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THE CONSTITUTIONALITY OF TELEMATIC BREAK OF CONFIDENTIALITY ORDERS, OF AN UNIDENTIFIED SET OF PERSONS, BY GEOLOCATION, IN LIGHT OF RIGHTS TO PRIVACY OF INTIMACY

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INTRODUCTION

Judicial decisions that grant requests for breach of confidentiality of telematic data by means of geolocation, covering a countless number of individuals who simply transited at the time indicated by the authority, have been continuously handed down by the Courts of Rights that seek to elucidate the occurrence of a crime. The issue raised seeks to analyze these judicial decisions in the light of the Federal Constitution, the Civil Rights Framework for the Internet (Law Number 13,709/18).

From the aforementioned laws, it is understood that generic court orders are prohibited by the Constitution and by the rules that regulate the matter of data protection and breach of confidentiality. As a rule, the inviolability of private life, intimacy, data secrecy and the protection of personal data (article 5, X and XII), even if they are not absolute rights, the only possible just cause in criminal proceedings for removal of such guarantees is an indication that the holder of these rights is involved in illicit acts.

What happens in court orders for breach of confidentiality is precisely that: it is a determination that intends to subvert legitimate services from providers, in their various forms, as defined by the Civil Rights Framework for the Internet, to carry out the fishing practice of unsuspecting people. and innocent people for criminal investigation, contrary to constitutional guarantees.

Initially, it appears that the notion of privacy is not recent, however privacy has been widely addressed by the legal system at the end of the 19th century. As presented in the book "From Privacy to Personal Data Protection", by Danilo Doneda (2020 edition) "(...) the protection of privacy identifies and accompanies the consolidation of the theory of personality rights itself and, in its more recent developments, rejects the reading according to which its use in the name of an exacerbated individualism (...). Something paradoxically, the protection of the privacy of the information society (...)".

In addition to the notion of privacy, it was found that in recent decisions, the jurisprudence of STF (Federal Court of Justice) reaffirmed the understanding that the Brazilian legal system prohibits orders of an "exploratory nature". In addition, the premises presented by the STF (Federal Court of Justice) and the extensive jurisprudence are also not rejected by the judgment of STJ (Superior Court of Justice).

The orders questioned here are not strictly restricted to the provision of registration data and IP (Internet Protocol) records, but information on the geolocation of certain individuals, without evidence of involvement in the illicit act; in any case, there is no exemption from demonstrating the real need and relevance of the provider's user data, an intrinsic requirement of the constitutional duty to motivate court orders (article 93, XI, FEDERAL CONSTITUTION/88), in addition to item II of article 22 of Law 12.965/2014.

COLLISION OF FUNDAMENTAL RIGHTS

The collision of fundamental rights occurs when two divergent positions contend to prevail in a single situation. In the context of fundamental rights, there is a recurrent situation in Brazilian law of collision between principles and, according to Canotilho "principles are norms that require the accomplishment of something, in the best possible way, according to the factual and legal possibilities"[1]. In the event of a conflict, what must be sought is an understanding of the concrete situation so that there is the possibility of carrying out a weighting that results in an agreement between the principles.

1 Canotilho, Constitutional Law, Cit., p. 1123.

The constitutional principles can be diverse and the exercise of balance is essential According to Alexy:

> "The first law of balancing, according to which the greater the degree of non-satisfaction of a right or principle, the greater must be the importance of satisfying the conflicting principle. This assessment takes place in three stages. In the first, it seeks to establish the degree of non-satisfaction or detriment to the principle that tends to be relegated in the specific case. In the next moment, the importance of satisfying the principle that tends to prevail is assessed. In the third moment, the importance of satisfying one of the principles is verified, justifies the damage to be carried to the other colliding principle."[2].

Next, the second balancing law presented by Robert Alexy is taken into account "the more intense the interference with a constitutional right, the greater the degree of certainty of the premises that justify it (On Balancing..., Ratio Juris, cit., pp. 446-447)". This judgment of weighting between the goods in confrontation can be made both by the judge, to resolve a dispute, and by the legislator, when determining that, under given conditions of fact, one right will prevail over the other[3]. The collision of rights is the necessary restriction of them in some situations[4]. Professor Virgílio Afonso da Silva presents the present understanding from the theory of inherent limits stating that "fundamental rights are not absolute because they have their limits defined, implicitly or explicitly, by the constitution itself."[5].

In this sense, it is understood that to establish the limit of need for action, it must be observed whether there are plans as efficient as the state measure. In his work, Professor Virgílio Afonso presents three questions that must be adopted in order to carry out the weighting in order to establish the limits of the use of the principles to achieve the objectives pursued: (i) the measure is adequate to promote the objective set? (ii) is the measure necessary? and (iii) the measure is proportional in the strict sense?[6].

RIGHT TO INTIMACY AND PRIVATE LIFE

There are some differences between the expressions "Right to privacy" and "Right to private life", the first protects private life against unauthorized disclosure of something accessed lawfully, while the second would protect the individual against illegitimate invasion[7]. For Tércio Sampaio Ferraz, privacy is always exercised before others, which would be the right to name, image, reputation, forms of coexistence, etc. Intimacy, on the other hand, is in the exclusive scope that someone reserves for themselves, without any social repercussions, in this case would be the intimate diary, the sworn secret, their own convictions, among other aspects[8].

Intimacy and private life are independent expressions that constitute rights. The Brazilian Constitution establishes, in its article 5, item X, the inviolability of intimacy and private life, which gives the individual the right to prevent the intrusion of strangers into private and family life, as well as to prevent access to information about privacy of each.

PUBLIC INTEREST

The public interest as a principle of great

2 Robert Alexy, On balancing and Subsumption. A Structural Comparison, Ratiojúris, v. 16, number 4, p. 436-437, Dec. 2003.
3 Gilmar Mendes, Course of Constitutional Law. cite., p. 320.
4 Virgílio Afonso, Fundamental Rights, Cit., p.
5 Virgílio Afonso, Fundamental Rights, Cit., p.
6 Virgílio Afonso, Fundamental Rights, Cit., p
7 Ibid., p. 26.
8 Tércio Sampaio Ferraz Jr., 1993, p. 442/443.

importance when talking about the collision between fundamental rights and limits of constitutional principles. Often, what can be observed is a collision between a very personal principle, such as the right to privacy and intimacy and the public interest.

What is the boundary between the public and private spheres?

According to Hannah Arendt, intimacy is the limit of the right to information, through the consideration that the intimate life of people is not of public interest.

As it refers to the collectivity, the public interest goes beyond the limited time horizon of the lives of individuals, considered in the singularity [9]. However, the invasion and disrespect for people's privacy and intimacy is not justifiable, precisely because it understands that private life and public life belong to different worlds. [10].

According to Célia Leite Costa, there is a fine line between freedom of information and respect for privacy, so it is almost impossible to establish, a priori, which of the two rights must prevail, indicating the common sense that, in most cases, solutions must be sought in the examination of each specific case[11].

CIVIL RIGHTS FRAMEWORK FOR THE INTERNET; LAW ON TELEPHONE INTERCEPTION AND GENERAL DATA PROTECTION LAW

The study of constitutional law shows that, in order to talk about restrictions of a fundamental right, it is first necessary to understand the scope of protection of this right or, as Canotilho (2000) prefers, its normative scope.[12].

The right to privacy and intimacy provided for in the Constitution (Article 5, X) already emanates a right to the inviolability of the secrecy of communications, even if this did not have an autonomous provision, as stated in Article 5, XII, which expresses "in the cases and in the manner established by law for the purposes of criminal investigation or criminal procedural instruction".

Pursuant to articles 7, VII and 22 of the Civil Rights Framework for the Internet, article 11 of Federal Decree Number 8,771/2016[13], of the Criminal Procedure Code and the General Data Protection Law, there is no legal authorization to determine the breach of confidentiality of personal geolocation data of a range of non-individualized persons, from the mere provision of geographic coordinates, without any imputation of unlawful conduct

9 Lafer, *A reconstrução dos direitos humanos - um diálogo com o pensamento de Hannah Arend*t, 1988, p. 236.

10 Célia Leite Costa, *Intimidade versus Interesse Público,* p. 194-195.

11 Célia Leite Costa, *Intimidade versus Interesse Público,* p. 195.

12 Decree Number 8,771/2016 regulates the admitted cases of discrimination of data packets on the internet and traffic degradation, indicate procedures for data storage and protection by connection and application providers, point out measures of transparency in the request for registration data by the public administration and establish parameters for inspection and investigation of infractions. (Decree 8771/16 | Decree Number 8771, of May 11, 2016).

13 In recent decisions, the jurisprudence of Eg. STF reaffirmed the understanding that the Brazilian legal system prohibits orders of an "exploratory nature". V. DTF, JUSTICE DIARY, May 6, 2020, Inq 4831, Rep. min. Celso de Mello, monocratic decision: "And the reason for observing the existence of a connection with the allegedly criminal events under criminal investigation resides in the fact that our legal system, in addition to supporting the constitutional principle of personal intimacy, repels evidentiary activities that characterize true and harmful "fishing expeditions", that is to say, the Brazilian positive legal system repudiates measures to obtain evidence that translate into illicit merely speculative or random investigations, of an exploratory nature, also known as prospecting measures, simply prohibited by the legal system. Brazilian (...)". And further: "Prior judicial control to authorize the search and seizure is essential in order to verify the existence of just cause, in order to avoid fishing expedition (generic investigations to search for incriminating elements at random, without any prior basis)" (STF, JUSTICE DIARY, July 31, 2020, HC 163.461, Judge-Rapporteur Gilmar Mendes).

to those affected.

The violation of due process of law and the presumption of innocence in the context of the constitutional protection of personal data are defined by article 5, LVII and LIV, FEDERAL CONSTITUTION/88. The pretense of breaking telematic secrecy without identifying specific targets, based on the generic scanning of people's geolocation, distorts the underlying logic of criminal procedural law by determining that evidence be produced about a countless number of people, only to be later determine on whom suspicion rests. This is a fishing expedition, repeatedly prohibited by the jurisprudence of STF (Federal Court of Justice)[14].

The violation of the principle of legality is presented in article 5º, II[15], and 37, *caput*[16], FEDERAL CONSTITUTION/88. The Brazilian legal order does not provide, as an investigative measure, the restriction of the individual prerogatives of citizens without a legal basis or the surreptitious exploitation of internet company platforms to provide information dossiers of undetermined users, based on discriminatory criteria. Even if one could consider the compatibility of such a measure with the Brazilian constitutional order, it would have to be provided for in law, approved by the National Congress after public debate, with the delimitation of safeguards in respect of due process of law.

By imposing the breach of confidentiality of unspecified persons based on geolocation, the order disregards the constitutional and legal requirement of justifying the need for restriction based on minimal evidence of illicit conduct and the need for constructive measure. The maintenance of the republican regime depends on the adequate reasoning of restrictive decisions of law - notably in criminal investigation and, still, in relation to unidentified individuals who do not even boast the condition of suspects.

In relation to decisions to breach the confidentiality of telematic data by geolocation of non-individualized persons, it can be understood that there is a failure to observe the principle of proportionality in all its specific requirements. Therefore, even if generic breaches of confidentiality were allowed by the legislation, what is sought to be understood is that there is great disproportionality.

Generic breach of confidentiality orders are inadequate, as they do not offer any guarantee that they will lead to the perpetrator or perpetrators of the investigated crimes, nor can any accuracy be inferred from the data obtained, due to technical barriers. In addition, orders are unnecessary because, in most cases, there is no demonstration of the exhaustion of other less restrictive and potentially effective means of proof. Finally, the orders are disproportionate in the strict sense, as the determinations accept the collateral damage of breaking the secrecy of innocents, assuming that the extreme measure would be justified by the only eventual possibility of obtaining any clues about suspected effectives.

JUDICIAL DECISIONS ON BREACH OF CONFIDENTIALITY OF TELEMATIC DATA

Specifically, generic orders for breach of secrecy of telematic data by geolocation have already been object of annulment in judgments of several Courts of Justice in writs of mandamus filed with the purpose of rejecting requests for breach of secrecy based on geographic coordinates. Generic breach of confidentiality decisions violate article 5, X and XII, and article 93, IX, of the Federal

14 Canotilho, 2000, p. 1262.

15 Article 5, item II: "No one will be obliged to do or fail to do anything except by virtue of law.

16 Article 37, Caput: "The direct and indirect public administration of any of the Powers of the Union, the States, the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicity and efficiency.

Constitution.

Regarding the right to privacy, with the public interest in making criminal investigations viable and the efficiency of the criminal process, it imposes the requirement that the removal of privacy be contextual, specific and based on just reasons, as are the indications of someone's involvement in crime. It is, therefore, a basic control mechanism against arbitrariness to which judicial decisions on breach of confidentiality must comply. The point was developed in the opinion of the Deputy Attorney General of the Republic Raquel Dodge in the records of RMS 63.239/RN, in order to recognize the unconstitutionality of a generic measure of breach of confidentiality. check yourself:

"The Constitution protects citizens against the tracking of traces of their movements, data, correspondence and opinions by the State. This protection is important to guarantee freedom of thought, expression, opinion and assembly. Without probable cause of the commission of an offense, every individual is protected from personal search by the State. This is what the Constitution guarantees.

The historical root of this protection dates back to the period of the American Revolution and has its origins in a specific fact of great repercussion. British officers under King George searched the home of an individual John Wilkes for his diaries. They wanted to identify him as the author of anonymous pamphlets that criticized the king and fined him the enormous sum of a thousand pounds. They had no clue that he was the author of the pamphlets.

This fact generated the protection of privacy: the principle that residence, correspondence, personal records cannot be accessed by the State, without an obvious reason, without there being a licit and valid cause, defined by law. And only documents that are in direct correspondence with the investigated illicit fact can be accessed. Outside these limits, state action is arbitrary, tyrannical and unconstitutional. It would allow prospecting individuals at random, persecuting critics and dissidents, minorities and discriminated against, inflicting pain and suffering on individuals. The investigation of offenders, with access to their privacy data, is valid and necessary. Prospecting without cause is unconstitutional."[17]

In this vein, the jurisprudence of the Federal Supreme Court has been continuously rejecting orders of breach of secrecy that assume the profile of *fishing expeditions*[18]. Therefore, disregarding the privacy of innocent people as if it were an acceptable collateral damage is not allowed, this time the Supreme Court has already invalidated a series of commands of an indiscriminate nature, such as:

> "**BREACH OF CONFIDENTIALITY CANNOT BE USED AS AN INSTRUMENT OF INDISCRIMINATE DEVASION**, UNDER PENALTY OF OFFENSE TO THE CONSTITUTIONAL GUARANTEE OF INTIMACY. - **The breach of confidentiality cannot** be arbitrarily manipulated by the Government or its agents. **If this were not the case, the breach of secrecy would illegitimately become an instrument of generalized search and indiscriminate investigation of the sphere of people's privacy, which would give the State, in disagreement with the postulates that inform the democratic regime, the absolute power to search, without any privacy of people, which would give the State, in disagreement with the postulates that inform the democratic regime, the absolute power to search, without any limitations, confidential records of others.**

17 STJ (Superior Court of Justice), July 31, 2020, MPF (Federal Public Ministry) Opinion, RMS Number 63.239/RN, page 293-309 (e-STJ). Available in: <https://processo.stj.jus.br/processo/pesquisa/>.

18 Investigative fishing tactics on what will be investigated, as they are generic and lack probable cause (evidence and involvement in criminal activity) against those affected.

(...)

So that the exceptional measure of breach of bank secrecy does not detract from its legitimate purpose, it is essential that the state act that enacts it, in addition to being adequately reasoned, also precisely indicates, among other essential data, the elements of identification of the account holder (notably his/her CPF (social security number) and the time period covered by the order to break confidential records held by a financial institution"[19].

"For a better understanding of the controversy, I highlight excerpts from r. Decisions taken in ordinary instances:

1 - **THE DECISION OF THE COURT THAT REJECTED THE DEFENSE PROCEEDINGS REQUESTS** (pages 62-64): (…)

- regarding the request for breach of confidentiality of the ERBs that cover the regions delimited by the geographic coordinates specified to 951, I reject the request, given that the request contains an indeterminacy of ERB's that will certainly cover users who are not parties to the process, no neglecting that the respective breaches of confidentiality already contained the respective ERB's of the telephone line numbers. (...)

Finally, the request to break the telephone confidentiality of some Radio Base Stations (ERB's) in the period between 08:00h on 07/01/2012 and 24:00h on 07/05/2012, equally, appears unreasonable.

As stated by the single magistrate, in addition to the measure sought to reach an infinity of users without any connection with the process, in the breach of the telephone secrecy of the processed are the respective ERB's referring to the numbers used by them during the day 07/05/2012, date of offense"[20].

"BREAKDOWN OF CONFIDENTIALITY - WHICH IS SUPPORTED ON GENERIC FOUNDATIONS AND THAT DOES NOT INDICATE CONCRETE AND PRECISE FACTS REGARDING THE PERSON UNDER INVESTIGATION - CONSTITUTES AN ACT OF NULLITY. - The breach of secrecy inherent to banking, tax and telephone records, as it represents an exceptional measure, proves to be incompatible with the constitutional order, when based on deliberations emanating from the CPI whose decision-making support is based on generic formulations, devoid of the necessary and specific indication of probable cause, **which qualifies as a legitimating assumption of the rupture, by the State, of the sphere of intimacy to all guaranteed by the Constitution of the Republic"**[21].

"Criminal and Criminal Procedure. 2. Search and seizure in a place other than that defined in the court order. 3. **Authorization of means of investigation at addresses of legal entities, but the act was carried out at the homes of individuals not listed in the list. 4. Illegality that imposes the recognition of the illegality of the evidence. 5. Order granted to declare the illegality** of the probative elements obtained in the search and seizure carried out at the domicile of individuals and their derivatives, pursuant to the judgment"[22].

As it was extracted from the transcribed precedents, the Constitution, following the world standard, deals with the judicial breach of secrecy with the note of exceptionality and, for this very reason, the measure could only be justified by the existence of concrete

19 STF (Federal Court of Justice), JUSTICE DIARY, June 16, 2006, Habeas Corpus: 84758, Minister Rapporteur: Celso de Mello.

20 STF (Federal Court of Justice), JUSTICE DIARY November 25, 2015, RHC 131538, Minister Rapporteur: Cármen Lúcia.

21 STF (Federal Court of Justice), JUSTICE DIARY August 4, 2006, Ministry of Health 25668/DF, Minister Rapporteur: Celso de Mello.

22 STF (Federal Court of Justice), JOURNAL OF JUSTICE of July 31, 2020, Habeas Corpus: 163,461, Minister Rapporteur: Gilmar Mendes.

evidence of illicit activity on the part of the target. delimited, to be demonstrated in a reasoned court decision. This would be the only interpretation compatible with the constitutionalism that is a Democratic State of Law, committed to the protection of freedoms.

Furthermore, the Federal Supreme Court is not limited to the cases of fishing expeditions presented. In a paradigmatic way, in the Regimental Appeal, Inquiry Number 2245-4, which preceded Criminal Action 470 (monthly allowance), which deals with investigations of extremely high gravity and national relevance, the general breach of confidentiality order that determined a bank to that provided a list of customer identification data for a certain type of bank account. The determination was considered invalid by the STF (Federal Court of Justice) precisely because it was known that the claim for a generic listing would reach people not involved in the investigation, without probable cause that they had committed an illicit act. Check out the menu and excerpts from the votes that highlight the point:

> "REGIMENTARY INTERLOCUTORY. SURVEY. BREACH OF BANK SECRETITY. REMITTANCE LIST THAT IDENTIFIES ALL PERSONS WHO MADE USE OF THE NON-RESIDENT ACCOUNT HOLDED BY THE APPELLANT FOR THE PURPOSES OF REMITTING AMOUNTS ABROAD. GENERIC LISTING: IMPOSSIBILITY. POSSIBILITY OF PERSONS DULY IDENTIFIED IN THE SURVEY. INTERLOCUTORY PARTIALLY PROVIDED. 1. Remittance request to the Federal Supreme Court of a list by which all the people who used the non-resident account for the purpose of remittance of values abroad are identified: impossibility. 2. **It is considered illegitimate the breach of banking secrecy of generic listing, with names of people not directly related to the investigations (article 5º, inc. X, of the Constitution of the Republic**). 3. Reservation of the possibility for the Federal Public Ministry to formulate a specific request, regarding identified persons, defining and justifying its claim precisely. 4. Interlocutory appeal partially granted."

Vote of Minister Carmen Lúcia: "the article 5th, Inc. X, of the Constitution of the Republic guarantees everyone the right to privacy, private life, honor and image, with material or moral damages resulting from their violation being indemnifiable. The right to bank secrecy is one of the main constitutional guarantees that make that right to privacy effective.. **In the present case, the breach of bank secrecy that occurs through the delivery of a generic list, in which people not directly related to the investigations carried out in the inquiry can be identified.** If, on the one hand, it is necessary to break bank secrecy as a way of making investigations more efficient, and thus guaranteeing the State minimum conditions to punish those who act against the enacted law, on the other hand, privacy must be guaranteed. and the privacy of those who do not adopt questionable behavior and, therefore, are not investigated, owing nothing, legally, to the State and society.";

Vote of Minister Ricardo Lewandowski: "(...) that I remain faithful and consistent with the vote I cast in Inquiry Number 2,206, in which I rejected - at least at that moment - the opening, breaking of bank secrecy of a plural account - as the eminent Minister Marco Aurélio says -, with hundreds or even thousands of account holders who were not under investigation at all. And this seems to me to be the case, too.

In theory, I am not opposed to the breach of confidentiality, as it is authorized by the Federal Constitution and the laws, but people must be under investigation and the request must also be substantiated. I do not see this justification, in this case, in relation to this large number of people for whom secrecy can be. I think, with all due respect, that it is more prudent for us to uphold the appeal.";

Vote of Minister Cezar Peluso: "It seems

to me that simply denying the appeal to be granted would allow a probe, insofar as the spreadsheet would reveal the names of all the other people who, without having any connection with the facts of which the investigation is concerned or who, at less apparently, they would not have committed any act from which some illicit activity could be inferred, they would have invaded their privacy.

My vote in favor is partial, in the sense of allowing the breach of confidentiality of those people that, in addition to Mr. José Eduardo and the company Dusseldorf Company Ltd, the Attorney General of the Republic discriminates, including relatives whose inclusion will justify, and whose names may have been used for the illegal transit of amounts abroad.";

Vote of Minister Celso de Mello"(...) the breach of bank secrecy will culminate in imposing, in kind, a **indiscriminate rupture of the sphere of financial intimacy of people in relation to whom there is simply no probable cause legitimizing this exceptional act of "disclosure** ".

In this regard, Madam President, I recall the constitutional jurisprudence of this Supreme Court (RTJ 173/805-810 - RTJ 174/844 - RTJ 182/955-956, v.g.), reaffirmed in numerous precedents in which the Federal Supreme Court **warned, regarding this issue, that the breach of confidentiality cannot be used as an instrument of indiscriminate investigation, under penalty of offense to the constitutional guarantee of privacy** "[23]

Technological advancement – and its application in investigations – cannot mean the erosion of rights and the trampling of basic guarantees. In an exemplary manner and in line with several constitutional courts in the world, Eg. STF recently did this by affirming the protection of personal data in ADI nº 389/DF, by the Rapporteur of Minister Rosa Weber, which deals with the sharing of data by companies and telecommunications providers of Commuted Fixed Telephone Service and Personal Mobile Service with the Instituto Brasileiro Foundation of Geography and Statistics, for the purpose of supporting statistical production resulting from the Coronavirus (Covid-19), which deals with Law Number 12.979/2020:

"**PRECAUTIONARY MEASURE IN DIRECT ACTION OF UNCONSTITUTIONALITY. REFERENDUM. PROVISIONAL MEASURE, NUMBER: 954/2020. PUBLIC HEALTH EMERGENCY OF INTERNATIONAL IMPORTANCE ARISING FROM THE NEW CORONA VIRUS (COVID-19). SHARING DATA OF USERS OF THE FIXED SWITCHED TELEPHONE SERVICE AND THE PERSONAL MOBILE SERVICE, BY THE PROVIDING COMPANIES, WITH THE BRAZILIAN INSTITUTE AND GEOGRAPHY AND STATISTICS. FUMUS BONI IURIS. PRICULUM IN MORA. DEFERRAL.**[24]

1. Consequences of personality rights, respect for privacy and informational self-determination were affirmed, in article 2, I and II, of Law Number 13.709/2018 (General Personal Data Protection Law), as specific grounds for the discipline of personal data protection.

2. Insofar as they are related to the identification – effective or potential – of a natural person, the processing and manipulation of personal data must observe the limits outlined by the scope of protection of the constitutional clauses ensuring individual freedom (article 5, caput), privacy and the free development of the personality (article 5, X and XII), under penalty of damage to these rights. The

23 STF, JOURNAL OF JUSTICE 09 Nov. 2007, Inq 2245 AgRg, Rel. Min Joaquim Barbosa, Rep, for judgment Min. Carmen Lucia.

24 STF (Federal Court of Justice), May 7, 2020, REF-MC at ADI 6389, Rapporteur: Minister Rosa Weber, Publication Date: 11/12/2020. Available in: < http://portal.stf.jus.br/processos/detalhe.asp?incidente=5895168>.

sharing, with a public entity, of personal data held by a public service concessionaire must ensure protection and security mechanisms for such data.

(...)

5. By not properly defining how and for what the collected data will be used, MP Number 954/2020 disregards the guarantee of due legal process (article 5, LIV, of the FEDERAL CONSTITUTION), in the substantive dimension, as it does not offer conditions for evaluation as to the suitability and necessity, understood as the compatibility of the treatment with the informed purposes and its limitation to the minimum necessary to achieve its purposes.

(...)

7. The retention of personal data collected by the public entity for thirty days after the decree of the end of the public health emergency situation is excessive, a time clearly exceeding what is strictly necessary for the understanding of its declared purpose.

(...)

10. *Fumus boni* Iuris and periculum in mora demonstrated. Granting of the precautionary measure to suspend the effectiveness of Provisional Measure *nº 954/2020, in* order to prevent irreparable damage to the intimacy and secrecy of the private life of more than a hundred million users of mobile telephony services."

Vote of Minister Rosa Weber (Rapporteur): "(...) Such information related to the identification - effective or potential - of natural persons, constitute personal data and, to this extent, integrate the scope of protection of the constitutional clauses ensuring individual freedom (article 5, caput), privacy and the free development of the personality (article 5, X and XII). Its manipulation and treatment, this way, must observe, under penalty of injury to these rights, the limits outlined by the constitutional protection. (...) In the classic article The Right to Privacy, written in four hands by US Supreme Court Justices Samuel D. Warren and Luis D. Brandeis, it was already recognized that political, social and economic changes incessantly demand recognition of new rights, which is why it is necessary, from time to time, to redefine the exact nature and extent of protection of the individual's privacy. Regardless of its content, changeable with technological and social evolution, however, it remains as a common denominator of privacy that can only give way in the face of consistent and legitimate justification. In his words, "the unwarranted invasion of individual privacy must be reprimanded and, as far as possible, prevented.". (Italics ours)

Vote of Minister Luiz Fux: "(...) therefore, data such as names, telephone numbers and addresses are extremely relevant for personal identification and potentially dangerous when cross-referenced with other information shared by people and entities. (...) Personal data today is extremely important, mainly because the risks of sharing this information between private companies and the government cannot be underestimated, especially when these security and transparency procedures do not exist."

Vote of Minister Ricardo Lewandowski (Vogal): "(...) It is necessary to be clear, therefore, that we are not talking about insignificant information, but about the access key to the data of millions of people, with high value for the execution of public policies, it is true, but also with a probable risk of adopting expedients, sometimes hidden, obscure, which can cause unrest in the individual's daily life. This risk is characterized by the possibility of improper treatment of these individually descriptive elements, or their use by third parties who were not, in principle, the recipients of that information."

Vote of Minister Gilmar Mendes: "(...) although new communication technologies have become a necessary condition for the

> realization of basic rights – as is evident in the field of freedom of expression, political manifestation and religious freedom – it appears that **these same technological advances raise widespread risks of violation of basic fundamental rights, beyond the communicational issue.** (...) The fundamental right to equality – as the core of any constitutional order – is subject to serious risks in the face of technological evolution. The high concentration of data collection, treatment and analysis makes it possible for governments and companies to use algorithms and data analytics tools, which promote discriminatory classifications and stereotypes of social groups to make strategic decisions for social life, such as the allocation of opportunities to access employment, business and other social goods. (...) This is why, far beyond the mere debate on communication secrecy, **this Court must recognize that the legal discipline of the processing and use of information ends up affecting the system of protection of individual guarantees as a whole**." (Italics ours)
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> **Vote of Minister Cármen** Lúcia: "(...) this judgment [has to do] with the very circumstance that the transfer of data, as stated in the Provisional Measure, is not shaped, not restricted to what is necessary to have compatibility with the provisions and requirements of the Constitution. (...) International Human Rights Law has demanded precisely the determination of legally defined limits, legitimizing norms that establish legitimate objectives to be achieved, the adequacy of the means used, the proportionality, the temporality of these means in order to achieve the objective proportionately sought by the means used by the State."

Besides, in a very recent judgment, the Inter-American Court of Human Rights reaffirmed the requirement that any police approach must be based on facts or real, sufficient and concrete information that, in a concatenated manner, allow an objective observer to reasonably infer that the person to be approached was probably the author of some crime. And that's because, in a rule of law, the loss or restriction of the freedom of an innocent person is intolerable, even if carried out in the interest of investigation and reparation of crimes. As is evident, if the need for well-founded suspicion applies to approaches carried out for the purpose of identification in the analogue world, there is no reason why it must not be so in the virtual realm.

> "Personal freedom rights [25], equality before the law and prohibition of discrimination [26], and protection of honor and dignity [27] in relation to the obligations to respect and guarantee the rights [28] and the duty to adopt provisions of internal law [29].

CONCLUSION

As it can be seen, the thesis that must prevail is the unconstitutionality of decisions that generically present the breach of confidentiality of telematic data of an unidentified group of people based solely on geographic coordinates, since the indiscriminate supply of personal data of a -number of people who simply transited in an area that would be affected by the geographical coordinates presented would be incompatible with the constitutional requirements in this matter and with the understanding of most Courts, as seen above.

The generic order of processing of personal data and removal of the right to privacy and data secrecy of an unknown number of people does not fulfill any requirement inherent

25 Article 7 of the American Convention.
26 Article 24 and 1.1 of the American Convention.
27 Article 11 of the American Convention.
28 Article 1.1 of the American Convention.
29 Article 2 of the American Convention.

to the principle of proportionality, as a parameter to assess the validity of restrictions on fundamental rights. In this sense, even if there was a legal basis for this type of measure - which we saw that there is not - the generic orders must obey the three requirements imposed by the principle of proportionality: (i) adequacy - the measure must be able, in theory, to produce the intended objectives; (ii) necessity – inexistence of another less burdensome measure and equally suitable for the production of the result; and (iii) proportionality in the strict sense - the burdens imposed by the measure cannot be more intense than the benefits resulting from its implementation[30].

The claim to break telematic secrecy without identifying specific targets, based on generic scanning of people's geolocation, contrary to existing normative guidelines, is manifestly unconstitutional and illegal. It distorts the underlying logic of Brazilian criminal procedural law and of any democratic rule of law by determining that evidence be produced on a countless number of people, only to later determine on whom suspicion rests. Strictly speaking, it is simply impossible to identify just cause without at least one individual recipient, against whom evidence of the commission of crimes can be imputed. This is the minimum presupposition for considering a legitimate restriction on privacy.

As previously discussed and as recognized by the STF in Topic 1,148, this is a decision with the potential to multiply in numerous other criminal investigations across the country, in the face of internet application providers and companies that process personal data. In an even more specific way, we can understand the importance of dealing with the present matter and, for this reason, apparently and based on what has been demonstrated above with the understandings of the Courts, the Superior Court of Justice and the Federal Supreme Court, what must prevail is the protection of telematic data and the prohibition of decisions that defer the breach of secrecy, in a generic way, of an unidentified group of people based on geographic coordinates.

30 v. Luís Roberto Barroso, Course on contemporary constitutional law – The fundamental concepts and the construction of the new model, 2009, p. 255 et seq. and STF (Federal Court of Justice), JUSTICE DIARY, March 27, 2009, ADI 855, Rapporteur: Octavio Galloti, by judgment of Minister Gilmar Mendes.

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