

Mandate of the Special Rapporteur on the right to privacy

REFERENCE:
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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolution 37/2.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the draft bill on "Freedom, Responsibility and Transparency on the Internet (No. 2,630/2020)", the purpose of which is said to combat deliberate disinformation online, currently being debated in the National Congress. In this regard, I express my concern regarding some provisions and the infringements it could entail for the right to privacy of Brazilian citizens and other users of the Internet both inside and outside the country, including those with whom they communicate.

I am aware that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on Freedom of Expression of the Inter-American Commission on Human Rights have raised with your Excellency's Government concerns relating to possible restrictions on the right to freedom of expression on the internet. (BRA 6/2020). Thus, in keeping with the mandate conferred upon me by the Human Rights Council, I will hereby address issues for the fundamental human right to privacy posed by the "Freedom, Responsibility and Transparency on the Internet" Bill.

I understand that on 1 April 2020, the Bill "Freedom, Responsibility and Transparency on the Internet" entered the Brazilian Federal Senate. Since 19 June, several versions and numerous proposals for amendments (152 so date) have been circulating, which have drawn criticism from a large part of Brazilian civil society and human rights organizations in the region. According to the information available, these bills were introduced a little over a month ago in the Federal Senate with insufficient opportunity for debate and discussion with the various stakeholders. The latest version of the bill was presented on 25 June, two hours before the remote session began, without time to be considered, and several senators requested that the vote be postponed.

My comments are not intended to provide an exhaustive analysis of the Bill, but rather to address the provisions considered particularly problematic in relation to the right to privacy, 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 the right to privacy

The right to privacy is enshrined in article 12 of the Universal Declaration of Human Rights and article 17 of the ICCPR, which state that no one should be subjected to “arbitrary or unlawful interference with his privacy, family, home or correspondence”. Further, UN resolution A/HRC/RES/34/7 recognises “that the right to privacy can enable the enjoyment of other rights and the free development of an individual’s personality and identity, and an individual’s ability to participate in political, economic, social and cultural life, and noting with concern that violations or abuses of the right to privacy might affect the enjoyment of other human rights, including the right to freedom of expression and to hold opinions without interference”.

The International Covenant on Civil and Political Rights (ICCPR) was ratified by Brazil on 24 January 1992. The human rights it enunciates are universal, interdependent and indivisible.

The right to privacy at Article 11 is enshrined also in the American Convention on Human Rights, ratified by Brazil on 7 September 1992 and establishes that “No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation”, and at Article 11(3) “Everyone has the right to the protection of the law against such interference or attacks.”

Any constraints upon the right to privacy under Article 17 of the ICCPR 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 and 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).

Measures restricting enjoyment of the right to privacy 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 the digital age, protecting these rights requires exceptional attention.

While acknowledging the challenging issues Bill No. 2,630/2020 on "Freedom, Responsibility and Transparency on the Internet" seeks to address, I am seriously

concerned that the Bill may contain provisions contrary to the nature of human rights and to article 12 of the International Covenant on Civil and Political Rights and article 11 of the American Convention on Human Rights.

Scope of the draft bill and general provisions

The bill states that it is aimed at regulating "social networks" and "private messaging services" with more than two million registered users, including those based abroad "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". As social networks and services with less than two million registered users do not operate under the regime proposed by this Bill (article 1), the proposed legislation establishes differing guarantees of, and access to the right to privacy for Brazilian citizens, and other users. The undermining of the universality of fundamental human rights, alongside the potential encroachment upon the enjoyment of the right to privacy raised by the Bill, indicates the need for consultation and more considered amendment to ensure the Bill's aims are achieved to the extent permissible under international human rights law.

The breadth of scope of the Bill's provisions raise concerns as to their arbitrary use by the authorities responsible for applying them in a manner that reduces civil liberties and democratic principles by the monitoring and surveillance of the social media users.

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".

I concur with other views expressed that these standards lack clarity and are fraught with ambiguity. The risk of arbitrary or abusive interference increases with the vague language adopted by the law. This accentuates the importance that the State fully complies with the requirement of legality.

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.

This measure constitutes a very generic and open-ended requirement to trigger the obligation to collect user personal data. If approved, it 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 who do not have a valid identity document, a reality that affects millions of people from groups in vulnerable situations in Brazil and other countries globally. These are some of the forms of inequality that have been further exposed and sometimes exacerbated 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 privacy as well as 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 addition, the obligation to associate an account with an identity document and/or a mobile phone number directly undermines the right to remain anonymous in the legitimate exercise of the enjoyment of the right to privacy, personality and dignity, as well as freedom of thought and expression. I have recommended such protection for those vulnerable to discrimination and violence on the basis of their gender, sex characteristics and sexual orientation (A/HRC/43/52).

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 obligation to store data from the origin (traceability) of "bulk" messages could infringe the right to privacy and the protection of personal information. While this measure is understood to be intended to restrict the capacity for action of groups or interests that coordinate the sending of malicious messages, it raises questions concerning proportionality, adequacy of existing oversight mechanisms within Brazil as well as the

consistency between the data protection provisions of Brazil's incoming data protection law and this Bill. It is understood, for example, the General Data Protection Act provides for the right to deletion of personal data at any time. In this context, I draw to your attention the recommendations of the Special Rapporteur on the right to privacy to the General Assembly on personal data and its use (A/73/45/12).

It is possible 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. 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.

On encryption and anonymity, I commend statements by members of the Government regarding the maintenance of encryption. I have recommended to States Parties the need for States to provide comprehensive protection for secure digital communications by promoting strong encryption and anonymity-enhancing tools, products and services (A/HRC/43/52 paras 28(b), 45(k), 52(a)(b); 2018 A/73/45712, para 117(d)). I very strongly recommend the Government of Brazil to implement the above as minimum standards within the country and therefore drop any proposals that would run counter to them.

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, in some cases immediately and, in others, possible removal following a moderation procedure that respects the right to defence.

I see the duty to notify users when their content is being analyzed as a positive aspect but remain concerned about the possibility of infringements of privacy that this raises. The Brazilian Civil Framework for the Internet approved in 2014 enshrines protection of privacy as fundamental regulatory principle and provides guarantees to safeguard this right.

Lastly, I am concerned by reports that civil society, independent experts and other interested parties have had little or no opportunity to raise questions and provide feedback on proposals. It is important that the current rushed approach is tempered, with due consultation to assess the human rights impacts of the Bill, and consider alternate means to achieve the objectives sought. The current process and provisions is not aligned to international standards, and affects the right to maintain a zone of privacy to exercise fundamental freedoms.

I join the call from other Special Rapporteurs (see BRA 6/2020) in urging your Excellency's Government to review the draft law, to open a public space for discussion of its content with civil society, actors and experts in the field, and to allocate additional time for legislative and public consideration to ensure that it is in line with the international human rights law standards.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned information.
2. Please provide any human rights impact assessment that has been undertaken on the provisions of the draft Bill.
3. 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.
4. 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.
5. Please provide information about further safeguards including the creation of an independent authority which would be responsible for the oversight of surveillance including bulk processing of personal data.
6. 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 my highest consideration. I 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.

Joseph Cannataci
Special Rapporteur on the right to privacy