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Abstract: This paper aims to present an overview of the provisions about children and teenagers' data protection laws worldwide in order to find out what are the best paths related to the subject or to identify if there are legislative models with safeguards, in theory, that are more beneficial. To achieve this goal, the authors analyze the legal data protection standards for children and teenagers in the United States of America, South Africa, Latin American (Argentina, Brazil, Colombia, Mexico, Peru, Uruguay) and the European Union. The conclusion is that, although there is no specific law that can serve as a paradigm for all others, there is a range of positive legal provisions adopted in all analyzed laws that can serve as a parameter for legislative improvement worldwide.

I. INTRODUCTION

The use of electronic devices is a trademark of the new generation of children and teenagers. According to work published by the Brazilian Internet Steering Committee in 2019, 86 percent of the population between 9 and 17 years old was an Internet user in Brazil in 2018, which is equivalent to 24.3 million connected individuals.[1] The United Kingdom's

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Office for National Statistics provides that 89 percent of children aged 10 to 15 years go online every day, and further estimates that due to the COVID-19 pandemic children now spend even more time online than ever before.[2] In South Africa, 59.4 percent of child participants of the South African Kids Online study say "that it was fairly true or very true that they knew lots of things about using the internet."[3]

Therefore, there is no doubt that this is a current and relevant topic. This not only arises because of the huge number of incidents; but above all, due to the natural vulnerability of the children involved. The topic is particularly important because children cannot understand that data brokers build user profiles based on the pages they access in order to sell the information to companies that, in turn, target advertisements that are often not suitable for the children's ages.[4] In addition, there is societal pressure to participate in certain social networks, under penalty of social exclusion from peer groups.[5]

Worldwide, several data protection laws have been published, with specific characteristics for the safety of children. In this study, we will analyze the European General Data Protection Regulation (GDPR), the United States Children's Online Privacy Protection Act of 1998 (COPPA), the Brazilian General Data Protection Law (LGPD)—which has dedicated specific rules to regulate the data protection of children and teenagers in Brazil—the Latin American standard, and the South African Protection of Personal Information Act (POPIA). Although we use five specific normative sets, several others are mentioned in this text to show experiences from other countries.

The objective of this article is to survey and categorize normative systems for children and teenagers' personal data protection. It is proposed to identify whether the Brazilian legislator has adopted the best path in relation to minors or if there are other legislative models for the

1. Pesquina Sobre Uso da Internet por Criancas e Adolescentes no Brasil [Survey on Internet Use by Children in Brazil], Braz. Internet Steering Comm., 1, 229 (2019) (Braz.) [hereinafter Survey on Internet Use].

2. *Children's Online Behavior in England and Wales,* OFF. FOR NAT'L STAT. 3-4 (2021) (U.K.), https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/childrensonlinebehaviourinenglandandwales/yearendinginmarch2020 [hereinafter *Children's Online Behavior*].

3. Patrick Burton et al., *South African Kids Online: A Glimpse into Children's Internet Use and Online Activities,* CTR. FOR JUST. AND CRIME PREVENTION 21 (2016), http://www.cjcp.org.za/uploads/2/7/8/4/27845461/.

4. Karen McCullagh, *The General Data Protection Regulation: A Partial Success for Children on Social Network Sites, in* DATA PROTECTION, PRIVACY AND EUROPEAN REGULATIONS IN THE DIGITAL AGE 110, 124 (Tobias Bräutigam & Samuli Miettinen eds. 2016).

5. *Id.* at 113.

protection of data on children and teenagers with safeguards that are, in theory, more beneficial. The aim is to study the legal protection structures in order to seek different types of rights that may not be provided for in certain laws when compared to others. It is intended, with this, to rethink and contemplate current and future protection possibilities, so as to provide deeper debates. The research problem is summed up in this question: are there protective mechanisms for the children and teenagers' personal data (from other regulatory models on the same subject) with broader guarantees than those thought by the legislators of the different countries mentioned?

This article analyzes the legal standards on data protection for children and teenagers in the United States of America, due to its specific federal protection law; the laws from South Africa and Latin American countries have been chosen, due to the social, political and economic contexts similar to those in Brazil; and the European Union because the Brazilian LGPD was based on European regulation. The initial hypothesis is that some levels of protection were considered by the drafters of certain laws, but not by others. Because of such diverse realities and possible experiences in different countries, it seemed likely that important safeguards were not discussed by the laws of the countries studied.

There is no intention of assessing the effectiveness of legal protection mechanisms because there is no space for using tools that allow access to knowledge of the nature and value of things in the broad contexts of the realities of the different countries mentioned below. It would involve measuring the implementation, the regular functioning of control agencies (governmental or not), and social adherence to the rules. This would certainly require much deeper and broader research, linked to the efficiency of a network of complex institutions in deep contexts. In theory, it is possible that a legal system that does not provide a specific data protection law for minors is, in practice, more effective than other countries that have acted in the opposite way, but that have not adequately equipped their control offices. Legal texts do not guarantee the effectiveness of rights on their own. The goal, as stated, is to identify and discuss the expansion of children's and teenagers' protection.

Arriving to the conclusion requires the identification of three practices that deserve special attention: (1) express mention of the principle of children's' best interests as a guide for good practices; (2) restriction of the information collected to the activity adhered to by the data subject; and (3) the right of permanent publicity for the information of children and teenagers. Four levels of protection were also perceived in the international legislation that can contribute to the enforcement of rights

worldwide: (1) periodic reviews of all protective legislation, such as the American COPPA; (2) withdrawal of consent for processing when the minor seeks protection against his own legal guardians, as observed in the European GDPR and the South African POPIA; (3) periodic *ex post* evaluation of legal provisions to verify the effectiveness of the law; and (4) provision of data protection as an autonomous right in the national laws on the rights of the child, so that the child and teenager protection network develops a culture of attention to this topic. This is shown in the following topics.

II. THE EUROPEAN NORMATIVE MODEL

In the European Union, the *General Data Protection Regulation (GDPR)* dedicated itself to the protection of children's and teenagers' personal data on various devices,[6] summarized in Table 1.

Table 1[7] - Elements and characteristics of the processing of personal data of children and adolescents by the European GDPR

Normative aspects	Legal Predictions
Principles	Article 57, no. 1(b) of the GDPR says that the supervisory authority shall pay special attention to activities addressed specifically to children. Recital no. 58 speaks of the principle of transparency when stating that "any information and communication . . . should be in such clear and plain language that the child can easily understand."

6. Council Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119/1).

7. *Id.*

Type of consent	Recital no. 38 states that "[the] consent of the holder of parental responsibility should not be necessary in the context of preventive or counseling services offered directly to a child." According to Article 8, n. 1, the consent of the holders of parental responsibility for all children under 16 is essential.
Right to permanent publicity of information	Silence about children and teenagers.
Restriction of the information collected to the activity adhered to by the data subject (games, online platforms, websites and applications)	Silence about children and teenagers.
Age restriction of guarantees	Up to 16 years. Article 8, no. 1, however, states that "Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years".
Right to data erasure and oblivion	Recital no. 65 stresses the special importance of these rights in favor of children.

Despite dedicating Article 8 specifically to children and teenagers, there are special provisions on them throughout the text of the regulation. It is noteworthy that the only article dedicated exclusively to children was limited to dealing with just one topic: consent.[8] Nevertheless, there are sparse provisions across the GDPR for these vulnerable subjects.[9]

8. *Id.* at 119/7.

9. Interestingly, 56% of European users do not read the terms of consent and 18% do not take them into account. McCullagh, *supra* note 4, at 115.

Article 8 no. 1 makes it clear that the protective measures of the GDPR are aimed at minors under 16 years of age.[10] That same provision, however, says that "Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years."[11]

Some authors criticize European discretion, arguing that instead of giving this freedom to States, it should use a standard according to the experts' assessment of young people's ability to discern their data and the knowledge of what is advertising or elements of the games for setting a standard.[12]

As the analysis chapter on the Brazilian normative model will show, Article 8 no. 2 from the GDPR served as an undisguised inspiration for Article 14 no. 5 of the Brazilian LGPD.[13] Both require that the controller must check — considering the available technologies — whether the consent was actually given by the parental responsibility holder.[14] This is the only form of valid consent when the service offered is aimed at children and teenagers, as per Article 8 no. 1of the GDPR.[15]

The European legislators went beyond the Brazilian one and envisioned those sad hypotheses in which the person responsible for the minor does not act on his behalf. For these situations, recital no. 38 states that "[t]he consent of the holder of parental responsibility should not be necessary in the context of preventive or counseling services offered directly to a child."[16] Therefore, the parents' or guardians' consent is withdrawn when the data processing is done by the protective network of children and youth, since preventive services can, even in theory, turn precisely against the holders of parental responsibility, custody or guardianship.

Paragraph 6 of Article 14 of the LGPD was another Brazilian guideline of European inspiration.[17] It repeats Article 12 no. 1 and recital no. 58 of the GDPR to define that data subjects under the age of 16 should

10. Council Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119/37).

11. *Id.*

12. McCullagh, *supra* note 4, at 131.

13. *See* discussion *infra* Section V.

14. Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 8, Agosto 2018 (Braz.).

15. Council Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119/37).

16. *Id.* at 119/7.

17. Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 8, Agosto 2018 (Braz.).

receive information about the processing "in a concise, transparent, intelligible and easily accessible form, using clear and plain language."[18]

In spite of the absence of express mention of principles in the articles especially planned for the protection of children and teenagers, two principles are extracted from the GDPR which should guide the security of minors in the use of information society services. The first one is found in Article 57, no. 1(b) of the GDPR, according to which the supervisory authority should pay special attention to activities addressed specifically to children.[19] Recital no. 58 speaks of the principle of transparency, stating that "any information and communication . . . should be in such a clear and plain language that the child can easily understand."[20]

Despite the lack of a specific article in this regard, recital no. 65 expresses special relevance to the right to erase data and the right to forget children. According to the European legislators, this is because consent at this stage of life is given without full awareness of the risks inherent in processing personal data.[21] Therefore, recital no. 65 says that "[t]he data subject should be able to exercise that right [to erasure and forgetting] notwithstanding the fact that he or she is no longer a child."[22]

Likewise, self-regulation means that different systems have different solutions. While "Club Penguin" limits which data can be made available to third parties, such as an identification or phone number, others, such as Facebook, transmit that data.[23]

It should also be noted that the GDPR does not exhaust data protection in Europe.[24] The Member States of the European Union are free to legislate complementarily on the subject, establishing national authorities. For example, the Portuguese National Data Protection Commission (CNPD) defined in its plan of activities for 2020 to "publish a guideline on the treatment of personal data of children especially for guardians."[25]

18. Council Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119/39).

19. *Id.* at 119/68.

20. *Id.* at 119/11.

21. McCullagh, *supra* note 4, at 120.

22. Council Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119/13).

23. McCullagh, *supra* note 4, at 113.

24. *Id.* at 119.

25. *Plano de Actividades* [Activities Plan], BRAZ. INTERNET STEERING COMM., 8-9 (2019) (Braz.) [hereinafter Activities Plan].

III. THE U.S. NORMATIVE MODEL

The normative model of the United States of America differs from all others because it has a specific federal law for the protection of children and adolescents' data: the Children's Online Privacy Protection Act of 1998, commonly identified by the acronym COPPA.[26] Its main aspects related to this study are summarized in table 2.

Table 2[27] - Elements and characteristics of the processing of personal data of children and adolescents by the American COPPA

Normative aspects	Legal Predictions
Principles	It lists two main purposes: (a) to protect the privacy of personal information collected from and about children on the Internet; (b) to provide greater parental control over the collection and use of that information.
Type of consent	Verifiable parental consent for the collection, use, or disclosure of personal information from children under the age of 13.
Right to permanent publicity of information	Controllers must "provide clear, prominent, and understandable notice about the practices of collecting and using information from the website operator through the website."

26. Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–05, 1301 [hereinafter COPPA].

27. *Id.*

Restriction of the information collected to the activity adhered to by the data subject (games, online platforms, websites and applications)	There are no restrictions, but there must be "reasonable efforts to notify parents and an opportunity to prevent or reduce the collection or use of personal information collected from children over the age of 12 and under 17."
Age restriction of guarantees	People under 16 years old. Section 2, no. 1. The level of protection for some specific guarantees varies with age.
Judicial protection mechanisms	*See* Section 5.
Forecast of periodic reviews	*See* Section 7.

Two COPPA principles emerge from the two purposes defined in its preamble: (a) the protection of private personal information collected from and about children on the Internet, and; (b) greater parental control over the collection and use of that information. Every enforcer must keep in mind these two targets established by the legislature in formulating the law.

According to Section 1302, no. 1, the protections are intended for people under the age of 13.[28] In addition, there is variation in the level of coverage of some rights depending on age. For example, according to Section 1303(b)(1)(A)(ii), "any website or online service directed to children that collects personal information from children . . . [must] obtain verifiable parental consent for the collection, use, or disclosure of personal information from children [who are under the age of 13]."[29] Section 1303(b)(2)(C)(i), imposes that those same websites must use "reasonable efforts to provide the parent notice and an opportunity" to prevent or curtail the collection or use of personal information collected from children over the age of 12 and under the age of 17.[30] It is interesting that despite

28. *Id.* § 1302(1).
29. *Id.* § 1303(b)(1)(A)(ii).
30. *Id.* § 1303(b)(2)(C)(i).

the initial age limit (16 years), there is a safeguard aimed at children under 17 years old.

Section 1302 no. 8, defines personal information as "individually, identifiable information about an individual" presenting the following example list: (A) a first and last name; (B) a home or other physical address; (C) an email address; (D) a telephone number; and (E) a Social Security number.[31] The letters "F" and "G" continue the previous idea and points to any information that would facilitate or enable the "physical or online contacting of a specific individual," including information that is associated with "an identifier described in this paragraph" in such manner as to become identifiable to a specific individual.[32] The Federal Trade Commission expanded the concept in 2011 to include phone numbers, photographs, videos, audio files, and geolocation information.[33] As can be seen, the North American conception is as profound as that of the European GDPR,[34] distancing itself from the timid wording of Article 5 of the Brazilian LGPD,[35] presented later.

Unlike the Brazilian LGPD, there is no provision for the right to permanent publicity of information, although there is an order, provided for in Section 1303(b)(1)(A)(i), for controllers to provide clear, prominent, and understandable notice about the website operator's information collection and use practices.[36] Permanent advertising refers to the modalities of data processing of the website, not to its content, as in Brazil.

In three other points, U.S. law differs from all others: (1) it provides for specific judicial protection of the rights established in COPPA, to which Section 5 was dedicated;[37] (2) it provides for periodic reviews of its provisions, the first being five years after the initial term, pursuant to Section 7,[38] and; (3) it *ex post* analyzes periodically with the objective of

31. *Id.* §§ 1302(8)(A)–(E).

32. COPPA, §§ 1302(8)(F)–(G).

33. FTC Children's Online Privacy Protection Rule, 16 C.F.R. § 312.2 (2020).

34. *See* Council Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119/33). Article 4, no. 1 of the GDPR defines "personal data" as information relating to an identified or identifiable natural person ("data subject"); an identifiable person is a person who can be identified, directly or indirectly, in particular by reference to an identifier, such as a name, identification number, location data, identifiers electronically or to one or more specific elements of the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

35. Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 2, Agosto 2018 (Braz.). ("For the purposes of this Law, it is considered: I - personal data: information related to the identified or identifiable natural person").

36. COPPA, § 1303(b)(1)(A)(i).

37. *Id.* § 1305(a)(1).

38. *Id.* § 1307.

verifying the effectiveness of the law, per Section 7.[39] The Federal Trade Commission has fulfilled its role of keeping that law "up to date and relevant, including through a 2013 rule that brought COPPA into the age of mobile and social media."[40]

IV. THE LATIN AMERICAN NORMATIVE MODELS

There was a Latin American trend regarding the protection of data processing by minors: the lack of confrontation, or only a shy mention of the subject. In the data protection laws of Argentina[41] and Uruguay[42] there is no legal provision aimed specifically at children and teenagers. In Uruguay, a subsequent regulatory decree remained silent on the issue, without any mention of children or teenagers.[43] Any protection to the processing of information of children and adolescents is made according to the general provisions contained in the protective laws of childhood and youth.[44] In Argentina, a bill that proposes to modify the reality indicated has been discussed since 2018.[45] Even so, there is no concern with deepening the issue, because the only two specific proposals are related to the legitimacy for filing the habeas data lawsuit per Article 80[46] and the mandatory impact assessment when there is significant non-incidental processing of data on minors per Article 40.[47]

Ley Estatutaria 1581 of 2012, which deals with the prevalent rights of boys, girls, and teens, expressly prohibits the data processing of minors in Colombia unless it is public in nature.[48] In addition, the law requires the State to provide legal representatives and guardians of children information about the risks arising from the processing of children's and adolescents' data.[49] Article 12 from Decree 1377 of 2013 repeated the prohibition of processing data of minors, unless it was public data, provided

39. *See id.*

40. Ariel Fox Johnson, *13 Going on 30: An Exploration of Expanding COPPA's Privacy Protections to Everyone,* 44 SETON HALL LEGIS. J. 420, 455 (2019).

41. Law No. 25.326, Oct. 30, 2000, [MDL VIII-PDP] J.A. (Arg.).

42. Law No. 18331, August 11, 2008, [1] Nat'l Reg. L. & Decree 378 (Uru.), https://www.impo.com.uy/bases/leyes/18331-2008.

43. D. 414/009, Sept. 15, 2009, [1] Registro Nacional de Leyes y Decretos [National Registry of Laws & Decrees] 552 (Uru.).

44. *Id.* at 2.

45. Personal Data Protection Act of 2020, Sep. 19, 2018, (Arg.).

46. *Id.* at 29–30.

47. *Id.* at 19–20.

48. L. 1581/12 Octubre 17, 2012, art. 8 [48587] Diario Oficial [D.O.] (Colom.).

49. *Id.* at art. 7.

that the best interests and fundamental rights are respected, in addition to having a prior authorization of the legal representative.[50]

In Peru*, Ley de Protección de Datos Personales*, Law n. 29733 of 2011, provides that special measures will be enacted to protect the personal data of minors from data processors.[51] Article 13 sec. 3 of the *PDPL* stipulates that minors' rights recognized therein will be exercised through legal representatives, always maintaining minors' best interests.[52] In addition, one of the functions of the National Personal Data Protection Authority is to promote and strengthen the culture of data protection for minors.[53] In 2013, article 30 of the Supreme Decree no. 003-2013-JUS, designed to regulate Law no. 29733, established the obligation of database holders, especially public entities, to collaborate with and promote knowledge of the right to protection of personal data of children and adolescents.[54]

Mexico was the Latin American country with the legislation that went deepest into the theme of this study, although it also did so timidly. This North American country, in fact, presented an interesting normative path for the construction of a protective legal framework for the processing of personal data. In 2002*, Ley Federal de Acceso a la Información Pública Gubernamental* was the first order to recognize the right of protection of personal data for the public sphere.[55] In 2009, two paragraphs were added to Article 16 of the Mexican Constitution to raise the right to protection of personal data to a fundamental and autonomous right.[56] The following year, *Ley Federal de Protección de Datos Personales en Posesión de los Particulares*, for the first time, brought clear rules on data processing.[57] In 2017, *Ley Federal de Transparencia y Acceso a la Información Pública* abrogated the Governmental Access to Public Information Act of 2002 and provided for several rules on data protection.[58] So far, legislation has turned a blind eye to childhood and youth. This

50. L. 1377/2013, Junio 27, 2013, Diario Oficial [D.O.], art. 12 (Colom.).

51. L. 29733, Jul. 3, 2011, Law for Personal Data Protection, N.L. 445746, tit. III, art. 13, § 3 (Peru).

52. *Id.*

53. *Id.* at tit. VII, art. 33, § 6.

54. L. 29733, [D.S.] 003-2013-JUS, Mar. 22, 2013, N.L. 491320 ch. IV, art. 30 (Peru).

55. Mendez Enriquez, Olivia A., "Marco jurídico de la protección de datos personales en las empresas de servicios establecidas en México: desafios y cumplimiento," 7, 25.

56. Constitución Política de los Estados Unidos Mexicanos, CPEUM, Article 16, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021.

57. Ley Federal de Protección de Datos Personales en Posesión de los Particulares [LFPDPP], Diario Oficial de la Federación [DOF] 05-07-2010, últimas reformas DOF 05-07-2010 (Mex.).

58. Ley Federal de Transparencia y Acceso a la Información Pública [LFTAIPG], Diario Oficial de la Federación [DOF] 09-05-2016, últimas reformas DOF 27-01-2017 (Mex.).

changed for the first time in 2017, on the occasion of another law: *Ley General de Protección de Datos Personales in Posesión de Sujetos Obligados*,[59] whose safeguards for boys and girls are summarized in Table 3.

Table 3[60] - Elements and characteristics of the processing of personal data of children and adolescents by the Mexican *Ley General de Protección de Datos Personales en Posesión de Sujetos Obligados*

Normative aspects	Legal Predictions
Principles	The best interests of girls, boys and teenagers, under the terms of the applicable legal provisions.
Type of consent	According to the rules of representation provided for in the applicable civil legislation.
Right to permanent publicity of information	Silence.
Restriction of the information collected to the activity adhered to by the data subject(games, online platforms, websites and applications)	Silence.
Age restriction guarantees	Silence.

Very close to Article 14 of the Brazilian *LGPD*,[61] Article 7 of the latter Mexican law establishes the child's best interests as a principle for

59. Ley General de Protección de Datos Personales en Posesión de Sujetos Obligados [LGPDPPSO], Diario Oficial de la Federación [DOF] 26-01-2017, ch. II, art. 7 (Mex.).

60. *Id.*

61. Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 8, Agosto 2018 (Braz.).

processing of personal data, and refers to the other legal provisions applicable to children and youth.[62]

Consent, according to Article 20, must be given in accordance with the rules of representation provided for in applicable civil law.[63] Pursuant to Article 49, these same rules of representation apply to the exercise of the so-called ARCO rights (Access, Rectification, Cancellation and Opposition).[64]

In addition, the only other mention of the new legislation on children and adolescents is made in Article 107.1, which prevents the conciliation stage during the review appeal when there is a violation of the protection of the rights of minors.[65]

A final observation is essential in relation to the Mexican normative system: *Ley General de los Derechos de Niñas, Niños y Adolescentes* expressly took care to protect the personal data of children and teens.[66] Article 76 provides for the rights to personal and family privacy, as well as the protection of personal data.[67] Article 77 considers violation of privacy to be any handling of the image, name, personal data or references that allow identification in the media.[68] Further, Article 109 obliges social assistance centers to guarantee the protection of personal data, in accordance with the applicable legislation.[69] There is no doubt, therefore, that the Mexican legislator proved to be advanced in addressing the issue in the very special legislation on childhood and youth.

V. THE SOUTH AFRICAN NORMATIVE MODEL

The Protection of Personal Information Act 4 of 2013,[70] or simply POPIA, is an extremely important piece of legislation for the survey proposed in this study.

Table 4[71] - Elements and characteristics of the processing of personal data of children and adolescents by South African POPIA

62. Ley Federal de Protección de Datos Personales en Posesión de los Particulares [LFPDPP], 4, Diario Oficial de la Federación [DOF] 05-07-2010, últimas reformas DOF 05-07-2010 (Mex.).

63. *Id.* at 5.

64. *Id.* at 5, 9–10.

65. *Id.* at 20–21.

66. Ley General de los Derechos de Niñas, Niños y Adolescentes [LGDNNA], Diario Oficial de la Federación [DOF] 04-12-2014, últimas reformas DOF 11-01-2021, (Mex.).

67. *Id.* at art. 76.

68. *Id.* at art. 77.

69. *Id.* at art. 109.

70. Protection of Personal Information Act 4 of 2013 (S. Afr.).

71. *Id.*

Normative aspects	Legal Predictions
Principles	Silence.
Type of consent	The Competent Person, in different contexts.
Right to permanent publicity of information	Silence.
Restriction of the information collected to the activity adhered to by the data subject (games, online platforms, websites and applications)	Yes. Provided expressly in Section 35(3)(c).
Age restriction guarantees	Silence.
Safeguarding the public interest with safeguards	Innovative forecast, contained in Section 35(2).

The rule is to prohibit the processing of personal data of children under 18, according to Sections 4(4) and 34 of POPIA, except for the cases provided for in Section 35(1), or authorization granted by the regulatory body, according to Section 35(2).[72]

As in other cases, the consent of the legal guardian must be expressed for the processing of data.[73] Agreement is also required in specific situations, such as the collection of personal information from other sources other than the data subject himself,[74] the retention of information on file,[75] and further processing of information.[76] It is exempted, on the other hand, from personal information that has been deliberately made

72. *Id.* § 4(4).
73. *Id.* §§ 11(1)(a), 35(1)(a).
74. *Id.* § 12(1).
75. *Id.* § 14(7).
76. Protection of Personal Information Act 4 of 2013, § 15(3)(a) (S. Afr.).

public by the child with the consent of a competent person.[77] This is a provision very close to recital no. 38 of the European GDPR, which also withdrew the consent of the holder of parental responsibilities "in the context of preventive or counseling services offered directly to a child."[78]

Section 32 (1) (c) and (d) removes a data subject's prohibition on processing personal information relating to the health or sex life when processing is done by schools, if such processing is necessary to provide special support for students or making special arrangements related to their health or sexual life; or by any public or private body that manages the care of a child, if such processing is necessary for the performance of their lawful duties.[79]

Section 35(1)(d) also exempts the prohibition on processing when, for example, there is a need to exercise or defend a legal right or obligation, it is essential to fulfill an obligation under public international law and for historical, statistical, or research purposes.[80] Then, Section 35 (2) provides for the processing of the public interest with safeguards: the regulator has the power to authorize the processing of data of minors if this is in the public interest, provided that guarantees are put in place to protect the child's personal information.[81]

An example of this protective condition is the establishment and maintenance of reasonable procedures to guarantee the integrity and confidentiality of the personal information collected.[82] The Brazilian LGPD, despite not addressing this in its Article 14, specifically aimed at children and teenagers, provided for a similar mechanism in § 2 of Article 48.[83]

As in § 4 of Article 14 of the Brazilian LGPD,[84] Section 35 (3) (c) of the South African POPIA prohibits the collection of more personal information from children and adolescents than is reasonably necessary given its intended purpose.[85]

77. *Id.* § 35(1)(e).

78. Council Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119/7).

79. Protection of Personal Information Act 4 of 2013, § 32(1)(c) (S. Afr.).

80. *Id.* § 35(1).

81. *Id.* § 35(2).

82. *Id.* § 35(3)(d).

83. Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 16, Agosto 2018 (Braz.).

84. *Id.* at 8, sec. III, art. 14.

85. Protection of Personal Information Act 4 of 2013, § 35(3)(c) (S. Afr.).

VI. The Brazilian Normative Model

The Brazilian LGPD devoted its Article 14 to the "Processing of Children and Teenagers' Personal Data."[86] The short specific regulation is summarized in Table 5.

Table 5[87] - Elements and characteristics of the processing of personal data of children and adolescents by LGPD

Normative aspects	Legal Predictions
Principles	The child's best interests (Article 14).
Type of consent	Specific and highlighted by at least one of the parents or legal guardians (Article 14, §§ 1 and 5), in a simple, clear and accessible way considering the child's level of development (Article 14 §6), with an exception provision (Article 14, § 3rd).
Right to permanent publicity of information	The controllers must keep public information about the types of data collected (Article 14, § 2).
Restriction of the information collected to the activity adhered to by the data subject (games, online platforms, websites and applications)	Article 14, § 4.
Age restriction of guarantees	Omission of protection of adolescents in §§ 1 to 6 of art. 14.

86. Lei No. 13.709, de 14 de Agosto de 2019, Diario Official Da União, 157 (59, t.1): 8, Agosto 2018 (Braz.).

87. *Id.*

A relevant aspect is the target audience of the protective legislation. As the Brazil LGPD is silent on this matter, we must read Article 2 of the Child and Adolescent Statute (ECA), to conclude that "a child is considered to be a person up to twelve incomplete years old of age, and an adolescent is that between twelve and eighteen years of age."[88] The provision is consistent with Article 1 of the United Nations Convention on the Rights of the Child.[89] As noted, there is a difference between the age group of Brazilian law and that adopted in Europe. In the European Union, States have the option to define the minimum age from 13 years old, as indicated.[90]

This is the portion of the population for which Article 14 of the LGPD, according to which all activity of children and teenagers' processing personal data should be directed "in [their] best interests, pursuant to this article and relevant legislation."[91] Despite the lack of express mention of the ECA or the United Nations Convention, the expression "best interests" refers immediately to the principle of the child's best interests, provided for in Article 3, no. 1 of the mentioned Convention.[92] This principle has a triple nature: (1) as a substantive right - the child's best interest is the primary consideration in decisions that respect them; (2) as an interpretive legal principle – amidst numerous possible legal interpretations of the proper norm, the child's best interest should always be chosen; and (3) as a procedural rule – in decisions affecting children, there must be an explanation for how the child's best interests were considered.[93]

The Brazilian LGPD, moreover, expressly placed the principle of the child's best interests in the position of an interpretive guide when referring, in the beginning of Article 14, to "relevant legislation."[94] Here, this expression must be understood as the legal framework formed by the special protective legislation for children and youth in Brazil, of which

88. Lei No. 8.069, de 13 de julho de 1990, Estatuto da Criança e do Adolescente [E.C.A.], Diário Oficial da União [D.O.U.] de 14.7.1990, art. 2 (Braz.).

89. G.A. Res. 44/25, Convention on the Rights of the Child, art. 1 (Nov. 20, 1989).

90. Council Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119/37).

91. Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 8, Agosto 2018 (Braz.).

92. G.A. Res. 44/25, *supra* note 89, at art. 3, § 1.

93. Catarina da Silva Dias Duarte, O direito das crianças a serem ouvidas nos processos que lhes respeitam como concretização do princípio do superior interesse da criança, 15, 60 (Feb. 26, 2019) (Dissertação de mestrado em Direito do Porto) [Master's Thesis, Catholic University: Porto Law School].

94. Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 8, Agosto 2018 (Braz.).

ECA, the UN Convention on the Rights of the Child, and Article 227 of the Federal Constitution.[95] The reference to "relevant legislation," in this way, means that the data protection of boys and girls is not restricted to Law no. 13.709 / 2018.[96]

Another important aspect is the type of consent required when dealing with users under the age of 18. Section 1 of Article 14 of the LGPD requires that the "processing of children's personal data" must be carried out by means of "specific and prominent consent given by at least one of the parents or the legal guardian."[97] Therefore, the consent of the holder of parental responsibility is always necessary. Section 6 of Article 14 also requires that the information provided by platforms intended for children and teenagers be differentiated.[98] They must be simple, clear and accessible; there is no specific language standard.[99] Data processing agents must adapt communication to the "physical-motor, perceptual, sensory, intellectual and mental characteristics of the user."[100] If applicable, they should use "audiovisual resources when appropriate, in order to provide the necessary information to the parents or legal guardian and appropriate to the child's understanding."[101] As a consequence of the principle of the child's best interests, all of these requirements must be interpreted as cumulative, if any of them are not observed, there will be no valid consent.[102]

In Brazil, the data processing agents for children and teenagers do not suffice with the already commonplace and fictional "I Agree to Privacy Policy" checkbox found in almost all websites and applications for mobile phones. It is necessary for consent to go beyond the simple agreement which maintains the opacity of powerful, complex, and invisible algorithms.[103] There is no room for artificiality in obtaining consent from parents and guardians. Copying almost *ipsis litteris* Article 8, Section 2

95. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] Oct. 5, 1988, art. 227 (Braz.).

96. *See generally* Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 8, Agosto 2018 (Braz.).

97. *Id.* at 8, art. 14, § 1.

98. *Id.* at 8, art. 14, § 6.

99. *Id.*

100. *Id.*

101. *Id.*

102. Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 8, Agosto 2018 (Braz.).

103. Michael Veale & Lilian Edwards, Comment, *Clarity, Surprises, and Further Questions in the Article 29 Working Party Draft Guidance on Automated Decision-Making and Profiling,* 34 COMPUT. L. & SEC. REV. 399 (2018).

of the GDPR,[104] Article 14, Section 5 of the LGPD says that "[t]he controller must make all reasonable efforts to verify that the consent referred to in § 1 of this article was given by the person responsible for the child, considering the technologies available."[105]

Furthermore, Section 2 of Article 14 requires controllers to "maintain public information on the types of data collected, the form of its use, and the procedures for the exercise of the rights provided for in art. 18 of [the LGPD]."[106] Article 18, one of the most relevant of the LGPD, lists the rights that the data subjects have before the data controller in Brazil: confirmation of the existence of processing; access to data; correction of incomplete, inaccurate or outdated data; anonymizing, blocking or eliminating unnecessary, excessive or treated data in non-compliance with the provisions of the law; portability of data to another service or product provider, upon express request; elimination of personal data processed with the consent of the data subject; information from public and private entities with which the controller shared data use; information about the possibility of not giving consent and about the consequences of the refusal; and, revocation of consent.[107]

Article 14, section 2 is one step ahead of Article 18 because it requires controllers to maintain public information about the types of data collected and the form of its use.[108] For the processing of adults' data, this publicity is done upon request.[109] Here, this request is expendable and the publicity must always be accessible.[110] Otherwise, Article 14 Section 2 of the LGPD is useless.

One of the great merits of the LGPD in relation to children and teenagers is the restriction of the information collected to the activity adhered to by the data subject (games, online platforms, websites, and applications). According to Section 4 of Article 14, processing agents cannot transfer personal information of minors to other "games, internet applications or other activities to provide information."[111] In other words, the data collected can only be used in the accepted activity. Furthermore, this use is limited to what is strictly necessary for the operation of that activity

104. Council Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119/38).

105. Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 8, Agosto 2018 (Braz.).

106. *Id.* at 8, art. 14, § 2.

107. *Id.* at 9, art. 18.

108. *Id.* at 8, art. 14, § 2.

109. *Id.* at 9, art. 18.

110. *Id.* at 8, art. 14, § 6.

111. Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 8, Agosto 2018 (Braz.).

itself.[112] There is a double restriction, therefore, for the collection of data from children and adolescents: (1) the information is restricted to the activity for which consent was expressed; and (2) only the information strictly necessary for the functioning of the attached platform can be collected.

There are still several points that need to be addressed in relation to the theme. For example, there is no mention of consent of children in relation to their photos posted by third parties on social networks. Is there a children's right to privacy? Is there a right to have such photos forgotten? What if the photo is posted by the parents themselves? It is estimated that there are more than 250 billion photos on Facebook, for example.[113] New technologies allow different uses for these images. These topics are now beginning to be discussed in the different normative regulations, but there is still no consensus on them.[114]

There is also an evident impropriety in all six paragraphs of Article 14 of the LGPD.[115] Adolescents are only mentioned in the beginning of Article 14, which says "[the] processing of children and adolescents' personal data should be carried out in their best interests, under the terms of this article and the relevant legislation."[116] Thereafter, references to teenagers cease, and Sections 1 through 6 only refer to children.[117] This distinction may not make sense for countries whose laws use the word "children" for everyone under the age of 18. This is not the case for Brazil, which expressly differentiates children (those up to 12 years old) from adolescents (between 12 and 18 years old.)[118]

The big question that arises from this is whether the following omissions were the result of the legislature's carelessness, or whether they were deliberate. Both hypotheses are plausible. It is quite possible that the LGPD writers did not pay due attention to the necessary protection of teenagers. It is reasonable to imagine, on the other hand, that the omission resulted from the lobby of the games, applications, and electronic platforms, especially because strict technical requirements have been

112. *Id.*

113. Katie McKissick, *Just How Does Facebook Store Billions of Photos?*, USC News (Nov. 21, 2021), https://www.news.usc.edu/88075/how-does-facebook-store-billions-of-photos/.

114. Ciara F. Hurley, *Sharing Isn't Caring: Putting Photographs of Children on Social Media Under the Lens of the GDPR 2016* 1, 5 (Feb. 6, 2018), https://www.ssrn.com/abstract=3109431.

115. Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 8, Agosto 2018 (Braz.).

116. *Id.* at 8, art. 14.

117. *Id.* at 8, art. 14, §§ 1-6.

118. Lei No. 8.069, de 13 de julho de 1990, Estatuto da Criança e do Adolescente [E.C.A.], Diário Oficial da União [D.O.U.] de 14.7.1990, art. 2 (Braz.).

established for these segments on the collection and processing of data from children.

The fact is that the legislature's omission creates problems of interpretation and impacts business planning. After all, in Brazil games and platforms aimed at teenagers aged 12 years or above also suffer from the restriction of data collection provided for in Section 4 of Article 14 of the LGPD.[119] Applications also aimed at them must develop mechanisms to verify the real origin of consent, as required by Section 5 of the same Article 14.[120] Music and video platforms are obliged to offer different data processing information to all minors under the age of eighteen (which would include teenagers) or only those under the age of twelve (which constitutes the legal status of a child according to the Brazilian legislation), in order to comply with Section 6 of Article 14.[121]

The solution to these questions is in the beginning (*caput)* of Article14: the principle of the child's best interests.[122] The meaning should always be that of entire protection, since only this interpretive principle sees the adolescent in his real position of natural vulnerability, due to his condition of being a human being still in development.[123] Therefore, in all paragraphs of Article 14 of the LGPD, where only "child" is read, "child and adolescent" must also be read, despite the legislative omission.

Certain authors argue that the right should have gone further, such as the prediction that after the age of majority, all children's data should be automatically erased, except when adults expressly indicate that they would like to maintain their history and profile.[124] A child-focused approach must go beyond mandatory parental consent, and the various dimensions of children's rights must be assessed, such as their capacity for autonomy and the existence of preconditions for participation.[125]

VII. CONCLUSION

The survey carried out shows that most legislation has innovative protective measures worthy of celebration, but there is still room for

119. Lei No. 13.709, de 14 de Agosto de 2019, DIARIO OFFICIAL DA UNIÃO, 157 (59, t.1): 8, Agosto 2018 (Braz.).

120. *Id.* at 8, art. 14, § 5.

121. *Id.* at 8, art. 14, § 6.

122. *Id.* at 8, art. 14.

123. Simone Van der Hof & Eva Lievens, *The Importance of Privacy by Design and Data Protection Impact Assessments in Strengthening Protection of Children's Personal Data Under the GDPR,* 23 COMMC'NS L. 36 (Jan. 30, 2018), https://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3107660.

124. *Id.* at 37.

125. *Id.* at 42.

progress in order to fully protect the right to preserve children and adolescents' personal data.

In addition to being among the norms with a greater age range (for protecting young people up to 18 years of age), Brazilian law is even ahead of the European GDPR - which served as a model - and the American COPPA when, for example, it expressly mentions the principle of the child's best interests as an interpretative and guiding best practices (Article 14, *caput*), in which it is only matched by Mexican law. Likewise, the restriction of the information collected to the activity adhered to by the data subject, provided for in section 4 of Article 14 of the LGPD, finds similarity only in the South African POPIA. Now, the great innovation of the Brazilian Law, unprecedented among the studied legislations, is the right to permanent publicity of children and adolescents' information. In view of the findings, five beneficial measures are proposed for more effective protection of minors' personal data worldwide.

The first is the periodic reviews of all protective legislation, due to the enormous speed of development of new technologies and strategies for the data capture and processing.

Second, according to recital 38 of the GDPR, the withdrawal of the consent of legal guardians to provide "preventive or counseling services offered directly to a minor";[126] or similarly, the withdrawal of consent when the personal data has deliberately been made public by the child, with a competent person's consent, or when the child is seeking help for the violation of rights or obligation in law, such as in Section 35(1) of POPIA.[127]

Third, it is important that the rules on prior consent are adequate to allow the teacher or person responsible for health care and elementary education, pre-school, or day care, to report cases of which he is aware and suspicious of to the competent authority.[128] The example of Section 32(1)(c) and (d) of the POPIA of waiving the consent of the legal guardian must be followed to allow processing of personal information relating to health or sexual life when the processing is done by schools or other entities that are part of the child and youth protection network, or when the processing is necessary to protect the physical or mental safety of the vulnerable public analyzed here.[129] This is a deficiency in Brazilian law.

126. Council Regulation 2016/679 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119/37).

127. Protection of Personal Information Act 4 of 2013, § 35(1) (S. Afr.).

128. *Id.* at 42, § 32.

129. *Id.*

The fourth measure to be adopted by worldwide legislation is its periodic *ex post* evaluation, in order to verify the effectiveness of the law, as provided for in Section 7 of the North American COPPA.[130] As defined by the United Nations Committee on the Rights of the Child in its General Comments no.5 (2003)[131] and 14 (2013),[132] it is essential that all legislation, public policy or budget allocation go through a continuous impact assessment process, an idea summarized in the acronym "CRIA" (child rights impact assessment). It takes care of one of the ways of ensuring the priority of the principle of the child's best interests, as required by Article 3, paragraph 1 of the United Nations Convention on the Rights of the Child.[133]

Fifth and finally, it is important to start the debate on the prediction of the right to the protection of personal data by child protection laws, as seen in Mexico. Addressing the issue in special legislation is relevant because the safety network is guided by this kind of standard.[134] In fact, a minimal symbiosis between special laws is suggested in order to create a legal culture of attention to the children and teenagers' data protection.[135]

130. COPPA, § 1307.

131. Committee on the Rights of the Child [C.R.C.], General Comment No. 5, 34th Sess., U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003), https://www.digitallibrary.un.org/record/513415.

132. Committee on the Rights of the Child C.R.C.], General Comment No. 14, 62nd Sess., U.N. Doc. CRC/GC/14 (May 29, 2013), https://www.digitallibrary.un.org/record/778523.

133. G.A. Res. 44/25, *supra* note 89, at art. 3, § 1.

134. *Id.* at 1.

135. *Id.* at 2.