article 43, which grants the consumer the right to access information stored about them in databases and records. Also, the Brazilian Civil Code, launched in 2022, stipulates the inviolability of private life as one of the personality rights (Article 21).

Thus, while Europe has undergone a gradual maturation on the theme, Brazil has a more recent focus on data protection. In addition, as the study above mention states, the LGPD does not establish rules on national security, public security, and criminal procedure, leading to most surveillance measures being controlled by judicial authorities, such as decisions for monitoring communications, where the judiciary emerges as the primary recipient of decisions regarding legal normativity. This criterion is seen as problematic in the study, potentially affecting the level of protection in situations of governmental access[1318].

In fact, while the European Union seeks to establish itself as a single digital market for a common data space, Brazil does not have an antitrust tradition, due to the absence of an agenda in face of other high priority issues or even a lack of vocabulary on the matter[1319]. Thus, while the cross-border aspect lies as a fundamental for data flow and corresponds to a fundamental subject on the international level, Brazil takes data flow and its openness in a distinct manner, being more attentive to personal data protection, whose legal sphere is impacting the digital transformation of the state, including open data and data sharing.

B. Open by default, for data transfer

Among the spheres of taxonomies that rule data, it is established that in the world of technology, on a large scale, there is an oscillation between *"open*" and "*closed*" systems. For governments, the usual recommendation is promoting a government that must seek to be *open by default*. In general terms, the philosophy of open government by default is about making government data and policy-making processes available for the public to engage with, within the limits of existing legislation and in harmony with the national and public interest. The provision is that a digital government is open by default when it is able to employ data tools *collaboratively* and within the framework of an *interactive process* to create intelligence with the public sector and

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[1318] *Ibid.*

[1319] R.A.F. ZANATTA, *Dados, mercados digitais e concorrência*, Belo Horizonte, MG, Editora Letramento, 22 septembre 2022.

society. The proposal is to establish a model in which the public sector not only makes data available, but uses it to potentially create intelligence[1320].

In summary, the understanding is that open government by default can: ***i)*** both promote and identify that a digital government is being directed towards the user; ***ii)*** that the decisions made are being carried out in a transparent manner; ***iii)*** that they achieve a democratic bias in view of the possibility of interaction; ***iv)*** and that they enable inclusivity and also act in an agile manner. In this sense, according to the United Nations, a *data-centric* digital government must have a direct and indirect relationship with data governance, with strategies and public policies aimed toward this end[1321].

The Brazilian government's concern with data can be traced back to the General Information Technology Strategy (EGTI), published over the years since 2011[1322]. There are four categories on the subject in Brazil: open government; open government Data; National Open Data Infrastructure and the Brazilian Open Data Portal. In addition, the government lists eight norms that regulate the Brazilian open data policy, including the Access to Information Law[1323] (Lei de Acesso à Informação – LAI, in the Portuguese acronym) and Decree No. 8.777/2016, which instituted the Open Data Policy. Finally, Decree No. 10,160, of December 9, 2019, in Article 1, institutes the National open government Policy, within the scope of the Federal Executive Branch, to be operationalized through action plans to increase transparency and access to information, as well as to improve the provision of public services and strengthen integrity[1324]. Therefore, the proposal for *open data* lies in publishing readable, useable and reuseable data as well as making it available to the public without restrictions. To this end, they must not only be

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[1320] OECD, *The OECD Digital Government Policy Framework*, *op. cit.*

[1321] UNITED NATIONS (éd.), *The future of digital government*, *op. cit.*

[1322] *Ibid.*

[1323] Law No. 12.527, of November 18, 2011 - Access to Information Law; Decrees; Decree No. 10.160, of December 9, 2019 - Establishes the National Open Government Policy and the Interministerial Open Government Committee; Decree No. 9.903, of July 8, 2019 - Amends Decree No. 8.777, of May 11, 2016, which establishes the Open Data Policy of the Federal Executive Branch, to provide for the management and rights of use of open data; Decree No. 8.777, of May 11, 2016 - Establishes the Open Data Policy of the Federal Executive Branch; Decree No. 7.724, of May 16, 2012 - Regulates Law No. 12.527, of November 18, 2011; Resolutions of the National Open Data Infrastructure Steering Committee; Resolution No. 2, of March 24, 2017 - Approves the Terms of Use of the Brazilian Open Data Portal; Resolution No. 3, of October 13, 2017 - Approves the rules of the preparation and publication of Open Data Plans, as provided for in Decree No. 8.777, of May 11, 2016; Normative Instructions: Normative Instruction, No. 4 of April 13, 2012 - Institutes the National Open Data Infrastructure - INDA.

[1324] The Decree also sets up the Interministerial Open Government Committee, within the scope of the Office of the Comptroller General. It is, therefore, a committee of the Federal Union body, whose purpose is aimed at controlling corruption. According to its website: "The Comptroller General of the Union (CGU) is the federal government body responsible for defending public assets and increasing transparency in management, through

accessible, but also *readable in* an *open format* and with the authenticity of *having complied* with standards and protocols. In this way, an open data process, as well as its exploitation, relates to *three* basic *axes,* highlighted by Open Knowledge Brasil: availability and access, reuse and distribution and universal participation[1325].

In a nutshell, data opening is a process involving technical, material, organizational, and infrastructural criteria. Thus, "*open information*" is part of the transparency movement and responds to economic concerns about opening public data for sharing and innovation[1326].

C. Data sharing framework at Brazil

Politically, viewing data flow as a freedom means open and available data[1327]. This finds support in the Federal Constitution, the Access to Information Law, and the LGPD[1328]. The Brazilian government delineates the following obligations concerning data: openness, transparency, protection, and regulation. Also, the Brazilian data governance report identifies three pivotal discussion areas: ***i)*** the significance of data governance; ***ii)*** data use to augment public value; and ***iii)*** the role of data in fostering public *trust*[1329].

The National Infrastructure for Open Data positions itself as the primary reference for sharing and utilizing public – open - data and for governmental standardization[1330]. The National Infrastructure proposes four principles for open government Data: transparency, *accountability*,

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internal control, public auditing, corrections, ombudsman and anti-corruption actions." C.-G. da U. UNIÃO, *Institutional - Comptroller General of the Union*, https://www.gov.br/cgu/pt-br/acesso-a-informacao/institucional, https://www.gov.br/cgu/pt-br/acesso-a-informacao/institucional, consulté le 16 novembre 2023

[1325] In the organization's terms: ***availability and access*** *- the data should be available as a whole, at no more than a reasonable cost of reproduction and, preferably, should be downloadable via the Internet. The data should also be available in a convenient and modifiable form;* ***reuse and redistribution*** *- the data should be provided under terms that allow for reuse and redistribution, including combination with other datasets;* ***universal participation*** *- everyone should be able to use, reuse and redistribute, there should be no discrimination against people or groups.* OPEN KNOWLEDGE BRASIL, " Why "open"? "

[1326] OECD et INTER-AMERICAN DEVELOPMENT BANK, *Broadband Policies for Latin America and the Caribbean*, *op. cit.*

[1327] W. GILLES et I. BOUHADANA, « The Free Circulation of Data: Between the 5th Freedom of the Single Market and the Revival of Open Data », *op. cit.*

[1328] B.R. BIONI, P.G.F. da SILVA et P.B.L. MARTINS, « Intersecções e relações entre a Lei Geral de Proteção de Dados (LGPD) e a Lei de Acesso à Informação (LAI) », *op. cit.*

[1329] J.S. DA SILVA CRISTOVAM et T. MEINHART HAHN, « Administração pública orientada por dados: governo aberto e infraestrutura nacional de dados abertos », *op. cit.*

[1330] INDA pertains to the cluster of guidelines for sharing public data and information within the Open Data model, in alignment with the Standards for Electronic Government Interoperability (e-PING).

citizen participation, and technology and innovation[1331]. Actions mut reflects the sum of these principles, as disposed in Article 5 of Decree No. 8.777/2016, adhering to the principle of legality, and aligning with the international agenda aimed at promoting transparency and social participation in public administration[1332].

Concerning structure, the Gov.br Platform provides federal arrangements for services to be shared. User data is collected, stored and processed on the Platform. Additionally, by the E-digital strategy framework, it can be noted that the policy of data sharing aims to design a "*common knowledge*" within Brazilian data governance. In turn, Decree 10.046/2019, *Brazilian Data Sharing Decree* - seeks to facilitate the collection and sharing of data between organizations in the federal public sector and between public and private organizations. Also, from the Decree[1333], the *Central Data Governance Committee* (CCGD) was created to implement guidelines on government data sharing standards, aiming towards the facilitation of data sharing between public bodies.

The *Committee* provides guidelines, related to the LGPD, notably regarding data sharing. The resolutions deal with standard procedural instruments relating to sharing[1334], emphasizing interoperability and database monitoring. The instrumentation began with the *risk classification* databases, defining databases as high, medium, or low risk for sharing. This classification was considered essential to assist the LGPD's personal data protection guidelines. The Committee defined directives, that, although related to the LGPD, establishes a permissive understanding, aiming to reduce data administrators' perception of risk[1335].

While this broad and expansive view of data protection can be seen as a support for thinking about personal data protection and legal frames for sharing, the Brazilian legal and political mechanisms regarding data sharing are delimited in a fragmented manner. Firstly, it is

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[1331] i) transparency: data on government activities are open, comprehensible, timely, freely accessible, and adhere to the basic standard of open data; ii) *accountability*: operating by rules and mechanisms that establish and justify actions, as well as responding to criticisms and demands, thereby accepting the responsibilities entrusted; iii) citizen participation: implementing mechanisms that engage society in debate, collaboration, and proposing effective contributions towards a more effective and responsive government; and iv) technology and innovation: recognizing new technologies and fostering innovation as a key element in this process J.S. DA SILVA CRISTOVAM et T. MEINHART HAHN, « Administração pública orientada por dados: governo aberto e infraestrutura nacional de dados abertos », *op. cit.*

[1332] *Ibid.*

[1333] F. FILGUEIRAS et L. LUI, « Designing data governance in Brazil », *op. cit.*

[1334] The CCGD excludes the two federal government public companies that perform data collection, SERPRO and DATAPREV. That means that the state cannot use these companies to create protocols for data storage and security, as well as interoperability between databases. *Ibid.*

[1335] *Ibid.*

considered that the changes made by the Decree are limited by fiscal matters[1336]. Besides, as already posited in **Chapter 5**, each federal institution develops security and storage technologies in its own way. These dynamics reinforce conflicting situations shaped by the ownership and custody of data and the fragmentation of data storage and use. Therefore, even though the Brazilian E-digital strategy emphasizes sharing, it lies ineffective due to the instrumentation contradicting the intentions of the data policy[1337].

Similarly, Lucas Carvalho exposes that the public sector sees LGPD as an obstacle to innovation of public policies and services, showing several responses to the changes brought about by the data protection law[1338]. Therefore, an examination of Brazilian legal open data movement and data sharing framework reveals "*the fragmented approach in their incorporation into the legal system, as well as the existence of other frameworks still awaiting legal certainty regarding their enforcement. Internationally, this positions Brazil in an anachronistic stance compared to other nations that have established clear guidelines for the operation of data within Public Administration*"[1339].

On one hand, in political action manners, Fernando Filgueiras points out the fragmentation of data governance policy in Brazil and even the difficulties posed by LGPD within the government and public administration. He notes the limitation of the law for the Brazilian data governance process, especially due to the established impositions, including the provision of the past existence of specific regulations for the public sector[1340].

On the other hand, in the legal sphere, Brazilian doctrine has predominantly engaged in an interpretative reading of digital transformation based on the theory of fundamental rights, and, moreover, the logic of protecting individual or collective rights in the face of the state. Hence, legal doctrine has made efforts not only to demonstrate the compatibility between legal

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[1336] *Ibid.*

[1337] *Ibid.*

[1338] L.B. de CARVALHO, « O poder público e a proteção de dados pessoais no Brasil: novos desafios, velhas práticas administrativas », *Revista de Direito Administrativo*, août 2023, vol. 282, n° 2, pp. 133-162, disponible sur https://periodicos.fgv.br/rda/article/view/89347 (Consulté le 28 novembre 2023).

[1339] J.S. DA SILVA CRISTOVAM et T. MEINHART HAHN, « Administração pública orientada por dados: governo aberto e infraestrutura nacional de dados abertos », *op. cit.*

[1340] Indeed, for Filgueiras, LGPD represents a critical moment, where "*a situation of political conflict has been created that shapes the dynamics of the data governance project in the Brazilian federal government.*" This is because, according to him, the advent of LGPD required managers to adapt and adjust policies and strategies to the norm, creating a situation of conflict in data governance dynamics. For the author, the decree aims to facilitate data sharing, while LGPD imposes restrictions. F. FILGUEIRAS et L. LUI, « Designing data governance in Brazil », *op. cit.*

instruments, but also to advocate the necessity and potentiality of data protection rights, that need to direct the shared legal regime[1341].

Under the LGPD, the processing of personal data must observe principles and rely on a proper legal basis. Such provisions are distinguished by their categories, such as the processing of sensitive data. In the case of the public sector, the Supreme Court, in 2020, decided that only in relation to the execution of public policies does the legislation refer to a single legal basis under Article 7, and Article 11, which deals with sensitive data, as well as its application in the case of sharing by the administration. Thus, Chapter IV of said law would serve as an additional basis for the processing of personal data. Article 23 would be a case where the processing of personal data is allowed in the execution of legal competencies, or in the case of public services[1342].

However, doctrine and courts have been consolidating in the sense of limiting the use and sharing of data in the public power to the strict compliance with the provisions of the commercial protection of personal data law. Furthermore, the Authority responsible for personal data protection has gradually determined itself as a competent agency to dispose including about public sector data governance matters. A guideline published by the ANPD in 2023 on the processing of data by the public sector, states that any of the legal bases defined in the personal data protection law can be employed by the public sector. Furthermore, the authority positions itself as a decisive entity on the topic, and also addresses the need for observance of the LGPD by every public servant, who is subject to autonomous liability in case of non-compliance, which encourages a culture of fear more than one of exchange[1343].

In turn, data policies in Brazil are sparse, not unified, and lack a specific authority, highlighting their fragmented nature. This absence of systematization or synchronization among documents leads to insecurity in political agendas, security, technical management, resulting in the disregard of existing protocols and manuals. Consequently, this often results in judicial

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[1341] B.R. BIONI, P.G.F. da SILVA et P.B.L. MARTINS, « Intersecções e relações entre a Lei Geral de Proteção de Dados (LGPD) e a Lei de Acesso à Informação (LAI) », *op. cit.*

[1342] MILIEU CONSULTING SRL, « Government access to data in third countries II », *op. cit.*

[1343]The text states : « *Finally, it is important to note that public servants who violate the GDPR are also subject to personal and autonomous administrative liability, according to Article 28 of Decree Law No. 4,657 of September 4, 1942 (Law of Introduction to the Norms of Brazilian Law*). »

Original : *« Importante ressaltar, por fim, que o servidor público que infrinja a lgpd também é passível de responsabilização administrativa pessoal e autônoma, conforme o art. 28 do Decreto Lei n° 4.657, de 4 de setembro de 1942 (Lei de Introdução às normas do Direito Brasileiro »)* C. LANDERDAHL *et al.*, « Tratamento de dados pessoais pelo Poder Público », s.d.

decisions regarding the control of information exchange in the digital environment. In Brazil, in sum, data flow is limited and data share between entities are submitted to *the private* regime.

§ 2 The challenges of digital state transformation by the individual's freedom code

For The Bennett Institute for Public Policy at the University of Cambridge[1344], rather than taxonomies, it is necessary to define *how value* is created from various types of data, how it is captured by various entities, and how it is distributed. The value of data, which can be distinct from its creation and production, may be contemplated in several ways, either oriented towards the benefit of the collective, the social, or, from an individualistic economic perspective. Currently, the online environment is dictated by this latter viewpoint[1345].

Meanwhile, as the emergence of data as private value permeates and affects states, the public sector navigates through its process of digital conversion, attempting to manage the inherent challenges posed by a globally networked environment, namely, *security, privacy, surveillance, and inequality*[1346], while the *production of value* in the public sector is left behind[1347].

A. Open data for data exploitation

As mentioned, *data* has a variety of *statuses.* New value chains emerge, as seen, from data exploitation, creation and collection, organization, processing, analysis, reuse, among others[1348]. Naturally, data are non-rivalrous, not property, depending on *access* and *knowledg*e.

[1344]For then, is a data value chain: Or, we can dispose: raw data, processed data, integrated data, analysis, insights, action and finally value. Nevertheless, the value of Data will be disclosure better in another section of the thesis. BENNETT INSTITUTE FOR PUBLIC POLICY, « The Value of Data - Policy Implications », *Bennett Institute for Public Policy*, s.d., disponible sur https://www.bennettinstitute.cam.ac.uk/publications/value-data-policy-implications/ (Consulté le 27 octobre 2023).

[1345] The political instrumentalization and economic exploitation of the public sphere can be observed in the field of digital and social media. An economic-exploitative dimension is inherent to all communication carried out on platforms that follow business models based on surveillance M. SEELIGER et S. SEVIGNANI, « A New Structural Transformation of the Public Sphere? An Introduction », *Theory, Culture & Society*, juillet 2022, vol. 39, n° 4, pp. 3-16, disponible sur http://journals.sagepub.com/doi/10.1177/02632764221109439 (Consulté le 27 octobre 2023).

[1346] Inequality will be discussed at chapter 8.

[1347] M. ZIOSI *et al.*, « Smart Cities: Mapping their Ethical Implications », *SSRN Electronic Journal*, 2022, disponible sur https://www.ssrn.com/abstract=4001761 (Consulté le 18 octobre 2023).

[1348]The architecture for a cross-border data flows is disposed in principle, that constitute the perception of *Data flows by default*, as limiting data localization to defined/specific circumstances; Consent and transparency - the

As an accessible digital asset, data do not disappear when people use them. Data only become valuable when they are used[1349].

Therefore, it is no coincidence that the debate on Internet governance and protection is giving way to the debate on data governance, i.e. who has access to it, who uses it and who exploits the value of its use. If, until recently, the debate on "*open data*" was reserved for the decision-making community, as it becomes clear that data is being transformed into economic value, the debate on access to public sector data has been revived, refocusing it on the need to promote innovation and deepen an economic policy based on stimulating growth through technological progress. To put it more precisely, as the elites' perspective shifts from civic engagement to economic policy, political issues gradually move away from their original civic roots[1350].

In this sense, the defense is not only about personal data protection or democratic participation, but the openness of data to entrepreneurship. On this basis, one stares at a government that is open, so that the exploitation of circulation may continue to be carried out by those who have knowledge (qualifications and appropriate technology)[1351]. For that, the practices of *good governance* will establish metrics and standards for implementation by states. This is what Evgeny Morozov and Francesca Bria understand as the neoliberal model of the digital transformation of the public sector. The exploitation and visualized circulation of data as commodities is the result of an economic policy of data extraction, while the data collected in the public sector is used by private companies instead of being used for the good of the community[1352].

This logic extends to the legal realm, as Julie Cohen rightly points out, which is not anachronistic to the changes, but is part of the construction of phenomena in the networked environment, supporting and underpinning relationships based on the logic of data

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rights and responsibilities of individuals to share; Data portability and integrity; Cyber security and system resilience; interoperability - technical standards; Responsibility and trust - responsibility of data providers, controllers and processors; Education and awareness ; personal cyber behavior and data literacy in a digital world. In: J.-F. HENROTTE, « La libre circulation des données électroniques consacrée comme cinquième liberté du marché unique », *op. cit.*

[1349] V. MAYER-SCHÖNBERGER et T. RAMGE, *Access rules*, *op. cit.*

[1350] *Ibid.*

[1351] E. PAPADIMITROPOULOS, « Beyond neoliberalism », *op. cit.*

[1352]For the authors : « *Like it or not, the smart cities agenda, together with the sensor and connectivity infrastructure it promotes, also opens many doors to the kind of audit-obsessed quantification celebrated by neoliberalism* ».

Original *: « querendo ou não, a pauta das smart cities, em conjunto com a infraestrutura de sensores e de conectividade promovida por ela, também abre muitas portas para o tipo de quantificação obcecada por auditorias celebrada pelo neoliberalismo* ». E. MOROZOV et F. BRIA, « A cidade inteligente », s.d.

extraction[1353]. In fact, human rights and legal dichotomous disposition fail contenting with the informational mechanisms of extraction, leading to a place where they *"are increasingly outflanked and coopted"*[1354]. As a result, the public sector is tasked with encouraging the protection of individuals and opening up data for production, establishing data rights protections, not rarely still linked to the notion of freedom and autonomy of individual property, which will prove to be truly insufficient, especially since in the digital economy, value is not necessarily built by property, but by the production of knowledge made possible by the extraction of data.

This can be seen in the very rationale behind the digital transformation of governments and the open data policy in Brazil. The initial and main objective is to open up public acts of public agents, especially budgetary ones, which is in line with the rationality of the Brazilian control system. The provision about opening up data so that it can be made available and provide collaboration is placed as a direction, either between bodies of the institution, or for civilians, which is actually more symbolic than effective, especially considering the small and optional/non mandatory legal provision of spaces for innovation and collaboration, which is examined in the digital government law[1355].

It is true that the Brazilian government, as seen, has dedicated a specific policy to Open data, the "*Brazilian Open Data Policy*" (PDA). Its aim is to "*promote transparency, engage in social participation, develop new and better government services and increase public integrity*". However, as has already been made clear, public integrity in Brazil is considered synonymous with probity (moral obligation)[1356], and does not encompass the willingness to examine data as

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[1353] As Julie Cohen explains: "*The increasing power and prominence of network-and-standard-based legal institutional arrangements for economic governance—arrangements that exist to facilitate global flows of extractive activity and that tend to treat protective regulation as network damage—has left older human rights institutions increasingly sidelined*". J.E. COHEN, « The Biopolitical Public Domain: The Legal Construction of the Surveillance Economy », 28 septembre 2015, disponible sur https://papers.ssrn.com/abstract=2666570 (Consulté le 30 octobre 2023).

[1354] J. COHEN, « Internet utopianism and the practical inevitability of law », *op. cit.*

[1355] In turn, this policy deals with technological promotion through open data, providing a basis for the development of more open, effective and accountable governments. According to Article 2 of Decree No. 10.160, of December 9, 2019, the National Open Government Policy's guidelines are: increasing the availability of information on government activities; encouraging social participation in decision-making processes; encouraging the use of new technologies that foster innovation, strengthening public governance and increasing transparency and social participation in the management and provision of public services; and increasing transparency processes, access to information and the use of technologies that support these processes S.-G. REPUBLICA (PR), Decreto nº 9.319, de 21 de março de 2018, *op. cit.*

[1356] Discussed in **Chapter 6.**

a valuable product, or even to identify a data-driven government as a necessary and fundamental code for disposing of relationships and, above all, of the policies and norms to be established.

In short, through good governanc*e*, the understanding is that technologies allow for increased transparency and make it possible for individuals to control government activities, as well as the performance of the policies implemented and the work of public managers[1357]. It is, therefore, a logic still aligned with dichotomous and oppositional formats. Accordingly, based on the information provided on the Brazilian government's website, the Open Data initiative includes the publication of various data that make it possible to monitor government actions[1358]. The effects of open data by the government encompass inclusivity (the provision of open and accessible standardized data to be used in any tool), **transparency (**open and accessible information) and **accountability (**open data sets allow knowledge of the performance of governments in fulfilling their public policies).

There is no denying the essential need for instruments of oversight, openness and transparency. However, while the open data policy is aimed at controlling the actions of public managers, it is silent on the way in which relationships are established within a networked ecosystem, and also on the provision of data as value, and on the reality of circulation and sharing not as goals, but as necessities in a data-driven ecosystem. The digital transformation goes beyond the transparency of the digitization of services and the oversight of the actions of public managers. Policies aimed at collaboration are incongruous with a body of legislation that does not address the reality of a reticular and interdependent ecosystem[1359].

In short, data in the public is examined ***from*** the point of view of private data, commercialization, ownership and protection of personal data. This is a private reading of data law, which establishes a policy of data circulation by the public authorities (open), and individual protection of personal data (by consent and informational self-determination). This undermines the idea of open circulation and the exploitation of sharing, affecting the development of the ecosystem and leaving several regulatory gaps, in privacy, security and even in the public sector frame.

[1357] F. FILGUEIRAS, « Indo além do gerencial », *op. cit.*

[1358] In fact, the Brazilian government considers "*Open Government Data" to be a "methodology for publishing government data in reusable formats", with the* aim of increasing transparency and citizen participation, as well as promoting collaborative actions by society.

[1359] B. BIONI *et al.*, « The digitization of the Brazilian national identity system: A descriptive and qualitative analysis of its information architecture », *op. cit.*

B. Privacy and security

Personal data protection is a major legal concern. In Brazil, this issue is worked mainly in the LGPD and demonstrates some problems related to the focus on data protection, facing a concern that are recent in the Brazilian legal system[1360]. However, the legal debate focused solely on personal data blurs other fundamental issues of an environment that goes far beyond protecting personal data in the world of collection and extraction at various levels and layers. Though, directing the debate to personal data protection (whose protection, it must be emphasized, is not opposed here) conditions an anthropocentric and subjectivist view, bringing undesirable results, including personal data protection[1361].

As seen, smart city solutions are typically predictive, seeking to anticipate problems such as crime, transportation congestion, and pollution. However, there is still a developing debate about all the nuances that emerge in a smart city. It cannot hide the fact that it also interferes with other values and legal positions, which can often complicate the debate and identification of rights to be protected. As Sofia Ranchordas highlights, the principles and instruments of public law remain reactive and ignore potential damage caused by predictive systems. Moreover, public law continues to emphasize the need to limit human discretion and individual failures instead of systemic failures and datafication systems that categorize citizens in new ways[1362].

[1360] In Brazil, although there are provisions on data protection since the Constitution, such as the habeas data remedy, and later, the consumer defense code, the legislation was sparse and not very effective. Thus, the treatment of the issue is recent. A.C. AGUILAR VIANA, C. FERREIRA DE MIRANDA et M. WACHOWSKI, « Perfil algorítmico e discriminação digital: uma leitura a partir das normas europeias e brasileiras », *WACHOWSKI, Marcos, Proteção de dados pessoais em perspectiva: LGPD e RGPD na ótica do direito comparado, Curitiba, Gedai/UFPR*, 2020, pp. 441-504, disponible sur https://scholar.google.com/scholar?cluster=17046511968963159791&hl=en&oi=scholarr (Consulté le 28 octobre 2023).

[1361] Whereas the European Union considers the automated decision as a ban, in Brazil there is a right to review the automated decision without the guarantee that this review will be conducted by a human. Therefore, the right to an explanation lacks legal support in Brazil. R D.W. TONIAZZO, T.S. BARBOSA et R.L. RUARO, « O direito à explicação nas decisões automatizadas: uma abordagem comparativa entre o ordenamento brasileiro e europeu », *Revista Internacional CONSINTER de Direito*, décembre 2021, n° 13, p. 55+, disponible sur https://link.gale.com/apps/doc/A695239922/IFME?u=anon~1c40fd6c&sid=googleScholar&xid=5c5c9b37 (Consulté le 30 octobre 2023).

[1362] Sofia Ranchordás explains the difficulty regarding smart cities. Smart cities are strategies, products, narratives, and processes that reshape the relationship between governments and citizens, frequently excluding 'dumb' citizens. Second, smart urban solutions are typically prescriptive, attempting to foresee problems such as crime, traffic congestion, and pollution. In contrast, public law principles and instruments continue to be reactive or responsive, ignoring potential harms caused by predictive systems. In addition, public law continues to emphasize the need to limit human discretion and individual flaws, as opposed to systemic flaws and datafication systems

The individualistic discussion about personal data often results in a broad provision of a general protection through fundamental rights, which also may not bring relevant effects[1363]. The institutional and legal structures are put face to face against a networked ecosystem that is composed of multisectoral actors, who communicate with each other, beyond the flows of data and information, whose protections, whether for individuals, a group, or even the nation, are not remedied through an individualistic – understood here as subjectivist - reading of law.

In Brazil, issues related to protecting *personal data and surveillance* and security are gaining prominence day after day. There are successful cases of surveillance programs[1364]. However, surveillance in Brazil should be treated with great caution, as it can cause the potentiation of inequalities and discrimination. In 2023, Brazil was identified as the primary target for cyber-attacks in Latin America. Then, while the country needs to consider a security framework, it is also crucial to look at the situation from another side. One in which it is not only a surveillance agent, but also an agent that watches over its citizens with massive technology[1365].

Among the issues emphasized regarding surveillance, facial recognition in public spaces becomes an object of debate. In São Paulo, the topic has been under discussion since 2019, when Metrô, the company responsible for the city's underground metro system, opened a tender and appointed a consortium to install a facial recognition system using artificial intelligence. Several stations would have their surveillance systems linked to some 5,080 cameras. The subject of facial recognition was the subject of bills (865 of 2019), aiming to make the installation of facial recognition cameras in Metro stations mandatory. Meanwhile, another law

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that categorize citizens in novel ways. S. RANCHORDAS, « Smart Cities, Artificial Intelligence and Public Law: An Unchained Melody », 26 septembre 2022, disponible sur https://papers.ssrn.com/abstract=4229327 (Consulté le 28 octobre 2023).

[1363]Their business models assume that they know each of their users perfectly. Because of their algorithms, they are able to analyze parametric sums of data in order to dictate each user's choices for the benefit of their advertisers. In this way, they generate true standards in that they are massively followed. They are therefore artificial intelligences that largely frame the activities on digital platforms. P. BELLANGER, « Souveraineté numérique et ordre public », *op. cit.*

[1364]Salvador, Bahia, Carnival 2019. A facial recognition camera identified a murder suspect at one of the many street party checkpoints. He was a gypsy woman with a water pistol. After public authorities verified his identity, two police officers arrested him. The authorities use such examples to justify facial recognition technology in the country. J.V. ARCHEGAS et C. PERRONE, « ‚Don't Snoop on Me': How 9/11 ultimately sparked a movement for privacy and data protection in Brazil », *Verfassungsblog*, décembre 2021, disponible sur https://verfassungsblog.de/os3-dont-snoop/ (Consulté le 28 octobre 2023).

[1365] *Ibid.*

project, launched in 2022, n. 385/2022[1366], proposed to restrict the use of facial recognition technologies by the Public Authority[1367] .

However, several problems are emphasized, such as information security, the sharing of images with other agencies, the sharing of ideas between public entities such as federal units and the federal government, which lack explanations, creating fearfulness regarding the use of these technologies[1368]. Add to this scenario, a 2023 report from the Shodan.io institution, that shows Brazil occupying the 4th position in countries that most acquire Chinese camera systems whose potential risk of discrimination was highlighted[1369]. It is known that algorithms are indispensable tools for a data-driven approach, which is operated by data surveillance and supported by information of the most diverse nature[1370]. However, beyond predictive processes, these systems can cause what Cathy O'Donnell calls "*weapons of mathematical destruction*"[1371]. This is because the algorithmic models used in applications shape people's experience on these networks. Moreover, it limits human constructs and potentiates the inequalities in the offline world[1372].

In Brazil, the problem takes on a specific guise[1373]. In 2022, Brazil ranked as the third most incarcerating country in the world and the country that kills the most transgender people[1374]. Facial recognition technologies reinforce this scenario. There is no transparency in the Brazilian method concerning contracts for the acquisition of these systems, nor is it even known what

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[1366] A.L. do E. de S.P. ESTADO DE SÃO PAULO, « Projeto de Lei n° 385, de 2022 (PL 385 / 22) », 23 juin 2022, disponible sur https://www.al.sp.gov.br/propositura/?id=1000448817 (Consulté le 7 novembre 2023).

[1367] The municipality of the city of São Paulo opened a bidding process for hiring an equivalent tool, however, the challenges to the call for bid led the city to give up the bidding process in December 2022.

[1368] T. TIMAN, M. GALIC et B.-J. KOOPS, « Surveillance Theory and Its Implications for Law », 1 décembre 2017, disponible sur https://papers.ssrn.com/abstract=3098182 (Consulté le 28 octobre 2023).

[1369] R. MOODY, « NDAA-prohibited cameras: Which countries and cities have the most Hikvision and Dahua camera networks? », *Comparitech*, 19 avril 2023, disponible sur https://www.comparitech.com/blog/vpn-privacy/ndaa-prohibited-camera-networks/ (Consulté le 7 novembre 2023).

[1370] R.S. COSTA et B. KREMER, « Inteligência artificial e discriminação: desafios e perspectivas para a proteção de grupos vulneráveis frente às tecnologias de reconhecimento facial », *Revista Brasileira de Direitos Fundamentais & Justiça*, octobre 2022, vol. 16, n° 1, disponible sur https://dfj.emnuvens.com.br/dfj/article/view/1316 (Consulté le 28 octobre 2023).

[1371] C. O'NEIL, *Algorithmes, la bombe à retardement*, *op. cit.*

[1372] *Ibid.*

[1373] Research published in 2020 and conducted by the Igarapé Institute between the years collected between 2011 and 2019 revealed that 30 cities in the country employed facial recognition technologies in the activities of guards, police officers, and other agencies. It has been implemented since 2019 with tantalizing promises by the private and public sector for policing and public safety, with the justification of increased efficiency.

[1374] E. PINHEIRO, « Brazil continues to be the country with the largest number of | Geral », *Brasil de Fato*, 2022, disponible sur https://www.brasildefato.com.br/2022/01/23/brazil-continues-to-be-the-country-with-the-largest-number-of-trans-people-killed (Consulté le 7 novembre 2023).

this technology uses for facial pattern recognition criteria, or how the inputs in the databases (Datasets) work[1375]. Finally, a survey by the Security Observatory Network published in 2022, emphasized that 90% of those arrested through facial recognition in the country, were black[1376]. It is not by chance that Brazil's adoption of facial recognition is viewed as problematic[1377]. Nevertheless, it continues to have the same dissonant laws of a public law formatted for individuals, by a private and individualistic law.

C. Private legal public transformation

In cross-border data flows, the construction of data rights based on the sharing paradigm presupposes a model in a free market of data interoperability for use and sharing of available data[1378]. The open data by default regime, characterized by its openness and availability for reuse, is intended to serve as a model for a regime that is not exclusivist. However, as Valerie Varenot rightly points out, the model is "*imperfect*" [1379]. Not only does it come up against the rights of third parties, which paralyze its openness, but it is also subject to the attraction of the private data law regime, which draws it into the orbit of the private reserve. It's worth remembering that while open data is established as an obligation of openness for the public sector, private data falls within the spectrum of ***closure,*** protected and secured by copyright and private property rights.

Moreover, much of the data is produced by private actors who treat it as an asset and have no intention of sharing it, even official statistics agencies, which are geared towards the common good. There is also a natural resistance to the sharing process between public and private

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[1375]The organization Panóptico, which monitors the implementation and results of recent policing programs employing facial recognition technologies, points to results showing that facial recognition has led to increased crime in Brazil. Indeed, historically, technology-based surveillance criminalizes low-income and racialized communities. M. FOUCAULT, *La Naissance de la biopolitique. Cours ...*, Paris, 4apr. J.-C..

[1376] M.E.L. da SILVA, *Máquina de moer gente preta: a responsabilidade da branquitude*, Rio de Janeiro, RJ, CESec, 21 septembre 2022.

[1377]As Rodrigo Firmino and Fernanda Glória explains, in research published in 2022, the nation appears to be a fragile territory for the adoption of a technology that is admittedly racist and discriminatory, with 54% of the Brazilian population classified as black, 85% of persons approached by police in Brazilian cities, and 2/3 of those incarcerated being black. Connecting with activists, social movements, and members of parliament at all three levels (local, state, and federal) to craft legislation banning facial recognition technologies has been one axis of action and agenda regarding this subject R.J. FIRMINO et F.G. BRUNO, « Building a Latin American Agenda for Studies on Surveillance, Technology, and Society », *Surveillance & Society*, décembre 2022, vol. 20, n° 4, pp. 357-363, disponible sur https://ojs.library.queensu.ca/index.php/surveillance-and-society/article/view/15917 (Consulté le 28 octobre 2023).

[1378] V. VARNEROT, « La distinction droit privé/droit public en droit des données », *op. cit.*

[1379] *Ibid.*

entities. One example in Brazil can be highlighted by the decision of the telephone companies, in 2020, during the COVID pandemic, who refused to provide data information. Three Direct Actions of Unconstitutionality[1380] questioned the Provisional Measure n 954 of 2020, which required telecom operators to transfer their data to the Brazilian Institute of Geography and Statistics (IBGE). The Supreme Court suspended the Provisional Measure because it did not meet the Constitution for protecting the fundamental rights of Brazilians[1381]. The court's decision pointed out insufficient criteria in the case of data sharing and addressed the absence of an absolute fundamental right, requiring the exercise to be carried out through other principles.

However, while the decision suspended the Provisional Measure, it did not propose an alternative that could more broadly assess the public interest at stake. As a result, the Institute ceased to produce essential statistics. Such an example highlights that what the digital transformation of the state lacks is the perception of data as value. When it comes to the digital transformation of the states, commonly, digitization emerges as a primary vector for change, aiming to generate economic benefits and simplify administrative procedures[1382]. Also, such digitization should yield services more finely tuned to user expectations. Nonetheless, digitization represents a stage preceding datafication, which involves the process of converting traceable, quantifiable, analyzable, and performative data into a digital format. Through datafication, quantified actions enable immediate and predictive analysis, also becoming accountable for the capture and circulation of data[1383].

Employing smart cities as an example, both organic and digital spaces operate through pervasive and ubiquitous computing. Management is carried out through sensors that collect, store, and process data. The management of data flows and circulation occurs in real-time[1384]. Data, obtained through surveillance structures, public records, or crowdsourcing, circulates

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[1380] ADI 6387, ADI 6388, ADI 6389, ADI 6390, and ADI 6393.

[1381] According to the minister, notwithstanding the severity of the health crisis one cannot legitimize "the trampling of fundamental guarantees enshrined in the Constitution". Minister Alexandre de Moraes emphasized that fundamental rights are not absolute and find limits in Constitutional rights, whose relativization must observe the principles of reasonableness and proportionality, which, for him, did not occur in the case.

[1382] A. SUPIOT, « Aux origines des États : la souveraineté de la limite », *op. cit.*

[1383] According to the author, datafication refers to all activities translated into data and that can be processed by algorithms into new types of *social* and *economic* value—not just discretely quantifiable interactions (such as what one purchase), but also their contexts and semantic relationships (what someone like or may even potentially like). The authors employ the concept of commodification to refer to the platforms' ability to transform "online and offline objects, activities, emotions, and ideas into tradable commodities," which is fundamental to this governance model. J. VAN DIJCK, *Platform Mechanisms*, 1, *op. cit.*

[1384] F. FILGUEIRAS et B. SILVA, « Designing data policy and governance for smart cities », *op. cit.*

through connections established between public and private entities. That means that in the nuanced hybridity of cyberspace, *infrastructure can manifest as either public or private*, combining into a foundational sharing arrangement which is pivotal for data governance throughout all procedural stages—digitization, collection, extraction, prediction, manipulation, storage, and commodification[1385].

Such a framework elucidates that data extraction, handling, and exploitation, in myriad forms, which permeate the reality of digital transformation, particularly as the delivery of services, regarded as crucial for the population, emanates from governmental actions. In other terms, personalized and quantified decisions have already become a standard mode. Just as in the private sector, the public sector also collects, extracts, digitizes and commodifies. And it must do so in order to provide services to the community[1386]. Admittedly, these public activities are not all ignored in the literature. However, instead of examining information as an *asset,* a socio-technical infrastructural phenomenon and a dependent context, the discussion of data is still limited to an individualistic bias, whether for the protection of data (civil, individual or collective), or for the circulation of data for commercial exploitation.

Surveillance, for instance, is placed as a primary factor for examination in the context of data flow and data use in the public sector. As Michel Foucault explains, the surveillance of cities was a consequence of the productive perspective, in face of the economic development and of a society that was becoming self-regulating[1387]. In the society of control, surveillance is conducted not only by states, but also by companies[1388]. It enhances its effect with the social networks, because people also participate in the surveillance plexus. Incidentally, Kevin Haggerty and Richard Ericson develop a valuable concept of "*Surveillance Assembly*",[1389] which refers to a diversity of heterogeneous objects, whose unity arises from working together as a functional entity. Assemblies comprise flows, which can be people, institutions, or data.

[1385] V. ALMEIDA, F. FILGUEIRAS et F. GAETANI, « Digital Governance and the Tragedy of the Commons », *op. cit.*
[1386] J. COHEN, « Internet utopianism and the practical inevitability of law », *op. cit.*
[1387] M. FOUCAULT et V.L.A. RIBEIRO, *Segurança, penalidade e prisão*, Ditos e escritos, n° n. 8, Rio de Janeiro, Forense Universitária, 2012.
[1388] Whereas in the disciplinary society people moved between "confinements", in the control society there is an "unlimited moratorium". G. DELEUZE, « Les sociétés de contrôle », *op. cit.*, p.37.
[1389] K.D. HAGGERTY et R.V. ERICSON, « The surveillant assemblage », *The British Journal of Sociology*, 2000, vol. 51, n° 4, pp. 605-622, disponible sur https://onlinelibrary.wiley.com/doi/abs/10.1080/00071310020015280 (Consulté le 28 octobre 2023).

The flows, hitherto opaque[1390], once coupled, become systems of domination, which allow one to govern other people's actions[1391].

In other words, even in the public sector, surveillance is not carried out exclusively by the state. Even the decisions and services provided, such as public security, are not made in isolation by the public authorities. Digital surveillance is hybrid and, in this sense, the state is not solely responsible for providing security, especially since it is mixed with private actors in the collection and provision of services. One example in Brazil can be observed on the Federal platform E-gov, that employs surveillance structures and public/private activities[1392].

Furthermore, it's also worth remembering that Soshanna Zuboff refers to what she calls surveillance capitalism to precisely define surveillance not by the state, but by the market in the digital age, which in short refers to companies that collect the digital footprints of citizens and consumers[1393]. Despite this scenario, the limitations of surveillance or data use activities recall not over the private power, but over the state. As Catalina Goanta and Jerry Spanakis observe, while state surveillance is viewed with apprehension, surveillance exercised by *"companies to prevent, for example, the proliferation of dangerous products that could affect consumers in general, has traditionally been accepted as a necessity for the application of effective consumer protection"*[1394].

Thus, while there is a culture of data openness within a single data market in a common space within the European Union, Brazil, on the other hand, does not have a competitive discussion and establishes limiting measures regarding sharing between the public sectors. Consequently, while, the commercial practices of digitization, extraction and commodification in the private sector are accepted, the public sector is generally seen with all kinds of limitation regarding data use and sharing.

Flavia Lefebvre shows that, in the past, Brazil was a colony for exploiting natural wealth. Then the country opened its market to exploitation by oligarchies of digital services, such as social networks, search engines, streaming, and educational services precariously contracted with

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[1390] A.C. AGUILAR VIANA et T. GOMES MARCILIO, « Estudos sobre a vigilância: do panóptico ao big-other | International Journal of Digital Law », *International Journal of Digital Law3*, 2023, vol. 3, n° 2, disponible sur https://journal.nuped.com.br/index.php/revista/article/view/1237 (Consulté le 30 octobre 2023).
[1391] T. TIMAN, M. GALIC et B.-J. KOOPS, « Surveillance Theory and Its Implications for Law », *op. cit.*
[1392] F. FILGUEIRAS et L. LUI, « Designing data governance in Brazil », *op. cit.*
[1393] S. ZUBOFF, *The age of surveillance capitalism*, *op. cit.*
[1394] C. GOANTA et J. SPANAKIS, « Discussing The Legitimacy of Digital Market Surveillance », *op. cit.*

Google. This dependency has gradually deepened. Brazil finds itself in a situation of heavy dependence on companies that exploit applications for video posting, search engines, and educational products[1395]. In exercising a public right, these agreements force citizens into an unregulated data capture and processing market[1396].

In short, Brazil's data extraction policy and insufficient legal dispositions drains the business base out of the country, scraps the digital infrastructure, and weakens the possibility of training machine learning models controlled by Brazilian entrepreneurs and organizations. In this vein, Brazil emerged as a colonized[1397], country in modernization[1398] and became digitally colonized within a data-driven society[1399]. In its report on digital development, the United Nations already made this observation when it warned that developing countries risk becoming mere suppliers

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[1395]Reports published in 2022, show that 75% of Brazilian universities have "*free*" contracts with Google, as well as 79% of the Public Institutions of Higher Education in the country have their institutional e-mails allocated in private servers, located outside the country, and that are managed by companies involved in the lucrative market of collection, analysis and commercialization of personal data. Google (Alphabet, Inc.), stores 72% of the institutional e-mails of the country's public universities. F. LEFEVRE, « A dependência digital do Brasil \textbar Blog da Flávia Lefèvre », *op. cit.*

[1396] Henrique Parra, when examining the sociopolitical effects of infrastructure adoption in educational environments reveals the existing confusion between "personal data" and "information", which endangers the privacy and intimacy of citizens. According to the author, Google's contracts with Brazilian public schools and universities involve the politicization of ignored technological decisions for economy and efficiency. H.Z.M. [UNIFESP PARRA *et al.*, « Infraestruturas, Economia e Política Informacional: o Caso do Google Suite For Education », 2018, disponible sur https://repositorio.unifesp.br/handle/11600/51998 (Consulté le 28 octobre 2023).

[1397] Traditionally, coloniality refers to patterns of power that emerged because of colonialism, that defines culture, work, intersubjective relations and knowledge production beyond the strict limits of colonial administration. Coloniality can be related to power itself, where it deals with the interrelationship of power, between forms of exploitation and domination; it can be related to knowledge and the impact of colonization on different aspects of knowledge production; finally, coloniality can be related to being itself, referring to the experience of colonization and its impact on language N. MALDONADO-TORRES, « On the coloniality of being », *Cultural Studies*, mars 2007, vol. 21, n° 2-3, pp. 240-270, disponible sur https://www.tandfonline.com/doi/full/10.1080/09502380601162548 (Consulté le 27 octobre 2023).

[1398] S.A. SILVEIRA, « Responsabilidade algorítmica, personalidade eletrônica e democracia », *op. cit.*

[1399] The digital postmodern moment is sometimes characterized as neocolonial, a reinvigorated form of neoliberalism, which is done through a kind of colonization that exerts control over people's lives through data. Neocolonialism, however, brings a trap that lies in placing any kind of power relationship as neocolonial. Notions of colonialism, imperialism, and slavery are employed and generic parallels are drawn between the present and the past, which can lead to trivializing the experience of colonization and overlooking specificities of the past and colonial geography. About: N. COULDRY et U.A. MEJIAS, « Le colonialisme des données », *op. cit.*

of raw data to global digital platforms. At the same time, it forced them to pay for digital intelligence derived from their data.

This reading results in a scenario in which, in the contemporary digital world, the public sector's role has increasingly become to prioritize citizens' privacy and open itself up to allow the continued extraction and production of *information* by the private sector.

Section considerations

In accordance with the prevailing trend of regulatory frameworks, data are scrutinized in terms of private data, commercialization, ownership, and personal data protection. This approach encompasses the notion of openness for circulation and the exploitation of sharing. However, as Viktor Mayer-Schönberger[1400] aptly observes, the general discourse advocating openness, access, and social development for the construction of values is conflicting, incoherent, and illusory. According to the author, the failure lies in placing distinct rationalities in two different spaces, because if personality protections through individualistic criteria coincide with a personalistic view, the defense for the construction of values is in opposition to this interpretation. Moreover, the criticism resides in the fact that data law is geared towards the person, the individual, and the market.

Under these conditions, data law regulation, although based on the public circulation imperative and open by default, has difficulty in freeing itself from the exclusivist model and the property/contract diptych by creating conceptual structures independent of the inheritance of the distinction between private and public law, suitable for the realization of its object. Data law, built on the imperative of circulation, "*retains the relics of an academic canon, which is also fragile and relative*"[1401]. Incidentally, one can, for instance, elucidate the disposition that means open data in the public sector, but limited data sharing in the public sector.

Nevertheless, the problem does not lie in restricting circulation. One understands that it concerns applying that which is private in the public environment, conditioning not only individual freedoms but also the logic of circulation and sharing in the public sector. Continuing

[1400] V. MAYER-SCHÖNBERGER et T. RAMGE, *Access rules*, *op. cit.*

[1401] V. VARNEROT, « La distinction droit privé/droit public en droit des données », *op. cit.*

with the trend of civil legal realm dominance in the legal order, data is analyzed in terms of private data, commercialization, ownership, and personal data protection. This is fundamentally an economic reading of data law, in which a policy of public data circulation (open data) and individual personal data protection (through consent and informed self-determination) is established.

As William Gilles and Irene Bouhadanna states[1402], as transnational data flows multiply, not recognizing the freedom of data circulation would implicate the actual limitation of freedom. Nevertheless, open data freedom cannot be treated by economic, political and social means in equal measure. Thus, considering the circulation of data as a freedom requires rethinking the very concept of freedom, it also demands a new observation of data in the public sector, which must see it as an asset to be put in circulation to achieve freedom and development.

Section 2. Relational autonomy as the design of freedom in the digital state and the data society

Section 1 highlighted that digital transformation remains anchored in the dichotomy of state/society, freedom/property/general interest, which also leads, likewise, to an antagonistic and oppositional view of relationships, thus enhancing the individualistic bias. Hence, while digital technologies are being exploited by private entities within their own imagination, public law has not kept up with this transition, applying models of autonomous modern law to networked structures. This misalignment is one reason why fundamental rights have been indicated as failing to establish an adequate legal protection system[1403].

Alain Supiot[1404] contends that individual freedom, within the realm of *governance by numbers*, finds itself contested and constrained by those very numbers, for it ultimately becomes orchestrated by them. He underlines a significant shift in how legal notions are probed,

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[1402] W. GILLES et I. BOUHADANA, « The Free Circulation of Data: Between the 5th Freedom of the Single Market and the Revival of Open Data », *op. cit.*

[1403] Julie Cohen states that: "*The same networked capabilities that enable widespread public access to information also have enabled powerful corporate entities to build and manage far-flung global empires. (...) such entities wield increasing power over the conditions of human freedom. In:* J. COHEN, « Internet utopianism and the practical inevitability of law », *op. cit.*

[1404] A. SUPIOT, « Aux origines des États : la souveraineté de la limite », *op. cit.*

impacting the very concepts of freedom and democracy. This shift occurs because these concepts all derive from the same framework (the modern machine). According to Supiot, the decline of state sovereignty does not lead to an increase in freedoms but rather to their subordination to objectives that are even more imposing because they are decided by no one.

In 1927, John Dewey pointed out that technological inventions create means that modify associative behavior and change the quantity, character and place of impact of their indirect consequences. Thereon, the *new public* remains incipient, unorganized, because it can't use the political positions it inherited[1405] .

So, given this scenario, the proposition to be made, in view of the theoretical proposal outlined throughout this thesis, is that, instead of thinking about the individual or private law conditioning the relationships established in the networked environment, especially those relating to the public sector, it is *information,* data, its *flow* and the need to stick to its multiple facets, that should condition thinking about a public legal regime of the digital state model for a society that is dependent on data. It is understood that data circulation can be thought of as a paradigm, for thinking about – in the public sector - guaranteeing the *interests of the community,* protecting the rights of citizens, imposing duties to the actors that relate to each other in the ecosystem.

Therefore, it becomes important to, firstly, understand the scope and extent of data flow as a fundamental right of freedom and **(§1)**, secondly, to examine data flow as a functional right of freedom **(§2)**.

§1 Data flow as a positive fundamental right

Within the Brazilian legal framework, data flow and data sharing do not evade scrutiny in the context of personal data protection discussions. These aspects are crucial to elucidate and comprehend the scope of the right to freedom of circulation within the legal system, and how one might conceive data flow as a functional data right. Furthermore, in the legal domain, the

[1405] J. DEWEY et G. LEJEUNE, « De l'absolutisme à l'expérimentalisme », *op. cit.*

following is examined: data flow as a facet of data protection **(A)**, core concepts (self-information determination) **(B)**, and also the functional facet, the due process **(C)**.

A. Data flow as a facet of personal data protection

In the Brazilian legal framework, personal data protection concerns a *complex right,* that can be understood in terms of material, formal, and instrumental fundamentality, extending beyond individual, collective, and multi-level dimensions (subjective and objective[1406]), including both negative and positive guarantees. Also, personal data protection is considered a distinct right from that of privacy and self-determination[1407], even though they are intrinsically connected. The material fundamentality of the right to personal data protection is substantiated as a "protector of the principle of human dignity, the right to development of personality and informational self-determination, and the right to privacy"[1408]. This interpretative exercise is dogmatic and encompasses a unique path of doctrinal justification (the development of personality as one facet, the right to privacy as another, and informational self-determination linked to the right of data protection), which accompanies jurisprudential guarantees and are

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[1406] Daniel Wunder Hachem explains that fundamental rights can be viewed from two distinct perspectives. "*The first approach pertains to their subjective dimension: it conceives of the provisions defining fundamental rights as constitutional norms granting a subjective legal position, which empowers the holder to demand from the claim's recipient the fulfillment of a specific positive or negative provision. The second approach perceives fundamental right norms from an objective perspective. Seen through these lenses, such constitutional determinations are not limited to conveying subjective rights: they also incorporate, beyond this, a value-laden content of an objective nature, triggering autonomous and differentiated legal effects, transcending the relational structure inherent in subjective rights*". In: D.W. HACHEM, « A dupla titularidade (individual e transindividual) dos direitos fundamentais econômicos, sociais, culturais e ambientais », *Revista Direitos Fundamentais & Democracia*, 2013, vol. 14, pp. 618-688, disponible sur http://revistaeletronicardfd.unibrasil.com.br/index.php/rdfd/article/view/505 (Consulté le 29 octobre 2023).

[1407] As Rafaela Nataly Facio highlights, concerning data right protection at Brazilian legal literature, Brazilian legal system deals with two autonomous fundamental rights, which may overlap but do not fully coincide. However, despite its autonomy in relation to privacy, the scope of its protection implies an examination of the latter, as they are traditionally addressed together by Brazilian doctrine. R.N. FÁCIO, *A transparência no tratamento de dados pessoais nas atividades estatais para fins de segurança pública preventiva, defesa nacional e segurança do estado*, Universidade Federal do Paraná, Curitiba, 2023.

[1408] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, s.l., Associação Data Privacy Brasil, 2022, disponible sur https://repositorio.pucrs.br/dspace/handle/10923/24870 (Consulté le 28 novembre 2023).

derived from the text of the Constitution, especially Article 1, Clause 3, addressing individual rights and guarantees, the rule of law, and human dignity[1409].

In turn, the formal fundamentality aspect of the right to data protection confers the quality of immediate applicability of fundamental norms, directly binding all state powers and actors, and leading to effectiveness in relations among private parties (both directly and indirectly). Moreover, formality implies a duty to observe material limits to the power of constitutional reform, such that its formal institution carries an additional burden, adding substantial positive value within the Brazilian legal system. As a fundamental right, the doctrine also advocates for a multi-level constitutionalism perspective, meaning that the national legal framework should harmonize with international treaty documents, thus subject to jurisdictional control of conventionality[1410].

Nevertheless, it is through the *procedural* aspect of data law protection that freedom of data flows manifests. Bruno Bioni and al. believe that the goal of data protection rights, even within the LGPD, "*is not to restrict the circulation of information, but rather, to stimulate it. Its ultimate objective is to ensure an adequate informational flow*"[1411]. This is because "*by introducing a list of legal bases – authorization hypotheses for the processing of personal data – not limited to the consent of the data subject, there is an acknowledgment that public and private entities need to process personal information, and this informational flow should not always be tied to the will of the data subject*"[1412]. Thus, the legal basis of the LGPD would provide legal certainty in *data treatment*, especially because the LAI enforces active transparency as a public legal duty.

With this rationale, it is emphasized that *personal protection data right* cannot be regarded merely from a negative perspective of freedom. In fact, the consideration is that a limited view on the scope and content of the data protection right would be the cause of emerging problems

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[1409] *Ibid.*

[1410] About conventionality control in Brazilian public administration: D. WUNDER HACHEM, « A convencionalização do Direito Administrativo na América Latina », *Revista de Direito Administrativo*, décembre 2021, vol. 280, n° 3, pp. 207-257, disponible sur https://periodicos.fgv.br/rda/article/view/85156 (Consulté le 4 décembre 2023).

[1411] Original : « *A lógica da proteção de dados e a moldura normativa da LGPD não é de restringir a circulação da informação, mas, muito pelo contrário, de estimulá-la. Seu objetivo último é garantir um fluxo informacional adequado* ». B.R. BIONI, P.G.F. da SILVA et P.B.L. MARTINS, « Intersecções e relações entre a Lei Geral de Proteção de Dados (LGPD) e a Lei de Acesso à Informação (LAI) », *op. cit.*

[1412] Original : *« ao trazer um rol de bases legais hipóteses autorizativas para o tratamento de dados pessoais – não restrito ao consentimento do titular – há um reconhecimento de que entidades públicas e privadas precisam tratar informações pessoais e que esse fluxo informacional não deve estar sempre atrelado à vontade do titular ». Ibid.*

concerning data protection and the LGPD in the Brazilian public sector[1413]. That is, the difficulty lies regarding power in an *antagonistic matter,* within a reductive perception of personal data as a negative freedom, which means removing information or limiting data flow in the public sphere. In contrast, a perception "*of data protection as a tool to guarantee the adequacy of information flow – which at times will require the interdiction of information circulation as a remedy*"[1414] guarantees the freedom of data flow.

Therefore, Brazilian legal literature seeks to illustrate not only the individual's aspects of the right. It is argued that personal data has as its antithesis "*anonymous data*"[1415]. Based on this and employing references to the concept of "*personal information*" in the LAI and Decree No. 8.771/2016 (i.e., of a publicist origin), it would emphasize "*the expansionist concept of personal data, with the broadening of the qualification of data as personal*", which is confirmed in the LGPD when defining personal data as information related to an identified or identifiable natural person in its Article 5, Clause I[1416].

Ultimately, the recognition of data protection as an autonomous fundamental right in Brazil, by Constitutional Amendment 115/2022, would prove its nature *"beyond the safeguarding of private information*"[1417]. Indeed, it is posited that the "*logic of data protection is to ensure an adequate informational flow"*[1418], and in this view, the relevance of the positive aspect of freedom is assumed. Within the Amendment, personal protection gains a meaning of protection of the human being and, therefore, are held by fundamental principles of the dignity rights protection. Thus, according to the literature, if the negative dimension of freedom represents the individual right to data protection, the positive aspect confers the materialization of the collective dimension, which is characterized by the freedom associated with the flow of information and control over this circulation[1419]. Ultimately, this means that *data flow* is stated

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[1413] Lucas Carvalho reports on the resistance to the LGPD by public managers, and the misunderstanding of its scope. L.B. de CARVALHO, « O poder público e a proteção de dados pessoais no Brasil », *op. cit.*

[1414] B.R. BIONI, P.G.F. da SILVA et P.B.L. MARTINS, « Intersecções e relações entre a Lei Geral de Proteção de Dados (LGPD) e a Lei de Acesso à Informação (LAI) », *op. cit.*

[1415] J.S. DA SILVA CRISTOVAM et T. MEINHART HAHN, « Administração pública orientada por dados: governo aberto e infraestrutura nacional de dados abertos », *op. cit.*

[1416] *Ibid.*

[1417] B.R. BIONI, P.G.F. da SILVA et P.B.L. MARTINS, « Intersecções e relações entre a Lei Geral de Proteção de Dados (LGPD) e a Lei de Acesso à Informação (LAI) », *op. cit.*

[1418] *Ibid.*

[1419] G.D. MIRANDA, E. DORIA et L.M. BARBOSA, « Compartilhamento e tratamento de dados pessoais pelo setor público no Brasil: uma análise do Decreto n. 10.046/2019 », *Cadernos de Dereito Actual*, juillet 2022, n° 18, pp. 326-343, disponible sur https://www.cadernosdedereitoactual.es/ojs/index.php/cadernos/article/view/806 (Consulté le 27 novembre 2023).

as a fundamental right with a particularly instrumental shape, whose concretization lies on specific a *material/values* evaluation, alongside a *due process* for its implementation.

B. Informational self-determination and process

In the Brazilian legal context, the fundamental right to the protection of personal data has become intertwined with the constitutional principle of *human dignity*. This interconnection manifests both autonomously, in the guise of self-determination, and within the realm of personality rights (encompassing the right to the free development of one's personality and the specific rights to privacy and informational self-determination)[1420]. Human dignity is perceived as the principle that not only justifies the fundamental nature of data protection but also defines its substance.

Within this schema, legal interpretation of the core value that lies in data protection represents a self-determination perspective. Concerning informational self-determination, it involves an individual's prerogative to decide about the disclosure and use of their data[1421]. Its legal literature and court decisions development stems from its distinction from the right to privacy in legal literature of United states, that is, the right to be left alone[1422]. The process of self-determination includes *informed consent* and the recognition of self-determination as an autonomous fundamental right of the individual, within the general constitutional framework of the free constitution of the individual[1423].

Thus, in Brazilian legal framework, as explained by Ingo Wolfgang Sarlet and Gabrielle Sarlet, informational self-determination will encompass an *individual dimension*, the constitutional

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[1420] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

[1421] S. RODOTA, « Nouvelles technologies et droits de l'homme : faits, interprétations, perspectives », *Mouvements*, 2010, vol. 62, n° 2, pp. 55-70, disponible sur https://www.cairn.info/revue-mouvements-2010-2-page-55.htm (Consulté le 3 décembre 2023).

[1422] The legal concept of privacy was developed by Samuel Warren and Louis Brandeis in an article published in 1890 in the Harvard Law Review. At the time of creating the privacy concept, the authors justified its development due to the need for Law to keep pace with then-existing transformations, which highlighted a legal gap regarding factual and concrete situations (1890). The concept of privacy was then developed, with the intention of detaching from the notion of property and claiming the right "to be left alone", in a more moral than material perspective. This formulation of "left alone" therefore links intimacy to individual freedom, particularly in confrontation with press freedom. In: A.C. AGUILAR VIANA et E.D. SALGADO, « Enfrentando a pandemia e protegendo dados: privacidade descolonizada », in *Proteção de dados na América Latina*, serie pautas em direito, Rio de Janeiro, 2021, disponible sur https://www.livrariaarquipelago.com.br/protecao-de-dados-na-america-latina (Consulté le 3 décembre 2023).

[1423] S. RODOTA, « Nouvelles technologies et droits de l'homme », *op. cit.*

guarantee of individual subjective right (the possibility for each person to decide about access, and use), and a metaindividual one, i.e., *collective dimension*. The positive freedom of data protection, then, constitutes a precondition for a "*free and democratic communicational order, distancing itself, in this measure, from a conception of individualistic and even isolationist privacy akin to a right to be left alone*"[1424]. Thus, if the *negative freedom* corresponds to non-action of the state, self-determination is a necessary value for the attainment of other rights. Furthermore, informational self-determination is established as a nuanced right, reliant upon a mechanism, thus indicating that beyond the substance it protects and ensures for self-determination, it actualizes itself only within a concrete situation.

The negative dimension of the data protection right has the nature of a static right in which the holder delineates what should be excluded, just as positive freedom brings an instrumental qualitative aspect, for "*the private sphere would not be something pre-existing awaiting violation, but a space to be constructed post-factum and dynamically through the control of personal information*"[1425]. In this framework, Brazilian data protection legal academia posits that *"the due informational process is increasingly seen as a necessary guarantee. Indeed, the autonomy of the right to personal data protection vis-à-vis the right to privacy is rooted in this rationale of due process*"[1426].

The doctrine of *informational due process* has gained prominence in the Brazilian legal system, particularly following a judgment delivered by the Supreme Federal Court (STF), where Justice Gilmar Mendes[1427] emphasized the subjective dimension of the right to data protection, linking it to its procedural character. In his words: *"It is possible to identify, as a corollary of the subjective dimension of the right to personal data protection, the preservation of a true 'informational due process'* (informational due process privacy right), aimed at granting the individual the right to avoid data exposures without minimal control possibilities, especially in relation to data processing practices that can subject the individual to predictive and peremptory judgments" [1428].

[1424] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

[1425] B.R. BIONI, *Proteção de Dados: contexto, narrativas e elementos fundantes*, São Paulo, SP, B. R. Bioni Sociedade Individual de Advocacia, 22 juin 2021.

[1426] *Ibid.*

[1427] S.T.F.S. BRASIL, ação direta de inconstitucionalidade 6.529 distrito federal, 2021.

[1428] B.R. BIONI, *Proteção de Dados*, *op. cit.*

Thus, in the context of the informational society, the materiality of due informational process is quantified from the content of informational self-affirmation, which, in turn, through the lens of fundamental rights theory, is situated in the principle of human dignity, which confers the value of the rights to be protected, that is, the material dimension[1429]. On the other hand, as observed, the fundamentality of rights also implies an instrumental and collective dimension. From a doctrinal perspective, this is evident from a democratic standpoint, i.e., the social participation of citizens.

So, what can be inferred about the legal interpretation of the freedom of data flow right, in Brazilian legal literature and legal framework, is that it is considered as a positive dimension of personal data protection. Its nature is functional, as it concretizes within an examination of core values (self-information determination and personality protections), and an informational due process that guarantees it. Moreover, the expansionist understanding of the right to data protection stems not only from the perception of this right not being tied to the bias of individualistic freedom, or even being collective/democratic, but also from a ***relational*** reading, as a portrait of its own ontology.

§2 Data flow as a functional right of freedom

The instrumental facet of data protection rights is esteemed as the guarantee of freedom of data circulation, a positive aspect of data protection that finds in negative freedom the protection of personality/privacy. However, this positive dimension manifests through its own ontology, that is, it is a functional right (not autonomous or subjective). Bruno Bioni well explains the qualitative difference of data protection as a positive dimension, represented by the "*transposition from the axis previously focused on the trio 'person-information-secrecy' to the axis now composed of four elements 'person-information-circulation-control*"[1430]. Within this rationale, the author highlights the nature of the positive dimension of data flow right, both qualitatively allocated into the perception of self-informational, and also in the very perception of data flow as an instrumental fundamental right. Thus, in an understanding of data

[1429] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*
[1430] B.R. BIONI, *Proteção de Dados*, *op. cit.*

flow as a fundamental right of freedom, its concretization relies on two aspects: the core and self-information determination (the values), and the procedural manners. Then, as one can observe a relational ontology of data law by freedom of data flow **(A),** it is possible to note that it justifies the model of a Brazilian digital state by legal literature **(B).**

A. The relational autonomy and self-determination

As observed, within the context of due informational process, the fundamentality of informational self-determination is justified by personality rights, privacy, and human dignity, based on the theory of fundamental rights. In legal scholarship, Jennifer Nedelsky approaches human rights from a relational perspective, which allows for seeking autonomy in relationships rather than through reasoning based on domination relations under the pretext of respecting one party's rights and interests. According to Emmanuel Jeuland, this involves an articulation between rights and duties within the framework of fundamental principles. However, the author considers it a liberal approach that implies a state respecting at least the preexisting rights[1431]. In this way, such understanding of autonomy and freedom could be examined within the scope of data right matters, especially when considering the nature of the relational ontology of the object and space of study (network ecosystem).

Nedelsky's reading brings a particular perception of freedom. By understanding autonomy as a relationship, autonomy itself becomes relational. The objective of the relational approach is to understand all the different dimensions of human relationships - including their interaction with ideas, institutions, and personal practices – which promote autonomy. Nedelsky criticizes the perception of autonomy as an individual's independence or isolation (in modern terms), in order to, instead, propose a perception of autonomy in a relational manner, that is, emerging from relationships that structure a person's "self". This structuring find support in legal concepts, which present themselves as symbols, and also as a way to materialize autonomy. That is, the relational perspective views the relationships between individuals, society, and the

[1431] E. JEULAND, « Theories of Legal Relations », *op. cit.*

state not as opposing categories, concepts, positions, but maintaining that they are symbols, which are relationally constituted in a given context[1432].

In this manner, and as already stated, the idea of self-information itself lies in a contextual dependency perception. When discussing the right to self-determination, Stefano Rodotá emphasizes the character of autonomy, highlighting two elements: the importance of context and the link between the self and identity[1433]. Not by chance, Brazilian legal academia highlights that "the legitimacy of personal data processing depends much less on an analysis of its ontological aspects - concerning nature - and much more on aspects related to the context of treatment[1434]. Thus, the purpose of the collection and the addressee of the information are more decisive for assessing the constitutionality of data processing than the classification of data as private or intimate[1435]. Data right, in this way, gains its protection not from legal subjectification, but from a context-relation.

Regarding the distinctions between perceptions of data protection and privacy, Stefano Rodotà highlighted that the "*right to respect for private and family life primarily represents the individualistic moment*"[1436], in the exclusion or interference of third parties, in a negative protection. On the other hand, data protection would be fixed on the modalities of data processing, in a way that its realization is made through its circulation. In this way, circulation means connection and interaction, that supplants objects or subjects protection/control, and moves towards the relations. Data rights, in this manner, gains protection by a relational analysis of law, which means a transformation from autonomous meaning to relational perspective, that is, a cybernetic imaginary.

In this vein, one can understand that Rodotà's interpretation of data protection, by establishing the unstable and unconditioned nature of the data protection disposition for determining the freedom of data flows, reveals a functional vision of the data right itself. Indeed, this perspective of data protection emphasizes the procedural and instrumental character of the data flow as a fundamental right, whose positive dimension of freedom stems from the effective

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[1432] J. NEDELSKY, *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, *op. cit.*

[1433] S. RODOTA *et al.*, « A vida na sociedade da vigilância: a privacidade hoje », in *A vida na sociedade da vigilância: a privacidade hoje*, 2008, pp. 381-381, disponible sur https://pesquisa.bvsalud.org/portal/resource/pt/biblio-1081769 (Consulté le 3 décembre 2023).

[1434] L. SCHERTEL FERREIRA MENDES, « Autodeterminação informativa », *op. cit.*

[1435] B.F.D. PAULA, « Vigilância estatal e o direito fundamental à proteção de dados pessoais », Faculdade de Direito (FD), 2021.

[1436] S. RODOTA *et al.*, « A vida na sociedade da vigilância », *op. cit.*

instrumentalization of another right, which has an unstable nature, also conferring a dialogic character to the right itself as a science.

In fact, the return of the relational agenda directs the social relationship from the viewpoint that relationships are put together. It is a choice that presupposes examining the connections that are made in relationships, as these interactions lead to greater structuring, stability, and regularity than the contingent actions of the elements that are linked[1437]. So, a reading of freedom as a relational concept signifies a substantial mutation concerning the legal disposition that is displayed in actors/agents, to establish itself in the actions of agents in a particular context. With this, data flow as a right of freedom can imply a positive facet of data protection, but whose materiality will not find support only in individual freedom (personality) and its subjectivity. With that, data protection is not held only with consent and data subject, but moves towards the context and the use (both as an actor, as an orchestrator, or as a user). Data flow, in this way, guarantees freedom in a relational manner, that depends on the responsibility of the other side.

This being so, relational freedom implies a substitution of the individual/collective aprioristic distinctions, that is, the individual right of autonomy and the control of citizenship by the state, to view freedom as a relational and contextual matter. This involves also how one sustains an informational due process as an implicitly constitutional principle that justifies a digital state by the law.

B. Informational due process as the legal core of the digital state

In the Brazilian legal literature, *informational due process* in the public sector is visualized – in the theory of fundamental rights – as a matter of human dignity. This view highlight's the political and legal framework that supports a view of a digital state in the Brazilian legal structure. Ingo Wolfgang Sarlet and Gabrielle Sarlet propose, by extracting from Article 1, caput, of the Constitution, which establishes the Democratic state of Law, combined with Article 1, III, of human dignity, and Article 1, single paragraph on popular sovereignty, adding also Article 2 of the separation of powers, an "*implicit, core, and structuring principles for state*

[1437] M. Di Felice et S. Surrenti, « Nem naturais, nem artificiais: As info-ecologias e as qualidades simpoiéticas dos ecossistemas conectados », *Civitas - Revista de Ciências Sociais*, août 2021, vol. 21, n° 2, pp. 293-303, disponible sur https://revistaseletronicas.pucrs.br/index.php/civitas/article/view/39936 (Consulté le 11 novembre 2023).

action, namely, the principle (and fundamental right) of due informational process and the informational separation of powers"[1438].

In the case of this current, the division of informational powers is accompanied by the instrumental vision of the right to data protection, and the material bias of human dignity, which prevails in its evaluative character in the context of the legal justification of the definition of a Democratic state[1439].

The doctrine of fundamental rights, therefore, brings an important body of precepts and legal notion interpretations, shaping state actions – the Brazilian state – to the nuances and particularities of an informational society. Consequently, legal instruments are formulated, expressly based on the theory of fundamental rights, supported by the doctrine of digital constitutionalism[1440], employing analyses that confer extensive and expansive interpretation of the constitutional core, proposing specific adaptations for the Brazilian state, justified with legal instruments.

Thus, political and public actions, as well as the state's own actions, are viewed in light of the respect and guarantee of individual and collective rights of autonomy (freedom and equality, social rights), which also leans on a broader data protection facet than that provided in LGPD[1441]. This doctrinal development of legal structuring and adaptations of law in the context of the Brazilian digital state are significant and employed here as a support point. Hence, it relies on the structure set out for a digital state that deals with constitutional instrumental facets. However, some issues of this theory must be highlighted, specially concerning its application to state actions models. Further, one proposes a particular path, starting from the approach of *network governance* and public law of the common good.

As seen, the theory of fundamental rights bases the analysis of the digital state on fundamental rights and human dignity, which implies individual/collective protection and the exercise of citizenship, that is, liberal democracy. In general, the theory of fundamental rights recognizes these as fundamental rights to be guaranteed by the state[1442]. These are *a priori* guarantees of

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[1438] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro, op. cit.*

[1439] *Ibid.*

[1440] *Ibid.*

[1441] In their terms: *This highlights the urgency of analyzing the above aspects in light of the theory of fundamental rights and, more specifically, on the basis of the principle of human dignity, (also) in view of Brazil's efforts to become a digital state. Ibid.*

[1442] As stated: "*This legal regime (guarantees), in turn, implies that fundamental rights correspond to legal positions enforceable by the individual against the state" Ibid.*

individual/collective ownership against a priori state duties. It is through freedom (individual or collective, negative or positive) that holders can demand from the state, whether in its inaction or action. Thus, while data rights and the digital state are examined, on the one hand, to expand the sphere of autonomy (individual/collective), on the other hand, state actions are limited to it.

It is, therefore, a view that links autonomy, freedom, with the private sphere, and positions the public sphere in opposition in the state context. According to Jennifer Nedelsky, within this perspective, the limit between these spheres is precisely to prevent individual autonomy from being within the legitimate scope of state power. Such distinction, differentiating civil and political rights, "*establishes a clear hierarchical relationship between them*"[1443]. That means, private over public, individual over state, autonomy over general interest. However, it is worth remembering that if autonomy was linked to the individual private sphere and the state to the political, public, and coercion, then the network environment – where data society manifests - overcomes this framework. Besides, in general, this current not only formulates an extended view of autonomy (encompassing individual and collective) but also establishes it in prevalence over the public sphere.

As seen, the theory of fundamental rights usually identifies freedom and autonomy in negative, positive, and instrumental dimensions. However, it positions itself with an antagonistic perspective of state and Society[1444], implying an oppositional and autonomous view of law, prioritizing the private over the public (individual and collective autonomy and political action dependent on this scheme). In this regard, Antoine Bailleux's[1445] explanation of the relevance of autonomy in the modern separation of public and private spheres is significant. As he explains, and as already mentioned in this research, the central concern of modernity lies in the private sphere, related to biological and economic concerns, while politics follow the prerogative of the public sphere. The author elucidates that, with globalization and the emergence of governance as a mode of political action, despite the redistribution of values in

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[1443] J. NEDELSKY, *Law's Relations: A Relational Theory of Self, Autonomy, and Law*, Oxford University Press, 2012

[1444] Gunter Teubner exposes, concerning that type of theories that, and, specifically in the case of human rights, these divisive theories of society result in them being conceived as the rights of parts against the State, which represents the whole society. G. TEUBNER, « La "matrice anonyme" : de la violation des droits de l'homme par des acteurs "privés" transnationaux », *op. cit.*

[1445] A. BAILLEUX, " Tensions autour du public et du privé - les enjeux d'un chiasme ", *Distinction (droit) public / (droit) privé : Brouillages, innovations et influences croisées*, D. Bernard et J. Van Meerbeeck (dir.), Bruxelles, Presses de l'Université Saint-Louis, 2022

favor of the private sphere, the roles of the two spheres in human life have changed restrictively. As compensation, the private sphere is endowed with strong political interests: it is there that individual and collective autonomy is achieved. Meanwhile, political matters are reduced to technical issues that demand responses.

The consequence of this, as observed, is that data rights, and the political and public action of the digital state, are examined based on these metrics. Thus, according to the theory of fundamental rights in Brazilian law, it is observed that the perception of a digital democratic state of law resides in being oriented towards the citizen, through an innovative, secure ecosystem that minimizes risks, based on *"the promotion of human dignity, informational self-determination, the protection of personal data, and other fundamental rights and guarantees*[1446]*"*.

Consequently, in relation to the individual, the aspect of freedom of data circulation corresponds to a protection of the individual or the collective. Thus, data rights, although proposed for cyberspace within an informational society, rest in regulating antagonistic issues, in a hyper-salience of the realm of freedom, whose opposition is against the state in relation to data rights and data holders, leading to the protection of data consent and open exploitation of data by private actors. Autonomy, in this view, rests autonomous and isolated.

Political action, in turn, becomes eclipsed, secondary to the prevalence of freedom (individual or collective)[1447], which demands positive action from the state to fulfill the expanded rights of freedom in postmodern society. That is, freedom and democracy (citizenship) continue in *opposition,* overshadowing political action, which is not treated on its own terms. It depends on these arrangements stipulated in the private dimension, while the public dimension continues to be synonymous with the state, which, in turn, is fulfilled when it meets the quantitative standards established in the private dimension (be it individual or collective freedom).

Indeed, it is through the lens of freedom that state action is advocated in the realm of a digital state. The positive facet manifests in the guarantee of information security. This facet also underscores a private view of the orientation of the digital state, which should not guarantee its ownership of the public interest, for which it is legitimate, but should orient itself to satisfy the

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[1446] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

[1447] Charles Taylor highlighted that the modern perception of freedom orients political action to a condition of their effective autonomy.C. TAYLOR, « Résonance et théorie critique », *op. cit.*

citizen and act innovatively[1448]. Thus, the individualistic bias also prevails in the orientation of the digital state towards the citizen, that is, the individual's satisfaction, and innovation in management by the public power, which is obliged to be accountable, innovative, and ensure a transparent flow of information.

That sort of demand of the state in a digital realm highlights the quantitative action of the state. If statistical modeling was already pertinent to the bureaucratic government, currently, evaluations are almost entirely conducted through numerical indicators, benchmarks, classifications, and rankings[1449]. Hence, the state loses moral authority to act in social contexts and becomes dominated by economic and financial calculations. Digital transformation of the state turns towards economic/financial development, superseding social development, as inferred from the objectives of Brazilian E-digital, which prioritizes economic efficiency and its development even before digital citizenship[1450].

This scenario fits into Antoine Bailleux's description of the emptying of the public dimension and the hypertrophy of the private dimension. As he posits, the *'freedom of the postmodern'* gains the autonomy of positive freedom. As for the public authorities, they are obligated to compile reports, relying on the dynamics of the private sector (innovation, as seen). The issue of ends is ignored in favor of means, and invocations of the general interest are replaced by private interests, which then become public interests[1451]. Hence, this logic struggles to

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[1448] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

[1449] C. MUELLERLEILE et S.L. ROBERTSON, « Digital Weberianism: Bureaucracy, Information, and the Techno-rationality of Neoliberal Capitalism », *op. cit.*

[1450] E-digital, Decree No. 9.319, dated March 21, 2018, II - digital transformation axes: f) digital transformation of the economy (Data-Based Economy; A World of Connected Devices; New Business Models aim to stimulate the computerization, dynamism, productivity, and competitiveness of the Brazilian economy, in order to keep pace with global economy; and g) digital transformation (Citizenship and Government): to make the Federal Government more accessible to the population and more efficient in providing services to the citizen, in line with the Digital Government Strategy. S.-G. REPUBLICA (PR), Decreto nº 9.319, de 21 de março de 2018, *op. cit.*

[1451] A. BAILLEUX, " Tensions autour du public et du privé - les enjeux d'un chiasme ", *Distinction (droit) public / (droit) privé: Brouillages, innovations et influences croisées*, D. Bernard et J. Van Meerbeeck (dir.), Bruxelles, Presses de l'Université Saint-Louis, 2022

legitimize any end other than that of reproducing conditions for economic growth[1452], or the reproduction of the market itself[1453].

In other words, through a perception of the fundamental rights applied by antagonistic matters, the danger lies in the shadiness of the public sphere, and in the purpose of political and public action for their own sakes. Typically, the action of the state is not examined as such, as a distinctive dimension (and not in opposition), in relation to freedom. Not surprisingly, on one hand, the private dimension establishes that freedom is the circulation of data. The government must be open by default, to allow the free use of open data, as already reported in the previous section. To the state, on the other hand, the freedom of data flow within the governmental space is limited, needing to adhere to its purpose of collection (since data ownership is private). Secondary use must be carried out within a strict and proven adherence to the precepts and norms that bring the protection of private use. Furthermore, the knowledge produced from the open data published by the state does not hold any subsequent protection.

This situation leads to a fragmentation of data policies, as seen, on one hand, while failing to reach the protection or regulation of other spheres and dimensions of cyberspace. In the end, the very doctrine of fundamental rights may incur the identified flaws concerning the rationality of *good governance*, which proposes a pragmatic and consequentialist digital transformation and the replacement of public interest by a private one.

That's the reason it is an argumentation that the focus of political and judicial institutions on security and data protection resources not only fails to recognize the value of data, but also leads to fragmentation of data governance policies, restricting the use of data for agreed purposes[1454]. In fact, a look at Brazilian literature, both within the political science and legal realms, proves this assertion. If, on the one hand, the networked space is observed from the flow of data in the context of political actions that lead to the exposure of how policies are fragmented, on the other hand, the legal culture emphasizes data protection and security, establishing a reading of the flow of data from the point of view of data protection, delimiting the model of data share in a digital state as a guarantor of the human person, and consolidating

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[1452] Upon close examination of the recommendations derived from these dimensions, it becomes clear that there is a prioritization of economic development over social considerations. This suggests the prevailing influence of economic logic in shaping public management strategies, indicating that public management primarily addresses economic growth rather than social advancement.

[1453] C. MUELLERLEILE et S.L. ROBERTSON, « Digital Weberianism: Bureaucracy, Information, and the Techno-rationality of Neoliberal Capitalism », *op. cit.*

[1454] M. MAZZUCATO, « For the Common Good », *op. cit.*

a policy and legal structure conditioned to the restricted use of data for agreed purposes, employing a digital state regime not towards public interest but citizen satisfaction and state innovation. Thus, Brazilian public data framework, rests fragmented and dictated by private manners.

Chapter considerations

In Brazilian legal studies, jurists have conceptualized data flow as a positive right of freedom, a fundamental right within an instrumental dimension, primarily derived - as per the prevailing doctrine - from the right to data protection[1455]. Incidentally, as seen, both good governance and the theory of fundamental rights emphasize state actions in the digital state focused on the experience of the user/citizen and openness by default, and the adoption of standards for goal assessments by the state. Besides, both *good governance* and theory of fundamental rights lead to the application of accountability in a manner directed towards the state. This entity, no longer required to guarantee the public interest but rather the satisfaction of users, must demonstrate compliance with standardized technical criteria. To do so, it must be open and transparent, and further, allow the use and exploitation of data. This rationality, seemingly adherent to the biases of governance and a "*democratic*" policy that ensures transparency, and user or market experience, ultimately neglects, on the one hand, the position of freedom and autonomy within the scope of all guarantees, and on the other, the management of risks and their assessment to the state, thereby reducing itself to a dichotomous project.

This scenario underscores that the other side of commercial, civil, and individualistic exploitation in cyberspace is precisely the viewpoint that, within the public sector, digital transformation serves to *protect* and *satisfy* private interests. Even though the terminology of citizen, or human (concepts that are not synonymous, which reveals the danger of using these words to conceal agendas or diminish others) or openness are used, the effect of this direction falls on an enhancement of individualism in the public sector[1456]. This arises because they

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[1455] B.R. BIONI, *Proteção de Dados*, *op. cit.*

[1456] Luciano Floridi et al. address this issue in relation to smart cities. As these approaches suggest, each label emphasizes a different connotation, which can reveal or conceal the agenda of various actors. M. ZIOSI *et al.*, « Smart Cities », *op. cit.*.

primarily stem from the private legal system, a logic that leads to the protection of individuals and government action to guarantee this scheme. As the user experience is emphasized, the services provided are examined in a unidirectional logic.

Thus, it's essential to demonstrate how technical-scientific rationality combined with neoliberal ideology has worked to subordinate social ends to economic means. In summary, bureaucratic rationality and innovation, adaptability, and efficiency are the functional means, but without progressive ends. They are both the means and the ends. There is little room for a discussion about public goods, and societal discussions are almost exclusively framed by "*financial realities*"[1457]. On the other hand, collective effort is not perceived because the individual decisions are what matter - with companies maximizing profits and consumers maximizing utility. Besides, shifting the debate about the public within the realm of private spaces can lead to indirect privatization, in addition to establishing compliance norms of accountability, but with a lack of responsibility[1458].

Within this scenario, one could expose that problems identified in the legal field concerning state actions (political and public) are that: ***i)*** the analysis of data is based on taxonomies; ***ii)*** through civil law readings, commercial legal laws and private law rationale are apparent; ***iii)*** the disregard for data as an asset; ***iv)*** a guide of values towards the citizen which can correspond to private interests; **vi)** the existence of a view of state actions by private categories. Therefore, it is important to shift the analysis of data in the public environment from being a byproduct of private logic (both individual and commercial), to examining them within their multifunctionalities.

[1457] C. MUELLERLEILE et S.L. ROBERTSON, « Digital Weberianism: Bureaucracy, Information, and the Techno-rationality of Neoliberal Capitalism », *op. cit.*
[1458] C. GOANTA et J. SPANAKIS, « Discussing The Legitimacy of Digital Market Surveillance », *op. cit.*

Chapter 8. Guaranteeing equality in the Digital State and the data society by informational responsibility

"The future is already here; it's just unevenly distributed".

- William GIBSON[1459]

The quote from fiction writer William Gibson, credited as the author of the term cyberspace, refers to a world in which a portion of society has *access*, and another does not. It is commonly used in cyber literature for highlighting the inherent inequality of the mentioned ecosystem. The inequality in the capacity to experience *"the aforementioned present"* can take various forms, from access to literacy, education or even discrimination, to the perception of the system as an architecture of inclusion/exclusion binary. For Gunther Teubner, this modern binary already dictates, and will continue to dictate, the informational society[1460].

The last chapter of the thesis seeks to investigate this phenomenon in a particular way and in light of the groundwork laid in previous chapters. Generally, *equality* is a notion debated alongside the notion of *freedom*[1461]. In the era of rights, freedom and equality are highlighted as negative and positive legal guarantees. Still, this research charted a path – from which it sought not to deviate – of examining the state's digital transformation through the lens of state actions. Through this perspective guiding the studies, the digital state was defined as an ideal type of political action – the *network governance*. Furthermore, it was posited that public law

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[1459] W. GIBSON, « A quote by William Gibson », *The economist*, 2003, disponible sur The economist (Consulté le 3 janvier 2024).

[1460]Gunther Teubner suggests that the exclusion of populations is a product of modernity, and that in the liquid modernity of hyper-individuality, it is dealt with through binary codes of differentiation, subordinated to inclusion and exclusion. This is the biggest code of the 21st century, which mediates the others. In this vein, an alternative proposed by the author is that fundamental rights can be imagined as a space for guaranteeing populations in functional systems, thus guaranteeing, through a legal project, the construction of counter-institutions guaranteed in different social fields. G. TEUBNER, " L'auto-constitutionnalisation des ETN? Sur les rapports entre les codes de conduite "privés" et "publics" des entreprises ", *Revue interdisciplinaire d'études juridiques,* 75

[1461]That is a board discussion at economic, political and legal philosophies. One summarizes here with the perception of jurist theorist Ronald Dworkin (one of most quoted at Brazilian fundamental rights doctrine) understand that freedom is the means by which the ideal of equality is provided in a society. In other view, economist Milton Friedman (one of the authors that oriented towards a hyper-individualistic perception of freedom), that states equality and freedom as two sides of the same value, that is, every individual should be treated as an end in themselves. R. DWORKIN, *A virtude soberana: a teoria e a prática da igualdade*, São Paulo, Martins Fontes, 2011, disponible sur https://bdjur.stj.jus.br/jspui/handle/2011/42991 (Consulté le 3 janvier 2024) ; M. FRIEDMAN, *Livre para escolher*, São Paulo, Editora Record, 9 mars 2021, p. 128.

adapted to this type of political action should uncover a material legal criterion, that of the regime of public interest (the political action of the common good).

As seen previously, in the government political action type, the freedom of solid modernity opposed authority, prevailing over it. In turn, the aim of this thesis is to present freedom in relation to (and not opposed to) responsibility (instead of authority). Besides, the public law of the *common good*, as well as *the code* established here for analysis (a society dependent on data, its flow, and its value), are employed as frames to be interpreted by legal matters, through policies frameworks, laws, and principles, in order to deal, from this space (and not from the dimension of autonomy), with elements of freedom and equality.

With this, it is thought that such a modification in the starting point of examining digital transformation, rights, duties, asymmetries, and gaps, can accommodate different interpretations of the legal instruments set forth in the Brazilian legal order. The view of state actions may be examined through its own particularities, going beyond the protection and security of individuals/citizens. The private reading is more restrictive. Through state actions, the dimensions of digitalization may be managed, viewing the aspects of data in the public sector. Here, state actions are broadly taken to examine how they should be thought to guarantee the content of their legitimization, that is, the common good and public interest (which are neither fundamental rights nor human dignity in a first place). Hence, it is from *responsibility* (and not freedom as the concept of autonomy) that Brazilian digital state actions legal framework is examined and observed. In addition, as seen before, the network governance model is attached to data society, whose code does not rest on an autonomous or individualist frame, but on a data-dependent society, in an ontology of interdependence. In this view, while **Section 1** highlights a perception of digital state informational due process legal regime, **Section 2** identifies informational responsibility, from a use responsibility perspective of data law.

Section 1. Network governance as the vector for the legal regime of informational due process right at digital state

Chapters 5 and 6 revealed the nuance of responsibility as a category that confers the content, the procedure and the legitimation of state actions. Currently, their correlation with principles employed towards a digital state model are examined. Thus, the discourse of fundamental rights and state duties deals with three categories: freedom, citizenship, and responsibility.

First, with the aim of escaping antagonistic views, this thesis seeks to examine these concepts from the above-mentioned categories in a relational manner. They, therefore, are not treated from the a priori ownership of agents, as regularly state do while abiding by an autonomous view of law, but from the relationships made between the agents (each with their guarantees and duties established in the legal order within the legal framework). Second, the aim is to escape the private reading of the law, employing the reading of public law of the common good, which places the construing and interpretation of responsibility from the legal regime of public law and the prevalence of the common good, and in this bias, the legal regime of the public interest, its supremacy over the private, when attending to political and public actions. Through the definitions proposed in the previous chapters of this thesis, consideration is given to the interpretation of the legal instruments of the digital state from the developed notions of network governance (*political action*), public law of the common good (the material content of political and public action), and public action (*the public interest*).

Within this schema, the present Section attempts to perceive the *informational due process right* as legal principle of a digital state model from state's actions and a data-driven society view, which lead to a delimitation of the ***informational due process right legal regime foundations* (§1) *and dimensions* (§2)** in a digital state action model.

§1 Foundations of the informational due process legal regime

The doctrine of the theory of fundamental rights argues that the legal-objective dimension of the digital state action in Brazilian legal framework rests on the *informational due process*

right[1462]. Freedom in its positive and collective dimension manifests by the provision of the states ***to act*** in the terms of security of information and its control. The value, and materiality of a digital state, lie in the aim of satisfying and protecting the citizen through the core of human dignity. The justifiability of data protection also implies an instrumental dimension. Here, in this reading, it represents the "*backbone of a liberal democracy*"[1463]. Thus, by the theory of fundamental rights, it is through the lens of both freedom and democracy (the exercise of democratic control), that informational due process right materializes in a Democratic rule of law. This entails the openness and provision of control mechanisms by citizens (the exercise of citizenship), as well as the adoption of specific governance measures by public managers.

The *network governance* approach of the political action model and the perception of a public law of the common good, broadens this consideration to highlight the impact of data as an asset and data flow in the realm of political and public actions ***from the viewpoint*** of state actions. The concept of informational due process right, from the perspective of network governance, will encompass the aforementioned legal systematic structure interpretation, but will include its own guarantee. That means consideration about a proper rationale, both through the understanding of a relational view of law and through state actions as departing points of analysis, which will sustain the public law legal regime, and the analysis of informational due process right by responsibility (instead of freedom), as the core in state actions. And, as it comes in a relationship, it does not posit an antagonist proposal, and as it states in a public and an informational regime, it attacks the applicable public law framework.

A- Rationale and applicable law framework

Concerning rationale, in examining informational due process right through the perspective of network governance, both positive and democratic facets are employed for delimitating digital state action. But the functional dimension of the informational due process can also be observed from its relational nature. This condition has a fundamental impact, since, examining it through state actions and a relational view of law, instead of considering the starting point of fundamental rights and positive guarantees of the citizens against the state, one establishes a

[1462] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*
[1463] *Ibid.*

relational ontology reading of the network governance model. In this manner, one considers both procedure and substantive dimensions of informational due process right from public law legal regime.

1- The relational view of data law regime

Through a relational perspective of data law, data rights and legal institutions transcend the debate of autonomous freedom and collective democracy, or control, authority, and citizenship, and have more extensive implications, as it does not establish discussions from an opposition between freedom/autonomy and democracy/citizenship/authority. As showed[1464], usually, fundamental rights theory views legal relationships by the dichotomy of individual and collective autonomous freedom vis-à-vis the state, with the self-regulated actions of private actors on one hand; and democratic control of citizenship through social/functional participation, oversight, and control of public managers' activities ex ante and ex post on the other hand.

In turn, through a relational reading of law, freedom, democracy, and responsibility are distinct categories, each with their own particularities, but they are not *inherently superior* in an a priori sense. Nor does one prevail over another. The relational view of law, sustained also by the perception of network governance, seeks to move beyond antagonistic dispositions to focus on relationships. In this context, the emphasis shifts from the agent and their a priori entitlements to deal with the *rights* and r*esponsibilities* of actors in a *given context*. The aim of employing the relational view of the law itself is to escape from the conditioned use of public law to the rules of private law, particularly the disposition of the autonomous individual as sovereign. For, (the code), dictated since the advent of the modern law model[1465], public law has been a corollary of private law, that is, it has been seen through the lens of the private, of private protections.

François Ost[1466], in proposing a model of social contract distinct from the classical one emerged within the nation-states, initially points that the former model hints at fundamental rights, rooted in *the individual* as the sovereign. Through this model, rights are increased and responsibilities

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[1464] This was discussed in **Chapter 7.**

[1465] As outlined in **Chapter 1**.

[1466] F. OST, « Nouveau contract planetaire », in *Journée de la thèse 2023*, Université Paris 1 Panthéon-Sorbonne, 8 novembre 2023.

are excluded. In another view, the idea of a functional understanding of law is dialectical. In this sense, *interrelation* is fundamental, not establishing a priority of the individual, but an interdependence. The *code* of cyberspace and relational law does not rest on individuals, but their relations.

In this manner, one can remember Tony Watson's explanation about the relational management perspective that rejects the entity as a "*thing*", but visualizes it as organizing relations, in a network model of premises, obligations, and protocols shaped in attention to the formation of individual identities that are constructed as social creatures, behaving as such at a given moment. The author explains that viewing as an emerging process involves recognizing that organizations (institutions) occur at a particular moment, in a specific community, as opposed to universalisms that separate. The *procedural-relational* construction does not stem from a predetermined necessity but is built from meanings by the culture in which individuals participate[1467]. Watson holds, as a starting point, that the procedural-relational perspective encourages viewing members and *"organizations themselves as changing facets of the social, economic, political, and cultural relations they have always been part of, instead of treating them as previously 'existing' and then inserted into relations*"[1468].

Thus, as Emmanuel Jeuland points out, a relational paradigm is emerging in law, as well as in the humanities in general and in the so-called hard sciences. The relational paradigm suggests that the focus should no longer be on entities, rules, physical and legal persons, and their subjective rights, but rather on what exists between the poles of the relationship[1469].

It is important to emphasize that this argument related to the relational bias of the law aligns with the rationality and imagination of cybernetics, the political action of *network governance*, whose uniqueness attracts the *"in context"* [1470] character, and also with the informational law of due process which is composed of a functional set. Furthermore, both responsibility and governance possess the same characteristics, with the entire set participating in the same *"relational logic*," which means the procedural nature that requires dialogue, achievable only through due process. In this sense, if the government model was static and authoritarian,

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[1467] T.J. WATSON, « Organization and work in transition: from the "systems-control" logic to the "process-relational" one », *op. cit.*

[1468] *Ibid.*

[1469] E. JEULAND, « Theories of Legal Relations », *op. cit.*

[1470] The particularities of this schema were developed in **Chapter 3** and **Chapter 4**.

governance is naturally procedural, justifying the observation of this particularity as a state action of a digital state.

Moving from an individualist notion of rights, François Ost[1471] suggests an idea of law responsibilities by their functions. With that premise, it aims to abandon a reading that imposes the prevalence of the individual (autonomous matter), to proposes a law whose ontology is relational, and observes a *condition* of responsibility per se.

2- Condition of Responsibility

In reading, not through fundamental rights, freedom, or even citizenship, but through state action, one can ponder about how legal configurations can be interpreted for an effectively responsive actuation in a digital state. Thus, moving away from the dimension of freedom, one is directed towards ***responsibility in state actions***, as the dimension that needs to be analyzed at first. One means *first,* because the object of research lies in the digital state model and public law. Thus, as the focus rests on state actions and public legal regime, one identifies state actions by a relational reading, within an informational paradigm, more specifically, that of cybernetics. Examining state action not from the government paradigm, but from governance, highlights their core distinctions, which cannot be denied at digital realm.

In this scenario, one can observe François Ost and Michel Van De Kerchove[1472] exposition about the government represents an institution, while *governance is a process*. While government is based less on a self-centered and hierarchical apparatus, governance is by nature polycentric involving a multitude of partial adjustments, a network of relationships in search of coordination principles. That means a whole complex of vocabulary and validation processes that are unique[1473]. In turn, the character network of the state action model elucidates its relational ontology. Through this rationale, one could be reminded of the perception of governance as an ideal type, which recognizes that institutions need to adapt in order to provide solutions for emerging problems. Governance starts from the premise that organizations should

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[1471] F. OST, « Nouveau contract planetaire », *op. cit.*

[1472] M. VAN DE KERCHOVE et F. OST, *De la pyramide au réseau ?*, *op. cit.*, p. 29.

[1473] This process was delimitated in both **Chapter 5** and **Chapter 6**.

explore interactive capacity to deal with different agents and actors and involve them in a perspective of interaction with different parts of society[1474].

Political action in a governance form[1475] – in broad terms – has its legal legitimacy verified by ***the validity***, that means, the practical demonstration of a public action that attends to their purpose. Thus, the particular concept in the legal realm of responsibility, within a governance approach *"does not refer to a strict sense of a duty to act, but an obligation to be accountable for the performance of a task or function"*, as is well explained by Daniel Mockle[1476]. That means that, in governance and informational society, responsibility takes a specific tread, attached to the relational character of its components. That nature manifests in the code (a data dependent society), in the legal tools (informational due process, data flow as an instrumental right of freedom, and accountability), and dimensions.

Further, by the defense of a relational approach, one works with the procedural nature of *data rights* and *responsibility*, examining it from the perspective *of data flows* and *data value*. Instead of analyzing the digital state with a view that protects the individual in first place and as the starting point, with the *network governance* model approach one establishes data flow and data as an asset as focal points, especially because, distinctly from state-nations that were configured by and for individuals, data society is a society that depends on data, in it, what matters cannot be protect by an individualistic shape, nor dichotomic concepts, as it is insufficient for that, as already demonstrated in the current research[1477]. In this sense, it systematizes and orders a scheme that depends on effective circulation for its realization, and is stated for data share and data flows.

In fact, one comprehends that a legal analysis of the public sector from a *data flow paradigm* is not merely foundational *but indispensable* for a government seeking a data-oriented modus operandi. Examinations must initiate recognizing this phenomenon as an omnipresent reality. Indeed, it allows reiteration that some of the fundamental characteristics of a data-dependent society justify examinations akin to the environment and the nature of the element that propels it: ***i)*** the ascendancy of data generation is emerging as increasingly vital and valuable, ***ii)*** the utilization of data in daily life is becoming increasingly pivotal, and ***iii)*** public sector decisions

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[1474] F. FILGUEIRAS et V. ALMEIDA, *Governance for the Digital World: Neither More State nor More Market*, Cham, Springer International Publishing, 2021, disponible sur https://link.springer.com/10.1007/978-3-030-55248-0 (Consulté le 4 décembre 2023).

[1475] Also exposed in **Chapter 5** and **Chapter 6**.

[1476] D. MOCKLE, *La gouvernance publique*, 1re éd., *op. cit.*

[1477] Notably in **Chapter 1, Chapter 2** and **Chapter 3**.

are increasingly rooted in data infrastructures and databases[1478]. Then, taking a scenario where the departing point rests on an interrelated phenomenon (data flows, data as value and data-driven society), it is necessary to surpass theories focused on the individual, that not rarely result in commercial exploitation or directs data protection towards data subjects. Thenceforth, it is understood that relationships in the context of the information society can be examined not in attention to an a priori position of the agents, but notably to their action in a given context. And, by moving from a delimitation focused on the agent to the establishment of mechanisms that deal with actions (processing, use, reuse, etc.), data flow right of freedom attains a relational and functional scope. Its guarantee is not directed against the state in opposition to an individual, but is positioned as a functional and contextual facet within the idea of network governance.

With this, a reading of freedom, citizenship, and responsibility is sought, in the digital environment, in the digital state, from *network governance* and a primacy of the public, as highlighted since the beginning of the research. It is still emphasized that, as the focus of the present research resides in the state, the public, and political and public actions, the discussion about individual/collective private protection is not the primary starting point, which does not detract from its relevance. The intention is purely to inquire ***from a reading*** of political and public action. This is not done, however, by abandoning the concepts and legal instruments already developed. On the contrary, the concepts, principles, and values already placed in the legal order are employed. The reading, however, is made in a distinguished manner.

Thus, the ontological procedural nature of both responsibility and due process are a composite *of two foundational elements*: procedure and material. Both the procedure and the value can be filled in several ways. In the case of a network governance approach and a public law of the common good, the process tends to have a multifaceted nature, being legally justified by a systematic interpretation of the due process principles. As for the values, in the context of the public sector, it is understood that they should be those by which traditionally the state action is legitimized, namely, the public interest, in addition to concepts that are particular to an

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[1478] A. BEAULIEU et S. LEONELLI, *Data and society*, *op. cit.*

informational paradigm, as protection and digital inequality, which found support in a specific legal framework.

3- Applicable legal framework

Concerning the applicable legal framework, theory of fundamental rights doctrine states that digital state and data share in the public sector can be justified by the constitutional notion of Democratic rule of law (Article 1, Constitution), the separation of powers and functional division (Article 2, Constitution), the fundamental objectives of the Brazilian state (Article 3, Constitution), the principles governing international relations (Article 4, Constitution), and the Federal state, *to act* as a guarantor of privacy, trust, and transparency, for an informational legal due process regime. In addition, due to its constitutional form, it is interpreted as a legal principle with direct effectiveness, which among other obligations, must be applied by the legislator and request the motivation of decisions involving all forms of data processing. Thus, the reading of the digital state through the theory of fundamental rights brings informational due process legal regime justification, which finds support in a systematic interpretation of the constitution and the legal system[1479].

Imputing the *informational due process right* as an implicit constitutional principle, Ingo Wolfgang and Gabrielle Sarlet[1480], for instance, highlight that it should be observed by state entities in conjunction with existing statutes in the Brazilian legal system, such as General Data Protection Law (Lei Geral de Proteção de Dados - LGPD in the Portuguese acronym). In fact, there is a tendency of applying[1481] the Brazilian personal data protection law to the public sector in a conditioning matter, which can lead to a superposition of a private law over the public realm. A directive published in 2023 by the National Data Protection Authority (Autoridade Nacional de Proteção de dados ANPD in the Portuguese acronym) - regarding data processing by the public sector states that the processing of personal data by the Public Power must be supported by one of the hypotheses of Article 7, or, Article 11 of the LGPD. These provisions should be interpreted together and systematically with the additional criteria set forth in Article

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[1479] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

[1480] *Ibid.*

[1481] As showed in **Chapter 7**.

23, which complement and assist in the interpretation and practical application of the legal bases in the scope of the Public Power[1482].

However, as Humberto Mota Filho well states, the LGPD, despite being applied public entities and impacting public governance, it is part of a broader legal system, not holding the exclusivity of legislative treatment on the protection of personal data[1483]. In this manner, one stands by Humberto Mota Filho[1484] perception of informational due process public legal regime, stating, as well developed in the research, the primacy of Constitution, alongside public legal principles in the Brazilian system. That does not mean disrespect of personal data protection, but the attention to public law legal framework and regime in state action matters.

Thus, one understands that the legal regime of informational due process right within the digital state should follow the legal foundations and the legal discipline of the public law legal regime, as well as a digital government adapted to a data-driven society. Indeed, understanding the informational due process right as the basis of a digital state based on state actions and responsibility, the legal regime of public law must be employed, not that of private law. Thus, it is not about thinking of the subsidiary application of public law and rules, but rather their primary application, including in terms of data protection. Consequently, it is understood that the data protection law is not the legislation that should serve as the basis for the entire legal regime of the informational due process of the digital state, but rather the legal instruments of public law. Therefore, it is not that the institutes and purposes of public law that should adapt, but, rather, that they should be examined within their perception, accompanied by respect for the principles and guarantees of personal data protection and data law.

Within this schema, it is understood, with support in the doctrine of fundamental rights that derives the constitutional principle of informational due process right, that such applies in the Brazilian legal order, understanding state actions from public legal regime. Within that, one must take the Constitutional framework accompanied by public law legal framework, especially

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[1482] Original : « o *tratamento de dados pessoais pelo Poder Público deve se amparar em uma das hipóteses previstas no art. 7º ou, no caso de dados sensíveis, no art. 11 da lgpd. Esses dispositivos devem ser interpretados em conjunto e de forma sistemática com os critérios adicionais previstos no art. 23, que complementam e auxiliam a interpretação e a aplicação prática das bases legais no âmbito do Poder Público* », C. LANDERDAHL *et al.*, « Tratamento de dados pessoais pelo Poder Público », *op. cit.*

[1483] In the realm of data protection, this matter is regulated in the Federal Constitution, the Civil Code, the Consumer Defense Code, and the Internet Civil Framework.. H.E.C. MOTA FILHO, « A governança pública da informação: transparência e segurança jurídica », juin 2022, disponible sur http://web.bndes.gov.br/bib/jspui/handle/1408/22445 (Consulté le 12 décembre 2023).

[1484] Thus, for the author, and contrary to majority legal scholarship, the LGPD standing out for its scope, enunciates principles, rights, responsibilities, and other applications arising from the processing of personal data and government data. *Ibid.*

the Administrative Procedure Law (Law. n. 9.784/1999), that disposes about the procedure legal regime in public administration, and the Law of Access to Information (Lei de Acesso a Informação, - LAI, in the Portuguese acronym, Law n. 12.527/2011), that dispose about the active duty to transparence by public sector and the right of information, alongside the Digital Government Law (Law n. 14.129/2021), and the whole public legal framework already highlighted in the current research, as the Decree 10.046/2019.

Thus, from the Constitution, the guarantees of due legal process are determinant for a due informational process, and must be observed as primate[1485]. Similarly, Law No. 9.784/1999, inscribes basic guarantees, such as respect for due legal process, the principle of proportionality, among others, exposing in Article 2 the duty of both the contradictory and due defense in public sector's process. In fact, Law No. 9.784/99 applies to the processes of the federal public administration, except for specific provisions, in the case of its subsidiary application in what is omitted (Article 69). Furthermore, the legal reality of the administration is one of constitutional unity[1486].. The complex distribution of competencies is known, as the constitution did not unequivocally discipline such issues, being treated in a multifaceted way. This does not prevent the law from being considered fundamental regarding procedural paces in the public sector, whether it is of the federation, other federative entities, or even independent authorities. It is accepted as a fundamental basis for procedural analysis, accompanied by more specific legal instruments. Additionally, Article 22, I of the Constitution can be considered analogously to understand that material competence is of the union regarding its legislation, thus having an impact as a norm that aims to confer incidence on administrative bodies, giving organicity and rationality, systematizing procedural action[1487].

Therefore**,** as for the legal understanding of public state action of the digital state model, alongside the disposition made by the doctrine of fundamental rights, one can dispose that, ***from a network governance idea, informational due process right by the picture of public law and political/public actions forms a perception of informational due process legal regime though Informational Responsibility.*** As a functional law in a reticular ecosystem and driven by data, it depends on the value that is fulfilled in it. Thus, while the informational due process

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1485 As posited in **Chapter 6**.

1486 R.F.B. FILHO et S.L. PIVETTA, « O regime jurídico do processo administrativo na Lei nº 9.784/99 », *A&C - Revista de Direito Administrativo & Constitucional*, octobre 2014, vol. 14, nº 58, pp. 107-135, disponible sur http://www.revistaaec.com/index.php/revistaaec/article/view/75 (Consulté le 2 janvier 2024).

1487 *Ibid.*

constitutes the procedural charm, the core/value will demand an orientation towards the *common good*, that is, the core value of a republic.

B. Legal regime foundation

According to the theory of fundamental rights, the material condition of the constitutional framework of a digital state depends on human dignity, fundamental rights and guarantees, and the requirements of the democratic state of law[1488]. In this context, it is argued that the material fundamentality of data protection leads to a call for a constitutional reinterpretation, notably of the position of the human person. Thus, in the Brazilian legal context, human dignity is perceived as the principle that not only justifies the fundamental nature of data protection but also defines its substance and outlines a model of the digital state. Indeed, according to the that doctrine, Brazil's rise as a digital state depends on the observance of the principle of human dignity. And, as Sergio Guerra warns, the Constitution institutes the primordial need for respect of fundamental rights and guarantees. The dignity of the human person occupies a central place in the structure of the state and the legal order[1489]. As observed, data flow as a right of freedom carries an *instrumental nature,* with procedural and substantive dimensions. That means that the principle can be identified with particularities depending on the sphere that is at stake. In the private sphere, the substantive dimension of these rights lies in the protection of personality and the possibility of its exploitation, and the materiality in human dignity, usually coming from the private perception of autonomy. In turn, in the public sphere, the right of data flow

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[1488]Ingo Wolfgang Sarlet and Gabrielle Sarlet states: *"The implementation of a Digital Democratic Rule of Law must be geared towards the citizen, through the implementation of an innovative and sufficiently secure, transparent and reliable ecosystem that minimizes the damage and risks caused and generated by Information and Communication Technologies and Artificial Intelligence (just to name the most important in this context) through the use of technical and legal guarantees geared towards the protection and promotion of the dignity of the human person, their informational self-determination, the protection of their personal data and other fundamental rights and guarantees, prohibiting any type of abusive practice, including with regard to cyber security".* I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

[1489] G.V. FUNDAÇÃO, *Regulação no Brasil: uma visão multidisciplinar*, Rio de Janeiro, Editora FGV, 2014.

should have as its content and procedure its own legal regime, which rests on the principle of the supremacy of public interest and its unavailability, and public law procedural mechanisms.

1- Supremacy of public interest

In the case of the public sector, traditionally, state actions move towards public interest, as public law legal regime has its material fundamentally in public interest[1490]. Thus, the public law of the common good reveals the material criterion of the legal regime. Brazilian administrative law – within the public law legal regime – is consecrated as an autonomous legal discipline because it carries a systematized set of norms that confer a certain unity. Celso Antônio Bandeira de Mello explains that, legally, this characterization consists in the attribution of the discipline that fundamentally outlines itself in function of the principles of the supremacy of public interest over private interest and the unavailability of public interests[1491].

Thus, Brazilian public legal regime, as traditionally rationalized by Hely Lopes Meirelles[1492], means that public law is founded on the supremacy of the public interest, given the prevalence of collective interests over individual ones. And, as he states "Whenever the right of the individual and the interest of the community come into conflict, the latter must prevail, since the primary objective of the Administration is the common good". Further, as previously mentioned, the principle of the supremacy of public interest underpins public acts within the Brazilian legal order[1493], whose legal content and materiality are related to both political and public action in a digital state model[1494]. As discussed previously, the public interest can be observed both in a political manner and in a concrete context. In one way or another, public interest remains the foundation that confers the legitimacy for actions of a state[1495].

Thenceforth, through the perception of public interest by governance and the relational view of the law, governance has in its legal materiality public law and the public interest, so that

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1490 As exposed in **Chapiter 1**, **Chapter 3** and **Chapter 4**.

1491 C.A.B. de MELLO, « O conteúdo do regime jurídico-administrativo e seu valor metodológico », *Revista de Direito Administrativo*, juillet 1967, vol. 89, pp. 8-33, disponible sur https://periodicos.fgv.br/rda/article/view/30088 (Consulté le 2 janvier 2024).

1492 H.L. MEIRELLES, J.E. BURLE FILHO et C.R. BURLE, *Direito administrativo brasileiro*, *op. cit.*

1493 It proclaims the superiority of the interest of the community, affirming its prevalence over the interest of the individual, as a condition, even, for the survival and assurance of the latter. C.A.B. de MELLO, « O conteúdo do regime jurídico-administrativo e seu valor metodológico », *op. cit.*

1494 This content was developed in **Chapter 4**, Section 2.

1495 The criterion that establishes a distinction between the idea of the supremacy of public interest over private interest and the classical doctrine**,** pointed out in **Chapter 3** and **Chapter 4,** does not reside in the materiality of

legitimization adapts according to the process. In this process, the specificity of the matter attracts the supremacy of public interest over the private, in the context of the public sphere.

In this view, some remarks about the notion of public interest must be pointed out. Firstly, employing the exposition of Daniel Wunder Hachem[1496], public interest does not mean disparity with fundamental rights, especially since public interest – as an indetermined concept – composes also with rights of the subject and collectiveness. Another clarification, is that the public legal regime, founded in public interest, does not mean an aprioristic and abstract "*supremacy of the public*", neither prevalence of the private by the lens of autonomous freedom. Through the relational perception of law, there is not prevalence of neither public nor private over another dimension, that is, not an autonomous law to be put before, but dimensions, categories which have their own content.

That means that the relational perspective of law identifies relationships of individual and collective not in antagonism, but in relation to a specific context. That is the core of a relational view of law (to overpass autonomous and hierarchical models). Though, it is understood that one cannot extract the public interest from being the core and delimitator of digital state informational due process. That means that the aim here is not to establish a supremacy of a legal regime over another, but to sustain the prevalence of the public inside its own dimension. That is, the legitimacy of a digital state is not a generic human dignity, fundamental rights or democracy, but the concepts of the public legal regime, the public interest, the very legal materiality of public law regime.

In this way, as seen in the **First Part** of the thesis[1497], if common good is understood as a concept of political action, its interpretation in the legal domain occurs in a way to be apprehended as a valuative principle in the order, through the perception of the republican principle, extracted directly from the Federal Constitution, in Article 1, II, in an implicit understanding[1498]. In turn, Brazilian public legal regime states the duty and legitimacy of public interest, categorizing that

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the public interest as a criterion that underpins the legal regime. Instead, it lies in the origin linked to the government model of political action, established as a unique legitimizer of the public interest, in an authority antagonistic to freedom (as highlighted at **Chapter 1**).

1496 In this context, it is worth considering Daniel Wunder Hachem's exposition that the said principle coexists with fundamental rights, finding its basis in various constitutional principles and guarantees, especially that of legality. D.W. HACHEM, « O Estado moderno, a construção cientificista do direito e o princípio da legalidade no constitucionalismo liberal oitocentista », *op. cit.*.

1497 **Chapter 3.**

1498 **Chapter 5** explored the nuances of value and principles, stating for a perception of the common good as republican value, extracted from the Brazilian Constitution.

the perspective of public interest in the activities of administration, government, and of the parties that act in the scope of network and data governance, must also attend to this end[1499]. In this sense, it is posited that the material fundamentality of the due process could be considered, in the Brazilian legal system, regarding the digital state and state actions examined in attention and conjunction with the fundamental value of the republic, materialized in the principle of the common good, set forth in Article 1 of the Federal Constitution, by the definition of the republic, and in Article 3, by the definition of the objectives of the republic, and also (but not first) the protection of the principle of human dignity, and the other principles that attract the content of data protection and data law regime. Thus, the interpretation made of the materiality of the value to reach the stature of a digital state, from the perspective of network governance, and based on a public law of the common good, aligns with the constitutional value of the common good.

As for the foundation of public state action, in an informational responsibility, it is directed toward public interest, reestablishing its own legal regime, putting the public interest as the material criterium of public law of the common good for a digital state model. Within that, one can dispose that the material legal-objective duty of the state in a digital state lies guaranteeing the republican value, the primary base of Brazilian Federal Constitution, by the material criterium of public law legal regime, that is, the public interest.

2- Due process substantive dimension

As mentioned above, within the reading of fundamental rights, the legal justification of the democratic rule of law rests on the broadened bias of freedom. By that frame, it is disposed that the juridical-objective criterion of the digital state in Brazil operates by a positive state fundamentality in the perspective of freedom (both in the collective and individual view of the law). This reading extends across all relations existing in the public networked ecosystem. Thus, the material content of privacy protection is positioned as values to be guaranteed in the

[1499] From this, together with others, it can be observed in Article 37 of Constitution, Article 2 of Law 9.784/1999, and also Article 23 of LGPD.

face of state activities. Ultimately, the instrumental fundamental bias is justified in a citizenship dimension that implies the control of state acts aimed at citizen satisfaction[1500].

Then, one can conclude, that the theory of the fundamental rights advocates the establishment of a Digital Democratic rule of law towards the citizen (as the good governance approach). The problem already highlighted in the research about that orientation[1501], is that by directing the perception of a digital state towards the guarantee of human dignity and citizen satisfaction, it can invert the very objectives of state action, promoting the insertion of private interests into the public sector. This is because, as seen, the antagonistic model between rights and duties places the priority of freedom (individual and collective) over state action. This priority causes the public interest to be replaced by dignity, which is not always consolidated on social rights. Also, it replaces the perception of legal public action legitimacy, that lies in guarantying public interest, besides being stated as a duty to be supported by the state, in opposition to rights of the private sphere. Within that, while the state is demanded to satisfy the citizen as the purpose of the institution, he needs to act innovatively, implying a control over that action. These readings persist due to antagonistic views, which set rights on the one hand, and duties in a secondary manner.

The reading of the digital state from the political action of network governance pursues to place a distinct evaluative point. First, it is important to repeat that it does not deny the statement of human dignity or data protection. That means that human dignity as legal fundamental right must be considered in the public sector. Solely[1502], the ***core value*** of political action rests in the common good, and public action in the public interest, which means that ***they cannot be displaced in the public legal regime***. In other words: one cannot replace public interest for citizen satisfaction and action for innovation, which may imply putting private interest inside the public dimension[1503].

Examining informational due process right by state actions, one states that the substantive dimension comes from the public law legal regime (the public law of the common good).

[1500] For the authors *"In a preliminary manner, it is important to note that there is not only a constitutional duty of state innovation but also a fundamental right to innovation"*. I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

[1501] **Chapter 5,** Section 1 and **Chapter 7,** Section 1 and Section 2.

[1502] As mentioned in **Chapter 3** and **Chapter 5.**

[1503] As Muellerleile and Robertson states about digital transformation of the states by the citizen perception leads to: "*The digital, as the foundation of social organization, arrives at a time when the imagined telos of modernity has largely disappeared and been replaced by a neoliberal capitalist ethos, where economic development is both the means and the end of social development*". C. MUELLERLEILE et S.L. ROBERTSON, « Digital Weberianism: Bureaucracy, Information, and the Techno-rationality of Neoliberal Capitalism », *op. cit.*

Through this idea, one understands that a substantive dimension of informational due process in the public sector cannot be proposed within a private interest origin core (liberty, autonomy, freedom or fundamental rights), but must be engaged by a *state action lens*. In turn, by state actions lens, one identifies that their legal regime lies at guaranteeing the public interest, and not the private one. That means that informational due process right must be applied in the digital state as legal justification, but as its functional nature, it is done by observing not the value of the private sphere, but the core of the public dimension, that is, the general interest.

Commonly, the action of the state towards public interest does not find discussion in legal doctrine. Indeed, even personal data protection has its observation in the public sector depending on general interest. In this way, it is important to note a decision by the Court of Justice of the European Union, in the case of Digital Rights Ireland (C-293/12), even when it considered against public interest, it highlighted that any restriction on these "*rights and freedoms can only be introduced if they are necessary and effectively correspondent to objectives of* ***general interest***[1504] *recognized by the Union or to the need to protect the rights and freedoms of others*[1505]", which exposes the criterium of the public interest and the substance dimension of a digital state in an informational due regime.

Moreover, analyzing the digital state by the network governance approach, one understands that the code of analysis cannot lie in the individual or its personality. As stated, the basis of interpretation departs from the perception of *the interconnection*, a nature of a data-dependent society. As seen, digital sphere is a realm of resources that are shared, whose infrastructure is extensive and corresponds to the access of citizens and companies to the internet, a network infrastructure of public and private organizations, cybersecurity systems, and network control[1506]. In digital space, for instance, platforms are made up of a multitude of agencies - individuals, governments, companies, citizens and consumers. However, the inclinations of these actors to protect their own interests rather than civil values and public interests in general cause conflicts between them and hinder the potential for social, economic and political influence. Van Dijck, Poell and de Waal argue that values, such as the public good, justice, social responsibility and democratic control, are more difficult to defend, because these values

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[1504] Legal perception in Brazil of public action.

[1505] « Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others (Cases C-293/12 and C-594/12) EU:C:2014:238 (08 April 2014) », *Practical Law*, s.d.

[1506] V. ALMEIDA, F. FILGUEIRAS et F. GAETANI, « Digital Governance and the Tragedy of the Commons », *op. cit.*

are neither fundamental to the economic logic of platforms nor can they be inscribed in the algorithmic processes through which they function[1507].

This scenario highlights that platforms have the power to *"shape the way decisions are made"*, which in turn *"can alter the value of the data being accumulated"*[1508]. In this way, if a platform's primary mission is to maximize advertising profits, this will shape the way it pursues innovation, engages with audiences and designs its products and services[1509]. Then, if data flow is essential and a reality; and considering that within the public sector, its openness and circulation cannot be geared towards profit, following the digitization of government services, it is now necessary for the government to further shape its identity as the *driver of technology* for public interest[1510].

As an alternative, one could speak of an approach focused on models of digitalization, ensuring that the value generated by new technologies is directed towards social and public goods, rather than being monopolized[1511]. In this sense, one understands that the purpose of state action and data use cannot be implemented by the private rights logic, but must have in its starting point the public interest, which can be accommodated by a perception that imposes the public law legal regime in a digital state model.

Thus, firstly, in public law, one cannot think of open government or data, privacy and public data as socio-technical systems with a commercial purpose. On the other hand, ***public*** does not mean that the government is the only agent creating value, or that public means state, but rather that value is created collectively by different agents and for the community as a whole, in the public interest[1512]. Nevertheless, this notion is difficult to reconcile with a structure disposed by private legal domain, which is based on the assumption that people maximize their own preferences[1513]. That means that a logic towards public interest cannot be held by legal standards employed with private data law, even if it comes from fundamental rights or dignity, as it represents – generally – the private legal regime, that states about *rights* and not about

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[1507] J. van DIJCK, T. POELL et M. de WAAL, *The platform society*, *op. cit.*
[1508] M. MAZZUCATO, « For the Common Good », *op. cit.*
[1509] *Ibid.*
[1510] C. GOANTA et J. SPANAKIS, " Discussing The Legitimacy of Digital Market Surveillance ", *Stan. J. Comp. Antitrust*, abril de 2022
[1511] C. GOANTA et J. SPANAKIS, " Discussing The Legitimacy of Digital Market Surveillance ", *Stan. J. Comp. Antitrust*, abril de 2022
[1512] M. MAZZUCATO, *Mission economy:a Moonshot Guide to Changing Capitalism*, 1, 1re éd., *op. cit.*
[1513] J. van DIJCK, T. POELL et M. de WAAL, *The platform society*, *op. cit.*

duties. Further, it cannot also be regarded by an autonomous view of law, but one that see the space as place of interconnections.

It is pertinent to recall, in this vein, that cyber strategies adhere to the philosophy ingrained therein. In this context, through a relational view of the cyberspace and data flow alongside data as a value, it is possible to change from *exploitation view* of data value to *exchange of* data. That means seeing the flow of information based on the possibility of exchange, which can be capable of encompassing an alternative to a model that favors a restrictive view of data use and its purpose. Then, concerning values, the data ecosystem in the public sector must be interoperable not through the logic of extraction, but through the exchange of data[1514], which assumes a relational ontology.

By seeing the ecosystem not as an individualistic code, but from the perspective of data as an asset and the necessity of data flows, one can reposit ***the purpose*** of public actions to a data share in a digital state that must be that of the public interest. Therefore, seeing the Brazilian digital state model through public law of the common good, one puts state actions around plural and public values, which can reestablish "*legitimacy at the center of an authentic public interest*". That can be employed by a pragmatic view of a democratic governance model. That means associate participation, state capacities, transparency and accountability at the means of public state actions[1515]. In addition, the perspective of ***the primacy of public law regime***, holds the public legal regime, which has public interest at the core.

Thus, accompanied by the logic of the public law of the common good, one can reestablish the public interest as the core and orientation of digital state action, that is not reduced to delivering a personal satisfaction, but works to achieve public interest. Within that, by *public interest*, interoperability and data exchange are disseminated by governments, as in a board scale, or local. Seeing data space as a place of exchange and in the purpose of the public interest represents a brake with an extraction rationale. By an exchange reading, interoperability is stimulated, as it lies as a fundamental step for the creation of values. With that, one can propose

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[1514] M. MAZZUCATO, « Inclusive and sustainable growth. A mission-driven multi-stakeholder approach », *CIRIEC-España, revista de economía pública, social y cooperativa*, 2023, n° 107, pp. 27-35, disponible sur https://revistas.uv.es/index.php/ciriecespana/article/view/26371 (Consulté le 30 octobre 2023).

[1515] F. FILGUEIRAS, « Indo além do gerencial », *op. cit.*

about directing towards public interest, instead of limiting the potential of the digital transformation.

Settling, ***responsibility***, as category and legal concept of digital state public action model, materializes through two elements: a *procedural* one, and a *material* one. In addition, responsibility attached to the network governance political model brings attention to *data flow* and *data as an asset* (instead of the individual), with a content that guarantees public law legal regime, that is, the public interest.

2§ Informational due process procedure dimensions

Informational due process in the public sector needs to engage with: ***i)*** a political dimension (network governance model); ***ii)*** an administrative and governance dimension (accountability, coordination, operation guidelines); ***iii)*** a management dimension (a strategy of security and privacy of information to comply), ***iv)*** a technical dimension (codes and standards to observe and apply); and the ***v)*** social/control dimension (which implies mechanisms of audition, and evaluation for control). These dimensions must be taken into account when dealing with the juridical tools necessary to dispose about a protection of the information society ecosystem.

A. Informational due process by the law

Data ecosystems are known to have a network character, where actors are interconnected, within multiple systems in different levels and dimensions. This requires clear arrangements to ensure usage and allow for exchange. Moreover, it is an environment of self-organization, as it has feedback cycles[1516]. Examining and identifying the broad aspect of responsibility in network governance model, that is, its dimensions and concepts (information, knowledge, data), the malleable nature in which it may be directed toward the production of value, as well as its use by public and private actors, the solutions in the legal realm will consider the myriad of traits, as well as in the values, consensus and dispositions established in law or other documents. Thus, the abiding by these norms will be evaluated paying attention to such criteria, e not just for a regulation of personal consensus or for the protection of subjective individual rights.

[1516] V. ALMEIDA, F. FILGUEIRAS et F. GAETANI, « Digital Governance and the Tragedy of the Commons », *op. cit.*

1- Procedure dimension

With informational due process right, through the reading of informational responsibility, the focus lies in controlling the ecosystem as a whole, especially those agents that participate. That is because it is understood that the data ecosystem is not set up in isolation but results from a complex of activities involving both public and private actors[1517]. In such manner, constitutional and legal guarantees exposed in Brazilian legal system must be applied to the whole system. Thus, the relational reading of law carries a procedural nature, therefore, prompting a due process, within the idea of rule of law. Exposing an idea of relational law, Emmanuel Jeuland disclosures that rule of law means that all people, public and private, including the state, are bound to laws that are fair and equitable, and, moreover, that all have the right to protection under the law. The notion of Rule of law is imposed based on the principle of due process of law, which grants every citizen the right to benefit from a procedure. Due process requires respect for the constitutional principles that guarantee them[1518]. In Brazilian doctrine, a fundamental factor that qualifies a process is the character of due legal process. Article 5, item LIV[1519], of the Constitution encompasses procedural and substantive aspects. Substantially, it represents the "*requirement of a fair trial, in the sense of guaranteeing the equitable, fair, and loyal participation of the subjects*"[1520]. Meanwhile, Article 5, LV, of the Federal Constitution establishes the principles of contradiction and due defense as fundamental rights, which are "*intimately linked to the principle of due legal process, as there is no due legal process without the granting of the fullness of the defense*"[1521].

In addition, the informational due process, as a facet of the principle of freedom of circulation of data, has its instrumentality that allows for a procedural reading, and in this sense, one can state a reading ***of the data value chain***. Knowledge of the data chain is fundamental because through it, it is possible to establish –strategies, and place the standards to be applied[1522].

[1517] M. DI FELICE et S. SURRENTI, « Nem naturais, nem artificiais », *op. cit.*
[1518] E. JEULAND, « Theories of Legal Relations », *op. cit.*
[1519] R.F. BRASIL Casa Civil, Lei n. 12.527/2011, Lei de Acesso à informação.
[1520] M. NOVELINO, *Direito constitucional*, São Paulo, Método, 2009.
[1521] V. PAULO et M. ALEXANDRINO, *Direito constitucional descomplicado*, São Paulo, Método, 2014.
[1522]According to Peter Desrochers, the supply chain refers to the system and resources transportation from the supplier to the customer. The value chain has the roots in this idea, considering both how value is added at the chain, for the product, service and actors involved. P. DESROCHERS, *Les données administratives publiques dans l'espace numérique*, *op. cit.*

Identifying dimensions, phases, and relationships, allows drawing more precise boundaries between what should or should not be made available through active or passive transparency, to what extent it should be made available, or even to subsidize the decision not to publicly disclose personal information[1523]. That means that legal research cannot escape an observation of the process of data flows, specially *concerning the values* that display *its treatment and use.* Launched in 2014, the International Integrated Reporting Council aims to articulate financial and non-financial information in a manner that exposes how an organization generates value[1524].

Thus, that apparatus should be noted as a part of the dimensions of accountability that emerges in data governance and the public sector. According to José Luiz de Moura Faleiros Júnior, accountability in Brazil within digital transformation of the state can be identified in political, professional, administrative, technical, democratic and management terms. Each one fulfills a relevant function and its identification is relevant to imply the responsibilities, competencies, duties and obligations that are pertinent to each dimension[1525]. As a result, for instance, data management (the technical side), will imply a consideration about compliance and standards relatives to that dimension, which, also, can be elucidated by the examination of the *use of data.* There is, in fact, and as already stated[1526], a hierarchy in this chain of institutional governance, policies and norms. If the political action model is capable of driving primary values, it is placed as the basis for the other stages of a multiple governance process, which incurs varied responsibilities.

2- Informational accountability

The doctrine of the theory of fundamental rights proposes a presence of a fundamental, general and structuring principle of the informational division of powers within the scope of Brazilian

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[1523] G. DA SILVA CRAVEIRO, « Lei de Acesso à Informação e Lei Geral de Proteção de Dados Pessoais: diálogos e possibilidades de harmonização », *Data Privacy Brasil*, 2021, disponible sur https://dataprivacy.com.br/live-do-data-lei-de-acesso-a-informacao-e-lei-geral-de-protecao-de-dados-pessoais-dialogos-e-possibilidades-de-harmonizacao/ (Consulté le 12 décembre 2023).

[1524] H.E.C. MOTA FILHO, « A governança pública da informação », *op. cit.*

[1525] J. FALEIROS JUNIOR, « Perspectivas terminológicas da "accountability" no governo digital: uma abordagem das dimensões política, administrativa, profissional e democrática », *Revista EJEF (TJMG)*, 2023, disponible sur https://ejef.tjmg.jus.br/wp-content/uploads/2023/07/revista-ejef-n2-artigo_06.pdf (Consulté le 13 décembre 2023).

[1526] Especially in **Chapter 5**.

constitutionalism, deduced from a systematic interpretation of the legal dispositions, expressly and implicitly in the Constitution, from its principles and fundamental rights and guarantees[1527]. That means an understanding of the prohibition of informational blocks, both private and public, that act in a monolithic manner. For the theory of fundamental rights, a reinterpretation of the constitutional principles themselves is necessary[1528]. In this view, one can observe that Brazilian legal literature justifies a comprehension of Brazilian Constitution that accommodates multiple centers of governance information. It is understood that the network aspect is related to the perspective of the various types of responsibility, as well as to the idea of an informational separation of powers. In this manner, informational accountability does not lie in a priority duty against the state. By examining the ecosystem and accountability as having multiple dimensions, it is possible to examine it in its dimensions and respective conformities, as well as with regards to the necessary adjustments.

Thus, as can be seen, the political dimension of *network governance* justifies the existence of decentralization and the lack of informational unity, whose justification lies in the nature of connectivity between actors and users. Indeed, as already stated, data is collected and maintained by many public and private organizations and is needed by the government for decision-making and policy formulation[1529], data-driven government requires data administration that goes *beyond government boundaries*. Accordingly, as Duncan Mccan adverts, a board design protection implies decentralization of information, in a matter that assures a non-existence of unity of control of information[1530]. This is especially true given the nature, as already seen, of data circulation, which is not distinguished by being a public or private institution, but rather in its complex process of treatment from collection to disposal, which involves, as seen, governance and data and information management.

Hence, accountability and compliance extend to governments, but also to firms operating with digital public data. For instance, it is society's right to know how algorithms predict guilt and establish penalties in justice systems, or how algorithms decide the allocation of social

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[1527] As Ingo Wolfgang Sarlet and Gabrielle Sarlet posit: *"The informational separation of powers consists of a ressignification, both logical and necessary, of the semantics of the principle of the division of powers (article 2 CF) in the light of digital constitutionalism. As a fundamental structuring principle, implicitly enshrined in the Federal Constitution"* I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

[1528] *Ibid.*

[1529] D.M.F. SALDANHA, « Transparência e accountability em serviços públicos digitais », s.d.

[1530] D. MCCAN, « Power and accountability in the digital economy », *New Economics Foundation*, 2019, disponible sur New Economics Foundation (Consulté le 13 décembre 2023).

benefits[1531]. Accordingly, advocating protection of the right to privacy demands higher levels of accountability from data processing agents, whether they are public legal entities or private legal entities[1532]. Information governance, thus, needs to manage with different dimensions of accountability[1533]. Therefore, informational accountability from network governance can incorporate several dimensions and facets of responsibility. As far as the political dimension is concerned, responsibility implies the core of networked governance model.

Further, the delineation of the digital state as a political action model with its proper particularities can be applied in the manners of informational accountability that is relational. This indicates the principles of governance which would be reflections of a conception of a distinct relationship from the way their positions are viewed. In this perspective, an orchestrator can identify non-compliance and disclose the behavior[1534]. That perception of accountability harmonizes with the model of orchestrated governance[1535], especially a digital state model structure for a data-driven oriented government. Through the perception of orchestration, one does not state a centralized mode, which can be useful to guarantee the informational separation of powers. In addition, within a view of informational accountability, Data, share, using data and the value of data by political and public actions - in the context of networked governance – moves the discussion from consent and data protection of personal data, to regulation of the

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[1531] V. ALMEIDA, F. FILGUEIRAS et F. GAETANI, « Digital Governance and the Tragedy of the Commons », *op. cit.*

[1532] V.H. SAITO et E.D. SALGADO, « Privacidade e proteção de dados: por uma compreensão ampla do direito fundamental em face da sua multifuncionalidade: Privacy and data protection: for a broad comprehension of a fundamental right in its multifunctionality », *International Journal of Digital Law*, novembre 2020, vol. 1, n° 3, pp. 117-137, disponible sur https://journal.nuped.com.br/index.php/revista/article/view/saito2020 (Consulté le 9 décembre 2023).

[1533] J. FALEIROS JUNIOR, « Perspectivas terminológicas da "accountability" no governo digital: uma abordagem das dimensões política, administrativa, profissional e democrática », *op. cit.*

[1534] K. ABBOTT, « The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State », *In Whose Benefit? Explaining Regulatory Change in Global Politics (Walter Mattli & Ngaire Woods, eds.)*, avril 2009.

[1535] Proposed in **Chapter 5**.

use of data. One moves, in this case, from a generic idea of risk management of public agents to deal with information management.

B. Information and security conformity and coordination

According to the doctrine of human dignity, the inclusion of the right to personal data protection in the constitutional catalog implies a *"constitutionally binding duty for the State to develop a republican management*"[1536]. Thus, the juridical-objective dimension of the fundamental right to personal data protection would encompass a *positive action* of the state in guaranteeing the security of information infrastructures[1537]. As already noted in this research, digital governance mechanisms in Brazil operate an institutional change regarding its governance, through legal regulations aimed at digital transformation. Decree No. 8.638/2016 established the Digital Governance Policy, including the Brazilian Digital Governance Strategy in its structure, as previously seen. In turn, the digitization of public services is an increasingly common means of collecting and storing data from predictive systems. Therefore, data governance emerges from institutional structures that shape the interactions of actors related to massive data. Consequently, data governance requires a dynamic that can deal with the connected difficulties of collecting, storing, processing, sharing, and using, reusing, and disposing of data throughout its lifecycle[1538].

1- Information and Security coordination

Fernando Filgueiras defines Data administration in ecosystems as "*the distribution of authorities over the network organizations to ensure data quality, system quality, and governance quality*". As can be seen, it means an adequate distribution of competencies, that can both ensure and protect the information as well as allow its use in operation and innovation. According to Filgueiras, it is necessary to define three aspects: **i)** which organization takes care of data; **ii)** which organization manages the quality of data; **iii)** who observes and exposes how

[1536] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro, op. cit.*
[1537] *Ibid.*
[1538] F. FILGUEIRAS et L. LUI, « Designing data governance in Brazil: an institutional analysis », *Policy Design and Practice*, *op.cit.*

data could be used. For all these competences, "*data managers must ensure compliance with laws, (protect by design), including the assurance that confidential data will not be shared or misused. However, data administrators should allow the use of information by employing privacy enhancement technologies*"[1539].

With this scenario, one can indicate that in a data-ecosystem between government and businesses, the original scope of data administration, which focuses on managing data quality, needs to be expanded to include *governance* (allocation of responsibilities and decision rights) and quality assurance of the system ***from an end-to-end data exchange perspective***. That assurance must be made in attention with a specify schema, that can expose codes, obligations, standards to be complied with different actors, spaces and levels. For doing so, a strategy for information governance (due process, content, value and procedural manners) requires the transparency of information and its security[1540].

In Brazil, the essential management structure of information security can be identified by the governance policy of the federal administration established in Decree No. 9.203/2017[1541]. The decree defines public governance as the set of leadership mechanisms, strategies and control instruments placed to evaluate and monitor management, aimed at conducting public policies and services of interest to society[1542].

The Management Structure exposes the actors, operators, alongside their competences and also legal justifications[1543]. The outline, therefore, developed by the Secretariat for Digital Transformation in Brazil, shows a clear layout of a framework that establishes guidelines for an information governance scheme, which highlights the different roles, directions and responsibilities of each actor in it[1544].

[1539] V. ALMEIDA, F. FILGUEIRAS et F. GAETANI, « Digital Governance and the Tragedy of the Commons », *op. cit.*
[1540] D.M.F. SALDANHA, « Transparência e accountability em serviços públicos digitais », *op. cit.*
[1541] S.-G. REPUBLICA (PR), Decreto n° 9.203, de 22 de novembro de 2017, *op. cit.*
[1542] *« Art. 2 For the purposes of this Decree, the following are considered to be:*
I - public governance - a set of leadership, strategy and control mechanisms put in place to evaluate, direct and monitor management, with a view to conducting public policies and providing services of interest to society ».
Original : « *Art. 2° Para os efeitos do disposto neste Decreto, considera-se:*
I - governança pública - conjunto de mecanismos de liderança, estratégia e controle postos em prática para avaliar, direcionar e monitorar a gestão, com vistas à condução de políticas públicas e à prestação de serviços de interesse da sociedade ».
[1543] E. DWECK et S. do G. digitl BRASIL, MINISTERIO DA GESTÃO E DA INOVAÇÃO EM SERVIÇOS PUBLICOS, « Guia do Framework de Privacidade e Segurança da Informação », septembre 2023.
[1544] They are: ***i)*** the Information and Communication Technology Manager, amid other duties, beneath Ordinance No. 778/2019, responsible for planning, implementing and improving privacy and information security controls in information and communication technology solutions; ***ii)*** the Charger of Personal Data Processing, amid other

This is evidence of the multidimensional nature of the responsibility for information governance, which is also accompanied by instruments that set out the tools and codes to be observed by the agents. Through this perception of levels of responsibility, it is possible to identify the roles and functions to be established, in an orchestrated manner, neither centralized nor fragmented. This highlights the need for an integrative and synchronous perspective of the dimensions of responsibility in the state. Legal instruments must be interpreted with attention to these levels, in order to establish a legal protection that can stimulate data exchange, the production of values for the social good, and at the same time be capable of evaluating these exchanges, and their potential. With this, these dimensions of responsibility come to rely not only on the support of general legal rules, but also on codes and operational manuals, which are fundamental for an adequate exercise of information management and governance.

2- Conformity and codes

In the realm of technology governance, technical standards play a significant role. Through these standards, constraints are established on the design or use of various technical objects or services. They are considered tools in regulating technological risks and deal with the beginning of the certification process, which equally involves demonstrating compliance with security rules to a governmental authority or private certification bodies. This process is known as standardization. Non-compliance with these standards can constitute a failure in the context of a public manager's actions. Thus, the combination of risk governance and technical standards results in legal methods to prevent technological risks. The standardization process is formed by a triptych consisting of the legislator, which sets the objectives, the organizations subject to

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duties, beneath article 41, §2, of LGPD, responsible for guiding privacy diagnosis, and the managers who own the information assets, also responsible for privacy controls in information assets that process personal data or sensitive personal data; ***iii)*** the Information Security Manager, amid other duties, beneath Normative Instruction No. 1/2020, of the Office of Institutional Security, of the Presidency of the Republic - GSI/PR, responsible for planning, implementing information security controls on information assets; ***iv)*** the Head of the Internal Control Unit, responsible to supervise the activities of the first line of defense; ***v)*** the Information Security Committee, with necessity to deliberate on matters relating to the National Information Security Policy; vi) the Cyber Incident Treatment and Response Team - ETIR, the network of teams, created by. APF bodies and entities, coordinated by the GSI/PR Government Cyber Incident Prevention, Treatment and Response Center; ***vii)*** the Information Security Policy - POSIN, responsible to establishing guidelines, responsibilities, competencies and subsidies for information security management. *Ibid.*

compliance obligations, and the administrative authorities with powers of control and sanction[1545].

In Brazilian legal and policy informational framework, as Humberto Mota Filho well disposes, it is possible to understand information governance in the context of public transparency, mainly the *quality of information*, when treating data to demonstrate how a public organization generates value[1546]. Through this understanding, information governance and due process gain more legitimacy when its guidelines, and accountability tools guarantee the values of accountability and public information, the quality of information and compliance of information. If quality can be checked by the adoption of practices of management, the compliance of information can be observed by the identification of collection, processing, storage, and elimination of personal and collective data[1547].

For instance, the Secretariat for Digital Transformation in Brazil, launched in October 2023[1548], a framework addressing legal compliance standards to Brazilian public federal administration about information and security of data. It is considered that the framework can guide the Federal Public Administration bodies on compliance with the LGPD. The Secretary plans, coordinates and supervises information security activities within the Federal Public Administration. Also, as seen, the purpose is to ensure the availability, integrity, confidentiality and authenticity of information in a national level[1549]. Such management is accompanied by the need to demonstrate compliance, whose place, where many of these practices are established, is in the codes.

The issue pertaining to standards is also aligned with professional responsibility, which embodies a set of technical and professional norms regarding the behavior and performance of a professional in a given profession. These are the manuals of ethical conduct, which are also subject to a set of regulations, acting in accordance with and autonomy from their activities[1550].

[1545] A. LATIL, « Le droit du numérique. Une approche par les risques », *op. cit.*
[1546] H.E.C. MOTA FILHO, « A governança pública da informação », *op. cit.*
[1547] *Ibid.*
[1548] E. DWECK et S. do G. digitl BRASIL, MINISTERIO DA GESTÃO E DA INOVAÇÃO EM SERVIÇOS PUBLICOS, « Guia do Framework de Privacidade e Segurança da Informação », *op. cit.*
[1549]The framework was inspired by: the CIS controls and implementation approach (CIS, 2021), the Privacy Framework core structure (NIST, 2020) and ISO/IEC and ABNT NBR standards. the LGPD, the ANPD publications and the GSI/PR Regulations demand the main compliance actions in privacy, personal data protection and information security. *Ibid.*
[1550]In the case of professional accountability, the characteristics that are evident include: i) subjection to a set of rules and practices established by Councils and Orders; ii) autonomy of the members; iii) realization of accountability in the technical dimension, through bodies (Councils and Orders) of a technical-professional nature,

In Brazil, the guide of security and information, addressed to agencies and entities of the Federal Public Administration, aims to disseminate best practices in privacy and information security, in compliance with the National Information Security Policy (Decree No. 9.637, 2018)[1551]. The Privacy and Information Security Framework contained in the Guide is organized into chapters that highlight its rationale and structuring of controls; the basic structuring control for privacy and information security management; describes the cybersecurity controls adopted; describes the privacy controls; deals with the implementation of privacy and cybersecurity controls; considers how to assess the institution's maturity; and posits the tools to monitor the Framework.

These manuals should not be considered irrelevant. On the contrary, from them one identifies the values to be respected, the functions and operations of each competency, as well as the instructions for activities. The identification of these manuals is significant in a way that they can be regarded as *a "mini-constitution"*[1552] establishing operational rules. Thus, the effectiveness of the codes and manuals will depend on the content laid out, but also on the verification of their realization. This means that they depend on the object of monitoring. In any case, they are a fundamental component within the concept of informational responsibility, forming an essential part of legal analysis and interpretation. They also allow for the analysis of responsibility in a decentralized manner, attentive to the multiple systems of responsibility.

Section considerations

Responsibility through a relational view and a public law of the common good constitute the core of an adequate informational accountability, informational governance, informational technical standards, which correspond their exigence by the *use,* in conformity with guidelines,

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formed by members of the same profession; iv) realization of accountability in the administrative dimension, by ordinary bodies of supervision and control of Public Administration; v) evaluation of the performance of rules and principles and technical outcomes; vi) definition, country by country, of the consequences of this accountability process. J. FALEIROS JUNIOR, « Perspectivas terminológicas da "accountability" no governo digital: uma abordagem das dimensões política, administrativa, profissional e democrática », *op. cit.*

[1551] I. NACIONAL, « Decreto nº 9.637, de 26 de dezembro de 2018 », s.d., p. 9, disponible sur https://www.in.gov.br/materia (Consulté le 3 janvier 2024).

[1552] G. TEUBNER, « L'auto-constitutionnalisation des ETN ? Sur les rapports entre les codes de conduite "privés" et "publics" des entreprises », *op. cit.*

codes, and principles that orient digital governance. As it can be seen, an examination based on the dimensions of responsibility, aligned with the information due process, dealing with data as a multifaceted value led to different legal solutions, from those that limit sharing to specific purposes, or maintain a type of data protection still linked to consent. From the condition of Responsibility, one dispose about informational due process right by the public law legal regime (procedural and substantive matters). Within that schema, **Section 2** will take into account the principles aligned with digital state's informational due process right structure.

Section 2 Informational due process responsibility as guarantee of right of accessibility and digital inclusion

Espousing the information paradigm definition, Manuel Castells demonstrates that its particularity lies in being "*technologies **to act** on information, not only information to act on technology, as with previous technological revolutions*"[1553]. In the same sense, Tim Wu points out that what differs from the industrial model is the fact that "*commodities are information*"[1554]. In sum, the platform arises as a business model, of extracting and controlling voluminous data[1555]. Therefore, one can conclude that the characteristic of the informational paradigm does not reside in the technology itself, but in the effects that alter the mode of value production, here economically employed as a model of value production from information technologies. The main point, here, is not in the knowledge that results, but in the use that is made of the technology. That is, the focal point of the information paradigm is the use. What

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[1553] M. CASTELLS, R.V. MAJER et F.H. CARDOSO, *A sociedade em rede*, *op. cit.*

[1554] According to him, technologies go through a phase of revolutionary novelty and youthful utopianism. In the end, they all become a new highly centralized and integrated industry. In other words, all the technologies of the 20th century that started from a proposal of free use, for the sake of new inventions and individual expression, have become mega-industries, monopolists, media giants, controlling the flow and nature of the content disseminated for commercial reasons. Industries that trade in information are naturally distinct from those based on other commodities. T. WU, *The master switch : the rise and fall of information empires*, New York, Alfred A. Knopf, 2011.

[1555] The intermediaries—of the platform—orchestrate themselves toward profit and implement their business models through surveillance, exerting monitoring and evaluation of digital communication. This functions as a cybernetic logic of control where communicative action is overseen, permitting feedback within the logic in the interest of those who possess and comprehend how to utilize the data. M. SEELIGER et S. SEVIGNANI, « A New Structural Transformation of the Public Sphere? », *op. cit.*

shapes the transformation is not the centrality of knowledge, **but the use** of this knowledge for production and circulation in a feedback loop that accumulates innovation and its use[1556].

Therefore, the consolidation of control over information is no longer a secondary process in support of another production process[1557]. In this way, although data can be seen as capital, it is mainly digital intelligence that can improve performance and generate wealth[1558], because it is from this that value is purified and built[1559]. Accordingly, the management and manipulation of data and information is, in itself, increasingly the object of value creation[1560]. Conversely, the *power of information* shifts power as it changes *the rules* of access to information. Then, control of information in a data-driven world is shifting in favor of those who generate, store, and analyze information flows on their digital platforms. Despite the concentration of informational power being beneficial for a few, informational power is rarely discussed, being treated in a unilateral and defensive manner[1561]. Other actors, such as states, suffered defeats economically, even if simply due to the inequality of information about market practices[1562].

Thenceforth, considering that data only becomes valuable when it is used, the question lies more in pondering about who takes care of *the asset*, how it has been doing, and what and why it should be locked[1563]. Thus, when information dictates, the central issue is no longer data privacy, so that regulating data use is as necessary as regulating data protection[1564]. Besides, it is recognizable that technology is not neutral. For Viktor Mayer-Schonberger, the discourse of network neutrality had been put by the technology industry in order to reject responsibility for the damages caused by their use. According to this understanding, if

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[1556] P. BECKOUCHE, « La révolution numérique est-elle un tournant anthropologique ? », *op. cit.*

[1557] C. PEREZ, « Capitalism, technology and a green global golden age: the role of history in helping to shape the future », *Rethinking Capitalism: Economics and Policy for Sustainable and Inclusive Growth*, 2016, vol. 1, pp. 191-217, disponible sur https://cp.informaticaprojects.com/wp-content/downloads/publications/theoretical-framework/BTTR_WP_2016-1.pdf (Consulté le 30 octobre 2023).

[1558] A. BEAULIEU et S. LEONELLI, *Data and society*, *op. cit.*

[1559]For instance, in an electoral survey, data collected only exposes meaningfulness when associated with questions, the reason and objective of the survey and integrated with the sum of demographic and temporal factors. J.S. DA SILVA CRISTOVAM et T. MEINHART HAHN, « Administração pública orientada por dados: governo aberto e infraestrutura nacional de dados abertos », *op. cit.*

[1560] M. CASTELLS, R.V. MAJER et F.H. CARDOSO, *A sociedade em rede*, *op. cit.*

[1561] V. MAYER-SCHÖNBERGER et T. RAMGE, *Access rules*, *op. cit.*

[1562]Report launched from McKinsey Global Institute in 2021 estimates that data and analytics could create approximately $1.2 trillion per year in value in the public and social sectors. C. MCKINSEY, « Data analytics: Accelerating maturity in the US public sector | McKinsey », *McKinsey and Company*, 2021, disponible sur https://www.mckinsey.com/industries/public-sector/our-insights/accelerating-data-and-analytics-maturity-in-the-us-public-sector (Consulté le 2 janvier 2024).

[1563] V. MAYER-SCHÖNBERGER et T. RAMGE, *Access rules*, *op. cit.*

[1564] *Ibid.*

these technologies are neither good nor bad, one could only hold users accountable for their use. Then, considering that technologies are not neutral, examining them based on *the use* of technologies could be more useful[1565].

Within that, in the context of network governance, data sharing, data usage, and the value of data through political and public actions, one must move the discussion from consent and personal data protection to the regulation of ***data usage***, which will imply a proper responsibility, to be observed with public legal principles. In this manner, one moves away from the idea of data rights from consent to a question of examining use, aware of non-neutrality, which prevents an evaluation[1566]. Additionally, alongside this scenario – and within data flow and data as an asset as mechanisms to be observed – one analyzes digital state's *informational due process public legal regime*, within their corollaries, that is, public legal principles interpretation **(§1)**, and informational responsibility audition and control **(§2)**.

1§ Legal duties and responsibilities of the data use

The legal regime of the digital state's informational due process follows the legal foundations and the legal discipline of the public law legal regime, as well as a digital government adapted to a data-driven society, which adds its own elements. In this sense, the public law regime consists of basic principles, accompanied by specific ones. Transparency is considered an indispensable principle in the public sector, what's more, it is unquestionably esteemed. The LAI establishes the perception of active transparency (Article 5[1567]) in prevalence in Brazilian information framework. Nevertheless, as seen[1568], in the the public sector, the difficulty faced by transparency does not lie in its existence, but in the combability with personality rights and its extension.

In one hand, in Brazilian legal scholarship and also in Court decisions, one can find a resistance to sharing data by the apprehension of exposing personal data of individuals. Also, the main idea of data flow transfers and data use by the public sector is positioned in a condition mode

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[1565] A. LATIL, « Le droit du numérique. Une approche par les risques », *op. cit.*
[1566] V. ALMEIDA, F. FILGUEIRAS e F. GAETANI, *op. cit.*, *IEEE Internet Computing*, 24
[1567] R.F. BRASIL Casa Civil, Lei n. 12.527/2011, Lei de Acesso à informação., *op. cit.*
[1568] Exposed especially in **Chapter 7,** Section 1.

to personal data protection, not privileging the public legal information framework[1569]. That leads to an apparent conflict between LGPD (private and commercial origins), and LAI[1570]. On the other hand, in public governance, transparency is considered an indispensable condition for exercising other particularities of responsibility. Nonetheless, transparency is still treated as a contemporary phenomenon of the moralization of political life, while the field of access to information is placed secondarily in face of the constant need to control public agents[1571]. One can dispose that the Brazilian moral culture has relevance in conditioning that perspective of transparency. But, beyond that, one can also ponder about the fact that transparency has commonly been approached from the perspective of agency theory, aiming to control the asymmetry of information between the citizen (principal) and governmental organizations (agent)[1572]. Thus, in terms of transparency, the contemporary phenomenon of the moralization of political life is attracting more attention than the field of access to information. In this line, ethics, integrity, and democratic control mechanisms demand transparency more to exercise this assessment of political moralization[1573] than to properly examine transparency as a facet whose complexity is distinct in a natural informational space, such as the cyberspace[1574].

Nevertheless, it is understood that one can identify transparency with different lens. In fact, transparency in data-driven society demands a perception more extensive and not limited to the control of corruption. Consequently, the picture of transparency also deserves to be broadened to direct not towards the public manager control, but to treat the process of a data-driven informational due process right in the public sector.

Within this idea, transparency constitutes ***the core*** of a broader perception of the fundamental right of access to information, employed to expose information as a public right, which positive dimension positions the duty of active transparency in the informational due process, attracting the public law legal regime, within all their principles and concepts, adapted to data-driven society. Moreover, focusing not on the rights of citizens but on the duties of the actors who use

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[1569]This is the case, for instance, in the decision of Brazilian Supreme Court regarding data sharing, which primarily employed the provisions of the LGPD, while only sparsely mentioning the Law of Access to Information S.T.F.S. BRASIL, ação direta de inconstitucionalidade 6.529 distrito federal, *op. cit.*

[1570] B.R. BIONI, P.G.F. da SILVA et P.B.L. MARTINS, « Intersecções e relações entre a Lei Geral de Proteção de Dados (LGPD) e a Lei de Acesso à Informação (LAI) », *op. cit.*

[1571] D. MOCKLE, *La gouvernance publique*, *op. cit.*

[1572] D.M.F. SALDANHA, « Transparência e accountability em serviços públicos digitais », *op. cit.*

[1573] As can be noted in the Brazilian Report about Public governance.P. da REPUBLICA, *Guia da política de governança pública*, s.l., Presidência da República, 30 novembre 2018.

[1574] This discussion was developed in **Chapter 6**.

data, the duties imposed on those responsible for data use are examined, especially regarding transparency related with information paradigm **(A)** as an active duty **(B)**, and security mechanisms **(C).**

A. Transparency of information

In French public legal structure, William Gilles and Irene Bouhadana[1575] emphasize the consistency of a legal regime for public data services and the adaptation of its economic legal model to the challenges of data governance that public administrations must integrate into their mode of operation. The public data service, in the words of the authors, pursues two objectives: to facilitate the provision of data and to allow its reuse. In general terms, that means a *right to public information*[1576]. By that, Open data as ***public data*** to deliver services is regarded by public law regime, within an application that exposes public sector particularities, as geared towards the collectivity, and promotes access for use and reuse of data by private actors (users, citizens, private companies).

From this assessment, it is possible to draw an analogy with the Brazilian legal structure, to ascertain a public data law regime whose foundation lies on the ***right of information***, which constitutes the counterpart of state actions by responsibility in an informational due process. By that perspective, one considers Brazilian public legal regime as the foundation necessary to define and exame the legal regime of informational due process in the digital state.

Taking that scenario, a first note is that data, information and knowledge are different concepts. In information theory, data is an elementary description of an objective reality. Traditionally, raw data is considered an "*oxymoron*", they can be good or bad, incomplete or insufficient[1577],. It all depends on the extraction and subsequent processing of the information and

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[1575] W. GILLES et I. BOUHADANA, *L'open data: droit d'accès et de réutilisation des informations publiques dans la société des données*, Actualité, Paris, LexisNexis, 2023.
[1576] *Ibid.*
[1577] Etymologically, information comes from the Latin ***form***. Information is characterized by a "*formatting of data*". *Knowledge is* therefore an interpretation of *information*. Like any "*investment in form*", the transition from data to information and then to knowledge can be characterized as a dialectic of loss and gain. *Information* becomes *knowledge* when one understands how to use it to achieve its goals and don't just see it as a description of accumulated facts. Businesses often possess an advantage over their rivals because they have the capacity to produce knowledge. Finally, wisdom is knowledge in action. These distinctions, in this manner, must be considered by legal realm, as value of raw data, information and knowledge are not identical.
L. GITELMAN (éd.), *« Raw Data » Is an Oxymoron*, *op. cit.*

transformation into knowledge. Data exists first, then information and finally knowledge, and the transition from one level to the other is carried out by "*distillation operations*". Thus, the value of collected data is distinct from that which is made available, as well as from the knowledge that is produced. Their distinctions, in this manner, must be considered by the legal realm.

The Brazilian legislator, in the field of the LAI, considers information to be a fundamental right[1578], and it must follow the principles of Brazilian public administration (Article 37 of Federal Constitution). LAI defines information as "*data, **processed or not**, that can be used for the production and transmission of **knowledge,** contained in any medium, support or format*". Thus, one can note that the law identifies information as processed or unprocessed data used for the production and transmission of knowledge, differentiating, then, information from knowledge, placing this concept as a category of its own (art. 4, I), as well as protecting information that is considered confidential (art. 4, III) and personal (art. 4, IV)[1579]. The law also establishes definitions for the treatment and availability of information, which reinforces that, in legal terms, in Brazil, information has provisions on the treatment, processing and sharing of information, even before personal data protection regulation.

Furthermore, the LAI does not differentiate between collection, use, treatment, and sharing, so that by its essence, the due informational process implies all these phases. Thus, it represents a comprehensive protection of the process, which occurs both beforehand and afterwards, including not only treatment but also sharing[1580]. In addition, the demarcation of the stages of data, its dimensions and constructions are fundamental, as it shifts and modifies the debate between personal data and access and publicity, towards information (in the broad sense), multidimensionality and functionality and attention to its characteristics, which cannot be measured in any way other than *contextually*. Examining data, information and knowledge through these lenses is an alternative to examining data not just as an *ex-ante*, but to deal with

[1578] E.D. SALGADO, *Lei de acesso a informacao (LAI)*, *op. cit.*
[1579] R.F. BRASIL Casa Civil, Lei n. 12.527/2011, Lei de Acesso à informação., *op. cit.*
[1580] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

its own gears of automated, predictive and profiling processes, which are organized not just in an individualistic collection, but are shaped by certain specificities.

In this sense, the scope of information - defended here - can be understood *broadly*, to include not only raw data, but also the information processed and made available, which implies its various facets. In other words, it's about protecting *information*. In this way, information and data can be read in the public sector by LAI, which is appropriate for information that is public. Thus, it could be considered that, concerning the public sector and government, Brazilian legal framework states a boarder perception of information than personal data protection from LGPD, which encompass data, information and knowledge, which allows an understanding of a public data legal regime, already disposed in the legal framework. It is therefore understood that the provisions of the LAI allow for a reading that extends its semantic understanding beyond the legal perception of information as equivalent to data, but places it as a specific condition.

B. Active transparency

In attention to LAI, the state's duty lies guaranteeing *access* to *information*[1581], i.e., it is not a guarantee of private information or closed access. Thus, opening up data is a legal obligation, especially as the law applies to the entire direct and indirect administration[1582]. With regard to *active transparency*, the law brings with it concepts of open data, especially in Article 8[1583]. In

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[1581] "*Art. 5 It is the duty of the State to guarantee the right of access to information, which shall be made available through objective and agile procedures, in a transparent, clear manner and in easy-to-understand language*". Original: "*Art. 5º É dever do Estado garantir o direito de acesso à informação, que será franqueada, mediante procedimentos objetivos e ágeis, de forma transparente, clara e em linguagem de fácil compreensão*".

[1582] I.e., nationwide.

[1583] Art. 8 It is the duty of public bodies and entities to promote, regardless of requests, the disclosure in an easily accessible place, within the scope of their powers, of information of collective or general interest produced or held by them. (...) Paragraph 2 In order to comply with the provisions of the caput, public bodies and entities must use *all legitimate means and instruments at their disposal, and disclosure on official sites on the World Wide Web (Internet) is mandatory.*

§ Paragraph 3 The sites referred to in Paragraph 2 must, in accordance with the regulations, meet the following requirements, among others:

(...) II - make it possible to save reports in various electronic formats, including open and non-proprietary formats, such as spreadsheets and text, in order to facilitate the analysis of information;

III - enable automated access by external systems in open, structured and machine-readable formats; Original: "Art. 8º É dever dos órgãos e entidades públicas promover, independentemente de requerimentos, a divulgação em local de fácil acesso, no âmbito de suas competências, de informações de interesse coletivo ou geral por eles produzidas ou custodiadas", (...)§ 2º Para cumprimento do disposto no ***caput,*** *os órgãos e entidades públicas deverão utilizar todos os meios e instrumentos legítimos de que dispuserem, sendo obrigatória a divulgação em sítios oficiais da rede mundial de computadores (internet).*

§ 3º Os sítios de que trata o § 2º deverão, na forma de regulamento, atender, entre outros, aos seguintes requisitos:

fact, the very rationale of the law is productive in the sense of informing the founding principles of *access* (in the broad sense), the core of which is publicity, with secrecy being an exception (art. 3°, I). In the case of the structuring principles, the law provides a body of elements, laying down minimum elements and principles to be observed[1584], and placing *publicity* as a basic principle. Therefore, within the legal regime of public law, information is considered by the framework of publicity[1585].

Thus, as can be seen, when addressing transparency through the lens of a data-driven government, the aim is to place transparency in the process itself, which finds support in Brazilian legal frame in the LAI, (as it exposes the duty of transparence), the Constitution, and also in the Federal Procedural Law, which brings several fundamental elements, not just in the publicity of public bodies' acts but in the need for a transparent process, enabling compliance with due legal process, as already delimitated in the begin of the Chapter. Besides, the *right to information* and the *right to the protection of personal data* are fundamental rights laid down in the 1988 Federal Constitution. Freedom of access to information is fundamental to a democratic state governed by the rule of law, and the LAI aims to regulate the right of access to information, reinforcing transparency. It must comply with certain premises, such as disclosure[1586].

Therefore, the processing of data is recognized, and the flow of information is not always dependent on the will of the data subject. In fact, both data protection law and public information law converge in the scope of active transparency and information on data that is produced or allocated in the public sector[1587]. Data protection, as Bruno Bioni points out, and as can be seen in other legislation, is an *ex-ante* criterion for validating information for disposal. But it is not and cannot be the foundation of a legal regime on information in the public sector

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II - possibilitar a gravação de relatórios em diversos formatos eletrônicos, inclusive abertos e não proprietários, tais como planilhas e texto, de modo a facilitar a análise das informações;
III - possibilitar o acesso automatizado por sistemas externos em formatos abertos, estruturados e legíveis por máquina.
C.C. REPUBLICA (PR), Law n. °12.527 of March 29, 2011, *Doc.*, 2011

[1584] B.R. BIONI, P.G.F. da SILVA et P.B.L. MARTINS, " Intersections and relations between the General Data Protection Law (LGPD) and the Access to Information Law (LAI): contextual analysis through the lens of the right of access ", *Cadernos Técnicos da CGU*, 1

[1585] E.D. SALGADO, *Lei de acesso a informacao (LAI)*, *op. cit.*

[1586] *Ibid.*

[1587] B.R. BIONI, P.G.F. da SILVA et P.B.L. MARTINS, " Intersections and relations between the General Data Protection Law (LGPD) and the Access to Information Law (LAI): contextual analysis through the lens of the right of access ", *Cadernos Técnicos da CGU*, 1

and by the public sector, especially since the cosmos of information is much broader than personal data. In another view, as information as a right has a duty of publicity, the purpose of data use is oriented toward public interest. If the right of information constitutes a fundamental right of freedom, whose positive implication demands an action of the state, then the obligation lies in the transparency (in broad sense). Thus, based on LAI, public legal regime and procedural Brazilian law, one can sustain the right of information primacy, which confers the duty of active transparence in the public sector, and must be analyzed, as a proper paradigm, in the public sector, conditioning state action legal regime, in harmonization (but not prevalence), of personal data protection law.

Further, in informational due process, transparency is placed alongside information, with the latter being its objective, so that transparency is employed from the conception, as an indispensable principle of a data flow paradigm, where it must be present in all stages, respecting the limitations of each space and protections. The principle enables access to information, not forcing mechanisms of collaboration or cooperation but free access to available information. It is considered that transparency constitutes a necessary and sufficient condition for individual and collective autonomy[1588]. In this manner, the principles of equity, accessibility, accountability, and transparency are not merely composed of explanations of the practices but also disclose how these practices are realized[1589]. That means that from transparency one can identify the purpose of data use, and also demand the explanation about the motivation, and attention to protocols that assure its security.

C. Guaranteeing information security

Commonly, the concept of information security involves the protection of confidentiality, integrity, and availability (accessibility) of information. According to these three pillars, security of information must ensure that it: is accessible when necessary for the operation of the organization and the achievement of its purposes (availability); is accessed and used exclusively by those who are duly authorized to do so (confidentiality); is truthful and not corrupted (integrity) [1590]. Brazil regulated its information policy in 2011, as already exposed.

[1588] E. PAPADIMITROPOULOS, « Beyond neoliberalism », *op. cit.*
[1589] M. MAZZUCATO, « Inclusive and sustainable growth. A mission-driven multi-stakeholder approach », *op. cit.*
[1590] H.E.C. MOTA FILHO, « A governança pública da informação », *op. cit.*

From this perspective, it is observable that the legislation accommodates the fundamental principles of information management, specifically in Article 6[1591], as previously identified in **Chapter 6**. Article 6 states that it is the responsibility of public authorities and entities, observing specific procedures applicable, to ensure: I - transparent management of information, facilitating broad access to it and its dissemination; (*material aspects*) - access, openness, treatment (management that should be understood in its broad aspect, openness, access, disposition, use) II - protection of information, ensuring its availability, authenticity, and integrity; and (*rules for use aspects*) - circulation. Finally, the third item posits the protection of confidential and personal information, considering its availability, authenticity, integrity, and eventual access restriction. (*design)*.

In this vein, the National Information Security Policy, instituted within the Federal Public Administration by Decree 9.637/2018, aims to ensure the availability, integrity, confidentiality, and authenticity of information in the national level[1592]. It covers the fields of cybersecurity and defense, physical security, and protection of organizational data. From the perspective of this policy, information governance generally finds the main guidelines developed to ensure the protection of data of these organizations. It is important to note that it is the responsibility of government bodies, at all levels, to protect the information they hold, in the obligation posited by LAI[1593]. In addition, Law 12.682/012, had legally hallowed these pillars by regulating the process of digitization, that is, "*on the preparation and archiving of documents in electromagnetic media*" . In this regard, the Brazilian legal system already recognized that such a process should maintain the integrity, authenticity, and the confidentiality of the digital document[1594]. Further, the Digital Government Law includes various dispositions on Open Data Government. Article 3, XXV - sets the preferential adoption, in the use of the internet and its applications, of technologies, standards, and formats that are open and free, as per the Civil Rights Framework for the Internet, which relates to the issue of data. Regarding the opening and availability of data, criteria are set for the classification and competence of the custody of digital documents[1595]. Article 4 contains the definitions already used in other legal acts concerning data and indicates the necessity to observe both LAI and LGPD. Thus, transparency

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[1591] R.F. BRASIL Casa Civil, Lei n. 12.527/2011, Lei de Acesso à informação., *op. cit.*
[1592] I. NACIONAL, « Decreto nº 9.637, de 26 de dezembro de 2018 », *op. cit.*
[1593] H.E.C. MOTA FILHO, « A governança pública da informação », *op. cit.*
[1594] *Ibid.*
[1595] S.-G. REPUBLICA (PR), Lei nº 14.129 de 29 de março de 2021, *op. cit.*

becomes not of the acts of a manager but of open data and information management, of open and itemized accounting, of open supply chains. It is an indispensable condition for incorporating trust-based management, to be observed alongside other public and digital rights principles[1596].

§2 Informational principles and control

By understanding the flow of information as a process, legal principles can be employed through the procedural arrangement itself **(A).** Finally, digital state informational due process legal regime demands control ex-ante and ex-post **(B)**.

A. Respect for public principles

Alongside transparency, public principles that are employed for validation of state actions are motivation, and proportionality.

1- Duty of motivation

When expressing the meaning of public interest in postmodern administrative law, Luis Fonseca Pires posits that motivation shows as an indispensable mechanism for concretization of the due process of legal interpretation and, also to the semantic concretization of public interest. As he notes, contemporary public interest is fluid, uncertain and indeterminate, which demands the duty of public administration to assume its role as the interpreter of society[1597]. By that, it rests clear that public interest as a core principle of public law legal regime has a validation by the identification of the principle of motivation. Celso Antônio Bandeira de Mello explains that the principle of motivation has constitutional stature and is implicit in item II of Article 1 and item XXXV of Article 5 of the Constitution, which sponsor citizenship as the foundation of the Federative Republic of Brazil. The principle, as he argues, is "*demanded both as an affirmation of the citizens' right to understand the 'why' of the actions of those who*

[1596] E. PAPADIMITROPOULOS, « Beyond neoliberalism », *op. cit.*

[1597] L.M.F. PIRES, « A pós-modernidade e o interesse público líquido », *A&C - Revista de Direito Administrativo & Constitucional*, avril 2013, vol. 13, n° 52, pp. 133-144, disponible sur http://www.revistaaec.com/index.php/revistaaec/article/view/136 (Consulté le 29 décembre 2023).

manage affairs that concern them, as they are the ultimate holders of power, and as an individual right not to be subjected to arbitrary decisions, since they only have to conform to those that are adjusted to the laws"[1598].

Not by chance, the relevance of the motivation principle for validity is highlighted by the Brazilian Supreme Court, that, in a decision concerning data sharing in the public sector notes for the validity and compliance with commands, the legitimate interpretation obligates one "*to link the data to be provided to an objectively proven public interest and with specific motivation*" [1599]. On the other hand, the Court considers that "*the absence of express motivation prevents the examination of the legitimacy of acts of Public Administration*", concluding, then, for the indispensability of this principle in an informational due process public legal regime[1600]. In fact, one can observe that the need for motivation is already expressed in Law 9.784/1999[1601]. In the statute, the administration is required to motivate its acts with factual and legal reasons, in order to protect the administered. In Article 2, Clause VII (motivation, theory of determining reasons) includes assumptions of fact and law. This aligns with the logic of due legal process, both process and procedure. Additionally, Article 50[1602] stipulates that acts must be motivated, in such a way that access to contradiction and full defense is necessary, in order to facilitate control. Motivation, thus, rests not only on public law literature and legal framework, but also itself imposes as fundamental in the digital realm. In this way, it is possible to ponder that data sharing in the public sector holds the examination of public administration principles as indispensable. In this sense, an informational model of due process presupposes the validity of this principle. In addition, they must be interpreted alongside specific procedures.

[1598] C.A.B. de MELLO, *Curso de direito administrativo*, *op. cit.*, p. 123.
[1599] *Ibid.*
[1600] S.T.F.S. BRASIL, ação direta de inconstitucionalidade 6.529 distrito federal, *op. cit.*
[1601] R.F.B. FILHO et S.L. PIVETTA, « O regime jurídico do processo administrativo na Lei n° 9.784/99 », *op. cit.*
[1602] "*Art. 50: Administrative acts must be motivated, indicating the facts and legal grounds, when:*
(...) Paragraph 1 The motivation must be explicit, clear and congruent, and may consist of a statement of agreement with the grounds of previous opinions, information, decisions or proposals, which, in this case, will be an integral part of the act".
Original: "*Art. 50. Os atos administrativos deverão ser motivados, com indicação dos fatos e dos fundamentos jurídicos, quando:*
(...) § 1o A motivação deve ser explícita, clara e congruente, podendo consistir em declaração de concordância com fundamentos de anteriores pareceres, informações, decisões ou propostas, que, neste caso, serão parte integrante do ato". R.F. BRASIL, *Constituição da república federativa do Brasil*, *op. cit.*

2- Data sharing purpose

The processing and sharing of data are indispensable in the fulfillment of state functions. For Ingo Wolfgang Sarlet and Gabrielle Sarlet, the scope of an informational due process, specifically regarding the public sector lies in how "*all forms of processing (use, storage, and sharing) of personal data by state bodies are tied to the observance of principles derived from the LGPD, which lists purpose, necessity, and adequacy as unshakable parameters*". In Brazilian legal scholarship, regularly, the understanding is that data sharing cannot exceed its purpose nor the legal competence of the recipient agency[1603].

Nevertheless, the need to pay attention to the precepts of public law is found in the examination of statement No. 12/2023 from the Brazilian Office of the Controller General[1604]. According to it, "*personal information*" cannot be used in an abstract manner to deny requests for access to documents or processes that contain personal data. As the institution explains, this happens because data can be treated (redacted, excluded, omitted, de-identified, etc.). In this manner, "*once duly protected, the remainder of the requested documents or processes can be provided, as stipulated by § 2 of Article 7 of Law No. 12,527/2011, ensuring access to the non-confidential part through a certificate, extract, or copy with the confidential part obscured*". From this decision, one can observe a correct understanding about information in the public sphere. As the Controller Office indicates, personal data protection needs to be connected "*with the guarantee of the right of access to information, which can be made flexible when, in the specific case, the protection of general and predominant public interest is imposed*"[1605]. The statement

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[1603] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

[1604] *« In requests for access to information and respective appeals, decisions dealing with the disclosure of data on natural persons must be based on articles 3 and 31 of Law No. 12.527/2011 (Access to Information Law - LAI), since: The LAI, being more specific, is the procedural and material governing norm to be applied in the processing of this type of administrative proceeding; and The LAI, Law 14.129/2021 (Digital Government Law) and Law 13.709/2018 (General Personal Data Protection Law - LGPD) are systematically compatible with each other and harmonize the fundamental rights of access to information, intimacy and protection of personal data, and there is no antinomy between their provisions ».*

Original : *« Nos pedidos de acesso à informação e respectivo recursos, as decisões que tratam da publicidade de dados de pessoas naturais devem ser fundamentadas nos arts. 3o e 31 da Lei no 12.527/2011 (Lei de Acesso à Informação - LAI), vez que: A LAI, por ser mais específica, é a norma de regência processual e material a ser aplicada no processamento desta espécie de processo administrativo; e A LAI, a Lei no 14.129/2021 (Lei de Governo Digital) e a Lei no 13.709/2018 (Lei Geral de Proteção de Dados Pessoais - LGPD) são sistematicamente compatíveis entre si e harmonizam os direitos fundamentais do acesso à informação, da intimidade e da proteção aos dados pessoais, não havendo antinomia entre seus dispositivos* ». C.-G. da U. BRASIL, REPUBLICA FEDERATIVA, Enunciado CGU 12/2023 — Informação pessoal, 16 mai 2023, disponible sur https://repositorio.cgu.gov.br/handle/1/7409 (Consulté le 3 janvier 2024).

[1605] *Ibid.*

also highlights the connection and systematic connection between the laws, especially, the LAI with LGPD and the Law of the digital government.

This highlights the limits and possibilities of secondary use of personal data by public authorities. Secondary use of data refers to the utilization of personal data for purposes that are different from those that motivated their collection. Miriam Wimmer, proposed an examination of its limits and possibilities in the Brazilian public sector. For the author, the first parameter justifying sharing lies in the compatibility of purposes. In the absence of such compatibility, she lists two elements to be added, to enable sharing and legitimize data processing, namely, authorization provided by the data subject or a specific legal provision. Regardless, it is imperative to apply data protection principles, and in this sense, self-determination, protection, and privacy, which provide procedural and material safeguards. This is done based on the protection parameters of the constitution[1606].

Indeed, the Brazilian Supreme Federal Court establishes the consideration of necessity, adequacy, and proportionality of the measure. In ADPF 695[1607], the sharing of the National Traffic Department's database with the Brazilian Intelligence Agency was questioned. The issue was not only the security of the information but the existence of adequate mechanisms to control the purposes of sharing. The legal approach to the fundamental right to data protection encompasses comprehensive protection shifted the focus from the content of the data to the possibilities and purposes of its processing. For Miriam Wimmer, the court outlined the elements it deems necessary for a proper informational process that addresses the purposes of processing[1608]. In fact, in its decision on data sharing, the Court presented the requirements for this exercise by the public authorities. It indicated the assumptions in line with the LGPD, as well the attention to the criteria of motivation and specific considerations about the proportionality of the measure. In this sense, proportionality is indicated as a basic precept to be employed in the governance and treatment of data in the public sector, alongside motivation. As explained: "*there would be no way to reliably ensure effective judicial contrast of administrative conduct with the principles of legality, purpose, reasonableness, and*

[1606] M. WIMMER, « Limites e possibilidade para o uso secundário de dados pessoais no poder público: lições da pandemia », *Revista Brasileira de Políticas Públicas*, avril 2021, vol. 11, n° 1, disponible sur https://www.publicacoes.uniceub.br/RBPP/article/view/7136 (Consulté le 13 décembre 2023).

[1607] S.T.F.S. BRASIL, Arguição de descumprimento de preceito fundamental n.695, disponible sur https://portal.stf.jus.br/processos/verImpressao.asp?imprimir=true&incidente=5938693 (Consulté le 3 janvier 2024).

[1608] M. WIMMER, « Limites e possibilidade para o uso secundário de dados pessoais no poder público », *op. cit.*

proportionality if the reasons that allowed recognizing their alignment or misalignment with those same principles were not contemporaneously known and explained". In this manner, for the Minister of the Supreme Court, the principle of purpose should take into consideration ***i)*** the reasonable expectations of the data subject, ***ii)*** the nature of the processed data, and ***iii)*** the possible harms to be accepted by the data subject. Thus, the purpose is seen as "*an unfolding of informational self-determination*"[1609].

Anyhow, the compatibility of purposes for data sharing has been reiterated with reference to the notion of *contextual integrity*, which will establish that one must focus on meeting the reasonable expectations of individuals concerning the way data is treated and shared. As Miriam Wimmer clearly demonstrates, in the international context, there is an understanding that the incompatibility of purposes can be overcome by the consent of the data subject or by specific, necessary, and proportional provision, observing the rights of data protection, with transparency becoming particularly significant in this regard[1610]. Therefore, it is important to emphasize that, given the recognition of the need for data exchange for the construction of values in the public sector, a legal analysis that relies on a rationale of data exchange for the construction of public values, rather than limiting sharing through the logic of extraction, should be underpinned by the objective of serving the public interest. That means that the legal principles may be interpreted by this perspective, not only reasonability, but also transparency and motivation. Within that, one can observe information as a public right, and active

[1609] S.T.F.S. BRASIL, Arguição de descumprimento de preceito fundamental n.695, *op. cit.*
[1610] M. WIMMER, « Limites e possibilidade para o uso secundário de dados pessoais no poder público », *op. cit.*

transparency as an expansive matter that demands observation of the whole informational ecosystem. This ecosystem, as relational, will demand constant evaluation and control.

B. Informational due process control

In the informational due process public legal regime, one can ponder that responsibility could be observed by a conception ***ex ante*(A)** and ***ex post* (B)**

1- Ex ante responsibility

Reflecting on data and information management, the necessity to establish a preliminary evaluation of risk impact reports is highlighted by the literature. Such reports must adhere to the parameters of transparency and accountability throughout the process, as well as the duty of act motivation[1611]. In this manner, one can recall the ideas of the good government model[1612], that reestablishes the common good at the center of the purpose of state actions. The purpose of good government is the well-being of the population[1613]. Virtuousness is calculated and conferred by such value. Thus, this implies examining concepts such as prudence, moderation, precaution, temperance, and peace. In the pre-modern perception, if the prince should seek the well-being of the community, on the other hand, he should avoid acting badly, that is, to be prudent and act with temperance. This idea of temperance and prudence will dominate the principle of the *good government*[1614], which can be useful for informational due process public legal regime.

From this perspective, with the idea of the informational due process, a principle that emerges is related to the concept of precaution. This indicates the need to pay attention, within the scope of data and information governance, to the adoption of **preventive measures**[1615]. The doctrine of fundamental rights lists a set of preventive measures to be taken by the state in the context of a digital democratic state. These are: ***i)*** availability appropriate to techno-legal standards; ***ii)***

[1611] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

[1612] Developed in **Chapter 3**.

[1613] L. FLORIDI, *Il verde e il blu: idee ingenue per migliorare la politica*, *op. cit.*

[1614] D. MOCKLE, « Le principe général du bon gouvernement », *Les Cahiers de droit*, 2019, vol. 60, n° 4, pp. 1031-1086, disponible sur https://www.erudit.org/fr/revues/cd1/2019-v60-n4-cd05038/1066349ar/ (Consulté le 8 octobre 2023).

[1615] Not only with regards to risk, but also prevention as the non-contingent nature of life.

integrity; ***iii)*** transparency in processing; ***iv)*** the duty of secrecy; ***v)*** transparency; ***vi)*** a monitoring plan for the entities that handle the data[1616]. Further, the precautionary principle in the digital realm means **design principles**. As seen, for theory of fundamental rights the material fundamentality of data protection leads to the defense of a constitutional reinterpretation, notably the position of the human person. Also, its emphases "*new forms of protection as an indispensable starting point*"[1617] for the legal establishment of a digital state. On one hand, there is a clear stipulation about the need for protection from the design stage—a protection that considers the individual's personality, self-determination, and integral human protection. The perspective of protection from the design constitutes a binding duty of a republican logic throughout the entire lifecycle of data that needs to be stated with attention to a core value.

By the network governance approach, sharing and circulation of data are fundamental in a digital government.

Hence, it is essential to focus on mechanisms that do not mask, but deal with these specificities. In addition, a design that is not against the public interest or common good should be thought of, but in replacement of a data extraction rationale. Thus, within the realm of design, *protection* should imply its prevalence over profit. Duncan McCann establishes six principles in this regard: ***i)*** protection by default: hardware, software, and platforms must protect users by default; ***ii)*** decentralized architecture: digital infrastructures should, be based on a decentralized manner to disperse power and, in order to foster the creation of a more secure and less vulnerable space of exchange; ***iii)*** empower the collective: individual rights and actions must be accompanied by a narrative concerning collective rights and actions; ***iv)*** data as a public good: transforming the economy for the common good, recognizing that the value of data is social. That means in the public sector recognizing the value of data for the social good; ***v)*** accountability: a strong accountability for those who collect and process data needs to be ensured; ***vi)*** increase transparency: ensure transparency within the system[1618].

[1616] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*
[1617] *Ibid.*
[1618] D. MCCAN, « Power and accountability in the digital economy », *op. cit.*

In this regard, ***institutional design*** should strive to meet the precepts of authenticity and integrity of information[1619]. Protection is a condition for the disclosure, treatment, and sharing of information, as derived from the LAI, expressly stated in the body of Article 6, which establishes three specific foundations: transparent management of information, ensuring broad access and dissemination; protection of personal information; and protection of the triad of integrity, authenticity, and availability. In other words, the legislator has not only encompassed the fundamental elements of proper and compliant information disclosure but also established these requirements for all stages of the data governance and management process, from collection to sharing. Therefore, from the perspective and intelligence of the LAI, information possesses not just the necessary requirements, but those suitable for a networked ecosystem. The support refers both to the constitutional apparatus, in the model of the Constitution, and to the ***republican principle***, a core value of the legal system.

Further, in the public sector, *"principles that improve behavior and promote solidarity and inclusion in the digital world through public values"*[1620] will be required. That means the necessary attention to the digital divide and inequality.

2- Equity in the design

Inclusive design means that "*no one will be left behind*", a concept that occupies the list of design principles of a digital government. The list of mechanisms for assessing accountability and reliability emphasizes the need for fairness. The recommendation is *that "leave no one behind" becomes the operating principle guiding policy development and implementation in e-government and the public sector.* At the policy and regulatory level, governments should adopt strategies of *"inclusion by design", "inclusion by default" or "inclusion first".* The OECD also highlights the need for design that addresses inclusion, with this criterion as an indispensable condition[1621] .

[1619] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro, op. cit.*

[1620] *Digital governance requires mechanisms of cooperation and collaboration, with the aim of promoting the integral development of the digital world. Cooperation and collaboration are needed to promote services anchored on ethical and political principles that promote societal development.* V. ALMEIDA, F. FILGUEIRAS et F. GAETANI, « Digital Governance and the Tragedy of the Commons », *op. cit.*

[1621] OECD, *The OECD Digital Government Policy Framework, op. cit.*

Nevertheless, the United Nations points out that inclusive design has not received enough attention in the digital transformation process[1622].. Focused on economic transformation and the user/citizen experience, inclusion is difficult to be achieved in an environment where it is not established as a priority, but as a secondary factor. In fact, Brazil's digital transformation is formatted for debureaucratization and efficiency, marginalizing the discourse on inclusion and equity. In Brazil, the Digital Government Act has two mentions of accessibility, modestly. There is a concern, but it is not a priority[1623]. There is almost no concern for factors related to Brazilian digital exclusion. In addition, there is no public policy aimed at digital inequality. This means that one of the most important factors to be considered in the Brazilian digital transition, which corresponds to the reality of its asymmetric population, with not only digital exclusion but also an essential social exclusion, is being ignored in public policy projects. This lack of attention to inequality in digital transformation implies problems not only in access. In fact, it can also potentiate exclusion and asymmetries[1624].

In this sense, alien legal techniques from developed countries – that although of federative size, constitute hegemonic countries - such as the United states, demonstrates an inadequacy to the reality of the country's crass social inequality. Decolonial and Latin America situated views are crucial for research and social action on technology, surveillance, and society[1625]. Hence, the

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[1622] The Survey tracks progress of e-government development via the United Nations E-Government Development Index (EGDI). The EGDI, which assesses e-government development at the national level, is a composite index based on the weighted average of three normalized indices. One-third is derived from the Telecommunications Infrastructure Index (TII) based on data provided by the International Telecommunications Union (ITU), one-third from the Human capital Index (HcI) based on data mainly provided by the United Nations Educational, Scientific and cultural Organization (UNEScO), and one-third from the Online Service Index (OSI) based on data collected from an independent online assessment, conducted by UNDESA.

[1623] The digital provision of public services must occur through technologies that are widely accessible to the population, including those with low income or living in rural and isolated areas, without prejudice to the citizen's right to face-to-face service. Sole paragraph. Access to the digital provision of public services will preferably be through self-service. (...) Art. 50. Access and connection for the use of public services may be totally or partially guaranteed by the government, with the objective of promoting universal access to the digital provision of public services and the reduction of costs to users, under the terms of the law.

[1624]This is the case of the application made available for cell phones to obtain emergency assistance due to the Coronavirus pandemic. The government failed to pay attention to the fact that a significant portion of the people who needed this benefit did not have access to the net. An example of digital transformation's inadequacy can be seen with the Brazilian reality in the Covid pandemic. In that occasion, emergency aid policies ended up not reaching the layer of the population that needed it the most, either because they did not have enough digital education to access the applications, or because they did not have the resources to access digital technology. This situation even created an intermediary work of people who accessed the applications for the concession of emergency aid, with a fee charged. In other words, not infrequently, the Brazilian reality - such as the digital exclusion - is ignored in the treatment of these tools, just as their use in a way inattentive to reality potentiates inequalities instead of diminishing them. E. GABARDO, O.L.C. DE FREITAS FIRKOWSKI et A.C.A. VIANA, « The digital divide in Brazil and the accessibility as a fundamental right », *op. cit.*

[1625] As The Latin American Network of Surveillance, Technology and Society Studies highlights "*the consequences of increased use of surveillance practices and technologies tend to deepen socioeconomic*

contemporary centrality of information technologies, materialized in surveillance policies as control practices, requires critical reflection to question and subvert their epistemological foundations and commonly claimed neutrality.

Bryce Clayton Newell proposes a design "*beyond individual consent*" to lead with the relationship between surveillance, privacy and the law in the peripheries of the South in order to promote dignity[1626].. Along these lines, Stefania Milan and Emiliano Treré allude to the idea of an ontological and ethical epistemological program of *Big-data from* the South[1627]. Digital cultures of the periphery, considered subaltern, disrupt hegemonic conceptions of innovation, and present the conflicting interests of a range of social forces. In summary, the decolonial reading argues that: ***i)*** damage to privacy throughout history must be considered in digital design; ***ii)*** attention must be paid to the peripheries; ***iii)*** the focus must be on exclusion[1628]. These examples show that the issue of design and equality missions must be addressed in a preventive way, from a design perspective, but that they cannot be limited to cosmetic provisions. It is imperative that Brazilian asymmetries be considered from a design perspective, thus implying specific programs for plural inclusion, as an indispensable fact for dealing with digital inequality. One can also add that a necessary modification lies in including design from and for the social, the public interest, in the way that the presence of an informational due process in substantive matters represents first, the respect of the public interest, alongside design principles that are necessary in the digital realm. Further, these considerations demand an ***evaluation.***

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inequalities and asymmetries in contemporary society, hindering debates for social justice, environmental justice, and data justice, which is particularly serious in countries of the so-called Global South. R.J. FIRMINO et F.G. BRUNO, « Building a Latin American Agenda for Studies on Surveillance, Technology, and Society », *op. cit.*

[1626]Then, a historical perspective of the place is necessary. In addition, experiences must be done alongside surveillance studies. That is, attention must be paid to surveillance through investment in methods and political duty to evaluating the concerns and experiences of people. B.C. NEWELL, T. TIMAN et B.-J. KOOPS, *Surveillance, Privacy and Public Space*, s.l., Routledge, 2018, disponible sur https://books.google.com/books?hl=en&lr=&id=17JjDwAAQBAJ&oi=fnd&pg=PT13&dq=info:BlOa7jYMh8oJ:scholar.google.com&ots=_7Pmza7bDn&sig=vmxILohTXiz6nOIz9T-lGTlT2gY (Consulté le 3 janvier 2024).

[1627] S. MILAN et E. TRERE, « Big Data from the South(s): Beyond Data Universalism », *Television & New Media*, mai 2019, vol. 20, n° 4, pp. 319-335, disponible sur http://journals.sagepub.com/doi/10.1177/1527476419837739 (Consulté le 3 janvier 2024).

[1628] *Ibid.*

3- Evaluation, ex post responsibility

Literature is strong[1629] in the essential necessity of monitoring an evaluation in digital transformation, data sharing, cross-border data flows and all types of protection[1630]. In the public sector, digital literature considers the necessity of repostponeing the evaluation to consider not only *the outcome* but also *why such* an outcome was sought and what impacts were intended. In the public sector, the 'why' is always the well-being of the community, - the principle of motivation - the common good, and the general interest. On one hand, there is an observation about the lack of evaluation mechanisms offered by the Data Sharing Decree[1631]. On the other hand, there are legal provisions in the public information framework that allow for this exercise[1632]. Additionally, the intelligence of the administrative process law enables the establishment of this type of control. However, paradoxically, while Brazil has a significant concern about the control of public managers' actions, regarding the digital transformation process, the flaws in auditing and evaluation mechanisms have been identified since the 2010s[1633]. In this sense, concern for this fact is of utmost importance[1634]. In the case of LAI, due also to its annexation to issues of morality and corruption, its competence lies with the Office of the Comptroller General. Hence, the Brazilian Controller General has the competence to supervise information public application. Thenceforth, if Brazil does not prioritize the digital transformation of the state, treating it as a core issue rather than subsidiary to the personal data protection process, its role will remain insufficient, as it will be limited to authorities that investigate protections and private rights, as well as authorities which dictate norms in this

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[1629]There is the requirement that "*the bodies responsible for data processing must act responsively and ethically, insofar as they institute data governance practices, which is done through technical measures such as the production of impact reports that ensure trust throughout the cycle, respecting, promoting and protecting the legitimate expectations of the holders/users of public services*". I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

[1630]When examining practices codes, Gunther Teubner states that among the social and legal conditions required to ensure the success of these codes are permanent *monitoring* and the existence of *binding contracts* with civil society certification bodies G. TEUBNER, « L'auto-constitutionnalisation des ETN ? Sur les rapports entre les codes de conduite "privés" et "publics" des entreprises », *op. cit.*

[1631] I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

[1632]*Ibid.*

[1633] TRIBUNAL DE CONTAS DA UNIÃO, *Acordao 2569/2018-Plenario*, *op. cit.*

[1634] Also in the LAI, art. 29 establishes that citizens can request a reassessment of the classification of information with a view to its declassification or reduction of the period of secrecy, as well as request declassification, with a list that is published annually by the highest authority of each body in compliance with art. 30 of the same law, in the manner provided for in articles 45 and 73 of Decree No. 7,724/2012.
I.W. SARLET et G.B.S. SARLET, *Separação Informacional de Poderes no Direito Constitucional brasileiro*, *op. cit.*

regard. In this context, an independent authority for the digital transformation of the government is indispensable for Brazil to consider its digital state autonomously.

Conclusion

"You can't make an omelet without breaking eggs, the old saying goes, and it is impossible to create new social configurations without somehow replacing or even obliterating the old ones. Therefore, if modernity exists as a meaningful term, it signals some decisive moments of creative destruction".

- David HARVEY[1635]

David Harvey's referenc2e to the *"old"* that demands a "*creative destruction*" concern here to the framework that positions the state *against* civil society within a subjectivist approach framed by rationalist imaginary (the machine).

This research, from the outset, sought to highlight the institutional, political, and legal modern structures supported and designed under *the code* of *the individual*, and how such structuring results in institutional and legal shortcomings when leading within cyberspace.

Additionally, it proposed, through a correlative exercise among categories (state, society, and public law), how one might theoretically reflect, using ideal types, on concepts of state actions and public law linked to a model of a digital state and a data-driven society. That approach

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[1635] D. HARVEY, *Paris, capitale de la modernité*, *op. cit.*, p. 12.

aimed to offer an alternative path to that which relies on the legal perception of freedom or democracy.

The information revolution, with the emergence of cybernetics, a new type of value production (social and economic), and the inherent interdependence of ecosystem relationships, compounded by new communication spheres (social and commercialization), coupled with new spatial dimensions – digitalization, datafication, commodification; and dependent on the indispensability of a continuous, adequate, and freely accessible flow for the promotion of "*knowledge*" (resulting from a value), synthesize the complexities of a data-dependent society and question how civilization will act to ensure that its technological progress is accompanied by social progress.

The public sector is not exempt from this scheme. With a plethora of data continuously extracted from the "*citizen crowd*[1636]," the state, as a "*giant of flesh and steel*"[1637]must belatedly learn to deal with the "*brave new world*" [1638], where it is required not only to provide services efficiently but also to meet citizen satisfaction through "*user experience*" evaluation, guaranteed by adopting good practices that attest to the ethical conduct of public managers, who act to serve the public interest, not their personal interest. Good governance's philosophy states that the purpose of public action is oriented toward increasing user satisfaction, while the government (by fundamental rights doctrine) is mandated to use data minimally – strictly and fundamentally necessary – in a clear perception of society's distrust of state actions, weakening the rhetoric of the great desideratum of digital transformation, that is, ***trust*** as the driving and finalists principle, the guarantee that will determine the maturity of a digital government.

Thus, governance instruments are employed transversally across various disciplines and also in the legal field. As a result, the doctrine employs private law concepts (the expanded autonomy of freedom, individual and collective, negative and positive, and even instrumental) to justify the political action of the digital state, aimed at ensuring citizen experience, being innovative, and protecting individual rights through personal data protection and the provision of public

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[1636] N. COLIN et H. VERDIER, *L'âge de la multitude*, 2e éd., *op. cit.*

[1637] J.P. BARLOW, « A Declaration of the Independence of Cyberspace », *op. cit.*

[1638] A. HUXLEY, T. MONTALEMBERT (DE) et J. CASTIER, « Le meilleur des mondes : Texte intégral / Aldous Huxley », *écoutez , c'est un livre !*, écoutez , c'est un livre !, Audiolib. Paris, 2015, disponible sur https://mediatheque.epernay.fr/Default/doc/SYRACUSE/917503/le-meilleur-des-mondes-texte-integral-aldous-huxley (Consulté le 12 février 2024), disponible sur https://mediatheque.epernay.fr/Default/doc/SYRACUSE/917503/le-meilleur-des-mondes-texte-integral-aldous-huxley (Consulté le 12 février 2024).

services for individual satisfaction. Two objectives that, in themselves, cause practical dilemmas, since the second depends on the flexibility of the first, or, at least, a distinct perception of the adequate handling of information flow.

Despite this, the principles of good governance are nourished in the legal environment and incorporated into the publicist vocabulary, where public law itself transforms the extrinsic legitimization of government (the formal authority of public interest) into an intrinsic and contextually dependent legitimization. This leads to various documents on public governance, beyond new doctrinal interpretations of the constitutional text, which privilege fundamental rights and human dignity, disregarding foundational nomenclatures of the public law legal regime, considered "*abstract*", such as public interest.

In the case of good governance, legitimation is achieved through transparency, the principle capable of demonstrating the conformity of public managers' actions (with public accounts, acting under integrity and ethics, i.e., against corruption), or in attention to user satisfaction, after guaranteeing their individual data protection. Here, it must be demonstrated that public interest (non-corruption, acting with standards and for user experience) prevailed over personal interest, which is measured in accountability, bringing evaluation through verifying adequate risk management and adopting responsibility measures, all linked to integrity, ethics, and individual utility.

The policies and practices of democratic governance, in a certain way, reinforce this scheme, as, in addition to not establishing concrete organizational and management structures, they advocate the use of transparency for the exercise of social control, especially in the acts of public managers, timidly presenting the possibility of extending this control to actors operating with public funds and resources.

Moreover, through *democratic governance*, the institutional dialogue of control over state acts falls on the judiciary, which has been demanded to decide issues related to data protection, sharing, and data exchange and use practices not only in the private sector but also in the public sector. While the private sector has a competent national authority for the defense and protection of personal data, the public sector has a fragmented structure, resulting from a complex scenario of scattered state activities, the autonomous organization of federation entities, the lack of concrete incitement for systemic integration of the network and data ecosystem, the generalized perception of a "*separation of powers*" instead of an orchestrated

governance, also, the point of limitation of *data use* over *data exchange*, and the absence of a specific authority to deal with public information governance at the national level.

Thus, if on one hand, the data public governance environment is visualized from its fragmentation, on the other, legal literature leads to a more protective interpretation of the security and personal information of data, rather than the stimulation of concrete programs and regulations to encourage a national database and exchange to produce social values, recognizing the potentialities of digital public services and activities.

Regarding interactions stemming from the paradigm of openness and circulation of data, although cyberspace constitutes a networked environment, i.e., transboundary flows (public and private, organic and artificial, data and information interacting inconsistently, emergently, and uncertainly), the state is demanded to open data (already properly processed, transformed into a readable mode, and made available for wide access), while the private sector maintains closed data access, offering access to its data only voluntarily (even when the information and knowledge used, produced, and reused come from data – in a broad sense – from public institutions). Based on the logic of *good governance*, governance instruments are employed to ensure this equation. That is, the policy of openness and sharing resides in making open data available for access and establishing governance principles for the public manager (transparency and responsibility).

Use and circulation do not fall upon private actors. While *democratic governance* is timid in proposing its use – considered idealistic – for joint construction, allocated in innovation laboratories. Here, when it concerns civil society, data are considered data Commons, with use and reuse for funds and exploration in cooperation. In contrast, in the case of uncontrolled opening of data from public services and activities, or even provided by users and citizens, collaboration lies in commercial exploitation, for the exclusive profit of actors who have access and adequate knowledge for its treatment. Transparency and accountability do not reach these dimensions.

Besides, in the legal realm, *freedom* is understood both negatively and positively, with an instrumental facet that implies direct state duties, leading to an expanded view of freedom (individual and collective) over political actions, politically and legally guided by the reading of the freedom dimension. These concepts are also justified in the state's rationale – *democratic* by law. state actions, in turn, have *freedom* and *citizenship* are mechanisms against the state,

not against power, or in favor of the public. This oppositional construction of society versus the state culminates in the apprehension of legal mechanisms, interpreted in strict accordance with the ideals of good governance (efficiency and results) or *democratic governance* (deepening democracy). Governance, thus, is biased governance, as it simultaneously relativizes the principles of good government (sovereignty, separation of powers, democracy, common good) and leaves untouched certain dichotomous aspects of solid modernity, such as the mentioned opposition between state and society.

Nevertheless, the vocabulary of governance need not be ignored; it can and should be utilized, but it must be revised with attention to the space in which it is located (public space), shaping the ends for public purposes (common good that is not public interest over private), and should reposition legitimacies (to reach actors in attention to their responsibilities).

The thesis proposes that the public law of the common good is capable of bringing this approach because it places the *res publica* and *the relationship* at the center, not as subsidiary or secondary. The *common good*, in this perspective, is positioned *as design* and *purpose*, and legitimization is relational – contextual, uncertain, and emergent. In addition, regulation is a process, as governance, whose value directs the method, means employed for the purpose to be achieved. public law of the *common good*, then, means moving from the value of the result – to the value of the *common good* (public value and public interest).

Concerning *public law of the common good* to both data society and the digital state, its applicability – must be regarded as a corollary of the arrangements between a political action model and a specific society. The research developed an idea of *public law of the common good* from a scheme of correlations, in a theoretical exercise of ideal types, of an ideal type of political action of the digital state, correlated with a data-dependent society, and how public law adapts to such arrangements, starting from the premise that law is a corollary of these interrelations. Within that, the digital state was sought to be defined as a category of political action of network governance, correlated with a data-dependent society, where the core does not reside in the individual or institution, but in their relationships, in a relational ontology.

In this perspective, public law of the common good is linked to the material criterion of public law, in the public interest, whose dual legal composition in the Brazilian legal order is justified by an interpretative employment developed from the perception of political action of the common good, the republican value (Article 1 of the Brazilian Federal Constitution), with public action in the public interest, related to the view of public management of public value.

Regarding conceptual schemes and categories, governance models do not centralize authority but responsibility.

Hence, this concept will compose the legal conceptual arrangement, alongside freedom and citizenship. To escape the antagonistic disposition and the private prevailing over the public, a relational disposition of law is considered, precisely to avoid dispositions that prioritize one dimension over another. That is, it seeks to prevent the expanded dimension of freedom from leading to the legal interpretation of public action. Thus, public action is legally analyzed in the condition of responsibility, not based on freedom, but based on itself.

From this exercise, juridical concepts of the state action of the digital state are employed, of legal objectivity in the principle of ***informational due process***, which, from the reading of public action, is based on the public law legal regime, thus, the material criterion of public interest.

Responsibility and due process, with their procedural biases, are both composed of *procedural* and *substantive* properties. Being analyzed in state actions, they thus deal with the legal principles of public law, employing both the Constitution and the administrative process law, the access to information law, accompanied by other laws that deal with the public law legal regime. The relational bias does not forget the relationship with other institutes (as freedom and individual protection), nor the character of attention not to the aprioristic holder but to the actor who uses and relates in their due responsibility. Moreover, the aspect of the code of analysis, that is, a data-dependent society, encompasses both the flow of data and its use (used here generally to deal with all facets of its employment, from collection to sharing).

The substantive aspect of informational due process, analyzed in public action, and thus in responsibility, also brings the value of the material criterion of public interest, which conditions the purpose of acting in an informational due process in this scope, as well as the motivations employed therein.

The joint employment of the public law legal regime with the code of analysis (flow and data as value) repositions political and public actions towards the public interest, in any of the activities – as long as they deal with use. Thus, the legal principles and guarantees are examined from this complex, that is: ***procedures and values of public law, in a data-dependent society.***

Instead of examining individual protection from informed consent, the condition of responsibility shifts to accountability for use. For this, transparency, a fundamental vector for

exercising control and acting in the ecosystem, is examined broadly to employ information transparency, which is a legal concept encompassing the use of data in public actions.

Information incorporates elements of the legal regime, based on active transparency, the duty of publicity, and motivation, thus listing transparency as a fundamental and indispensable channel of the public regime of the informational due process of the digital state.

Moreover, the public regime of the informational due process of the digital state attracts to itself the data sharing regime, which must be oriented towards the purpose of the public interest, according to the norms of the regime of openness, availability, and use, supported by the legal instruments of the public law legal regime.

Finally, the public regime of the informational due process of the digital state imposes the exercise of *ex-ante* and *ex-post* accountability, in the idea of precaution, bringing design principles, aimed not only at protection but also at plural inclusion, and equally adequate evaluation and control of due process as a whole. However, it must be remembered that such an outline also depends on political organizational arrangements and independent authorities aimed at treating the digital state as a guarantor of the public interest, listing social development before economic or private development.

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