

## **35 ANOS DA CONSTITUIÇÃO BRASILEIRA: EMENDA CONSTITUCIONAL Nº 115/2022 E A IMPORTÂNCIA DA PROTEÇÃO DOS DADOS PESSOAIS COMO UM DIREITO FUNDAMENTAL**

*35 YEARS OF BRAZILIAN CONSTITUTION: CONSTITUTIONAL AMENDMENT No. 115/2022 AND THE IMPORTANCE OF PROTECTING PERSONAL DATA AS A FUNDAMENTAL RIGHT*  
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**RESUMO:** O presente trabalho deve ser considerado como um trabalho panorâmico, que estabelece o processo de evolução do Direito Fundamental à Proteção de Dados Pessoais no Brasil, tendo como ponto de partida a Constituição da República Federativa do Brasil de 1988, até a sua formalização como Direito Fundamental Autônomo e Expresso por intermédio da Emenda Constitucional nº 115/2022. Ademais, o trabalho aborda os aspectos sociais e econômicos que demonstram o contexto e a importância de ter a proteção de dados pessoais como Direito Fundamental, que vincula todos os agentes na sociedade. Por último, o trabalho aborda as peculiaridades infraconstitucionais da proteção de dados pessoais no Brasil, a fim de demonstrar como esse Direito Fundamental se comporta fora do texto constitucional. O método

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utilizado foi o hipotético-dedutivo, com utilização de recursos bibliográficos e documentais. Por fim, o Direito Fundamental à Proteção de Dados Pessoais funciona como um Direito importantíssimo para proteger os sujeitos nas relações privadas, de modo que é possível afirmar, nos 35 anos da Constituição da República Federativa do Brasil de 1988, que o texto constitucional continua comprometido com a preservação do axioma da Dignidade da Pessoa Humana e em dar respostas aos dilemas sociais e econômicos vividos pela sociedade.

**PALAVRAS-CHAVE:** 35 anos de Constituição; Emenda Constitucional nº 115/2022; Direitos Fundamentais; Direito Fundamental à Proteção de Dados Pessoais; LGPD.

**ABSTRACT:** This work should be considered a panoramic work, which establishes the process of evolution of the Fundamental Right to the Protection of Personal Data in Brazil, taking as a starting point the Constitution of the Federative Republic of Brazil of 1988, until its formalization as a Fundamental Right Autonomous and Express through Constitutional Amendment No. 115/2022. Furthermore, the work addresses the social and economic aspects that demonstrate the context and importance of having the protection of personal data as a Fundamental Right, which binds all agents in society. Finally, the work addresses the infraconstitutional peculiarities of personal data protection in Brazil, to demonstrate how this Fundamental Right behaves outside the constitutional text. The method used was hypothetical-deductive, using bibliographic and documentary resources. Finally, the Fundamental Right to the Protection of Personal Data functions as a very important right to protect subjects in private relationships, so that it is possible to affirm, in the 35 years since the Constitution of the Federative Republic of Brazil of 1988, that the constitutional text remains compromised with the preservation of the axiom of the Dignity of the Human Person and in providing answers to the social and economic dilemmas experienced by society.

**KEY-WORDS:** 35 years of Constitution; Constitutional Amendment No. 115/2022; Fundamental rights; Fundamental Right to Personal Data Protection; LGPD.

**SUMÁRIO:** 1. Introduction 2. Historical evolution of fundamental rights and the fundamental right to protection of personal data 3. The importance of amendment no. 115/2022 in the new technological era 4. The fundamental right to protection of personal data: infraconstitutional aspects 5. Final considerations 6. References.

## 1. Introduction

Social change through new technologies and the unrestrained use of personal data brings ethical risks, including social ones, generating possible violations of fundamental rights. Privacy takes on new directions in the digital age. It is well known that society is increasingly becoming more aware of digital media, and the phenomenon of big data reveals the importance of data and information for organizations in today's world. It is therefore clear that, at this moment, technology and personal data dominate work and business relationships, and these technological advances require constant updating of the debate, namely through corporate surveillance, some of which arise

especially when analyzing the potential impacts on individuals themselves, personally and collectively, on freedom.

The General Data Protection Law, created to find solutions to conflicts arising from new technologies, seeks to guarantee the exercise of personality rights and the repression of discriminatory practices triggered by the misuse of personal data. Furthermore, findings regarding the legal nature of consent, legal assumptions, and legal responsibility for data protection, are directed toward the sense that individuals will not be able to disrespect the conduct, guarantees, and freedoms within the legal scope of rights, with the existence of conflicts between rights.

It is therefore necessary to create mechanisms that enable people to have knowledge and control over their data – which, in essence, are a direct expression of their personality. For this reason, the protection of personal data is considered in several legal systems as an essential instrument for the protection of the human person and as a fundamental right. After all, talking about protecting personal data is not just about protecting the data itself, but, above all, protecting the human beings to whom the data refers.

The general objective of this work is to understand the historical evolution of data protection in Brazil from the 1988 Constitution, until the introduction of Personal Data Protection as a Fundamental Right through Amendment No. 115/2022. Furthermore, we specifically seek to understand the importance of protecting personal data, the social and economic aspects that underlie its existence, and the infraconstitutional designs on data protection in Brazil.

To achieve the objectives outlined, the second section concerns the historical evolution of Fundamental Rights, with a final focus on the Fundamental Right to Protection of Personal Data in the Brazilian case. The third section aims to demonstrate Amendment No. 115/2022 and the social and economic context in which it is inserted, to expose how the Constitution intends and achieves an ontology of its text. The fourth section deals with describing the infraconstitutional intricacies of the Fundamental Right

to the Protection of Personal Data, with emphasis on the General Law on the Protection of Personal Data.

The method used is hypothetical-deductive, making it necessary to use research techniques, such as national and foreign bibliographical and documentary surveys, with interpretation of Brazilian legal norms, meaning the various procedures used, as peculiar resources, since the methods are outlined as fundamental stages of this research that is relevant to the current legal and social scenario.

In the end, the following hypotheses were outlined: there is a social and economic reality that defines the importance of the Right to Personal Data Protection being a Fundamental Right; the Right to Personal Data Protection goes through a historical evolution until the introduction of Amendment to the Constitution No. 115/2022; Amendment No. 115/2022 has legal and social relevance, considering the constitutionalization of Private Law, which places the subject as the center of legal protection, with respect to the axiom of Human Dignity.

## **2. Historical evolution of fundamental rights and the fundamental right to protection of personal data**

Fundamental Rights have a peculiar relationship with Human Rights. In Western culture, it is possible to say that Fundamental Rights are inspired by the Human Rights present in European universalism. The current meaning of Human Rights was consolidated after the Second World War, to repair the atrocities committed, through a renewal of the legal standards included in the United Nations Charter (1945) and the Universal Declaration of Human Rights (1948), as well as in other treaties and pacts. Thus, human rights are the result of historical achievements, and moral and ethical values, based on the principle of human dignity, encompassing the protection of life, freedom, and equality.<sup>4</sup>

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<sup>4</sup> PIOVESAN, Flávia. Direitos humanos e justiça internacional. 1. ed., 2ª tiragem. Prefácio de Celso Lafer. São Paulo: Saraiva, 2007.

In this context, Fundamental Rights emerged at the end of the 17th century, incorporated into the constitutions of many European countries. The growing social manifestations, especially the political revolutions of the late 18th century, reached Enlightenment political values and ideals, which preceded the incorporation of fundamental rights in a sphere that transcended borders.

The existence of fundamental rights arose from the need to define relationships between individuals and power structures, especially in relation to the State. Fundamental rights delimit the power of the State and, at the same time, require States to take positive steps by ensuring an environment that allows all people to enjoy their rights. According to Oscar Vilhena Vieira:

To overcome such a situation of “oppression”, in which the State can exercise coercion over its citizens – through normative acts – without the need to justify its actions in an abstract and general law, it would be necessary to return to the origins of the Rule of Law. To achieve this, Hayek revisited history and formulated a list of essential normative elements of the Rule of Law, seen as an instrument par excellence to ensure freedom. According to this version, it cannot be compared to the principle of legality developed by administrative law, because the Rule of Law represents a material conception regarding what Law should be.<sup>5</sup>

Therefore, fundamental rights were born, historically, as individual rights, aimed at protecting the individual in the face of the State. In this way, we ask what distinguishes rights from fundamental guarantees. Rights are constitutionally protected or protected assets, through which there is the possibility of exercising powers or demanding conduct. Guarantees are security measures that guarantee these rights, that is, they are material conditions or procedures used by holders to guarantee their rights.

In this sense, Fundamental Rights are nothing more than Human Rights incorporated into the legal system, that is, they are the rights guaranteed by a positive legal system, at a constitutional level. They enjoy reinforced protection and have a specific meaning since they represent the set of rights recognized and guaranteed by a positive, constitutional, and, necessarily, democratic legal order.

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<sup>5</sup> VIEIRA, Oscar Vilhena. A desigualdade e a subversão do estado de direito. Revista Internacional de Direitos Humanos. N. 6. 2007. p. 31

With the promulgation of the Federal Constitution of 1988, fundamental rights and guarantees acquired a greater level of importance in the Brazilian legal system, not only concerning terminological distinctions, given that the express categorization of fundamental guarantees was little used in Magna Cartas. The migration of fundamental rights from the constitutional text to its initial part, and then the fundamental principles, is also noteworthy, which acquires a particularly relevant connotation, as it expresses the clear choice of the Constituent to highlight sequentially the degree of legal relevance.

With a new Magna Carta that, in addition to many innovations and significant changes, also brought mention of certain points related to data protection, in the 1988 text. At the time, Article 5, which discusses rights, fundamental guarantees, and duties of citizens, already addressed issues relating to the privacy of Brazilians, in its section.

Although at that time the Magna Carta did not expressly address the Right to Data Protection as a fundamental right, we can observe that it confers implicit protection by providing habeas data as a data protection measure (Article 5 LXXII of the Constitution of the Federative Republic of Brazil), which has the constitutional claim, ensure the knowledge or rectification of the petitioner's personal information, contained in a public database.

In 2018, Law No. 13,709 appeared, which provided for the Protection of Personal Data in Brazil. The General Data Protection Law was an important legal milestone, demonstrating legislators' concern in updating the legal system with attention to social and economic events in society. The origin of the General Data Protection Law was very important, mainly from an epistemological point of view, because several occurrences regarding the relationship between the Right to Privacy and the Right to the Protection of Personal Data began to be named by legal concepts.

Soon after, in 2020, the academic noise regarding the fundamental nature of the Right to Personal Data Protection was responded to by the Federal Supreme Court

through ADIn No. 6393, whose rapporteur was Minister Rosa Weber.<sup>6</sup> At that time, the Federal Supreme Court declared the protection of personal data as an Autonomous Fundamental Right, protected by intimacy and private life, supported by the Dignity of the Human Person.

In 2022, Constitutional Amendment No. 115/2022 was approved, which inserted the Right to Personal Data Protection as an Autonomous Right and expressed in the 1988 Constitution, composing the list of Article 5 of the Constitution of the Federative Republic of Brazil of 1988. This means that Amendment No. 115/2022 places the subject as the center of legal protection, which, in the words of Eugênio Facchini Neto, means the "[...] "repersonalization" of civil law, or seen in another way, the "depatrimonialization" of civil law. In other words, the human being and his emanations are placed back at the center of civil law"<sup>7</sup>. Given this, Amendment No. 115/2022 represents an advance on the 1988 Constitution and the Constitutionalization of Private Law, considering that it represses conduct that aims to treat life as an object within the scope of private relationships. Thus, Amendment No. 115/2022 preserves the free development of the personality, maintaining the axiom of the Dignity of the Human Person intact.

### **3. The importance of amendment no. 115/2022 in the new technological era**

The growing technological progress and the approval of a Constitutional Amendment on the processing of personal data introduced something new to the Brazilian legal system. As violations against people emerge in society, especially in the virtual environment, the need for legal protection is felt. In this context, Amendment No. 115/2022 constituted a major advance in the regulation of the processing of

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<sup>6</sup> Supremo Tribunal Federal. ADIn 6393 MC-Ref, Relator(a): ROSA WEBER, Tribunal Pleno, julgado em 07/05/2020, PROCESSO ELETRÔNICO DJe-270 DIVULG 11-11-2020 PUBLIC 12-11-2020.

<sup>7</sup> NETO, Eugênio Facchini. A constitucionalização do direito privado. Revista Iurisprudencia, v. 2, n. 3, 2013, p. 26.

personal data in Brazil, to protect personality rights, which derive from the dignity of the human person enshrined in the 1988 Constitution.<sup>8</sup>

In this way, society is experiencing the so-called information age, in which data is an important asset for companies to achieve their businesses and objectives. Given this, there is a need to process data to produce information that will bring value to the economic activities of a given segment. In other words, data has become a major enterprise, a vital economic resource used for a new form of economic value.<sup>9</sup>

Technology no longer appears as a secondary element when considering business strategy. Using technology to extract variety and velocity from data is a foundation of business strategy. If, on the one hand, there is an interest among various economic activity groups in using data to implement their strategies, there is, on the other, a concern with the protection of personal data, mainly because it is a fundamental right.<sup>10</sup>

Data, as important assets, helps to improve the performance of organizations because they develop screenings that help with specific objectives and decision-making. On the other hand, the digital society allows the creation of digital trails that can be explored by organizations. In other words, interacting in the digital environment produces knowledge and data, which can be analyzed to obtain information.

It is known that an analysis of five credit card purchases can say a lot about a person's worth. The same situation occurs with a subject's behavior on social media. In this context, the person is in an obvious position of vulnerability, as part of their personal data is accessible to third parties without their control, putting privacy, intimacy, and personal data protection at risk.

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<sup>8</sup> VILELA, A. C. A. D.; LAIA, F. S.; VIEGAS, C. M. A. R. A efetividade da lei geral de proteção de dados pessoais para a tutela do direito ao esquecimento. 2021.

<sup>9</sup> MAYER-SCHÖNBERGER, Viktor; CUKIER, Kenneth. Big data: como extrair volume, variedade, velocidade e valor da avalanche de informação cotidiana. Rio de Janeiro: Elsevier, 2013.

<sup>10</sup> BOTELHO, Marcos. A proteção de dados pessoais enquanto direito fundamental: considerações sobre a lei geral de proteção de dados pessoais. *Argumenta Journal Law*, n. 32, 2020, p. 191-207.



Therefore, we cannot fail to mention that the need to protect personal data began to be discussed with greater intensity during the Facebook-Cambridge Analytica data leaks, involving approximately 87 million users. The Cambridge company's handling of personal data had a strong impact on two important events, namely the 2016 US presidential election and the Brexit vote. The Cambridge-Analytica case influenced the creation of the European Union's General Data Protection Regulation, which is the basis for the approval in Brazil of Law 13,709 of August 14, 2018, the so-called General Data Protection Law.<sup>11</sup>

In the case of Latin America, the Constitutionalization of Personal Data Protection worked as an important instrument for the democratization of Latin territories<sup>12</sup>, because the Latin constitutions of the 20th Century, through the introduction of Constitutional Remedies such as Habeas Data and the Amparo Action,<sup>13</sup> recognized that personal data are instruments used to maintain authoritarian regimes and the adoption of provisions to oblige the State to properly process personal data was urgent to oxygenate the society suffocated by authoritarianism.<sup>14</sup>

To understand the protection of personal data as fundamental, which justifies the constitutionalization of data protection<sup>15</sup> and Digital Rights, it is necessary to understand the context of Big Data and its impact on society. Etymologically, the term Big Data emerged in the mid-1990s, used for the first time by John Mashey, to designate

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<sup>11</sup> BOTELHO, Marcos. A proteção de dados pessoais enquanto direito fundamental: considerações sobre a lei geral de proteção de dados pessoais. *Argumenta Journal Law*, n. 32, 2020, p. 191-207.

<sup>12</sup> ANGARITA, Nelson Remolina. Aproximación Constitucional de la Protección de Datos Personales en Latinoamérica. *Revista Internacional de Protección de Datos Personales*, v. 13, 2012.

<sup>13</sup> ASOCIACIÓN, POR LOS DERECHOS CIVILES. *El Sistema de Protección de Datos Personales en América Latina: Oportunidades y Desafíos para los Derechos Humanos*. Buenos Aires, Argentina: ADC, 2017.

<sup>14</sup> CARRASQUILLA, Lorenzo Villegas. *Protección de Datos Personales em América Latina: Retención y Tratamiento de Datos Personales en el Mundo de Internet*. In: BERTONI, Eduardo. *Hacia una Internet Libre de Censura: Propuestas para América Latina*. Buenos Aires: Universidade de Palermo, 2012, p. 125-164.

<sup>15</sup> ÁLVAREZ-VALENZUELA, Daniel. La protección de datos personales en contextos de pandemia y la constitucionalización del derecho a la autodeterminación informativa. *Revista chilena de derecho y tecnología*, v. 9, n. 1, p. 1-4, 2020.

the manipulation and analysis of a volume of data. The main element associated with Big Data is the recording of phenomena, natural or not, in the data. This ability to produce and record data at scale is what will characterize the phenomenon of Big Data.<sup>16</sup>

Three fundamental dimensions are associated with Big Data. The first is volume because you have to deal with analyzing very large volumes of data. The second dimension is associated with speed because complex techniques must enable the analysis of large amounts of data quickly. Finally, the third dimension consists of variety, as there are multiple data sources, different information formed, and appropriate processing.<sup>17</sup> In this way, “the amount of stored information grows four times faster than the world economy, while the processing capacity of computers grows nine times faster. Everyone is affected by the changes”.<sup>18</sup> Therefore, the Big Data phenomenon refers to the enormous growth in the amount of data produced in the world that occurs through the continuous datafication of life.<sup>19</sup>

In the era of Big Data, data processing is important for prospecting useful information that will bring value to the organization's economic activity. When we increase the scale of data, we gain the scope for innovation, which is only possible when working with smaller quantities. However, the increase in the amount of data available for mining and the problems of rampant use of personal data did not go unnoticed by the courts, which began to hold many organizations responsible due to data security surveillance<sup>20</sup>.

Furthermore, the Internet has contributed decisively to the production of data. And, with the Internet, the spread of mobile devices has catalyzed this data production process. As a result, “the storage power, computing resources, and internet access offered by these devices increased not only the amount of unique data generated but

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<sup>16</sup> KITCHIN, Rob. *The data Revolution: big data, open data, data infrastructure & their consequences*. Thousand Oaks: Sage Publications, 2014.

<sup>17</sup> GOLDSCHMIDT, Ronaldo; PASSOS, Emmanuel; BEZERRA, Eduardo. *Data mining: conceitos, técnicas, algoritmos, orientações e aplicações*. 2. ed. Rio de Janeiro: Elsevier, 2015.

<sup>18</sup> MAYER-SCHÖNBERGER, Viktor; CUKIER, Kenneth. *Big data: como extrair volume, variedade, velocidade e valor da avalanche de informação cotidiana*. Rio de Janeiro: Elsevier, 2013, p. 06

<sup>19</sup> LEMOS, André. *Dataficação da vida*. *Civitas-Revista de Ciências Sociais*, v. 21, p. 193-202, 2021.

<sup>20</sup> HINTZBERGEN, Jule et. al. *Fundamentos de segurança da informação: com base na ISSO 27001 e na ISSO 27002*. Rio de Janeiro: Brasport, 2018.

also the number of times it was shared".<sup>21</sup> This data produced is recorded, analyzed, and organized, creating a phenomenon called datafication,<sup>22</sup> which is not only concerned with the digitalization of life but with the biased accumulation of personal data. According to Amaral:

From a technological point of view, the main element associated with Big Data is the recording of any phenomenon, natural or not, in data. This data is persistent, and stored for reproduction or analysis, whether immediate or future. This phenomenon is known as datafication. In other words, datafication is the electronic recording of any phenomenon.<sup>23</sup>

Algorithms and Artificial Intelligence use Big Data to process large volumes of data in real-time, meaning continuous exploration and management of life. Volume, speed, and variety are the characteristics of this phenomenon. The data is unstructured, volatile, and collected at a time close to its production. In addition to the attributes volume, speed, and variety, some add two others, namely, the value that represents the importance of the data for solving a given problem, veracity, related to the reliability of the data, since large volumes of data contain lots of inconsistent data.<sup>24</sup>

Thus, the phenomenon of Big Data allows the capture of entire populations or systems in volumes much larger than those employed in traditional small-scale data. This allows for a resolution that is desired as much as possible. Big Data is the phenomenon of mass production and storage of data, as well as processes and technologies to extract and analyze it. On the other hand, there is flexibility, as the scope data can be modified, and it is possible to add new fields of analysis with a certain ease, with a high degree of scalability, that is, the ability to expand quickly.<sup>25</sup>

The tool that allows you to systematize volumes of information that have become gigantic and whose potential increased exponentially with the advent of computing was, strictly speaking, the database. Databases are, in their fundamental

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<sup>21</sup> MARQUESONE, Rosângela. Big data: técnicas e tecnologias para extração de valor dos dados. São Paulo: Casa do Código, 2016, p. 05

<sup>22</sup> LEMOS, André. Dataficação da vida. Civitas-Revista de Ciências Sociais, v. 21, p. 193-202, 2021.

<sup>23</sup> AMARAL, Fernando. Introdução à ciência de dados. Rio de Janeiro: Alta Books, 2016, p. 09.

<sup>24</sup> SAMPAIO, Cleuton. Data Science para programadores: um guia completo utilizando a linguagem Python. Rio de Janeiro: Ciência Moderna, 2018.

<sup>25</sup> AMARAL, Fernando. Introdução à ciência de dados. Rio de Janeiro: Alta Books, 2016.

sense, a collection of information structured according to a certain logic – and the logic is always a logic of utility, a logic that aims to obtain the maximum possible benefit from a set. It has long been known what information can generate, as is clear from antiquity checking, the practice of systematically collecting information through a census of the population, an instrument of immense value to rulers of all times - to the point that historical documents on this subject are not few.<sup>26</sup>

Information itself is related to a series of phenomena whose importance and complexity have increased considerably in recent decades. What distinguishes it today is its historical importance and the greatest ingenuity in its processing and communication of information. As the storage and information capacity increases, the variety of ways in which it can be appropriated also increases, or the greater its malleability and usefulness, the more it becomes a fundamental element of a growing number of relationships, and the greater its possibility of influencing our daily lives, in a growing context that has as its backdrop technological development, in particular, the use of computers for personal processing, since the fundamental novelty introduced by computers is the transformation of dispersed information into organized information.<sup>27</sup>

Information may have an objective link to something revealing about it. This link means that the information refers to the characteristics of this person's actions, such as data regarding consumption, information regarding their manifestations, such as political opinions, and many others. It is important to establish this objective link, as there are other categories of information that, although they may also refer to a person, would not be exactly personal: other people's opinions about that person, for example, initially do not have this object link.<sup>28</sup>

Within the framework of the new era of information and communication technologies, whose object of economic exploitation is Big Data, the protection of personal data is now the object of special attention by the Brazilian Constitution,

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<sup>26</sup> DONEDA, Danilo. A proteção dos dados pessoais como um direito fundamental. Joaçaba, v. 12, n. 2, p. 91-108, jul./dez. 2011.

<sup>27</sup> LIMBERGER, Têmis. O direito à intimidade na era da informática. Porto Alegre: Livraria do Advogado, 2007.

<sup>28</sup> DONEDA, Danilo. A proteção dos dados pessoais como um direito fundamental. Joaçaba, v. 12, n. 2, p. 91-108, jul./dez. 2011.

recognizing, in an intersubjective-underlying way, the vulnerable position of the social media user. From the scenarios presented, the 1988 Constitution, notably rigid, has recognized the process of change in society, adapting to the social dilemmas experienced daily. Thus, it is clear that the adoption of Amendment No. 115/2022, which introduced the Protection of Personal Data as a Fundamental Right in the list of Article 5º of Constitution of the Federative Republic of Brazil, in addition to the recognition of Digital Rights, shows that there is a continuous commitment to the ontological realization of the Constitution.

#### **4. The fundamental right to protection of personal data: infraconstitutional aspects**

Constitutional Amendment No. 115/2022 appears in this context, serving as a guide for the interpretation and application of infraconstitutional laws that involve the processing of personal data and its protection, binding all agents of society to comply with them. You don't need to be a privacy expert to understand the importance of data protection today.<sup>29</sup>

According to the wording of Constitutional Amendment No. 115/2022, its discipline concerns the processing of personal data, including in digital media. Therefore, the amendment does not only deal with the digital format, including physical databases. Given this, within the scope of discussions about Constitutional Amendment No. 115/2022, it is necessary to highlight the role of the General Data Protection Law, to demonstrate how the Fundamental Right to Protection of Personal Data manifests itself infraconstitutionally, with emphasis on the main points of the law.

The first element to highlight is that the beneficiary of legal protection is the natural person. The expression “personal data” present in the wording of Article 1 of the General Data Protection Law brings this limitation. The identified or identifiable natural person and the subject will benefit from the protection of the law (PINHEIRO, 2019).

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<sup>29</sup> COTS, Márcio; OLIVEIRA, Ricardo. Lei Geral de Proteção de dados pessoais comentada. 2. ed. São Paulo: Revista dos Tribunais, 2019.

This idea is reinforced by the discipline contained in Article 5, item I of the LGPD (General Data Protection Law), which considers personal data as “[...] information related to an identified or identifiable natural person”.

For certain information to be considered data covered by the LGPD (General Data Protection Law), it must be linked to a natural person, in addition to being identified or identifiable. The criteria used by the General Data Protection Law to define the term “personal” is expansionist.<sup>30</sup> According to Cots and Oliveira, the General Data Protection Law did not define “[...] only as personal data that immediately identifies a natural person (...) as could be information such as name, CPF number, image, etc., but also included data that makes the person identifiable in a non-immediate or direct way”<sup>31</sup>.

It is important to emphasize here that the term “personal” mentioned by the General Data Protection Law covers both the data itself and the information resulting from the processing of the data, by the distinction made in the previous section. Although in the field of technology and information security, data and information are different concepts, the General Data Protection Law did not address this concern. It should be noted that this conclusion may arise from a simple reading of item I of Article 5 of the LGPD, which connects personal data to information relating to a natural person.

On the other hand, Article 4 of the LGPD states that the normative diploma does not apply to the processing of personal data carried out by a subject for exclusively private and non-economic purposes, for processing carried out exclusively for journalism, artistic, academic, public security, national, state security and investigation, and criminal offenses. Furthermore, it should be noted that Article 12 of the LGPD excludes anonymized data from the scope of the normative level, which is data relating to a specific person who cannot be identified, considering reasonable technical tools available at the level. It should also be noted that anonymized data cannot be confused with pseudo-anonymized data. These do not allow inversion, unlike what happens with

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<sup>30</sup> FEIGELSON, Bruno; SIQUEIRA, Antonio Henrique Albani (coords.). *Comentários à lei geral de proteção de dados: Lei 13.709/2018*. São Paulo: Revista dos Tribunais, 2019.

<sup>31</sup> COTS, Márcio; OLIVEIRA, Ricardo. *Lei Geral de Proteção de dados pessoais comentada*. 2. ed. São Paulo: Revista dos Tribunais, 2019, p. 71

pseudo-anonymous ones, whose inversion is possible thanks to a technique that is in the possession of the person responsible.<sup>32</sup> According to Pinheiro:

The delimitation of the applicability of the law concerning the types of data that are considered regulated by the LGPD demonstrates that the processing of personal data must follow a certain and functional purpose, but which does not exceed freedom of information and expression, sovereignty, security, and defense of the State.<sup>33</sup>

The Protection of Personal Data offered by the LGPD (General Data Protection Law) aims to protect the fundamental rights of freedom and privacy, as well as the free development of the personality of the natural person, demonstrating the most evident sign of the constitutionalization of Private Law, which it “depatrimonializes” relationships and places the subject as the center of protection. In this sense, the wording of Article 17 of the LGPD, “every natural person is assured of the ownership of their personal data and the fundamental rights of freedom, intimacy, and privacy are guaranteed, under the terms of this Law”.

This means that the interpretation of the rules that define the applicability of the LGPD must consider the nature of the protected party, so that the application or not of the same must promote, as much as possible, the fundamental right to data protection. Therefore, according to Feigelson and Siqueira, “the LGPD recognizes that, for citizens to be able to control the flow of their personal data, it is necessary to grant them certain subjective rights vis-à-vis those responsible for controlling data. such data”.<sup>34</sup>

In this sense, Article 2 of the LGPD provides the foundations underlying the discipline of protection, namely respect for privacy, self-determination,<sup>35</sup> freedom of expression, information, communication and opinion, inviolability, honor and image, protection and economic development and innovation, free enterprise, free

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<sup>32</sup> COTS, Márcio; OLIVEIRA, Ricardo. Lei Geral de Proteção de dados pessoais comentada. 2. ed. São Paulo: Revista dos Tribunais, 2019.

<sup>33</sup> PINHEIRO, Patricia Peck. Proteção de dados pessoais: comentários à Lei n. 13.709/2018 (LGPD). São Paulo: Saraiva, 2019, p. 57.

<sup>34</sup> FEIGELSON, Bruno; SIQUEIRA, Antonio Henrique Albani (coords.). Comentários à lei geral de proteção de dados: Lei 13.709/2018. São Paulo: Revista dos Tribunais, 2019, p. 120.

<sup>35</sup> MENDES, Laura Schertel Ferreira. Autodeterminação informativa: a história de um conceito. Pensar Revista de Ciências Jurídicas Universidade de Fortaleza (Unifor), Fortaleza, v. 25, n. 4, p. 1-18, 2020.

competition and consumer protection, human rights, freedom of personality, dignity, and exercise of freedom by natural persons. It seems that the protection of fundamental rights is quite evident in Article 2 of the LGPD<sup>36</sup> and that the protection of personal data should be seen as a "means right", that is, an instrument for realizing other rights Fundamentals.

The law's intention is not to impede technological development, but rather to harmonize the Economic Order regulated in the Federal Constitution with the Fundamental Right to the Protection of Personal Data, understanding that the latter works to protect the subject in a society in which data have great value for free enterprise and competition. The LGPD (General Data Protection Law) provides a legal basis for the processing of personal data, offering greater legal security to processors and operators, in addition to establishing clear protection and guaranteeing the right to data protection.<sup>37</sup>

The protection of natural persons in relation to the processing of personal data is a fundamental right, declared by different laws in many countries. The Latin American Constitution recognizes the Right to Protection of Personal Data expressly as an Autonomous Fundamental Right, in the case of Constitutional Amendment No. 115/220, or implicitly as arising from the Right to Privacy.<sup>38</sup> Thus, there is a constitutional authorization for the emergence of Infraconstitutional Laws to protect the protection of personal data, regardless of an express constitutional declaration of the protection of personal data.

The processing of personal data will only be carried out for legitimate, specific, and explicit purposes for the holder. This is the principle of purpose, with the prohibition

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<sup>36</sup> PINHEIRO, Patricia Peck. *Proteção de dados pessoais: comentários à Lei n. 13.709/2018 (LGPD)*. São Paulo: Saraiva, 2019.

<sup>37</sup> MALDONADO, Viviane Nóbrega (coord.). *LGPD: Lei Geral de Proteção de Dados Pessoais: manual de implementação*. São Paulo: Revista dos Tribunais, 2019.

<sup>38</sup> NASCIMENTO, Reginaldo Felix. *Sistema Latino-americano de Proteção de Dados Pessoais*. MANRIQUE, Jorge Isaac Torres; CALGARO, Cleide; BRASIL, Deilton Ribeiro. *Anais do VI Congresso de Direito e Inteligência Artificial*. Skema Business School, 2023.



of subsequent actions which is not compatible with the expressed purposes.<sup>39</sup> The protection of the fundamental right to data processing aims to reduce the risks associated with the collection and future use of personal data. Protection covers the entire data lifecycle, from collection to disposal, covering many that must be developed in accordance with the LGPD (General Data Protection Law).

With regard to personal data, they belong to their holder, because the objective of Data Protection, as stated in the general regulation on data protection in Europe, which inspired the Brazilian law, is to allow people to have greater autonomy over their personal data. In addition to the natural person as the recipient of legal protection, the LGPD (General Data Protection Law) lists other actors in legal relationships involving the processing of personal data. The first party mentioned above is the holder, the natural person to whom the data to be processed refers. As already noted elsewhere, the holder is only a legal entity excluding legal entities.<sup>40</sup>

An important point to highlight is that the duties of the controller and the operator may fall to the same person. The General Data Protection Law does not require that the controller and operator be different people, and either role may exist. However, in cases where it concerns a person, the operator must process personal data per the instructions of the controller, who, in turn, verifies compliance with the instructions and rules. According to Cots and Oliveira:

The LGPD does not establish how the controller's instructions will be transmitted to the operator, but it is certain that in any relationship in which a controller delegates the processing of personal data under his responsibility to an operator, clear instruments must be established for such processing.<sup>41</sup>

Thus, an important aspect provided for in the General Data Protection Law is the National Data Protection Authority (ANPD), which is a Public Administration body responsible for ensuring, implementing, and monitoring compliance with the General Data Protection Law. As it involves personality rights, the protection of personal data

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<sup>39</sup> FEIGELSON, Bruno; SIQUEIRA, Antonio Henrique Albani (coords.). *Comentários à lei geral de proteção de dados: Lei 13.709/2018*. São Paulo: Revista dos Tribunais, 2019.

<sup>40</sup> FEIGELSON, Bruno; SIQUEIRA, Antonio Henrique Albani (coords.). *Comentários à lei geral de proteção de dados: Lei 13.709/2018*. São Paulo: Revista dos Tribunais, 2019.

<sup>41</sup> COTS, Márcio; OLIVEIRA, Ricardo. *Lei Geral de Proteção de dados pessoais comentada*. 2. ed. São Paulo: Revista dos Tribunais, 2019, p. 168.

has been considered by the European Union to be a Human Right, deserving legal protection linked to personality, intimacy, and privacy. Therefore, both the manipulation of data and the products produced from them are protected by the general data protection regime, requiring conduct from controllers, operators, and managers to promote high information security.

## **5. Final considerations**

In this work, the importance of having the protection of personal data elevated to the status of a fundamental right was demonstrated, so that the data subject can be further protected, in the context of Big Data and the era of the information society, in which technology and data dominate all today's relationships.

Given this rapid digital evolution, there is a need for strong instruments to control the protection of personal data, from the Federal Constitution to legal and infralegal regulations. On the other hand, it is necessary for those applying the law to have a precise application of the law on the subject, to protect the individual as a human person, but also not to make the use of technologies unfeasible.

The protection of personal data as a fundamental right in the Federal Constitution acquires constitutional rigidity, reaching the entire Brazilian legal system and all constituted powers. Given what was exposed in this study, it is understood that such recognition arises from a need to make the foundations and principles of the Democratic Rule of Law more effective in the contemporary information society since it cannot be forgotten that the principle of human dignity human nature, inherent to each person, is the core of the entire legal system, including the area of privacy and protection of personal data.

Thus, despite being directly related, through this Article, it was demonstrated that the concept of information is not to be confused with personal data, the latter being information that refers to the objective characteristics of this person's actions, which concern their manifestations, opinions expressed, and many others. Therefore, the

subject's ability to self-determine their personal data, to be able to develop their freedom, and to receive transparency regarding the processing of such data, that is, this protection reaches the sphere of the right to equality and freedom.

As if that were not enough, the Big Data phenomenon reveals the importance of data and information for organizations in the contemporary world, as decision-making today rests on the collection and processing of data, which is why it can be concluded that today's society lives under the aegis of surveillance capitalism,<sup>4243</sup> in which personal data become precious information and instruments for public and private organizations, interfering not only in the field of privacy but also in the scope of personal data protection, which includes your freedom.

In this way, acquiring the status of a permanent clause, the protection of personal data not only guarantees greater legal security in relation to any type of information relating to citizens but also ratifies the effectiveness of this right which, despite being new, becomes fundamental, possessing greater strength to ensure the dignity of the human person.

Thus, complementarity and solidarity in the interpretation of the individual's constitutional rights, such as the protection of personal data, privacy, and the guarantee of freedom of expression, is a measure that is necessary with the intention of guaranteeing the exercise of such rights in a universal manner.

Therefore, the scenario presented has legal mechanisms to protect the holder of personal data from abuse and indiscriminate use of their data, offering greater legal security and allowing access to information about them, to determine rules and limits on how such data should be stored and processed within the information society.

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<sup>42</sup> ZUBOFF, Shoshana. *A Era do Capitalismo de Vigilância*. 1ª Ed. Editora, 2021.

<sup>43</sup> ZUBOFF, Shoshana. *Big Other: Capitalismo de Vigilância e Perspectivas para uma Civilização de Informação*. In: BRUNO, Fernanda et al (org.). *Tecnopolíticas da Vigilância: Perspectiva da Margem*. 1ª Ed. Boitempo, 2015, 17-68.

There is no doubt that there has been an expansion of the concept of privacy with the emergence of new technologies and, as a consequence of this, a spread of data on the computer network that has generated a huge increase in the most diverse forms of violation of personal data, especially through means digital data in the private sphere, and personal data must therefore have constitutional protection, as the General Data Protection Law protects citizens' personal data and confirms the guarantees of fundamental rights.

In short, it is necessary that the constitutionalization of the protection of personal data, which gains strength with the emergence of Constitutional Amendment No. 115/2022, including in digital media, be added to the protection of human dignity, guaranteeing citizens, in general, fundamental rights and guarantees sufficient to have the freedom to use their data in a conscious manner and with greater autonomy, without suffering violations of their personal information, thus avoiding being victims of fraud, exposure or irrelevant political invasions.

The tendency is for technology sectors to advance unbridled and essential tools such as the LGPD (General Data Protection Law) and Amendment No. 115/2022 can limit or at least mitigate the risks of digital society. The recognition of data protection as a fundamental right imposes on young professionals of the future, who are once again at the forefront of this movement, the difficult task of fighting against any act that leads to the defeat of democracy and fundamental rights in Brazil.

Amendment No. 115/2022 is important because, in the 35 years of the Brazilian Constitution, it is possible to identify that the process of affirming Fundamental Rights follows changes in society, the economy, and institutional arrangements at an international level. Thus, the Federal Constitution recognizes society's demands in an up-to-date manner concerning digital media and new forms of exploitation of the subject.

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