

Brief Abstract

New developments and current challenges of data protection law in Brazil

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Summary: Introduction; 1. Brazilian data protection law now and in near future; 2. The influence of the data protection wave in the Brazilian juridical system; 3. Final considerations;

Introduction

The development of data protection passed through some stages of laws that had the first beginning with the regulation of the very few computers that were able to manage databases in 1960 and 1970ⁱⁱ. Back that time, the data protection laws did not have to deal with concepts such as *free individual consent* neither the *principle of privacy*ⁱⁱⁱ.

However, nowadays, we are facing the need for improving the regulation and the governance of personal data, changing it to these new circumstances whether by adapting existing principles of law, or by shaping new enforcement means to protect the citizen.

In this scenario, a series of initiatives using new legislations about data protection have flourished in every country around the world. Vast numbers of legislations are being regulated in order to preserve the data and the consumer rights, security, privacy and other fundamental rights.

In order to protect the human interactions in regard to digital environment and a little late than the other countries, Brazil has now its own data protection law, called General Personal Data Protection Act, Law 13.709/1 or LGPD. It was established on 14th August 2018 but will only be effective from 17th February 2020.^{iv}

In near future, LGPD will apply to any processing carried out in the national territory; or even applies to any personal data collected in the Brazil territory. This new legislation recognizes lawful bases for processing consent, contractual and necessity to fulfill the legitimate interest of who controls the data or a third part.^v

1. Brazilian data protection law now and in near future

In Brazil, the protection of personal data is not represented by a unitary structure, but is constituted upon a series of provisions contained: in the Constitution, the Internet Bill of Rights, the Civil Code, the Consumer Protection Code, among others.

For instance, the 1988 Constitution of the Republic, together with the Internet Bill of Rights, are the most important documents regarding data protection law. The Constitution guarantees *freedom of expression* (Articles 5, IX and 220) and *information* (Articles 5, XIV, XXXIII and XXXIV and 220), and considers *privacy* and *intimacy* to be inviolable (Articles 5 and X), specifically the interception of telephone, telegraph or data communications (Articles 5 and XII), the prohibition of home invasion (Articles 5 and XI) and of violation of correspondence (Articles 5 and XII). There is also the institution of *habeas data* providing a generic right of access and rectification of personal data (Article 5, LXXII).^{vi}

There are three fundamental pillars that guided the construction of the Internet Bill of Rights: *net neutrality*, *freedom of expression* and *privacy of internet users*. This legislation encompassed some of the points contained in the LGPD. For example, Article 3, III is cited, which, when dealing with the principles on which the law is based, refers to *protection of personal data, in the form of the law*.^{vii}

Under most privacy frameworks, additional protections that will be given by LGPD, in 2020, apply to certain categories of data, such as the personal data of minors and *sensitive data* that will probably have a huge impact on Brazilian economy^{viii}. That can be said because the companies were using the information they collected as they wanted before, claiming that it was for commercial purposes but as nobody knows for sure the intentions behind this, it is very important that they will be able to be controlled by the State.

As an example, many multinational companies will already have to adhere to international standards and will have many of the necessary protections and policies in place by setting up their compliance departments to fit the new requirements of Brazil's LGPD^{ix}; as there are used to do in Europe or any other country that has data protection specific rule of law.

2. The influence of the *data protection wave* in the Brazilian juridical system

The LGPD will only be effective in 17th February 2020. By that time in near future, together with the, already implemented, the Internet Bill of Rights, Brazil might have a modern and sophisticated legislation about the protection of personal data what might open a trade flow between Brazil and world markets. Also, the LGPD might resolves the problem encountered by the Judiciary in not obtaining the cooperation of foreign companies which claimed the absence of jurisdiction to deny the provision of data requested by any national court.

However, the effects of this legislation will be implemented next year, we can see that similar to what organizations and companies encountered with the EU Data Protection Regulation (GDPR)^x. We can see that in Brazil, companies are now scrambling to figure out to tackle data protection principles in their own guidelines, changing the daily life of their employees and, in special, the consumers.

Besides the potential loss of reputation, prestige and financial possibilities, the companies are now more motivated to implement better ways to data access, data quality, data governance and also auditing capabilities, in order to comply with the recommendations of the legislations.^{xi}

In Brazil, for example, as mentioned, the LGDP will only start being enforced by 2020, but we can see that some companies and also the juridical system is trying to adequate to this new way of thinking data protection.^{xii}

A jurisprudence about digital market and *Drogaria Araújo*, a company from the state of Minas Gerais, Brazil, is a great example of that new wave and how the juridical system is trying to engage with data protection.

In this case, the fine charged to *Drogaria Araújo* by Brazilian Department for Consumer was not based on the LGPD, but its guidelines are clearly shown in the grounds of the sanction.^{xiii} The Consumer Protection Code, the law that in fact founded the fine, establishes that the consumer must have clarity of information when using goods or services, and that such clarity was not observed by *Drogaria Araújo* by the time they were collecting the fiscal identification number from consumers in exchange for discounts, since it did not clarify, objectively, the destination of such data.^{xiv}

Furthermore, the Consumer Department understood that the conditioning of discounts to the fiscal identification number constitutes an abusive and obscure measure, especially because was not following any safety parameters.

Despite the fact that this fine is arising from the Consumer Defense Code^{xv}, the decision strikes up a very important precedent in the field of data protection in cases related to digital market. Not only because of this specific case but also the implications for the future, as this new legislation has the potential to become the law that will most impact the daily life of Brazilian businesses since the advent of the Consumer Defense Code. And as far as the adoption of preventive measures is concerned, it will go far beyond it.

LGPD regulates in detail the processing of personal data, including digital media, by natural person or by legal entity of public or private law.^{xvi} Thus, the 7 million *reais* fine charged to *Drogaria Araújo* is only a small sample of what awaits the Brazilian business community if there will be any delay in its adaptation to the legislation, not only because it gives visibility to the issue, but also if we take into account that the fines imposed by the LGPD vary from 2% of the company's annual turnover and are limited to 50 million *reais*.^{xvii}

3. Final considerations

Since the digital era opens tremendous possibilities, the governments are also finding ways to improving and enforcing the legislations in order to provide better connections between people and law-making.

In this direction, entrepreneurs who deal with the collection and processing of data should seek specialized advice as soon as possible, since the measures required to comply with LGDP are countless and of significant complexity. In addition to counting on the aggravating factor of multidisciplinary, by establishing legal, procedural, technological, compliance and other parameters.

Therefore, analyzing how Brazil is entering a new era of personal information conditioning with the General Data Protection Law shows some possible legal and also moral consequences for the companies who do not know how to adapt to new paradigms.

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ⁱⁱ MAYER-SCHÖMBERGER, Viktor. *Generational Development of Data in Europe*. in *Technology and Privacy: the new landscape*. AGRE, Phillip, Rotenberg, Marc (eds). MIT Press, 2001.

ⁱⁱⁱ UNITED NATIONS. UN GA Resolution 68/167. *The right to privacy in the digital age*. Available at: <https://undocs.org/A/RES/68/167>. Access: 20 March 2019.

^{iv} BRAZILIAN DATA PROTECTION LAW. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2018/Lei/L13709.htm

^v *Ibidem*.

^{vi} BRAZILIAN CONSTITUTION. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm

^{vii} INTERNET BILL OF RIGHTS. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/112965.htm

^{viii} BACKER MACKENZIE. Available at: <https://www.bakermckenzie.com/en/insight/publications/2018/12/brazilian-general-data-protection-law>

^{ix} TMF Group. Available at: <https://www.tmf-group.com/en/news-insights/articles/2018/october/brazils-lgpd-compliance-challenges/>

^x EUROPEAN UNION GENERAL DATA PROTECTION LAW. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2018/Lei/L13709.htm

^{xi} EUROPEAN COMMISSION. SEVEN STEPS FOR BUSSINESS. Available at: <https://ec.europa.eu/commission/sites/beta-political/files/ds-02-18-544-en-n.pdf>

^{xii} EUROPEAN COMMISSION. EU data protection reform: ensuring its enforcement. https://ec.europa.eu/commission/sites/beta-political/files/data-protection-factsheet-role-edpb_en.pdf

^{xiii} PUBLIC PROSECUTOR'S OFFICE OF MINAS GERAIS, BRAZIL. MINISTÉRIO PÚBLICO DO ESTADO DE MINAS GERAIS. Available at: <https://www.mpmg.mp.br/comunicacao/noticias/drogaria-araujo-devera-pagar-multa-de-r-7-milhoes-por-capturar-cpf-dos-consumidores.htm>.

^{xiv} *Ibidem*.

^{xv} CONSUMER DEFENSE CODE. Available at: http://www.planalto.gov.br/ccivil_03/leis/L8078.htm

^{xvi} *Ibidem*.

^{xvii} PUBLIC PROSECUTOR'S OFFICE OF MINAS GERAIS, BRAZIL. MINISTÉRIO PÚBLICO DO ESTADO DE MINAS GERAIS. Available at: <https://www.mpmg.mp.br/comunicacao/noticias/drogaria-araujo-devera-pagar-multa-de-r-7-milhoes-por-capturar-cpf-dos-consumidores.htm>