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Collision Between Fundamental Rights, Reasonableness And Proportionality

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Abstract:
The article in question focuses on fundamental rights, their origins and reasonableness and proportionality, the latter being applied when there is a collision between two or more fundamental rights. Objective: Conduct a brief reflection on the collision between fundamental rights, reasonableness and proportionality, as well as address fundamental rights and data protection. Methodology: The study is a literature review related to the mentioned theme. The article had as research source the databases in Google Scholar, scientific articles and official websites. Discussions: It exposes the fundamental rights, the phenomenon of the collision between such values and the protection of personal data that is based on respect for privacy, informative self-determination, freedom of information, expression, communication and opinion, as well as the inviolability of privacy, honor and image, human rights, dignity and the exercise of citizenship by individuals. Result: The study led to the conclusion that the principle of proportionality is one of the most important principles of modern constitutional law. It aims to ensure that the limitations on fundamental rights are proportionate and reasonable, as well as the right to protection of personal data, including in digital media, is a fundamental right, with the color of an instone clause, with serious consequences for its violator.

Key Words*: Collision; Fundamental rights; Reasonableness; Proportionality Data Protection.*

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I. Introduction

This study focuses on the collision between fundamental rights, reasonableness and proportionality, as well as addressing fundamental rights and data protection. In this context, it is initially important to understand what fundamental rights and guarantees are. Fundamental rights and guarantees are instruments for protecting the individual against the actions of the state. They are based on the principle of the dignity of the human person, and are potestative, i.e. they guarantee the minimum necessary for the individual to exist.

Fundamental rights are set out in Title II of our Magna Carta and, in practice, they seek to establish configurations to make the rights guaranteed by the state to individuals effective. In this context, it is pertinent to state that fundamental rights are inalienable from the social contract made between the individual and the State, since the application of the fundamental rights of Brazilian citizens cannot be ignored by the State.

Sometimes, the exercise of a fundamental right by the holder ends up clashing with the right exercised by another individual, or even by legal assets that concern the community, leaving the need to find a balance between the exercise of the two, with the imposition of limits so that both can coexist, this is the collision of fundamental rights.

Sant'ana (2014, n.p.) states that "the first type of collision occurs when there is a clash between a fundamental right and other values or goods related to relevant community interests, which are also constitutionally protected".

According to Sant'ana (2014, n.p.) "Fundamental rights are not unlimited since, often, in order to realize them on a social level, it is necessary to impose limits, thus ensuring that others can enjoy their rights and maintain social peace". The author clarifies that "these limitations originate within the Constitution, covering the very scope of constitutional protection, so as to prevent certain forms or ways of exercising them in an absolute sense".

According to Cardoso (2016, p. 143) quoting Robert Alexy (2015) "collisions of fundamental rights can be understood strictly or broadly". The author further clarifies, based on Robert Alexy's studies, that "Collisions of fundamental rights in the strict sense arise whenever the exercise or realization of a given fundamental right entails negative consequences in relation to another person's fundamental right". (CARDOSO, 2016, p. 143 CITING ROBERT ALEXY, 2015).

In view of the above considerations, the study aims to briefly reflect on the collision between fundamental rights, reasonableness and proportionality, as well as addressing the fundamental right and data protection through qualitative and bibliographical research that made it possible to find conclusive information pertinent to the subject in question, with the aim of obtaining the conclusions allowing and a better understanding of its reality. This approach is justified by the fact that it is common for a situation to be supported by several fundamental rights that present antagonism between them, and we believe it is a valuable contribution to the academic environment.

II. Methodology Aspects

The research in question is qualitative and bibliographical, with the methodological path of the article in reference based on a bibliographical survey aimed at collecting data to elucidate the subject addressed in the databases available using the descriptors in social sciences and legal science that were selected, such as articles, books, scientific journals and official published manuals.

This work was developed using a qualitative approach, which requires a broad study of the object of research, taking into account the context in which it is inserted and the characteristics of the society to which it belongs. The researcher gradually builds up the different relevant elements that will shape the model of the problem studied, without following any criteria other than their own theoretical reflection (GONZÁLEZ REY, 2005, p.81).

According to Minayo (2009), qualitative research deals with a level of reality that cannot or should not be quantified, i.e. it works with the universe of meanings, motives, aspirations, beliefs, values and attitudes. Qualitative research seeks to understand the complexity of particular and specific phenomena, facts and processes.

González Rey (2005, p.3) states that qualitative research "emerged as a means of breaking away from the narrow and oppressive viewpoint of positivism, but it has not always faced the need to develop a solid epistemological foundation".

According to Creswell (2007, p. 187), qualitative research is fundamentally interpretative, i.e. the researcher interprets the data from a holistic view of social phenomena.

With regard to bibliographical research, this type of research is adopted in practically any type of academic-scientific work, since it allows the researcher to have access to the knowledge already produced on a given subject. There is also the production of scientific research that is based exclusively on bibliographical research, seeking the necessary information in theoretical works that have already been published to provide answers to the study problems established by the investigation (BRITO; OLIVEIRA; SILVA, 2021, p.6).

For Lakatos and Marconi (2001, p. 183), "it covers all bibliography already made public in relation to the subject studied, from single publications, bulletins, newspapers, magazines, books, research, monographs, theses, cartographic materials, etc.".

III. Theoretical Foundation

This study focuses on fundamental rights, their origins, reasonableness and proportionality. The fundamental rights consolidated and inherent to all Brazilian citizens through the Federal Constitution of 1988, have their existence linked to the creation of Human Rights as a whole.

Origin and History of Fundamental Rights

Fundamental rights are inalienable presuppositions of a Democratic State of Law, as they seek to realize values that are inherent to it. According to Moraes (2022, p. 3) quoting Mendes (2007, p. 221):

Fundamental rights provide elements for understanding the rule of law and democracy itself. The assertion that fundamental rights are the set of rights and freedoms institutionally recognized and guaranteed by a state's legal system at a given time goes back a long way, with origins in natural law. It is necessary to understand that fundamental rights are not always the same in every era, nor do they invariably correspond, in their formulation, to imperatives of logical coherence.

According to Fachini (2022, n.p.), history points out that "the first major milestone in the creation of fundamental rights and guarantees for the dignified existence of human beings is 1789, more specifically in the Universal Declaration of the Rights of Man and of the Citizen, written during the French Revolution". Still in line with the author's studies, he states that:

The ideals of human dignity and basic guarantees for the existence of humanity in society was an important milestone, as it was the first time that thought was given to the creation of universal rights that would guarantee the minimum conditions for human existence in society (FACHINI, 2022, n.p.).

According to Fachini (2022, n.p.) "the United Nations (UN) Declaration of Human Rights of 1948 is strongly based on its 1789 sister, and had a wider scope, since it is a primer of basic rights that is defended by all the countries that have signed it". Fachini also mentions that the 1988 Magna Carta, however, had an exclusive title to discuss only the fundamental rights of human beings within the limits of the state's actions, right at the beginning of the Brazilian Magna Carta (FACHINI, 2022, n.p.). In this vein, the author alludes that:

The fundamental rights and guarantees expressed in the Federal Constitution are strongly based on the Declaration of Human Rights, with the aim of conferring dignity on human life and protecting individuals from the actions of the State, which is obliged to guarantee and uphold these rights and guarantees.

It is necessary to point out that in Title II of the 1988 Constitution, fundamental rights and guarantees are protective norms that aim to protect citizens from the actions of the State and guarantee the minimum requirements for individuals to have a dignified life in society (FACHINI, 2022, n.p.). The fundamental rights guaranteed by the 1988 Constitution are set out in Article 6 and state that: education, health, work, leisure, security, social security, maternity and childhood protection, and assistance to the destitute, in the form of this Constitution, are social rights. As for the classification of fundamental rights, the Constitution has classified them into five groups: 1) individual rights; 2) collective rights; 3) social rights; 4) nationality rights, and 5) political rights.

Articles 5º to 17 of the Citizen Constitution outline the fundamental rights and guarantees that Brazilian individuals and society enjoy on an ongoing basis. The fundamental rights and guarantees are divided into specific themes in the Federal Constitution. They are: individual and collective rights (Article 5 of the Constitution), social rights (Articles 6 to 11 of the Constitution), nationality rights (Articles 12 and 13 of the Constitution) and political rights (Articles 14 to 17 of the Constitution). (FACHINI, 2022, n.p.).

3.2 Reflection on the collision between fundamental rights and reasonableness and proportionality.

As previously mentioned, the Federal Constitution of 1988 currently guarantees citizens various social and individual rights, with emphasis on Article 5, which guarantees a series of fundamental rights and guarantees listed in 78 sections, dealing with equality between men and women, freedom of expression and free labor, the right to property, the presumption of innocence, among others.

With the Magna Carta, Brazil was finally able to emerge from more than 20 (twenty) years of dictatorship, which is why the Constituent Assembly made an effort to provide for fundamental rights of all kinds in the Magna Carta, removing the possibility of suppressing or diminishing such guarantees from the reach of the ordinary legislator.

This category will deal with the collision of fundamental rights, making considerations about fundamental rights, the conjectures of conflicts between these rights. According to Cardoso (2016, p. 138):

It so happens that, in various everyday situations, the application of fundamental rights can result in a collision or conflict between them, creating a difficulty for the interpreter as to which right should prevail in the specific case. In this context, the theory of German jurist Robert Alexy, based on German jurisprudence, defends the use of the technique of weighting and the principle of proportionality as solutions to the problem of collision between fundamental rights structured as principles, and has been widely incorporated in Brazil by the doctrine and the Judiciary.

Therefore, the principle of proportionality is applied when there is a collision between two or more fundamental rights. In such cases, the principle of proportionality is used to determine which right should prevail.

With regard to the principle of proportionality, Moraes (2022, p. 7-8) states that:

Every principle has a binding force that limits the activities of public authorities to a greater or lesser extent. The principle of proportionality is a controlling instrument for public authorities, insofar as it imposes subjective and objective elements, based on reason, common sense, balance and justice, to assess the legitimacy of state acts, whether in the executive, legislative or judicial spheres.

According to Moraes (2022, p. 8) quoting Alexandre Freitas Câmara (1998. p. 42):

The substantial guarantee of due process of law can be considered as the very principle of the reasonableness of laws. This is because, by ensuring that due process of law is a principle that applies not only to procedure, but is equally important in the context of substantive law, a discussion was opened about the possibility of meritorious examination of acts issued by state agents, reflecting an idea of reasonableness and rationality, a notion of weighing up the means employed by the government and the desired ends, in order to provide an appropriate and less onerous solution for society.

According to Moraes (2016, p.8) proportionality, in the Democratic State of Law, emerges as a pillar of modern constitutional law, functioning as a measure of the legitimacy of acts of public power, avoiding arbitrary and unreasonable measures". In addition, it can be mentioned for a better understanding that the Magna Carta does not expressly include the principle of proportionality, however, it is found implicitly in the Constitution, notably in the combination of other principles, such as the principle of equality and due process of law, having a close connection with the legitimacy of Public Power

According to Cardoso (2016, p. 143) "collisions of fundamental rights in the strict sense are divided into collisions of identical fundamental rights and collisions of different fundamental rights. Collisions of identical fundamental rights can be divided into 4 (four) types".

Cardoso lists the four types below:

a) when the two subjects are affected in relation to the same fundamental right, both being on the same side. Ex: 2 (two) groups ask to demonstrate in the same place and at the same time (right of assembly); b) when the two subjects are affected in relation to the same fundamental right, but while one exercises a liberal right of defense, the other tries to exercise a right of protection. E.g. when a policeman kills a kidnapper to save the hostage (right to life); c) when the positive and negative sides of the same right conflict. E.g. the right to belief (the right to practice a belief or not); d) when the legal side and the factual side of the same right conflict. E.g. free justice (formal/legal equality and material/factual equality) (CARDOSO, 2016, p. 143).

Cardoso points out that the authors Dworkin and Alexy realize "that one of the solutions to the collision between rules is to declare one of them invalid. But he goes further, arguing that it is also possible to introduce an exception clause in a given rule so that the conflict is eliminated". (CARDOSO, 2016, p. 144).

Cardoso, considering Alexy, argues that "the procedure for resolving collisions of principles is weighting", which must be applied based on the principle of proportionality. (CARDOSO, 2016, p. 144).

The author alludes to the studies of Barroso (1999, p. 57) for a better understanding, where in the usual elocution, proportionality is identical to reasonableness. "Even in doctrine and jurisprudence, proportionality is usually treated as a mere synonym for reasonableness. For many, the only difference would be that proportionality is a German construct, while reasonableness is a North American construct." (CARDOSO, 2016, p. 146 CITING BARROSO, 1999, p. 57).

Fundamental Rights and data protection

The rights to privacy and protection of personal data contained in Article 5 of the Federal Constitution in the fundamental rights are guarantees aimed at promoting human dignity and protecting citizens. The right to privacy and the protection of personal data is essential to people's dignified lives, especially in this context of total insertion into digital life.

According to Paiva (2022, p.8):

The insertion of new technologies in the daily activities of citizens has given rise to new social phenomena that have demanded innovations and adaptations from the legal system. Among the countless changes in the legal landscape that have altered the way users have to operate their machines, we highlight the need for disruptive innovations to have access to the personal data of those who use them in order to achieve the precision expected when carrying out their tasks.

This collection of personal data can, in precarious circumstances, cause immeasurable damage to the data subject. According to Paiva (2022, p. 11) quoting Mattos (2013):

The insertion of new technologies, as well as the contributions and challenges that have arisen with the introduction of these tools into the daily life of society, began in the 20th century, albeit in a subtle way, through a Digital Revolution that was characterized by a radical change in the paradigms of the dissemination and exchange of information through technological devices.

Paiva (2022, p. 12) asserts that "this phenomenon of data collection became recurrent at the beginning of the 21st century, a fact that gave rise to numerous theoretical and legal discussions that sought to recognize data as a fundamental right of the human person". The author completed his reasoning by stating that "and, in this vein, also aimed to develop mechanisms capable of protecting this data in situations of risk to individuals".

The author goes on to say that it is imperative to "recognize that personal data is part of the privacy of the human being, and that it is essential to the construction of the personality of each individual and of society as a whole". (PAIVA, 2022, p.15).

This makes it imperative, according to the author, "especially in the Digital Age, to understand what data is from a legal perspective in the context of protecting intimacy, privacy and the attributes of individuals' civil personality". (PAIVA, 2022, p.15).

Paiva states in his studies that:

The protection of personal data - and, specifically in the concrete case addressed in the research, sensitive personal data - is a fundamental right, with space in the CRFB/88, with the status of a perpetual clause and with broad application throughout Brazilian territory. Its normative basis, identified in various legal instruments, exalts the need for and applicability of this right within the legal system, so that the relevance and validity of the protection of personal data in the current Brazilian legal scenario is indisputable. (PAIVA, 2022, p. 58)

According to Sarlet (2020, p. 183):

In the case of Brazil, as already mentioned, the Federal Constitution of 1988 (FC), although it refers, in art. 5, XII, to the secrecy of data communications (in addition to the secrecy of correspondence, telephone and

telegraph communications), does not expressly contemplate a fundamental right to the protection and free disposal of data by its respective holder, and the recognition of such a right is still something relatively recent in the Brazilian legal order.

For a better understanding based on the studies of Danilo Doneda (2006. p. 262):

[If,] on the one hand, privacy is seen as a fundamental right, the personal information itself seems, to a part of the doctrine, to be protected only in relation to its "communication", according to art. 5, XII, which deals with the inviolability of data communication. Such an interpretation carries the risk of suggesting a great permissiveness in relation to the use of personal information. In this sense, a STF decision, reported by Justice Sepúlveda Pertence, expressly recognized that there is no guarantee of inviolability of data stored on computers based on constitutional guarantees...Secrecy, in item XII of art. 5, refers to communication, in the interest of defending privacy.... Obviously what is regulated is communication by correspondence and telegraphy, data communication and telephone... The distinction is decisive: the object protected in the right to inviolability of secrecy is not the data itself, but its restricted communication (freedom of denial). It is the private exchange of information (communication) that cannot be violated by an outsider... The decision has since been constantly referred to as a precedent in judgments in which the STF identifies that the fundamental nature of data protection is restricted to the moment of its communication.

In force since August 2020, the General Data Protection Law, Law 13709/2018. Coming from the European GDPR, it enshrined a right also derived from fundamental rights guaranteed by the Federal Constitution, where the aforementioned standard regulates with specialty the processing of personal data, perceived as collection, transfer, manipulation, disposal by private companies and public bodies.

According to Sarlet (2020, p. 179-180) quoting KÜHLING (2016. p. 49):

The protection of personal data has reached an unprecedented dimension in the so-called technological society, especially since the introduction of computer technology and the widespread digitalization that has already taken on a ubiquitous character and affects all spheres of contemporary social, economic, political and cultural life in the world, a phenomenon commonly referred to as Ubiquituous Computing.

According to Pereira (2022, n.p.):

Constitutional Amendment No. 115 of February 10, 2002, published on February 11, 2002, was approved, amending the Federal Constitution to include the protection of personal data among the fundamental rights and guarantees and to establish the Union's private competence to legislate on the protection and processing of personal data. The amendment amended three articles of the 1988 Constitution. The first was to insert item LXXIX into Article 5, which guarantees the right to protection of personal data, including in digital media, under the terms of the law.

Pereira (2022, n.p.) completes his clarifications by stating that:

Another important change was made to article 21 of the CF/88, to add item XXVI, determining the Union's competence to organize and supervise the protection and processing of personal data, under the terms of the law. And finally, he mentions that Constitutional Amendment 115/22 inserted item XXX into article 22, giving the Union exclusive competence to legislate on the protection and processing of personal data.

Due to its significance, it is essential to mention the scope of the fundamental right to data protection in the Citizen Constitution. In addition, for the purposes of its collocation with legislation, case law and even doctrine on the matter, it must be emphasized that multiple pieces of legislation in force already provide for relevant aspects of data protection, such as: the Access to Information Law (Law No. 12. 5271/2011) and the so-called Marco Civil Internet (Law No. 12.965/2014), as well as the respective decree regulating it (Decree No. 8.771/2016). 527/2011) and the so-called Marco Civil da Internet (Law No. 12,965/2014), as well as the respective decree that regulated it (Decree No. 8,771/2016), but above all the General Data Protection Law (Law No. 13,709 of 2018). (PEREIRA, 2022, n.p.).

IV. Final Considerations

At the end of this study, it becomes clear that society is not watertight, just as laws evolve, change and improve in order to keep up with the historical evolutionary cycle and legally protect citizens' rights.

The growing complexity of social relations and the changes that have arisen have required the provision and protection, in our constitutional order, of a large number of Fundamental Rights. Therefore, the Citizen's Constitution was a milestone in guaranteeing fundamental rights, which are indispensable and which are part of the aura of human rights.

When there is a collision between two or more fundamental rights, the constitutional jurisdiction of freedoms, covered as the constitutional jurisdiction that protects fundamental rights, has its own method for

resolving these situations. In this respect, it is understood that the most appropriate technique for resolving conflicts between fundamental rights is the weighing of interests or goods, devised by German jurisprudence, based on the principle of proportionality.

Finally, in relation to the right to the protection of personal data, including in digital media, from now on it is part of the so-called right of personality, and therefore fundamental rights, after all, the protection of personal data has reached an unprecedented dimension in the so-called technological society.