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**Fundamental Rights and Data Privacy
in Brazil and in the European Union³**

Introduction

This paper aims to demonstrate the functioning of fundamental rights in Brazil and in the European Union regarding their current data protecting systems, showing where this data are found, how they are applied, who their recipients are, and what their application is in relation to personal data privacy protection policies. Brazil, which until now did not have a specific legal system in this regard, was obligated to create new laws to bring better security to Brazilian Internet users and found a quick way to do it by integrating the system that was already legally in effect in the European Union for protecting this fundamental right of all. As a result, this has improved Brazil's image and confidence to the

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public eye on this matter and fulfilled their legal agenda concerning public/federal data protecting legislation. For this reason, this work critically analyses the application and the impacts resulting from this general law in Europe that impacted greatly on the protection of personal present data in Brazil. It also enables a better understanding through a comparative analysis of the laws in question, thus allowing us to conclude that the GDPR – General Data Protection Regulation of the European Union was most important to influence the creation of the present LGPD (General Data Protection Law) in Brazil.

Fundamental Rights in Brazil

Fundamental Rights concern those rights focused on the human being incorporated in a country's legal system, as stated by Ingo Wolfgang Sarlet: “the term ‘fundamental rights’ applies to the rights of the human being recognised and affirmed in the constitutional law of a given State”⁴. In Brazil, the 1988 Federal Constitution provides for Fundamental Rights in its Preamble, Title II, Article 5, being the first to place the Fundamental Rights chapter at the beginning of the constitutional text, while all other Constitutions presented it at the end. As Flávio Martins explains, there was a change in priority: “The paradigmatic change in the priority of the topic was not only formal but spiritual as far as the constituent subject is concerned, placing the human person at the centre of concerns, rather than the State organisation with its competences and structure”⁵.

The holders of Fundamental Rights are thus identified in Article 5, *caput*, of the 1988 Federal Constitution: “All persons are equal before the law, without distinction, guaranteeing to Brazilians and foreigners residing in Brazil the inviolability of the right to life, freedom, equality, safety and property”⁶.

As can be seen, there is no reference to foreigners not residing in Brazil (tourists), this issue being left to the Supreme Court (Supremo Tribunal Federal – STF) to resolve as foreigners not residing in Brazil are also entitled to have their right to life safeguarded. The Supreme Court upholds the principle of universality, where all persons in the national territory, resident or otherwise, are holders of Fundamental Rights. According to the STF: “The guarantee of inviolability of fundamental rights, save for constitutional exceptions, also ex-

⁴ The efficacy of fundamental rights is well described in: Sarlet, Ingo Wolfgang, *A eficácia dos direitos fundamentais*, 6ª ed. Porto Alegre: Livraria do Advogado Editora, 2006, pág. 35/36.

⁵ Freely translated from: Junior, Flávio Martins Alves Nunes, *Curso de Direito Constitucional*, 4ª ed. São Paulo: Saraiva Jur. Editora, 2020, pág. 610.

⁶ Constituição da República Federativa do Brasil, https://www.senado.leg.br/atividade/const/con1988/con1988_15.12.2016/art_5_.asp [accessed: 8.04.2021].

tends to foreigners who do not reside or are not domiciled in Brazil. The universal nature of human rights does not square with statutes that ignore them. The expression residents in Brazil must be interpreted in the sense that the Federal Charter can only ensure the validity and enjoyment of fundamental rights within Brazilian territory”⁷.

As noted, fundamental rights are a set of guarantees whose main goal is to ensure respect and dignity to the human being under the protection of State power. In Brazil, the State guarantees those values to residents and tourists in its territory. The establishment of these rights guarantees respect for life, freedom, equality and dignity in an indiscriminate manner, providing citizens with security. This assurance is also true when there is a need to create new fundamental rights. As society is in constant transformation, it is necessary to create new ways of ensuring the dignity of the citizen in order to achieve this goal. We can cite as an example the need for creating a Data Protection Law that has as its objective the protection and proper storage of the personal data of Brazilian citizens, thus seeking to guarantee their privacy, image, and even honour.

The Charter of Fundamental Rights of the European Union

The creation of the Charter of Fundamental Rights of the European Union was motivated by the need to bring together in a single text the rights that were found in a variety of legislative instruments. This Charter was created on 7 December 2000, gathering civil, political, economic and social rights of European citizens in a single text. However, it was only a political commitment and had no binding legal effect. With the entry into force of the Lisbon Treaty on 1 December 2009⁸, this Charter became law in all Member States of the European Union. The Charter is divided as follows: a preamble, 54 articles divided into 7 chapters⁹, namely dignity, liberties, equality, solidarity, citizens’ rights, and justice. It is also noted that the Charter includes third-generation fundamental rights: guarantees on data protection, on bioethics, and good administration¹⁰.

However, there are two versions of the Charter, one with simplified language that every citizen can easily understand, thus ensuring better communi-

⁷ Again, our free translation from the insights on the Constitutional Law course presented in: *Curso de Direito Constitucional...*, *op. cit.*, pág. 610.

⁸ O PE após o Tratado de Lisboa: um papel reforçado na construção da Europa, <https://www.europarl.europa.eu/about-parliament/pt/powers-and-procedures/the-lisbon-treaty> [accessed: 16.04.2021].

⁹ Carta dos direitos fundamentais da União Europeia, <https://eur-lex.europa.eu/legal-content/PT/TXT/PDF/?uri=CELEX:12016P/TXT&from=FR> [accessed: 8.04.2021].

¹⁰ *Ibidem*.

cation and transparency, aiming to provide information to all citizens, but does not however have the necessary force of law, and another in a more formal language, which is legally binding. The European Union has also been concerned with children's rights, so the Charter recognised that all policies that affect children in some way, directly or indirectly, should observe the principle of the best interests of minors, promoting the well-being of all children, their right to protection and care, and unequivocally recognising the importance of protecting them against violations of their rights, abuse, and any situation that may put their well-being at risk¹¹. According to Jales (2015) the Charter adopted in 2000 became legally binding with the Treaty of Lisbon, and Member States are obligated to respect the Charter when applying European legislation. Although Member States should observe the Charter, they do have autonomy to apply national laws first.

What is data protection? How does data storage come about?

Personal data protection is understood as the opportunity that citizens have, together with commercial establishments/companies, to be able to choose the way in which their personal data are used, with the guarantee that such data will not be used in such a way as to cause them any harm, or discriminate them individually or collectively, thus guaranteeing their right to privacy. We therefore consider that personal data is all the information that would directly or indirectly reveal the data subject (although we also have anonymous data, which are those wherein the data subject cannot be revealed¹²). One can therefore say that data storage means retaining such information in a device, be it a computer with physical or virtual access to a "cloud".

As far as personal data is concerned, the right to personality is probably the right most affected, as the data stored by companies in their databases say a lot about that person, e.g. a film or music app can indicate all the contents that are to their liking, facilitated by the analysis of data left behind by the subscribers of such web pages. For instance, the rating of a film, the genre of music that the person listens to the most. Moreover, some of these social networks review their "clients'/users'" accounts at the end of the year and, based thereon, have access to the music they listen to the most, according to the information kept in a database that kept track of the number of times that someone listened to that song throughout the year.

¹¹ Carta dos direitos fundamentais da UE, <https://fra.europa.eu/pt/eu-charter/article/24-direitos-das-criancas> [accessed: 8.04.2021].

¹² Definition given in: Bioni, Bruno Ricardo, *Proteção de Dados Pessoais e a Função e os Limites do Consentimento*, São Paulo: Editora Gen, 2021, pág. 109.

The storage of such information implies the processing thereof, meaning all the operations involving personal information carried out by the data processor and the controller. Luiz Fernando do Vale de Almeida Guilherme explains the difference between the two and their tasks: “In practice, the main difference between them is that the former is responsible for making decisions regarding the purpose of data processing, while the latter performs the processing on behalf of the former. Even so, save for the exceptions in the regulation, both are liable for any damages caused to the data subject as a result of their conduct”¹³.

Therefore, in order to guarantee the fundamental rights such as the privacy, image and honour of all persons in connection with the personal data obtained on the Internet and stored by these companies, Brazil has enshrined the General Law on Data Protection, while the European Union has the General Data Protection Regulation, both of which include in their texts the penalties provided for those who infringe their respective laws.

General Data Protection Law (LGPD) in Brazil

The General Data Protection Law (GDPL) was instated in Brazil due to the need to protect the fundamental rights of the population in connection with the personal data exposed and stored on the Internet, which needed to be protected by a specific and detailed law. The GDPL is divided into 10 chapters and 65 articles, of which we will refer to the most relevant to us in the course of our research. The LGPD was ratified on 14 August 2018, but did not come into force in the same year. In July 2019, the creation of the national data protection authority was created (which we will report on below), and so the LGPD only came into force on 18 September 2020, meaning that the law is very recent in Brazil and is considered as a novelty in practice. Thus, Brazil only became part of the list of countries with specific legislation on the protection of personal data in 2020. The purpose of the LGPD is to protect the fundamental rights of natural persons or legal entities of public or private law, as set forth in its Article 1: “Article 1 of this law provides for the processing of personal data, including in digital media, by individuals or legal entities governed by private or private law, with the purpose of protecting the fundamental rights of liberty and privacy and the free development of the personality of individuals”¹⁴. In this same respect, the Brazilian author Luiz Fernando do Vale de Almeida

¹³ Our own translation. Insights from: Guilherme, Luiz Fernando do Vale de Almeida, *Manual de proteção de dados. LGPD comentada*, 1ª ed. São Paulo: Almedina, 2021, pág. 227 e 228.

¹⁴ Lei no 13.709, de 14 de agosto de 2018, https://www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/36849373/do1-2018-08-15-lei-no-13-709-de-14-de-agosto-de-2018-36849337 [accessed: 8.04.2021].

Guilherme comments that: “The purpose of the General Data Protection Law is to protect the rights of personality and keep alive the fundamental rights of man, since today with the advancement of technology, especially after the pandemic, this new paradigm should bring a new meaning to the freedom to hire natural persons”¹⁵.

This law applies to Brazilians and all those who are on national soil, that is, resident foreigners, tourists, and even foreign companies providing services to Brazilians must follow the rules of this law. The LGPD is a law of principles, all of which are contained in Article 6, namely: I. Purpose; II. Suitability; III. Need; IV. Free access; V. Quality of data; VI. Transparency; VII. Security; VIII. Prevention; IX. Non-discrimination; and X. Responsibility and accountability. In this sense, Patrícia Peck Pinheiro explains the methodology used by the regulator: “This methodology was a more objective way found by the regulator of dealing with a rule that, despite referring to fundamental rights, such as the protection of privacy, its procedural implementation must be along the lines of businesses and corporate structures”¹⁶.

Article 14 shows that the LGPD addressed the processing of personal data of children and adolescents with special care, whereby the processing thereof requires the consent of one of the parents or legal guardian, as shown in paragraph 1 of this article: “Article 14 – The processing of personal data of children and adolescents shall be carried out in their best interest, pursuant to this article and the relevant legislation. Paragraph 1 – The processing of personal data of children and adolescents shall be carried out with the specific consent given by at least one of the parents or a legal guardian”¹⁷.

The public authorities must comply with the processing of personal data obligations imposed by the LGPD, which are provided for in Article 23 of this law, thus being able to prevent personal data from being misused and compromising the right to personality, with the law also referring to the liability for offences, dealt with in Articles 31¹⁸ and 32¹⁹.

The LGPD also addresses the international transfer of data in all transactions made to other countries or international bodies, specifically in its Article 33, with a view to the protection of personal data of data holders if such rules are not followed, and considers the international transfer of data outside of these

¹⁵ For more information on the purpose of the General Data Protection Law, see: *Manual de proteção de dados...*, *op. cit.*, pág. 26.

¹⁶ Comments on the LGPD in: Pinheiro, Patrícia Peck Pinheiro, *Proteção de dados pessoais. Comentários à LEI N. 13.709/2018 (LGPD)*, 2ª ed. São Paulo: Saraiva Educação, 2020, pág. 33.

¹⁷ Lei no 13.709, *op. cit.*

¹⁸ *Ibidem.*

¹⁹ *Ibidem.*

terns. The penalties imposed on agents who process the data are of an administrative nature, and may range from a warning to a fine of R\$ 50,000,000.00 (fifty million reais) per offence. We can see that even without criminal sanctions all agents handling personal data are under a watchful eye, with the LGPD aiming to carefully handle the fundamental rights of all at all times. In this context, the National Data protection Authority is a public administration body (linked to the Presidency of the Republic), whose function is to monitor compliance with the LGPD, in addition to being responsible for guiding the application of the law, as explained by Patrícia Peck Pinheiro²⁰. The LGPD also created the National Council for Data Protection (CNPD), a consultative body of the ANPD whose main duties are set out in Article 58-B of the LGPD. The CNPD meets three times a year on an ordinary basis, and may meet on an extraordinary basis whenever convened by its chair. The commitment to users' privacy is extremely important nowadays since almost everyone has some kind of data stored on websites, social networks, and pages we visit every day. Having laws that regulate how such information is stored and what to do with it ensures legal security for all, as we know that in the case of a violation there will be a specific sanction.

The General Data Protection Regulation (GDPR) of the European Union

The General Data Protection Regulation was created in the European Union and came into effect on 24 May 2016²¹, having been implemented on 25 May 2018. This regulation applies to everyone in the territory of the European Union, residents and non-residents, regardless of whether they are Europeans or tourists. It focuses on the protection of the fundamental rights and brings together in one law all data protection rules, available on the European Union website: "The regulation is an essential step to strengthen individuals' fundamental rights in the digital age and facilitate business by clarifying rules for companies and public bodies in the digital market space. A single law will also do away with the current fragmentation in different national systems and unnecessary administrative burdens"²².

The European Union's concern with the digital protection of data and fundamental rights of its citizens is clearly visible in Article 1 of the General Data

²⁰ Comments on the LGPD in: *Proteção de dados pessoais...*, *op. cit.*, pág. 42.

²¹ Regulamento (UE) 2016/679 do Parlamento Europeu e do Conselho, de 27 de abril de 2016, <https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=celex%3A32016R0679> [accessed: 16.04.2021].

²² Data protection in the EU, https://ec.europa.eu/info/law/law-topic/data-protection/data-protection-eu_en [accessed: 16.04.2021].

Protection Regulation: 1. “This Regulation lays down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data; adding in its paragraph 2: This Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data, and ending this article with paragraph 3: The free movement of personal data within the Union shall be neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data”. Article 2 deals with the material application of the Regulation, indicating which activities are subject to these rules, that is, the processing of personal data wholly or partly by automated means, and to the processing other than by automated means, as explained by Caio César Carvalho de Lima²³. Article 3 deals with the territorial application of the Regulation, which we consider to be very important given that the European Union is a block formed by several countries, namely in all establishments located therein, even though the processing of personal data may take place outside of this territory. Again Caio César Carvalho de Lima clearly explains that for the purposes of the provisions of the GDPR, the establishment “situated on the territory of the Union” shall mean the establishment having its “effective and actual exercise of activity” in a certain nation of the Union, their form of association not being relevant, and the form of “branch or subsidiary” being applicable, as stated in Recital 22. A broad concept is therefore adopted for the application of the Regulation²⁴. However, the Regulation may apply to establishments outside of the European Union, as provided for in its Article 3.

The Regulation has a set of principles, which include loyalty, justice and transparency, limitation of purpose, data minimisation, accuracy, storage limitation, and integrity and reliability, all of which must be observed and followed in order to fully comply with the Regulation. The European Union was also concerned about children and drafted a specific article for children’s digital right management in its Article 8²⁵. The international transfer of data is presented in Chapter V, from Article 44 onwards, specifically how fundamental rights should be preserved in “borderless” digital media. This is perhaps a complex issue that will require some time for everything to really run smoothly as it should in all countries, as the legislation on data protection is still recent, and

²³ On the material application of the Regulation, see: Lima, Caio César Carvalho, *Comentários ao GDPR - Regulamento Geral de Proteção de Dados da União Europeia*, 2ª ed. São Paulo: Thomson Reuters Brasil, 2020, pág. 544.

²⁴ For more comments on the EU’s General Data Protection Regulation, see: *Comentários ao GDPR...*, *op. cit.*, pág. 593.

²⁵ Art. 8 GDPR Conditions applicable to child’s consent in relation to information society services, <https://gdpr-info.eu/art-8-gdpr> [accessed: 16.04.2021].

in the case of the European Union the Regulation itself includes principles to specifically address the international transfer of data in its Article 44²⁶. Finally, regarding the issue of the power to supervise data protection in the European Union, it is up to the Member States to choose the authority that will be responsible for the respective supervision and for defending the fundamental rights of persons. In fact, there may be more than one Data Protection Authority (DPA), with the powers given to them in accordance with Article 56 of the GDPR. In accordance with Article 68 of the GDPR, the European Data Protection Board has legal personality and is considered a Union body acting independently when performing its tasks or exercising its powers and in ensuring the decisions of the DPAs. The penalties imposed by the GDPR are provided for in Article 84, with Member States being responsible for establishing and applying them. Such penalties shall be effective, proportionate and dissuasive, and each Member State shall notify to the Commission any amendment affecting them. The application of the GDPR guarantees the protection of personal data as a right for all citizens of the European Union, allowing users to have control over their data and to decide whether to authorise the storage of data by companies and, if they do, for how long. Companies that are responsible for storing information, on the other hand, must strictly follow the rules imposed by the GDPR at the risk of being subject to the penalties under the law.

Final considerations

In this article we have briefly addressed the fundamental rights regarding the protection of personal data and how they are protected in Brazil and in the European Union by their recent legislations. We have presented a theoretical approach and have compared the legal systems under study as regards the laws in force on data protection and storage in Brazil and the European Union. We have concluded that the European General Data Protection Regulation (GDPR) had, for the reasons outlined above, a major influence on the creation of the General Data Protection Law (LGPD) in Brazil.

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²⁶ Art. 44 GDPR General principle for transfers, <https://gdpr-info.eu/art-44-gdpr> [accessed: 16.04.2021].

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Abstract

Fundamental Rights and Data Privacy in Brazil and in the European Union

Using the methodology of compared literature and compared law from Brazilian and European data protection laws in force, we used the comparative analysis of the legal texts of both laws: General data Protection Law and General Data Protection Regulation, the first from Brazil and the second from Europe, aiming to successfully determine that the legislation in Brazil on this matter is clearly influenced by the present European protecting data regulation because of its modern approach on the protection of fundamental rights, and that it would have never emerged under this European format without the GDPR in the European Union.

Key words: Fundamental Rights, Data Protection, LGPD in Brazil, GDPR in the European Union