


INCLUSION OF PERSONAL DATA PROTECTION IN THE BRAZILIAN CONSTITUTION: REFLECTIONS ON FUNDAMENTAL RIGHTS AND GUARANTEES

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ABSTRACT

The Constitution of the Federative Republic of Brazil of 1988, known as the Constitution of the Federative Republic of Brazil, represents a milestone in Brazilian legal and political history, establishing a wide range of fundamental rights and guarantees. This article aims, first, to analyze such rights and guarantees, discussing their importance and implications for the protection of human dignity and the consolidation of Brazilian democracy. Then, the intersection between fundamental rights and guarantees and the protection of personal data, the General Data Protection Law, and Constitutional Amendment No. 115 was made. The methodological approach used was based on a review of the legal literature and constitutional provisions. Finally, it is concluded that Constitutional Amendment No. 115/2022 is a crucial step in strengthening the right to the protection of personal data in Brazil, aligning itself with international trends and reaffirming the country's commitment to defending the privacy and dignity of its citizens. With this change, the Federal Constitution

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now reflects more clearly and directly the importance of protecting personal data, establishing a solid constitutional basis for the development and application of public policies and regulations related to the subject.

Keywords: Federal Constitution. Rights and Guarantees. Data Protection.

INTRODUCTION

HISTORICAL CONTEXT AND GENERAL PRINCIPLES

Enacted on October 5, 1988, the Brazilian Federal Constitution emerged at a time of significant transformation in history, characterized by the country's re-democratization after 21 years of military rule. This period of political repression left deep scars on Brazilian society, and the new constitution was drafted as a response to demands for freedom, justice, and respect for human rights. Thus, the constitutional text is not only a set of legal norms but also a true milestone in the fight for democracy and the construction of a more just and egalitarian society.

The Constitution reflects a solid commitment to the protection of human rights, the promotion of social justice, and the consolidation of a Democratic State under the Rule of Law. In its preamble and Article 1, it establishes the essential foundations that guide the nation: sovereignty, citizenship, human dignity, the social values of work and free enterprise, and political pluralism. These principles are fundamental to ensuring that the diversity and plurality of Brazilian society are respected and valued, promoting a democratic environment where everyone can actively participate in the country's political and social life (BRAZIL, 1988).

About Fundamental Rights and Guarantees, the Brazilian Federal Constitution, in its Title II, addresses a wide range of rights that are considered essential for dignified and respectful coexistence among citizens. This title covers articles 5 to 17 and is subdivided into five chapters: Individual and Collective Rights and Duties, Social Rights, Nationality, Political Rights, and Political Parties. Each of these chapters plays a crucial role in building a more equitable society and protecting fundamental freedoms.

In this context, it is important to focus specifically on individual and collective rights and duties, which are addressed in the first chapter. These rights guarantee all citizens the protection of life, liberty, equality, and security, establishing a legal framework that protects human dignity against abuse and arbitrariness. Furthermore, collective duties are also emphasized, reinforcing the responsibility of citizens towards society and the common good. Thus, the 1988 Constitution not only seeks to protect the rights of individuals but also to foster a civic conscience that promotes solidarity and social justice.

Over the years, the Constitution has been a vital instrument in the defense and promotion of human rights in Brazil, serving as a guide for legislation and public policies

that aim at inclusion and equity. Therefore, the 1988 Constitution is not only a legal document but also a symbol of the fight for freedom and dignity for all Brazilians.

Individual and Collective Rights and Duties

Article 5 of the Brazilian Constitution is one of the most extensive and detailed in the document, playing a fundamental role in protecting the individual and collective rights and freedoms of citizens. This article covers a wide range of essential rights that guarantee the dignity and citizenship of every individual in Brazil. Among these rights, the most important are the rights to life, liberty, equality, security, and property, which are fundamental to democratic and civilized coexistence.

In addition, the article ensures the inviolability of people's privacy, private life, honor, and image, recognizing the importance of protecting privacy in an increasingly exposed world. Freedom of expression, thought, religion, and peaceful assembly are also enshrined in this article, allowing citizens to express themselves, organize, and defend their ideas without fear of repression.

Another crucial aspect is the principle of legality, which establishes that no one can be forced to do or refrain from doing something except by a law. This means that the actions of the State and citizens must always be supported by legal norms, ensuring an environment of justice and predictability.

The right to due process is also highlighted, guaranteeing full defense and adversarial proceedings in judicial and administrative proceedings. This principle ensures that everyone has the right to defend themselves fairly and equally before the law, avoiding arbitrariness and abuse.

It is important to emphasize that all rights and principles mentioned in Article 5 are considered permanent clauses, which means that they cannot be abolished or reduced by constitutional amendments. This characteristic guarantees the stability and permanence of these rights, protecting them against attempts to dismantle or restrict them.

Therefore, article 5 is configured as a true pillar of Brazilian democracy, ensuring the protection of the fundamental rights of all citizens and reaffirming the importance of respect for human dignity (MORAES, 2020).

Impact and Relevance of Fundamental Rights and Guarantees

The fundamental rights and guarantees enshrined in the Federal Constitution of 1988 play a crucial role in promoting social justice and protecting human dignity. They provide a robust legal framework for the defense of individual and collective rights, establishing a system of checks and balances that strengthens democracy and the rule of law in Brazil. Furthermore, these rights are fundamental for the promotion of equality and social inclusion, ensuring that all citizens have access to the same opportunities and legal protections (SCARLET, 2019).

It is worth noting that, despite the advances provided by the Federal Constitution of 1988, the full implementation of fundamental rights and guarantees still faces several challenges in Brazil, since structural problems, such as social inequality, violence, corruption, and the inefficiency of the judicial system, often hinder the realization of these rights in practice.

Therefore, a continuous effort is required from the entire society, including governments, institutions, and citizens, to ensure that constitutional principles are translated into concrete realities for all Brazilians.

GENERAL DATA PROTECTION LAW

A proteção de dados pessoais tem se tornado um tema central nas discussões sobre direitos e garantias fundamentais, especialmente com o advento das tecnologias digitais que facilitam a coleta, armazenamento e processamento de informações pessoais em larga escala. No Brasil, esse debate ganhou relevância significativa com a promulgação da Lei Geral de Proteção de Dados (LGPD) - Lei nº 13.709, de 14 de agosto de 2018, que estabelece diretrizes para a proteção de dados pessoais e é considerada um marco na garantia desse direito fundamental (BRASIL, 2018).

Não se pode olvidar que a trajetória da proteção de dados no Brasil reflete uma resposta gradual às mudanças tecnológicas e às demandas sociais por privacidade e segurança. Antes da LGPD, a proteção de dados no Brasil era fragmentada, regida por leis infraconstitucionais como o Código de Defesa do Consumidor (Lei nº 8.078/1990) e o Marco Civil da Internet (Lei nº 12.965/2014). Estas normas, embora importantes, não ofereciam uma abordagem integrada e abrangente para a proteção de dados pessoais.

LEGAL AND CONSTITUTIONAL BASIS

As mentioned above, the Federal Constitution of 1988 already provided, in its article 5, items X and XII, for the inviolability of privacy, private life, honor and image of individuals, as well as the confidentiality of correspondence and telegraphic, data, and telephone communications, except by court order, in the cases and manner established by law for criminal investigation or criminal proceedings. These provisions provide a constitutional basis for the protection of personal data. (BRAZIL, 1988)

The enactment of the LGPD in 2018, inspired by the European Union's General Data Protection Regulation (GDPR), represented a milestone in the regulation of privacy and data protection in Brazil. The LGPD establishes principles, rights of data subjects, and obligations for data processing agents, in addition to creating the National Data Protection Authority (ANPD) as the body responsible for monitoring and regulating the law (BRASIL, 2018).

In this way, the LGPD came to complement this protection, creating a detailed regulatory framework that regulates the processing of personal data, providing rights for data subjects, duties for processing agents, and sanctions in case of non-compliance. It is worth noting that, among the main rights guaranteed by the LGPD are the right to confirmation of the existence of processing, access to data, correction of incomplete, inaccurate, or outdated data, anonymization, blocking or deletion of unnecessary, excessive data, or data processed in non-compliance with the provisions of the law. (SIQUEIRA, 2020)

The law guarantees individuals several rights over their data, such as the right to access, correct, delete, portability, and information about data sharing. The LGPD establishes principles such as purpose, adequacy, necessity, free access, data quality, transparency, security, prevention, non-discrimination, and accountability.

The LGPD also defines legal bases that legitimize the processing of personal data, including consent, compliance with legal obligations, implementation of public policies, studies by research bodies, execution of contracts, and credit protection, among others.

FUNDAMENTAL RIGHTS AND DATA PROTECTION

The LGPD consolidates the protection of personal data as a fundamental right, aligning itself with international best practices and data protection legislation in other

countries. This alignment is essential for Brazil's insertion in the global context of data protection and to ensure that Brazilian companies can operate by international standards.

In this regard, the importance of protecting personal data as a fundamental right is evident when considering the impact that inadequate data processing can have on the private lives of individuals. It should be noted that the indiscriminate collection and use of personal data can lead to significant violations of privacy, discrimination, and other harms, which justifies the need for robust and effective regulation (SIQUEIRA, 2020).

However, the effective implementation of the LGPD faces several challenges, including the need for awareness on the part of both data subjects and processing agents, the adaptation of processes and information systems to new legal requirements, and the creation of a culture of data protection in organizations.

The National Data Protection Authority (ANPD), created by the LGPD, plays a crucial role in supervising and enforcing compliance with the law, in addition to promoting knowledge and awareness about the importance of protecting personal data. The ANPD is also responsible for issuing complementary guidelines and regulations to ensure the uniform application of the LGPD. The creation of the ANPD is one of the major innovations of this law, as it is the authority responsible for ensuring the application of the law, promoting knowledge about data protection, and monitoring personal data processing activities. (BRASIL, 2018).

PERSONAL DATA PROTECTION AS FUNDAMENTAL RIGHTS AND GUARANTEES UNDER CONSTITUTIONAL AMENDMENT No. 115.

Constitutional Amendment No. 115, enacted on February 10, 2022, represents a significant milestone in the evolution of fundamental rights in the 1988 Federal Constitution. This amendment directly addresses the issue of personal data protection, recognizing it as a fundamental right and, therefore, essential for human dignity and coexistence in an increasingly digitalized society. The inclusion of personal data protection in the constitutional text establishes a new level of recognition and protection of this issue in the Brazilian legal system, reflecting the growing importance that this data has in the daily lives and social and economic interactions of citizens (BRASIL, 2022).

With the enactment of the amendment, item LXXIX was added to Article 5 of the Constitution, which states that "the right to the protection of personal data, including in digital media, is guaranteed, under the terms of the law." This addition not only legitimizes

the protection of personal data as a fundamental right but also gives greater legal robustness to this issue, requiring the legislator to seek effective ways to guarantee the security and privacy of citizens' information. Data protection thus becomes an extension of human dignity, a crucial element in a scenario where digital technologies are increasingly integrated into people's personal and professional lives.

In addition, the amendment also introduced paragraph XXVI to Article 21, which establishes the responsibility of the Union to organize and monitor the protection and processing of personal data, as stipulated by law. This means that, from now on, data protection is not only an individual concern but also a responsibility of the State, which must implement appropriate policies and mechanisms to ensure that personal data is processed ethically and securely. This proactive role of the Union is essential to ensure that practices for collecting and using personal data respect citizens' rights and are by the principles of transparency and accountability.

The approval of Constitutional Amendment No. 115 is a decisive step in the fight to protect the rights of individuals in an increasingly interconnected world. By recognizing the protection of personal data as a fundamental right, the Brazilian Constitution aligns itself with international human rights standards and reinforces the need for respectful and responsible treatment of personal information. This change not only establishes a robust legal framework but also promotes greater awareness of the importance of privacy and information security in contemporary society.

Thus, the amendment not only contributes to strengthening democracy and the rule of law but also represents a response to society's demands for greater security and protection in a digital context, where personal data can be vulnerable to abuse and exploitation. Constitutional Amendment No. 115, therefore, is an important step forward that reaffirms the importance of human dignity and privacy, essential in times of rapid technological transformation.

IMPACT OF CONSTITUTIONAL AMENDMENT NO. 115/2022

Constitutional Amendment No. 115/2022 represents a significant milestone in data protection in Brazil, explicitly recognizing the importance of privacy and control over personal data as essential rights for the dignity and freedom of citizens. By elevating data protection to the status of a fundamental right, the amendment strengthens the application of the LGPD and ensures stronger constitutional support for the defense of these rights.

Furthermore, the inclusion of the Union's authority to organize and monitor the protection of personal data in Article 21 highlights the State's responsibility to ensure compliance with data protection standards, promoting legal certainty and the effective protection of the rights of data subjects.

Constitutional Amendment No. 115/2022 is a crucial step in strengthening the right to personal data protection in Brazil, aligning with international trends and reaffirming the country's commitment to defending the privacy and dignity of its citizens. With this change, the Federal Constitution began to reflect more clearly and directly on the importance of protecting personal data, establishing a solid constitutional basis for the development and application of public policies and regulations related to the topic.

CONCLUSION

Personal data protection is a critical issue in the digital age, where the collection, storage, and processing of personal information occurs on a large scale. The advent of digital technologies has brought significant benefits, but also considerable challenges in terms of privacy and information security. The evolution of data protection legislation in Brazil, culminating in the LGPD and Constitutional Amendment No. 115/2022, marks significant progress in protecting citizens' rights in a digital environment.

The implementation of the LGPD and the constitutional recognition of data protection as a fundamental right have profound impacts in Brazil. These changes represent an advance in protecting the privacy of individuals, increasing legal certainty, and promoting a culture of compliance among companies. However, the effectiveness of these standards faces significant challenges, such as the need for greater awareness among the population and organizations, the adaptation of processes and systems, and the strengthening of the ANPD to ensure adequate oversight.

It is worth noting that these standards establish a robust regulatory framework aligned with international best practices, but their effective implementation requires continuous efforts from all stakeholders. Personal data protection is essential to ensure the privacy and security of individuals in an increasingly digital world.

Therefore, the inclusion of personal data protection among fundamental constitutional rights and principles represents an important step for Brazil, offering security and legal protection to citizens and promoting responsibility and transparency in data management practices. Therefore, the continuous evolution and implementation of data

protection policies are essential to face future challenges in the field of privacy and information security.

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