RESPONSIBILITY FOR THE CONTENT OF MESSAGES POSTED ON THE INTERNET

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1. Presentation

The so-called law of new technologies today is a theme of extreme importance to compared constitutional law.

With each new invention or discovery, human kind faces the need to establish ethical controls to regulate the use of the new resources. These controls must be proportional to the consequences of the new technology.

Greater facility to violate intimacy is one of the most drastic effects of the technological revolution, because of the difficulty of sufficiently and prudently controlling the new communications mechanisms so as to assure welfare and security.

The Internet traces its roots to the Advanced Research Project Agency Network, or Aparnet, a project of the U.S. Department of Defense whose aim was to assure communications among American scientists and the military even in case of a nuclear attack.

Today, technological advance is closely connected to the means of acquiring power through domination of information in societies.

In response to this trend, the field of technology assessment has emerged, involving critical analysis of the consequences of technological progress, to detect the possible risks posed by these advances to the maintenance of rights proclaimed as fundamental.

Technology assessment has influenced some currents of Anglo-Saxon social theory, with respect to the danger of virtual contamination of public freedoms, the so-called liberties pollution, in the universe of technologically advanced societies.

The current stage of technological development makes it hard to prevent incursions into people's intimate lives, due to the existence of ever more sophisticated and effective instruments to overcome attempts to defend against *collective curiosity*.

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2. The importance of Brazil's Internet Civil Framework Act

In Brazil, the growing feeling that the free and democratic use of the Internet, whose commercial use was well established for nearly two decades, was under threat by government entities and/or ill-intentioned commercial practices, led to the enactment of Law 12.965 in 2014, better known as the Internet Civil Framework Act.

The stated objective of lawmakers was to assure respect for fundamental rights through a law, rather than relying on the resolutions of regulatory agencies. This was seen as important in particular because market practices were jeopardizing users' right to privacy. Among these practices was the use of personal information gleaned from navigation of users by service providers to generate revenue beyond the fees paid for connection, by selling data to specialized marketing firms. Stated bluntly, the private information of citizens has become a resource with huge market value.

The Civil Framework Act seeks to forbid the invasion of the privacy of users, by assuring the secrecy of navigation data, It also protects the fundamental rights of intimacy of Brazilian citizens in cases of data gathered in Brazil but stored abroad.

Despite the contrary argument, common among multinationals, that foreign law must be applied in case of disputes involving data stored abroad, the Civil Framework Act allows Brazilians to use national courts as long as the service provider offers service to the Brazilian public or at least one member of its business group has an establishment Brazil.

On balance, it can be said that the Act was an important advance in the Herculean task of assuring the SECURITY of the data of Internet users in Brazil.

The analysis of the Internet Civil Framework demonstrates it is supported by an inseparable tripod of the principle of neutrality, the right to privacy and the right to freedom of expression.

The principle of neutrality, a matter that is subject to the greatest controversies and resistances, notably because it protects the interests of the majority of the population, prevents the service provider from giving privileged access to determined sites, causing them to be downloaded more quickly or with preference over others.

This principle is polemic because many companies allege they should have the right to sell packages with better performance or more advantages at higher prices. However, this model runs counter to process of broad social inclusion in the country, because people with smaller income naturally contract less expensive packages, and without neutrality these packages would not give access some applications, such as access to videos and social networks. The Civil Framework Act forbids data packets from suffering discrimination due to the origin, destination or content.

The penultimate version of the bill that led to the law required the establishment of data centers in Brazil. This was largely in response to the revelations of spying in other countries. However, for this to occur, the Brazilian government would need to provide

better market conditions, in terms of lower taxes and electricity rates, for data centers to locate in Brazil. In any event, this subject generated a concession to enable the law to be approved. The final text, negotiated between the rapporteur in the Chamber of Deputies, Federal Deputy Alessandro Molon, and the allied base supporting the bill, did not contain this determination. However, the law does require international companies like Google and Facebook to respect Brazilian law related to network transmissions.

The principle of neutrality also prevents that Internet access be fragmented. Providers would like to charge separately for each type of services offered/accessed, so that users could, for example, opt only for access to e-mails. But that proposal would leave a gap for digital exclusion. Telecommunications firms cannot give preferential treatment to determined groups.

The final text of the alw assures users of the right to contract different packages (speed, volume of data, etc.), but only if the user can access any type of application regardless of the velocity. This is a provision that assures the rights of consumers to digital inclusion in Brazil.

But without doubt, strengthening to right of privacy of Internet users was the most important point envisioned for the Civil Framework Act, as stated in the report on the bill that led to the law, written by its rapporteur. The Act specifies that personal communications and data of users stored in Brazil are inviolable except by court order. Thus, the secrecy of users' communications is now stronger under the law. The Act is an advance in guaranteeing preservation of the intimacy, private life and honor of users. For example, users have the right to opt out regarding supply of their online navigation data to third parties. Therefore, personal data such as name, address and telephone number may not be supplied to third parties by the service provider without the user's permission, except in case of a judicial order. The Act also specifies that the personal data of users must be definitively erased when so requested, such as when they decide to end a profile in a social network.

The Act requires service providers to supply clear information to users about the treatment that will be given to personal data, at the moment of contracting the service, and states that contracts that fail to respect the basic tenets of privacy will be null, besides establishing that Brazilian law shall apply to disputes regarding data disclosure even if the data are stored outside Brazil.

After approval of the Civil Framework, hopes among privacy proponents were high over approval by Congress of a Personal Data Law, affording broader protection, also including consumer relations beyond the Internet. The bill would create a regulatory agency to oversee the compliance with privacy rules. Unfortunately, this bill has not yet been approved.

The Civil Framework incudes an article on vengeance pornography, a type of online offense where a former sexual partner publishes images of sex with the victim without authorization. Unfortunately, this is very common in Brazil, and there is no specific rule on this behavior in criminal law, so that victims largely have to rely on civil

remedies.

This disposition is included in Article 21 (amended in relation to the original bill), according to which providers are residually liable for disclosure, without authorization of the participants, of images, videos or other materials containing scenes of nudity or sex acts of private character, when after receiving notification from the participant or legal representative thereof, they fail to diligently block the content within the ambit and technical limits of their service. However, to the chagrin of female lawmakers, the final text changed the term *offended party* to *participant*.

Therefore, access providers do not have primary (or joint and several) civil liability for damages caused by the content generated by their users. However, the Civil Framework states that the provider will be liable if after receiving a court order to remove material it fails to do so. The companies must also contact the user responsible for posting the material to explain the reasons for removal.

The Civil Framework, in regulating the removal of content from the Internet, transferred this responsibility to the judiciary, depriving service providers of discretionary power to do this at their own behest. Before passage of the Act, because of the absence of rules, providers were able to decide on removal or not of content.

Despite the Act, service providers continue to reveal secret and intimate information about their users. The cold calculation is that profit outweighs the ethical principles that should guide all activity.

Therefore, it is essential for political debate, prodded by public opinion (including through public hearings), to reach a collective construct to protect citizens against the constant technological aggressions to their intimacy, especially the massive use of informatics for this purpose.

The computer has unquestionably become a wonderful tool to manipulate huge databases. Today it is possible to learn all the transactions related to the life of a citizen, previously protected by the simple fact of being *hidden* in the crowd, *sheltered* by anonymity. To a certain extent, this represents a return to pre-industrial society, in which most people lived in small rural communities where privacy basically did not exist.

A particularly sticky issue triggered by the advance of information technology involves the guarantee of freedom of expression. While on the one hand, people now have the means to express themselves to global audiences at the mere click of a mouse, on the other hand the Internet Framework Act establishes that anyone can notify the provider to demand removal of content that is inaccurate or denigrating, or face the possibility of a civil suit. This puts the provider in the position of having to weigh the right of freedom of expression against the right to privacy. To be on the safe side, the company hosting the site, blog or social network often practices a type of *private censorship*, fearing a possible lawsuit. However, the provider can only be held civilly liable for content posted by third parties if it disobeys a court order to remove the comment in question.

3. The constitutional topography of the theme in Brazilian law

In the ambit of Brazilian constitutional law, it is necessary to assure effectiveness of the existing rules on fundamental rights and freedoms. In the specific case of privacy, it is necessary to conciliate the right to free circulation of information in society with the need to protect individual values, rights and liberties. In the structural field, the objective should be to establish limits on the storage of personal data, as well as legal guarantees to enable individuals to defend themselves against public and private automated databases.

Besides this, it is necessary to allow people the right of access to their personal information, with the possibility of deleting or correcting information that is erroneous or was gathered improperly. The corollary to this is the right of individuals to sue for compensation in case of transgression of their rights.

With a few exceptions, in countries where privacy is controlled by law, besides the requirement for public registration of databases about individuals, five fundamental rights of individuals are recognized regarding informatics: the right to privacy, consisting of the limitation on the use of information only for specific purposes and with authorization; the right to confidentiality, seeking to deter illegitimate access to information about third parties; the right of access to people's own information, to allow them to identify and correct errors; the associated right to correct and possibly delete inexact information, since such information has no legitimate use; and the right to a time limit on potentially damaging information, considering the lapse of time and need not to perpetuate mistakes.

With the Constitution of 1988, Brazil enshrined the inviolability of the secrecy of data, listed among the fundamental guarantees of Article 5 (in numeral XII). Likewise, it included the right to privacy as one of the fundamental rights (numeral X).

Before the Constitution of 1988, there was no legal provision regarding the inviolability of the right to privacy. This inclusion was certainly prompted to some extent by the development of informatics. However, this inviolable right does not cover the data themselves, only their communication (freedom of denial).

On the other hand, the right of access to information is assured in two items of Article 5 of the Constitution: numeral XIV – *all persons are assured of access to information and protection of the secrecy of the source, when necessary for the exercise of a profession; and numeral XXXIII – all persons have the right to receive from public entities information of private interest to such persons, or of collective or general interest, which shall be provided within the period established by law, under pain of liability, except for the information whose secrecy is essential to the security of society and of the State.*

The right of access to information is given teeth in the Constitution in Article 5, numeral LXXII, regarding the right to sue public authorities to obtain a writ of habeas data. However, this only applies to data in possession of the government, so it does not

resolve the question of private databases.

In the final analysis, then, with the promulgation of the Constitution of 1988 and the enactment of Law 12.965 in 2014, the use of the Internet in Brazil is specifically regulated, based on principles, guarantees, rights and duties for those who use the web, along with guidelines for the actions of the government. Brazilians are assured of several rights that are internationally acclaimed, such as: the right to privacy (through combination of Article 5, numerals X and XII, of the Constitution), the right of access to personal information (Article 5, numerals XIV, XXXIII and especially LXXII), the right of correction and possible exclusion of imprecise information (Article 5, LXXII, "b"), the right of confidentiality (protected indirectly by Article 5, X), and the right of lapse of potentially damaging information (right to be forgotten).

4. Conclusion

Without doubt, the main conquest of Brazilian citizens regarding the right to information access came with the establishment of habeas data (Article 5, LXXII). Unfortunately, this constitutional guarantee is largely ineffective for lack of follow-on enabling legislation.

In the final analysis, informatics, like any technology, can be used for honorable or dishonorable purposes, according to the intentions of the user. In this sense, it is worthwhile recalling the slogan of the National Rifle Association:

"*Guns don't kill people, people kill people*."

In the same way, the computer, in honorable hands, is a hugely beneficial instrument to mankind. But in unscrupulous hands, it can become an instrument of destruction.

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