

**Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur for freedom of expression of the Inter-American Commission on Human Rights**

REFERENCE:  
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3 July 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur for freedom of expression of the Inter-American Commission on Human Rights, pursuant to Human Rights Council resolutions 34/18 and article 41 of the Statute of the Inter-American Commission on Human Rights respectively.

In this context, we would like to draw the attention of your Excellency's Government to information we have received concerning the draft bill on "Freedom, Responsibility and Transparency on the Internet". The purpose of the draft bill, currently debated in the National Congress, is allegedly to combat deliberate disinformation online. In this regard, we wish to express our concern regarding some of its provisions and the restrictions that it could entail for the exercise of freedom of expression on the Internet.

According to the information received, on 1 April 2020, Bill No. 2,630/2020 on "Freedom, Responsibility and Transparency on the Internet" was tabled at the Brazilian Federal Senate. However, since 19 June, several versions and numerous proposals for amendments (152 so far) have been circulating.<sup>1</sup> The bill and its proposed amendments have drawn criticism from a large part of Brazilian civil society and human rights organizations in the region. According to the information available, the draft and subsequent amendments introduced a little over a month ago in the Federal Senate have not permitted sufficient opportunity for debate and discussion with the various stakeholders. A slightly amended version of the bill was presented on June 25, two hours before the remote session began, without time to be considered, and several senators requested that the vote be postponed. On 30 June, and without comprehensive debate, the Senate passed the latest version of the bill, and returned it to the House of Representatives.

The comments made in the present letter are not intended to provide an exhaustive analysis of bill 2.630/2020, but rather to address the provisions that we consider particularly problematic in relation to the principles of the right to freedom of expression, in accordance with Brazil's obligations under the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR).

**Legal framework for the protection of freedom of opinion and expression**

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<sup>1</sup> For an overview, see <https://www25.senado.leg.br/web/atividade/materias/-/materia/141944>.

The International Covenant on Civil and Political Rights (ICCPR) was ratified by Brazil on 24 January 1992. Article 19 (2) of the Covenant states that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". The exercise of this right may be subject to certain restrictions which, according to article 19 (3), must be expressly "provided by law" and "necessary" for "respect of the rights or reputations of others" or "for the protection of national security or of public order, or of public health or morals".

Similarly, the right to freedom of thought and expression is enshrined in article 13 of the American Convention on Human Rights, ratified by Brazil on 7 September 1992. This right includes "the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other media of one's choice". Similarly, Article 13(2) provides that the exercise of this right shall not be subject to prior censorship but shall be subject to subsequent accountability, which shall be "expressly provided by law" and "necessary to ensure (a) respect for the rights or reputations of others or (b) the protection of national security, public order, or public health or morals".

Any limitations to freedom of expression under Article 19(3) of the ICCPR and Article 13(2) of the ACHR must strictly comply with the principles of legality, necessity and proportionality. These requirements are included in both the inter-American and the universal systems of human rights. In relation to the requirement of legality, any limitation must be expressly, exhaustively, precisely, and clearly provided for in a law in the formal and material sense (OEA/Ser.L/V/II IACHR/RELE/INF. 2/09, para. 69). It is not enough that the restrictions be formally approved and by a competent body; they must also be sufficiently clear, accessible and predictable (CCPR/C/GC/34, para. 25), as well as satisfy the usual mechanisms for deliberation (OC 6/86, IACHR). The restrictions must pursue one of the exhaustively enumerated legitimate objectives in accordance with the previously cited articles. Lastly, they must be necessary, that is, the restriction must be more than "useful", "reasonable" or "desirable" (A/HRC/29/32, para. 34). It must be indispensable to the achievement of the legitimate aim, in that it cannot reasonably be achieved by less restrictive means. (OEA/Ser.L/V/II IACHR/RELE/INF. 2/09, para. 85). Moreover, measures restricting freedom of expression must comply with the principle of proportionality, i.e. they must not unduly interfere with other rights of the persons targeted (A/HRC/29/32, para. 35). Such measures "must be adequate to fulfil their protective role [...] and must be proportionate to the interest to be protected" (CCPR/C/GC/34, para. 34). In order to determine the proportionality of the restriction, it must be determined whether the sacrifice of freedom of expression that it entails is excessive or disproportionate to the advantages obtained through it (OEA/Ser.L/V/II IACHR/RELE/INF. 2/09, para. 88). In the digital age, protecting these rights requires exceptional attention.

Considering the standards mentioned above, we are seriously concerned that the bill may contain provisions contrary to article 19 of the International Covenant on Civil and Political Rights and article 13 of the American Convention on Human Rights.

## **Scope of the draft bill and general provisions**

The bill aims to regulate "social networks" and "private messaging services" with more than two million registered users, including those based outside Brazil "provided that they offer services to the Brazilian public or that at least one member of the same economic group has an establishment in Brazil". The broad and general scope of application of the draft bill could give rise to arbitrary limitations on the development and availability of social network and messaging technologies by the authorities responsible for implementing the bill. Moreover, the regulation of foreign social networks and messaging services could potentially lead to arbitrary restrictions on the availability in Brazil of network and messaging tools used by individuals outside Brazil contrary to the presumption that the freedom of expression and information applies without distinction of borders.

Among the general provisions, the standard requires providers of social networks and private messaging services to "take measures to (1) prohibit the operation of inauthentic accounts; (2) prohibit automated accounts not identified as such, understood as those whose automated nature has not been communicated to the application provider and publicly to users [...]". The text then defines that "inauthentic accounts" are those "created or used for the purpose of assuming or simulating the identity of a third party in order to deceive the public, with the exception of the right to use a company name and a pseudonym under this law, such as the explicit humorous or parodying spirit". On the other hand, "automated accounts" would be defined as those "managed predominantly by any software or technology that simulates or substitutes human activities in the distribution of content in private messaging and network service providers".

These standards are problematic for several reasons. They seek to suppress the use of accounts considered inauthentic as well as those automated to distribute information, without regard for whether the distribution of information is of public interest or for legitimate purposes. The Special Rapporteurs have encouraged technology companies to detect and discourage the use of automated accounts for the purpose of distributing deliberately false information or when they are used in a coordinated manner to harass persons exercising their freedoms on the Internet. However, it is a matter of concern that a legal obligation is established, particularly when the standards adopted lack clarity and are fraught with ambiguity. The procedural obligation to take "measures" is in and of itself ambiguous, as is the requirement that accounts be aimed at "deceiving the public". The Rapporteurs express concern that the assessment and implementation of these obligations fall on the "social networks" and "private messaging services", which could lead to mistakes as to which accounts would fall within the scope of the law, in turn increasing the risk that legitimate content would be subject to restrictions. These observations accentuate the importance that the State fully complies with the requirement of legality under human rights law.

Moreover, the generic prohibition of using automated accounts is a disproportionate restriction on the circulation of information. In principle, the publication and distribution of content on social networks using automation tools constitutes a legitimate exercise of the right to freedom of expression by its users. Restrictions are permitted where such tools are used for the purpose of interfering with the rights of third

parties through disinformation or deliberate misrepresentation. They are also permitted where the tools are used to disseminate speech which is not protected by freedom of expression, such as child pornography, or which constitutes a threat of real and imminent harm to persons, propaganda for war, and advocacy of national, racial or religious hatred that incites discrimination, violence or hostility.

### **Mandatory user identification**

The draft bill requires social networking and messaging platforms to identify all users. This entails a requirement of providing a valid identity document. Some versions of the project even require a cell phone number registered in Brazil and, in the case of a foreign cell phone number, a copy of the passport of the user. In line with this provision, social network and private messaging service providers are also required to suspend the accounts of users whose numbers are deactivated by telephone operators.

The measure, if approved, will create several obstacles to the exercise of fundamental rights. On the one hand, it represents a barrier to access social networks and instant messaging services for those who do not have a mobile device registered to them or which do not have a valid identity document, which is a reality that affects millions of people from groups in vulnerable situations in Brazil and other countries globally. These are forms of inequality that are inherent to Brazilian society and have been exposed during the public health crisis created by the COVID19 pandemic.

The imposition of excessive charges for the creation and use of accounts in social networks or messaging services has a direct impact on the right to freedom of expression and access to information for users. It also affects the exercise of other fundamental rights, such as the rights to education, health, as well as access to online goods and services. These restrictions come at a crucial age of digitalization. In this regard, we recall that States must guarantee “access not only to infrastructure, but also to the technology needed for its use and to the largest possible amount of information available on the web; eliminate arbitrary barriers to access to infrastructure, technology and information online; and take positive differentiation measures to allow for the effective enjoyment of this right for individuals or communities who face marginalization or discrimination” (OEA/Ser.L/V/II. Doc. 22/17, para. 35). In the 2011 Joint Declaration on Freedom of Expression and the Internet, the Rapporteurs on Freedom of Expression and Opinion recalled the need to take steps to progressively ensure access to the Internet for everyone.<sup>2</sup>

In addition, the obligation to link an account with an identity document and/or a mobile phone number directly undermines the right to anonymity in the legitimate exercise of freedom of thought and expression. The IACHR's Special Rapporteur has previously noted that anonymous speech is a common practice in modern democracies, since it encourages the participation of individuals in public debate and can avoid unjust reprisals (OAS/Ser.L/V/II.149, Doc. 50, para. 134). It has also made clear that states

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<sup>2</sup> UN, OSCE, OAS and ACHPR, “Joint declaration on freedom of expression and the internet” (2011) available here: <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=848>

"may only exceptionally require authentication or proof of identity from the person expressing it, applying a standard of proportionality" and that the private sector "to commit to the protection of human rights online, [...] should also protect anonymous speech, by not adding requirements on their platforms that the law does not establish" (OEA/Ser.L/V/II IACHR/RELE/INF.17/17, para. 228).

Similarly, the UN Special Rapporteur on the freedom of opinion and expression has warned that "the effectiveness of the real-name requirements as safeguards against online abuse is questionable. Indeed, strict insistence on real names has unmasked bloggers and activists using pseudonyms to protect themselves, exposing them to grave physical danger" (A/HRC/38/35, para. 30).

This does not mean, however, that anonymity is a safeguard for any kind of information. On the contrary, anonymous speech intended to commit crimes is not protected by the right to freedom of expression (OEA /Ser.L/V/II.149, DOC50, para. 135).

### **Limitations on user communications and data storage**

The draft also imposes a number of obligations on private Internet messaging services, including the obligation to limit the number of times the same message can be forwarded, by individuals and in groups, as well as to limit the maximum number of members per group. It also provides that platforms would be obliged to store the chain of message forwards for a period of at least three months, and making subject to be requested by court order.

The requirement to store data from the origin of "bulk" messages (traceability) could constitute an interference with the right to privacy as well as the right to freedom of expression. We understand that this measure is intended to restrict the capacity of action of groups or interests that coordinate the sending of malicious messages. However, the measure entails serious risks to restrict the free circulation of ideas and information of high public interest on the Internet, an action protected by the right to freedom of expression. It could permit monitoring those persons who are part of information exchange chains such as journalists, researchers, political and social leaders and other individuals who share information for legitimate purposes. This data storage requirement may also create an incentive to weaken end-to-end encryption. Encryption of communications provides individuals and groups with an online zone of privacy to hold opinions and exercise freedom of expression without arbitrary or illegal interference and attacks. Furthermore, the relationship and interdependence between the rights to freedom of expression and privacy is manifested through the principle of autonomy. Private conversations of individuals - which belong to their intimate sphere and contribute to their personal development - also enjoy strong legal protection and can only be limited based on the principles of legality, necessity and proportionality. It is crucial to respect the autonomy of individuals to navigate the network, receive and share information of a personal nature without interference from States.

The provision even reverses the burden of proof. The individual must demonstrate that by sharing certain content he or she did not intend to misinform. This gives State and

non-State actors a legal tool to criminalize journalists or opponents for political reasons or in order to generate a chilling effect among those who disseminate information that is intended to be concealed.

The IACHR Special Rapporteurs for Freedom of Expression of the IACHR has addressed the close link between "the violation of the communication privacy [which] has a chilling effect and hampers the full exercise of the right to communication" (OEA/Ser.L/V/II IACHR/RELE/INF.17/17, para. 10). The obligation to store data of those who use Internet applications puts the security of communications at risk and has the potential to compromise the right of journalists to maintain the anonymity of information sources, as well as the consequent loss of protection for informants of alleged corruption or abuse of power.

On encryption and anonymity, the UN Special Rapporteur on the freedom of opinion and expression emphasized that they are "especially useful for the development and sharing of opinions, which often occur through online correspondence such as e-mail, text messaging, and other online interactions. Encryption provides security so that individuals are able "to verify that their communications are received only by their intended recipients, without interference or alteration, and that the communications they receive are equally free from intrusion" (A/HRC/29/32, para. 17).

Of course, we encourage States and companies that operate Internet messaging and social networking platforms to adopt proportionate, non-discriminatory and transparent mechanisms to prevent abuse and the dissemination of deliberate misinformation, including temporary limitations on the sharing of information in pursuance of a legitimate purpose, such as preventing the suppression of voting during elections or the dissemination of deliberate misrepresentation of individuals. We have also recommended the establishment of transparency rules - including legal ones - for the handling of these online decisions.<sup>3</sup>

### **Content moderation and responsibility of internet service providers**

The draft bill and its proposed amendments would establish an obligation of content removal for social network providers, which should be immediate in the case of content related to certain crimes. In other cases, removal should be preceded by the opening of a moderation procedure that respects the right to defense.

Although we find positive the incorporation of guarantees of due internal process in the moderation carried out by private companies, such as the duty to notify users when their content is being analyzed, we highlight that it proposes a vague and ambiguous

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<sup>3</sup> In 2019, the IACHR Special Rapporteurship on the freedom of expression adopted the "Guide to guarantee freedom of expression regarding deliberate disinformation in electoral contexts", in which a series of criteria and recommendations were included for States and non-State actors, including telecommunication companies, intermediaries and media. The purpose of the guide is to facilitate combating disinformation without running contrary to international human rights law. The guide is available here: [https://www.oas.org/en/iachr/expression/publications/Guia\\_Desinformacion\\_VF%20ENG.pdf](https://www.oas.org/en/iachr/expression/publications/Guia_Desinformacion_VF%20ENG.pdf)

obligation for the removal of content which may lead to greater private censorship on the Internet.

In this sense, we consider that the text under analysis is a clear step backwards from the Brazilian Civil Framework for the Internet approved in 2014, which enshrined freedom of expression and protection of privacy as fundamental regulatory principles and which provided guarantees to safeguard these rights. The UN and OAS rapporteurs, as well as other human rights bodies, have on several occasions stressed that Law 12.965/2014 (known as the "Civil Internet Framework") should limit the liability of intermediaries to situations where they fail to comply with a court order.

Article 19 of the law provides that "with the intention of guaranteeing freedom of expression and preventing censorship, the Internet application provider may only be held civilly liable for damages resulting from content generated by third parties if, following a specific court order, it does not take measures to make the content indicated as being in violation unavailable, within the scope and technical limits of its service and within the specified time period, unless there are legal provisions to the contrary".

Intermediaries "are still private entities with financial, social, and individual interests that differ from those of the State. Requiring them to function as a court that balances the rights of its users goes beyond the scope of their competence and may lead to and provide incentives for abuses, to the detriment of freedom of expression and access to information" (OAS/Ser.L/V/II IACHR/RELE/INF.17/17, para. 112).

In the 2017 Joint Declaration on "Freedom of Expression, Fake News, Disinformation and Propaganda," we noted that "intermediaries should not be legally responsible in any case for third-party content related to such services, unless they specifically intervene in such content or refuse to abide by an order issued in accordance with due process guarantees by an independent, impartial and authorized oversight body (such as a court) ordering the removal of such content, and have sufficient technical capacity to do so."<sup>4</sup>

Likewise, the latest version of the draft bill incorporates the obligation for Internet service providers to pay journalistic companies, professionals of journalism in general, authors of literary and musical works "for the use of their contents". This rule, similar to a provision in the European Copyright Directive, could encourage active monitoring and content filtering, instead of promoting fair deals for the use of journalistic and artistic content.

Finally, the text provides for the following specific sanctions for social network and interpersonal communication providers to be applied by the Judiciary: (1) a warning, indicating the deadline for taking corrective measures; (2) a fine of up to 10% of the economic group's income in Brazil in its last fiscal year.

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<sup>4</sup> UN, OSCE, OAS and ACHPR, "Joint declaration on the Freedom of expression and "fake news", disinformation and propaganda" (2017), available here: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=1056&IID=1>

In relation to sanctions, it is crucial that States adopt proportionate measures to favor and encourage the circulation of information, considering the least restrictive means to address disinformation, such as the promotion of independent mechanisms of verification of facts, support for independent and pluralistic media, obligations of active digital transparency for State agencies, and positive measures of digital literacy of the population, among others.

Regarding the role of these types of Internet service providers, the IACHR Special Rapporteur for freedom of expression has stated that "intermediaries do not have—and are not required to have—the operational/technical capacity to review content for which they are not responsible. Nor do they have—and nor are they required to have—the legal knowledge necessary to identify the cases in which specific content could effectively produce an unlawful harm that must be prevented" (OEA/Ser.L/V.II DOC50, para. 99).

The draft departs from the protection offered by international law to intermediaries in the free flow of information on the Internet and constitutes, in that sense, a step backwards for the hemisphere. By making intermediaries responsible for the content that third parties share on their platforms, it is inevitable that incentives will be created that run counter to the free flow of information or that there will be higher levels of censorship for fear of punishment.

By regulating with the most limited and highly concentrated model, the project risks strengthening those actors, limiting the creativity that has always operated as an engine of change on the Internet, and preventing -even unintentionally- the emergence of new products and applications. The Internet is a wider, more pluralistic and diverse world than the large intermediary platforms.

### **Platform transparency obligations**

The Special Rapporteurs welcome the inclusion in the latest version of the draft law of transparency obligations for Internet service providers with regard to advertising, including election advertising or content that mentions a candidate, coalition or party. These provisions promote accountability to users, researchers and state authorities.

The IACHR Special Rapporteur for freedom of expression recently emphasized the need for States to review the legal frameworks that regulate electoral processes and to strengthen those related to transparency in electoral advertising. This entails including obligations for political parties to be “transparent and report on the expenditure that is invested in sites and platforms that operate online, entities involved in digital campaigns, data sources (such as data brokers), advertising agencies, and providers of digital tools.”<sup>5</sup>

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<sup>5</sup> IACHR Special Rapporteurship for the freedom of expression “Guide to guarantee the freedom of expression in the face of deliberate disinformation in electoral contexts”, OEA/Ser.D/XV.22 (2019) [https://www.oas.org/es/cidh/expresion/publicaciones/Guia\\_Desinformacion\\_VF.pdf](https://www.oas.org/es/cidh/expresion/publicaciones/Guia_Desinformacion_VF.pdf)



As the IACHR Special Rapporteur emphasized in its "Guide to Guaranteeing Freedom of Expression in Electoral Contexts" requested by the OAS General Assembly, there seems to be a consensus that the deliberate dissemination of false information impoverishes public debate and constitutes an obstacle to participation in democratic decision-making.<sup>6</sup> While we recognize the legitimate concern of States in taking measures to address the phenomenon of misinformation, it is important that these measures be proportionate, in line with international standards and the functioning of the democratic system.

### **Final considerations**

Lastly, we would like to express our concern about the opacity of the treatment of this initiative within the legislature. The draft bill has been the object of hasty discussion, without clear programming, and is being developed in the context of the COVID-19 emergency, providing little or no space for the participation of civil society organizations, academia and experts on the subject.

This situation is worrying due to the importance of the Brazilian Civil Internet Framework, considering the delicate regulatory aspects it addresses and the setbacks it could mean for one of the laws that best protects freedom of expression on the Internet, a condition for the effective exercise of human rights.

In this regard, we express our concern about the persistence of the draft bill, which ignores international standards, favors a restricted digital environment and affects the right to maintain a space of privacy to exercise fundamental freedoms, as well as the right to political participation.

We insist on the importance of understanding the decentralized, open and neutral nature of the Internet and reiterate that any regulation that impacts on its functioning must be the result of dialogue and must guarantee the participation of the different actors involved, maintaining the basic characteristics and enhancing its democratizing capacity and promoting universal access without discrimination.

We reiterate the importance that Internet regulations comply with the principle of network neutrality, recognized by the IACHR Special Rapporteur as a necessary condition for exercising freedom of expression on the Internet pursuant to the terms of article 13 of the American Convention" which seeks to "ensure that free access and user choice to use, send, receive or offer any lawful content, application or service through the Internet is not subject to conditions, or directed or restricted, such as blocking, filtering or interference" (OEA/Ser.L/V/II. Doc. 22/17, para. 11).

In light of these observations, we urge your Excellency's Government to review the draft law under consideration in this communication, to open a public space for discussion of its content with civil society, actors and experts in the field, and to allocate

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<sup>6</sup> UN, OAS, OSCE, and ACHPR, "Joint declaration on Freedom of expression...", op.cit. note 4.

additional time for legislative and public consideration to ensure that it is in line with the international human rights law standards described herein.

The Rapporteurs remain available to provide technical assistance with respect to the issues addressed in this communication, if deemed necessary and requested by the State of Brazil.

As it is our responsibility, under the mandates provided to us by the Human Rights Council and the Inter-American Commission, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comments you may have on the observations included in the present letter.
2. Please provide information on the steps being taken by Parliament to ensure that the draft bill is compatible with Brazil's obligations under international human rights law.
3. Please provide information on the status of the legislative debate, and the possibility that this note will be incorporated into the discussion of the draft law on disinformation.
4. Please provide information on the steps taken to ensure the participation of civil society, academia and experts in the field, in a public, transparent and diverse manner, in this legislative discussion which will have an impact on all citizens.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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