v. 3, n. 31, 2023

Scientific Journal of
Applied Social and Clinical Science

PROTECTION OF PERSONAL DATA AS A FUNDAMENTAL RIGHT IN BRAZIL: ASPECTS AND REFLECTIONS OF CONSTITUTIONAL AMENDMENT 115/2022

Bruno Emanuel Setubal Learte
Servant at the Public Ministry of Maranhão. Expert in Computer Forensics, Investigation and Cyber Intelligence. Postgraduate in Digital Expertise and Forensic Computing. Postgraduate in Ethical Hacking and Cybersecurity. Information Security Specialist. Postgraduate in Law, Cybersecurity and Cyber defense. Postgraduate in Criminal Law and Criminal Procedure. Graduated in Computer Networks. Independent Data Protection and Privacy Consultant with international certification (DPO/EXIN). Extension in Digital Law from ``Escola Superior do Ministério Público da União`` (ESMPU). Member of the National Association of Privacy and Data Protection Professionals (ANPPD). Member of the National Association of Computer Forensic Experts (APECOF). Writer and Researcher. Law Academic

Walerya Reis da Silva
Graduated in Law, Bachelor in Administration

All content in this magazine is licensed under a Creative Commons Attribution License. Attribution-Non-Commercial-Non-Derivatives 4.0 International (CC BY-NC-ND 4.0).

Abstract: This article aims to present reflections on constitutional amendment No. 115, of February 10, 2022, which includes data protection among the fundamental rights and guarantees of the 1988 Federal Constitution. The protection of personal data is a fundamental right that aims to ensure that individuals have control over their personal information and that this information is treated responsibly, this right is essential for the protection of privacy, freedom of expression and human dignity. In Brazil, data protection was recognized as a fundamental right by Constitutional Amendment 115/2022, adding section LXXIX to article 5 of the Federal Constitution, which establishes that "the right to protection of personal data is guaranteed, under the terms of the law, including in digital media", giving the Union the exclusive competence to legislate on the protection of personal data.
Keywords: data protection; privacy; freedom of expression; Federal Constitution; Constitutional Amendment 115/2022; digital media.

INTRODUCTION

There is no denying that the world is currently living in the Age of the Information Society or Technological Society (CASTELLS, 2002). Through the World Wide Web, our personal and professional relationships are connected in a space without physical borders, that is, through virtual space, called cyberspace. This space is formed by the flow of information and messages transmitted between computers, through an open network that anyone can access.

As a result, relationships have migrated from the physical space to the digital space and, as a consequence, more and more of our information is available in open sources and on the internet, especially through the use of applications and social networks (Facebook, Twitter and Instagram). By granting access and agreeing to the Terms of Use, we open up the possibility of using and sharing our personal data, often for the purpose of surveillance or to influence certain types of behavior.

Therefore, with the insertion of personal data in cyberspace, users' privacy and intimacy are becoming increasingly vulnerable. In this sense, this research aims to understand the protection of personal data in Brazil, but not just as a mere extension of the concepts of data protection, privacy in itself, but as a fundamental right, that is, as a right in itself, which only happened after the approval of Constitutional Amendment No. 115/2022.

Given this, the research problem is based on knowing the difference between data protection and how Brazilian legislation protects such rights. To this end, the inductive reasoning mode is predominantly adopted and the research is classified as bibliographic. Finally, it must be noted that, for a better understanding of the topic, this article is divided into four moments: in the first, the specific objective is to conceptualize fundamental rights; in the second, the specific objective is to analyze aspects of data protection; in the third, and put an end to the constitutional protection of personal data as an independent fundamental right.

BRIEF CONSIDERATIONS ON FUNDAMENTAL RIGHTS: CONCEPT AND DIMENSIONS

Fundamental rights arise from the rupture of the Absolutist State and the birth of the Liberal State of Law. Thus, "the history of fundamental rights is also a history that leads to the emergence of the constitutional State, its dirty essence lies [...] in the protection [...] of fundamental human rights" (SARLET, 2012, p.24). In the same sense, fundamental rights "assume a definitive prominent position

in society when the traditional relationship between the State and the individual is reversed and it is recognized that the individual has, first, rights and, later, duties (MENDES; BRANCO, 2020, p. 127).

It is possible to state that fundamental rights are rights expressed in legal documents that protect individuals against abuses of State power, that is, they limit the State and, at the same time, guarantee basic and fundamental values of human beings.

The constitutionalization of fundamental human rights did not mean a mere formal enunciation of principles, but the full affirmation of rights, from which any individual can demand their protection before the Judiciary for the realization of democracy. It is noteworthy that judicial protection is absolutely essential to make effective the applicability and respect for fundamental human rights provided for in the Federal Constitution and in the legal system in general (MORAES, 2021, p.02).

Given its importance, it has central characteristics, such as historicity, relativity, imprescriptibility, inalienability and unavailability. In relation to historicity, fundamental rights, according to Bobbio (1992, p. 18), are historical constructions, created from different realities during periods of humanity. Therefore, they are not fixed or static, on the contrary, "they are born gradually, not all at once and not all at once" (BOBBIO, 1992, p. 19). In the same sense, Mendes and Branco (2020, p. 143) state that fundamental rights "are a set of faculties and institutions that only make sense in a certain historical context".

In relation to relativity, fundamental rights are not absolute, so they may conflict with each other or even with other fundamental rights (BOBBIO, 1992; LENZA, 2021). In this sense, according to Mendes and Branco (2020, p. 142), there is no need to talk about absolute rights; as many other fundamental rights as other values can limit them." Regarding inalienability and unavailability, fundamental rights cannot be renounced, bought, sold or destroyed.

It is worth highlighting that fundamental rights, although considered as historical, have three generations. First generation rights are those based on freedom and are held by the individual; therefore, they are based on the Liberal State. According to Bonavides (2008, p. 517). These rights are enforceable against the State and "translate themselves as faculties or attributes of the person and display a subjectivity that is their most characteristic feature; in short, they are rights of resistance or opposition before the State".

However, the Liberal State was an abstentionist state, that is, it was not concerned with social issues. And, with several social problems, especially due to the Industrial Revolution, "the absenteeist ideal did not respond satisfactorily to the demands of the moment" (MENDES; BRANCO, 2020, p. 136). In this context, a new conception of the State was needed. And thus, second generation rights are born, "through which the attempt is made to establish real and equal freedom for all, through corrective action by Public Authorities" (MENDES; BRANCO, 2020, p. 136). These rights are based on equality and concern social rights, such as assistance, health, education and work. Therefore, the State comes to be understood as a Social State, that is, an Interventionist State (STRECK; MORAES, 2003).

Finally, the third generation of fundamental rights is related to rights considered diffuse or collective, that is, it does not consider the man himself, but inserted in a group (LENZA, 2021). This includes the right to peace, development, quality of the environment, conservation of historical and cultural heritage (MENDES; BRANCO, 2020).

Fundamental rights are, traditionally and by most Constitutional Law scholars (LENZA, 2021; MENDES; BRANCO, 2020; MORAES, 2021), separated into three generations, which were exposed above. However, it is important to highlight that for other authors, such as Paulo Bonavides, there is still the fourth and fifth generation. For Bonavides (2008, p.85), the fourth generation is related to the era of globalization and, therefore, the right to democracy and information is included here. And the fifth generation is related to the right to peace, traditionally inserted in the third generation.

Having briefly explained the concept of fundamental rights, we will move on to the central issue of considering the right to intimacy and the right to privacy as fundamental rights from amendment 115/2022, subsequently, understanding them in light of personal data.

In general terms, privacy refers to the meaning of something that is not public. However, when analyzing the concept in a more complex way, it has been realized that privacy goes far beyond that. By saying that everyone has the right to privacy, we return to the thought that all human beings have the right to keep certain information and parts of their lives out of the public sphere (BIONI, 2021). Thus, for Bioni (2021, p. 91), privacy can be understood as the "right to be left alone, to be safe from interference from others, from secrecy or secrecy, which are rights calibrated by the dichotomy of the public and private spheres. A person has the right to remove aspects of their life from the public domain".

In the same sense, Mendes and Branco (2020) state that privacy would have as its purpose "the behaviors and events related to personal relationships in general, to commercial and professional relationships that the individual does not wish to be reflected in public knowledge".

In effect, privacy is a right that allows the exclusion of "information that the holder wants to preserve for himself" from the knowledge of third parties (JABUR, 2005, p. 254). Furthermore, José Afonso da Silva (1989, p. 183) stated that "privacy is the set of information about the individual that he can decide to keep under his exclusive control, or communicate, deciding to whom, when, where and under what conditions".

The concept of intimacy, on the other hand, concerns "behaviors and events relating to personal relationships, commercial and professional relationships [...]" (MENDES; BRANCO, 2020, p. 285). Thus, the central object of intimacy are more intimate episodes and facts of everyday life, involving closer relationships. For example, banking data is a protection in relation to privacy (broader), and issues of sexual orientation are a protection in relation to intimacy (more restricted and personal) (NUNES JUNIOR, 1997, p. 91).

Privacy is provided for in several provisions of the Federal Constitution and has, as mentioned, broader protection. Thus, in addition to protecting information about the person, privacy also protects the home and communications. According to art. 5th, item XI of the Federal Constitution of 1988, "the house is an inviolable asylum for the individual, with no one being able to enter it without the resident's consent, except in the case of a flagrant crime or disaster, or to provide assistance, or, during the day, by court order[...]".

GENERAL ASPECTS ABOUT DATA PROTECTION IN THE BRAZILIAN LEGAL ORDER

The broad digitalization and computerization promoted by the so-called technological society has made the protection of personal data central to recent debates that permeate the digitalization of law, since

Scientific Journal of Applied Social and Clinical Science ISSN 2764-2216 DOI 10.22533/at.ed.21633123221110

such processes are inherent to all spheres of contemporary social, economic, political and cultural life (SARLET, 2021).

Although data protection in the legal system has been structured as a set of cohesive regulations very recently, it is possible to observe that this theme, as a legal discipline, has been built for at least five decades at a global level (DONEDA, 2021).

Very briefly, the concepts and contours of what is understood by personal data protection today began to be developed in the 1960s and developed with greater autonomy given the perception that automated data processing represents a risk factor. to the individual (DONEDA, 2021).

It was in the 1960s that the current technology became information technology, with the first discussions beginning about the viability and possibility of building computerized state databases, such as the emblematic case of the *National Data Center*, in the United States, in order to that the determination of the limits of the right to privacy began to be debated also within the context relating to personal data (DONEDA, 2021).

It appears that the vast majority of doctrine attributes the current profile of the institute to influences arising from European regulatory frameworks, although it is necessary to recognize that the guiding guidelines that establish data protection as formulated and present in more than 140 countries, are strongly influenced by the development of the institute in the United States and are linked to the fundamental right to privacy (DONEDA, 2021).

In fact, the first and most important debates on the topic were proposed within the North American context, with the article "*The right to privacy*" authored by researchers Samuel Warren and Louis Brandeis, in 1890, as a starting point, through which What remained evident was the inseparable confrontation between the protection of privacy and technological progress, which, according to those surveyed, would enable new and more efficient ways of obtaining and disseminating personal information, thus representing a challenge (SARLETE, 2021).

Such a prophetic observation not only proved to be true, but also represents a great challenge for Law as a guiding discipline for social relations, given the perception that such technological advances have evolved and are evolving at an unimaginable speed, while orders Conventional legal systems, called upon to deal with the new phenomena emerging from this revolution, prove to be incapable of achieving satisfactory results for the effective protection of individual rights (FACCHINI NETO, 2021).

The third theoretical axis of this research therefore intends to promote a brief historical review of the development of data protection around the world in order to contextualize the advent of the formulation of these rights in Brazil and then elucidate some basic concepts that permeate the discussion.

CONSTITUTIONAL PROTECTION OF PERSONAL DATA AS AN INDEPENDENT FUNDAMENTAL RIGHT

It is important for a better analysis of the context in which data protection was included as a fundamental right through a formal addition to the major standard. We can understand the Constitution as a legal norm conditioned by the reality of its time, and must therefore be understood as a living organism, capable of reflecting and protecting the legal assets dear to the society on which it intends to base elementary consensuses (BARROSO, 2020).

Considering this prerogative together with the fact that societies are in constant evolution,

the undoubted understanding that the Magna Carta needs, eventually, to be adapted to the demands of new times and new generations, given the risk that the text prepared previously limit or harm contemporary values and wills, paving the way for the action of real factors of power that will culminate in their resilience and overcoming (BARROSO, 2020).

On the other hand, the Constitutions must not be fickle to the point that they are weakened and susceptible to any movement that confronts their normative claims, since such a scenario would also imply the fragility of the Democratic State of Law itself (BARROSO, 2020).

It is in this context of searching for the necessary balance between stability and adaptability that the constituent power took care to foresee the procedures and limits to be observed by the constitutional reform process. In the Brazilian case, the 1988 Constitution regulates it in detail through its art. 60 (LENZA, 2022).

The device represents the possibility of action by the Reforming Derived Constituent Power, which has the capacity to promote reforms, changes and modifications to the normative text of the Federal Constitution, when the established limitations are observed (BARROSO, 2020).

This power is manifested through constitutional amendments, a normative instrument that was used to add the fundamental right to the protection of personal data to article 5 of the constitution with Constitutional Amendment 115/2022, the object of study of this article (LENZA, 2022).

The aforementioned constitutional amendment originates from PEC 17/2019, which had its justification based on four elementary pillars, being (i) the perception that technological advancement provides opportunities for benefits, but can also generate harm to citizens if used without observing moral principles and ethical; (ii) the evaluative autonomy of the right to data protection in relation to the right to privacy; (iii) the observation that several countries already had their own laws and broad discussions regarding data protection and (iv) the tendency for the topic, its basic concepts and principles to become fragmented (BRASIL, 2019).

However, the Brazilian Constitution already addressed issues relating to information and the right to privacy, through guarantees of freedom of expression, right to information, inviolability of private life and intimacy, inviolability of data, as well as establishing the habeas data action, which served as a method of access and rectification of personal data (DONEDA, 2020).

In this sense, the right question arises about the real need to once again amend the federal constitution given the perception that, for part of the doctrine, several fundamental rights already enshrined in the diploma would refer to the idea of privacy and that the LGPD would be careful to centralize the discussions on the topic.

As necessary to continue this research, we then began to analyze the foundations that corroborate the idea expressed by item ii of the aforementioned justification, demonstrating, subsequently, the need to promulgate Constitutional Amendment 115/2022.

As explained previously, there is a strong relationship between the rights to privacy and the protection of personal data, to the point where part of the doctrine understands that the fundamental right to data protection would be an evolution of the right to privacy. However, this conclusion has proven to be a superior understanding, whether in legal literature, legislation or jurisprudence, so that it is increasingly clear that the fundamental right to data protection is an autonomous

fundamental right (BIONI, 2020 *apud* SARLET, 2021, p.52).

This is because, as Sarlet understands, the relationship between these two rights would not translate into "complete overlap of the respective scopes of protection." On the contrary, these concepts express fundamental differences, which do not allow us to simply infer that they are fundamental rights linked to each other. In the author's words:

> A first difference that can be pointed out lies in the fact that – following the lessons of Stefano Rodotà – privacy indicates a negative and static vision, largely based on the idea of making interference from third parties impossible. On the other hand, data protection gives the holder positive and dynamic powers made available to them with a view to controlling the collection and processing of data concerning them. Thus – according to Rodotà – the legal good protected in privacy revolves around information and secrecy, while the right to data protection encompasses information, circulation and respective control (SARLET, 2021, p. 51).

Furthermore, the object of the fundamental right to data protection is broader, since the terminological concept of "information" is, for this right, equally expanded, integrating all types of personal data, regardless of whether they relate to the personal life (intimate, private, social) or not (MENDES, 2018).

Although it is understood that the fundamental right to data protection is, in fact, an autonomous, independent right in relation to the right to privacy, taking into consideration, the important differences that exist in its scope of protection, there are still constitutional States where this fundamental right does not is expressly recognized in the Magna Carta, even though this right is considered to be implicitly affirmed.

In this sense, although it could be interpreted as existing implicitly, data protection as a fundamental right expressed in the Magna Carta has great value in order to provide the normative force required to encompass the phenomenon of data protection throughout the entire world. its extension, guaranteeing the necessary level of equality for this right in relation to other constitutional guarantees, which would even be capable of giving a new interpretation to the aforementioned decision cited by the late Doneda and also to the decision of the STF, in which the Court recognized that in the confrontation between the right of access to information and the right to protection of sensitive personal data of public servants, the understanding that the second would have less protection in relation to the first must prevail, considering the constitutional principles of transparency and publicity.

FINAL CONSIDERATIONS

The evolution of fundamental rights over time demonstrates the need to adapt to contemporary demands. Data protection stands out as an essential right to preserve privacy, freedom of expression and human dignity in the digital context.

We have seen that the technological revolution has promoted such robust advances in the capacity to collect and process data that we see today in an informational society, where personal data increasingly gains great economic relevance given the infinity of possibilities for its use.

In this context, Constitutional Amendment 115/2022 consolidates data protection as an autonomous right, going beyond the mere extension of the right to privacy. It recognizes the dynamics and specific challenges involved in the processing of personal data, giving individuals control over their information.

The inclusion of data protection as a fundamental right also strengthens Brazil's position in the global context, aligning it with international data protection trends.

This contributes to creating a safer and more trustworthy environment for using and sharing personal information.

The changes promoted by the amendment resulted in the express provision of the right to the protection of personal data, the material competence of the Union to organize and monitor the topic, as well as the establishment of exclusive competence to legislate on the protection of data.

It is concluded that the modifications to Constitutional Amendment 115/2022 mark an important step in consolidating data protection as a fundamental right in Brazil. By recognizing the importance of preserving privacy and controlling personal information, the amendment contributes to the construction of a fairer and more conscious society in the field of data management.

REFERENCES

BARROSO, Luís Roberto. **Curso de Direito Constitucional Contemporâneo**: os conceitos fundamentais e a construção do novo modelo 9. ed. São Paulo: Saraiva Educação, 2020.

BIONI, Bruno Ricardo. **Proteção de Dados Pessoais: a função e os limites do consentimento**. 3. ed. Rio de Janeiro: Forense, 2021.

BOBBIO, Norberto. **A Era dos Direitos**. Rio de Janeiro: Campus, 1992

BONAVIDES, Paulo. A quinta geração de direitos fundamentais. **Revista Brasileira de Direitos Fundamentais e Justiça**, Belo Horizonte, v. 2, n. 3, abr./jun. 2008.

BRASIL. [Constituição (1988)]. **Constituição da República Federativa do Brasil de 1988**. Brasília, DF: Presidência da República, 1988.

BRASIL. **Proposta de Emenda à Constituição nº 17, de 2019**. Acrescenta o inciso XII-A, ao art. 5º, e o inciso XXX, ao art. 22, da Constituição Federal para incluir a proteção de dados pessoais entre os direitos fundamentais do cidadão e fixar a competência privativa da União para legislar sobre a matéria. Disponível em: https://www25.senado.leg.br/web/atividade/materias/-/materia/135594. Acesso em: 06 nov. 2023.

CASTELLS, Manuel. **A sociedade em rede**. 6. ed. São Paulo: Paz e Terra, 2002.

DONEDA, Danilo Cesar Maganhoto; **Da privacidade à proteção de dados pessoais**: elementos da formação da Lei Geral de Proteção de Dados. 2. ed. São Paulo: Thomson Reuters Brasil, 2020.

DONEDA, Danilo Cesar Maganhoto; Panorama histórico da proteção de dados pessoais. In: MENDES, Laura Schertel; DONEDA, Danilo; SARLET, Ingo Wolfgang; RODRIGUES JR., Otavio Luiz; BIONI, Bruno Ricardo (Coord.). **Tratado de Proteção de Dados Pessoais**. Rio de Janeiro: Forense, 2021.

FACCHINI NETO, Eugênio; Limites à proteção de dados: Dragnet surveillance e o caso

Marielle Franco, de acordo com recente julgamento da terceira seção do STJ. In: SARLET, Gabrielle Bezerra Sales; TRINDADE, Manoel Gustavo Neubarth; MELGARÉ, Plínio. **Proteção de dados**: Temas controvertidos. São Paulo: Editora Foco Jurídico, 2021.

JABUR, Gilberto Haddad. **A dignidade e o rompimento da privacidade**. In: MARTINS, Ives Gandra; PEREIRA JÚNIOR, Antonio Jorge (coord.). **Direito à privacidade**. São Paulo: Centro de Extensão Universitária, 2005.

LENZA, Pedro. **Direito Constitucional**. 25. ed. São Paulo: SaraivaJur, 2021.

LENZA, Pedro. **Direito Constitucional**. 26. ed. São Paulo: Saraiva Jur, 2022.

MENDES, Laura Schertel Ferreira. Habeas Data e autodeterminação informativa: os dois

lados da mesma moeda. **Direitos Fundamentais & Justiça**, Belo Horizonte, ano 12, n. 39, p. 185-216, jul./dez. 2018. Disponível em: https://dfj.emnuvens.com.br/dfj/article/view/655/905. Acesso em: 07 nov. 2023.

MENDES, Gilmar Ferreira; BRANCO, Paulo Gonet. **Curso de Direito Constitucional**. 15. ed. São Paulo: Saraiva, 2020.

MORAIS, Alexandre de. **Direito constitucional**. 37. ed. São Paulo: Atlas, 2021.

NUNES JUNIOR, Vidal Serrano. **A proteção constitucional da informação e o direito à crítica jornalística**. São Paulo: FTD, 1997.

SARLET, Ingo. **A eficácia dos direitos fundamentais: uma teoria geral dos direitos fundamentais na perspectiva constitucional**. 11. ed. Porto Alegre: Livraria do Advogado, 2012.

SARLET, Ingo Wolfgang; Fundamentos constitucionais: o direito fundamental à proteção de dados. In: MENDES, Laura Schertel; DONEDA, Danilo; SARLET, Ingo Wolfgang; RODRIGUES JR., Otavio Luiz; BIONI, Bruno Ricardo (Coord.). **Tratado de Proteção de Dados Pessoais**. Rio de Janeiro: Forense, 2021

STRECK, Lenio Luiz; MORAIS, José Luis Bolzan. **Ciência Política e Teoria Geral do Estado**. 3. ed. Porto Alegre: Livraria do Advogado, 2003.