Instituto de Tecnologia & Sociedade do Rio

Technical Note on Congressional Bills No. 2927/2020 (Chamber of Deputies) and Bill No. 2630/2020 (Federal Senate)

The Institute for Technology and Society of Rio de Janeiro (ITS) hereby presents the following Technical Note on relevant topics regarding Congressional Bills No. 2927/2020 (formerly 1429/2020), presented by congressman Felipe Rigoni and by congresswoman Tábata Amaral, and nº 2630/2020 (formerly 1358/2020), presented by Senator Alessandro Viera, both with the same wording and which institutes the “Brazilian Law of Freedom, Responsibility and Transparency on the Internet”.

The Note is divided into three parts. In the first, we summarize below our main comments about the text. In separate documents we will also present reviews and questions about the wording itself of the text of the draft laws. In the third, we present a suggestion for a Draft Law that seems to us to better meet the objectives set out here to combat disinformation.

1. Opaque and rushed approval process: There is an important process issue that needs to be observed. The Draft bill is scheduled to be voted in the Senate on June 6. Such an ambitious text that deals with a vital issue for Brazilian democracy should not be voted in a hurry and without due public consultation. Brazil is known internationally for opening the process of creating the Marco Civil da Internet (Brazilian Internet Bill of Rights) to all interested parties, inaugurating in 2009 a new way of building laws and public policies on the network. To approve the current text in a hurry and in the state it is in - full of wording errors and conceptual inaccuracies - would send a very negative message about how Congress sees society's participation in the legislative process.

The hasty vote of the Senate still calls into question the legitimacy of the consultation on the text opened on the Chamber of Deputies website (on the first version of the Draft Law). Voting in one Legislative House while consulting on an outdated version of the text occurs in another, reinforces the image that public consultation is of little relevance.

2. The text freezes the technology in its current state and will expire quickly. In general, the projects are not technologically neutral. That is, the text of the projects reflects the current technology, the Internet and the applications that we now use in 2020. It is easy to read the articles and understand that “this article is for WhatsApp”, “this one has an eye on Twitter” and so on. A law is made to last, so that its wording can keep up with the development of technology.

Attaching the wording of the law to the way applications exist today is the recipe for failure of the law application. Furthermore, by portraying in the law exactly how certain apps work, the law obliges all other competitors to follow the chosen app model. This has a strong impact on innovation and competition. That is, if the chosen one was WhastApp, the law now obliges all instant messaging apps to be like WhatsApp.

Example: “Art. 13. Application providers that provide private messaging services will develop usage policies that limit the number of forwardings of the same message to a maximum of 5

(five) users or groups, as well as the maximum number of members of each group of users to maximum of 256 (two hundred and fifty-six) members. ”

It is asked what would be the scientific rationale to compel - in text of law - all messaging applications in operation in Brazil to have a maximum number of 256 members per message group? Instead of proposing a text that could be comprehensive and follow the development of technology, the projects freeze the development of apps as they are in 2020.

3. The text turns Brazil into an island, creating rules for applications to work here that don't exist elsewhere in the world. The Internet tends to ignore boundaries and that is why an application launched in a virtual store or available for download is - in principle - available worldwide. By creating numerous rules for the functioning of social networks and messaging applications in the country, the Draft Bills of law will create one of the two possible scenarios: or their compliance will be selective, with the platforms ignoring the difficult compliance devices and which are not paralleled by other countries (ie , the law “will not catch”); or it will serve as an instrument for the authorities to put pressure on applications to comply with the demands of the law, removing from the country some new features launched abroad or even preventing its operation here. Brazilians could become a third-rate Internet users, with access to fewer products and services.

4. The text is full of conceptual inaccuracies. Some of the concepts brought up in the text are different from those that already exist in Brazilian legislation, generating unnecessary conflict between rules. This is the case, for example, with the concept of “application provider”, which in the text can be both an individual and a legal entity. The current legislation, the Marco Civil da Internet (Law 12.965 / 14) treats application providers only as legal entities. Was there any reason for individuals to be considered providers by the text of the Draft Laws? Would it be revoking Marco Civil or would individuals be providers only in cases involving disinformation? This is the kind of unnecessary confusion created by the conceptual inaccuracy of the text.

But the discussion of concepts becomes even more serious when analyzing central definitions for Draft Laws such as disinformation. The text defines disinformation as "content, in part or in whole, unequivocally false or misleading, verifiable, placed out of context, manipulated or forged, with the potential to cause individual or collective harm, except for humor or parody."

This concept is full of subjectivisms and imprecise terms. Who measures the potential for content to cause harm? The definition ignores the possibility of manipulating conclusions through the use of true information, exaggeration, disagreements, controversies, and mixing real information and opinions, for example, through informational techniques and manipulation of opinions.

5. The definition of an inauthentic account is problematic and will generate noise with the debates about anonymity, pseudonyms, and the social name of trans people. In defining “inauthentic account” as “account created or used for the purpose of disseminating misinformation or assuming a third person identity to deceive the public”, the project is not clear about the possibility of adopting fantasy names, pseudonyms, in addition to joining

swampy terrain involving the legal contours of anonymity and conflicts between civil and social names of trans people.

An initial obstacle in the definition of "inauthentic account" is the need to discover the purpose for which the account was created. This is an entirely subjective mission, which should not be up to the providers who will have to identify these accounts and remove them.

The project is not in accordance with the consolidated jurisprudence of the Brazilian Federal Supreme Court and the Brazilian Superior Court of Justice regarding the constitutional prohibition of anonymity. The Supreme Court recognizes that constitutional prohibition does not oblige people to insert their identification alongside any and all expressions of thought. The Court understands that the objective of the Constitution is to generate ways that can lead to the identification of the person responsible for the speech. What is forbidden is that there is no way to arrive at the authorship of the content, but there is no duty to publicize the identity.

In this sense, the Superior Court of Justice has consolidated its position as being sufficient to identify the user by providing the registration of the protocol number (IP) of the computers used to register accounts on the internet or their use, thus enabling accountability in the event of abusive conduct practiced on the network. Thus, the system of record-keeping imposed by Marco Civil would suffice to fulfill the purpose of identification contained in the Federal Constitution.

It should also be noted that the notion of inauthentic account places more obstacles in the already tumultuous debate about real identity on social networks and its affects transgender people in particular.

6. By focusing on “inauthentic accounts” and “artificial disseminators” the text forgets the misinformation created by authentic accounts and automated behavior. It is known that an important part of the disinformation networks in Brazil and in the world goes through accounts that are used by clearly identified people, who serve as anchors of legitimacy and guidance for the performance of robot networks. These accounts sometimes belong to authorities and celebrities. In addition, it is important to note that more and more accounts that spread misinformation are not only inauthentic but totally or partially automated. With humans effectively working here and there to generate the appearance of a more organic engagement that defies bot identification programs. The Draft Law thus lose sight of “automated behaviors” by focusing more on the identity of whoever operates the account.

7. The text will generate more monitoring on the Internet. By requiring providers to start monitoring their platforms to find out who is spreading misinformation and who is or is not an unauthorized account or an artificial disseminator, the Draft Laws legitimize and encourage ever-greater control over the Internet. The responsible platforms already carry out this type of control. The Daft Laws should encourage good practices in moderating content, but not impose a monitoring duty, which goes against even the Superior Court's jurisprudence on platform functioning and the duty to monitor as not being the essence of the activity and a constituent of addiction or service defect for accountability purposes.

8. The text reverses the provider liability regime set forth by the Marco Civil. Since 2014, a civil liability regime for platforms has been in force in Brazil. Its divided into that corresponding to acts of third parties and another for own acts. Article 19 of the Marco Civil states that providers will only be held liable for the content of their users if they fail to comply with a court order that determines the removal of the content. This "immunity" only applies to "damages arising from content generated by third parties". But its different when providers decide to remove or moderate content in accordance with their Terms of Use. If they end up acting abusively or remove content and accounts in error they can be prosecuted. Brazil already has several cases in which the author of posts or the owner of improperly removed accounts won in the Judiciary. The Santa Catarina Court has already convicted Google for mistakenly removing parodies of songs claiming it was a copyright infringement. A congressman has already won a lawsuit against Facebook because the company removed his account alleging that he was spreading fake news, all of which already occurs without the need for a new law.

The text of the projects creates an obligation for companies to monitor inauthentic accounts and artificial disseminators, which can be sanctioned if they fail to comply with this determination. But it is worth questioning that if a person allegedly suffers damage caused by a bot or by disinformative content on the Internet, what would be the chances of a judge reading the text of the law, as it stands today, and understanding that the provider answers the victim because he violated the legal obligation there? If the provider has allowed the robot to operate on its platform, it will be responsible for all damages resulting therefrom. This conclusion extinguishes any limitation on providers' liability for third-party content when the damage is caused by disinformative content. The result is in the item below.

9. The text will encourage more censorship on the Internet. With the risk that they will be immediately liable for damages caused by uninformative content, providers gain an even greater incentive to control the content that passes through their platforms. Anyone who thinks that the platforms have removed more than they should have to be prepared for even more removals. This is a structural failure of the projects. By disarming the Marco Civil liability regime, the text opens the door for successive injuries to freedom of expression. For no other reason, Article 19 of the Marco Civil begins with the expression “In order to ensure freedom of expression and prevent censorship”.

For the reasons above, we understand that the text of the Draft Laws, as it stands, needs important adjustments so that it can be a viable instrument in the fight against disinformation. In its current state, if approved, the text will bring more problems than solutions in tackling fake news. ITS is available to continue to contribute to this debate and to submit additional proposals.