COMMUNICATIONS SECURITY IN AN INSECURE WORLD: IS THERE A SOLUTION?*

SEGUARANÇA DA COMUNICAÇÃO EM UM MUNDO INSEGURO: HÁ UMA SOLUÇÃO?

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ABSTRACT: Contemporary constitutionalism is founded on fundamental rights, which have been hardly conquered by peoples of different nations and times. One of these rights is information, once individuals must be informed of their personal data in order not to be, for example, unjustly accused of something illegal. More complex than the right to information is the right to communication and this may be described as the right to share information expressing one’s opinion, based or not on scientific sources. Being a part of individual fundamental rights, information and communication are comprehended in State negative obligations towards people, which implies not to interfere in private lives, including businesses. This is especially emphasized in the right to privacy and in laws whose aim is to protect intellectual property. These rights have recently seemed to be menaced by worldwide notices of internal government surveillance over other countries communications mainly by the internet. Countries


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accused have tried to punish delators alleging they had betrayed their government and terrorism has been used, in last internal countries’ surveillance acts, to justify the relativization of privacy in communications. So as to protect their internal government and private communications including intellectual property to safeguard enterprises from unfair competition, some countries have been enforcing laws concerning the internet. Although this may be a sign of protection, once the internet has no frontiers, isolated responses to surveillance problems are not able to face international relations and lack of loyalty among nations and their economic and security interests. Then, in spite of having failures, one may assume that, in this case, international treaties may be the most effective means of preventing “undue” surveillance, even knowing that the human factor and the ideologies behind peoples’ behavior may be used to infringe laws on behalf of what they believe to be a great cause.

**Key words:** Communications security; terrorism, international and internal surveillance; right to privacy; intellectual property protection
1. INTRODUCTION

As the aim of this paper is to discuss information security in a world too far from the time when individual rights were institutionalized, it is relevant to understand that the nowadays scenery is very different from then, and this includes terrorism and communications facilities.

It is widely known that States have always tried to protect their territories and that different types of official measures are taken so as to achieve this aim, including war and diplomatic strategies, which have not always been so loyal as they have seem to be.²

One may surely assert that not always States’ interests can be considered so high because protection may have a different signification to each State and to each individual. While it is reduced to defend itself from any kind of attack to ones, it may correspond, to others, to attack in order to guarantee something that one State consider of its legitimate property and in this case war is almost inevitable.

With the increase of terrorist actions and terrorist groups throughout the world, inviting young people to take part in their "cause", one may say that the "enemy" is inside and not only outside its frontiers. Youngsters educated in Europe and in the United States have been used to spread terror using the information they gained in the countries whose people and government they fight against. Connecting society nowadays has facilitated the communication among people from various parts of the world and this can be used for good and bad intentions. So, one of the ways governments have found to fight terrorism is to intercept communications to prevent attacks and to isolate people responsible

for such acts. However, measures like these can be questioned when other sovereignty entities become under surveillance and this occurs on behalf of a pretense security protection.

2013 was a year in which diplomatic relations between Brazil and the United States and between Germany and the United States suffered due to accusations that this last one was promoting surveillance over official correspondence of the others. In spite of the accusations have been a result of breaking of loyalty of their delators, countries have been taken some efforts to prevent that their strategic correspondence becomes public, which might contribute to weaken their power in the game among nations.

Besides that, individuals and enterprises have shown themselves worried with this situation, as privacy is a right that derives from freedom of communication and of information, once these rights must not be used against their producers and this encompasses enterprises secrets related to intellectual property and business loyalty.

From having to choose between security and privacy, international society must find a way of protecting both, balancing interests in order not to, on the one hand, lose what humanity has hardly conquered in the path of individual rights, and, on the other hand, lose all rights due to actions that can destroy a way of life of a culture which founds its roots on freedom and tolerance.

2. Information and communication as fundamental rights

Fundamental rights have been hardly conquered by peoples of different nations. They have a close relation to the crack of absolutist regimes,
when power has been divided among different functions of government, which had once been concentrated in one single person, usually the king.

Since one person detained total power over everything, it was certain that anything against the government would be punished, even the expression of thought if it could be considered a threaten to the norms imposed.

As a landmark of constitutionalism, constitutions in the modern period are connected not only with the organization of the State, but also and mainly with fundamental rights as individual guarantees against State abuse. So, it is not strange that this category of rights is denominated negative rights, meaning that the State must not interfere in people’s lives.\(^3\)

These rights relate themselves with equality among people, independently of their religion, origin, genre, freedom to go wherever one wants and to come from, freedom of enterprise, freedom of expression and this comprehends the various forms of cultural expressions such as music, religion, speech and this includes press freedom.\(^4\)

One right which is connected to freedom of speech constitutes of right to information as there is no way of defense if one may not receive information about what has been happening and, more important, about him or herself. This last sort of information has provided the right of petition and some constitutional remedies such as \textit{habeas data} and as this exists in order to give the opportunity

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\(^3\) About the relation between liberal theory and fundamental rights, J. J. Gomes Canotilho asserts: “that will always consider them as citizens’ defense rights towards the State, which must not interfere in private autonomy.” (Free translation) \textit{Direito constitucional e teoria da constituição}. 5.ed. Coimbra: Almedina, 2001. p. 382.

\(^4\) When freedom is discussed, J.J. Gomes Canotilho writes about tolerance and religious freedom. \textit{Direito constitucional e teoria da constituição}. 5.ed. Coimbra: Almedina, 2001. p. 381. Knowing that religious and cultural differences are connected to tolerance and this includes foreigners and other minority groups, the same author exposes inclusion making a quotation of international documents such as the Convention over Protection of National Minorities, and supports that “Minority will be, fundamentally, one group of citizens of a State, in numerical minority or in not dominant position in this State, with different ethnical, religious or linguistic particularities from the majority of the population, sympathizing one another and fond of a will of survival and the assertion of equality related to the rights of the majority.” (Free translation). p. 385.
of someone knowing official information about him or herself, this leads, joined
to the right to petition, to the due process of law, implying the right to defend
oneself from any kind of accusation and the right to have one’s suit judged by
courts, meaning that there will not be exceptional tribunals.

Once the task of this paper is to analyze some aspects of information,
it seems important to emphasize that the right to communicate is too far more
overarching than the right to information. While the later is related to a passive
behavior, the first is related to an active one, as to be informed depends
practically on others, and to communicate implies giving one’s opinion and
influencing others with one’s ideas.  

Since everyone can express his or her opinions, democracy is
emphasized by discursive actions, which contributes to strengthen tolerance,
respect for others and to ameliorate ways of life in society and this is enough to
justify the maintenance of these rights, preventing privacy invasion or the use of
such means by States, in actions that precisely obstruct the rights whose invasion
is supposedly protecting.

3. Information and communication in the digital era

Considering that communication comprehends more than the simple
right to information, it is valid to mention that this helps to strengthen democracy

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5 “This way, qualified right to communication as a right to information in a double context, by which people
have access to all types of information and, simultaneously, express their opinions and shows their
questions, projects, creations and other features of their personality, one may say that the internet is the
economically convenient, socially efficient and technologically adequate instrument for practicing this
fundamental right.” (Free translation). FELIZOLA, Pedro Augusto Maia Felizola. O direito à comunicação
como princípio fundamental: internet e participação no contexto da sociedade em rede e políticas públicas
de acesso à internet no Brasil. In: Revista de Direito, Estado e Telecomunicações, v. 3, n. 1, Brasília:
Grupo de Estudos em Direito das Telecomunicações (GETEL), do Núcleo de Direito Setorial e Regulatório
when people start to discuss things that used to be confined in some cabinets, especially in the age of the internet.

When television was created it helped to turn information available, but in times of personal computers and the internet, information is worldwide spread in real time and opinions may come and go from one side of the planet to another independently of television or of governments.

Besides official and commercial sites, one may assert that blogs and social nets have strongly contributed to increase the volume of information and communication for personal and scientific discussions, in this last situation, mainly in hospitals and research centers.

As everything shows its good and bad side, the net has been also used as a means of illegal actions, such as electronic transactions fraud and interference in others’ communications. This points out the discussion, on the one hand, about right to privacy, since the internet has been used to capture people’s information and enterprises’ secrets as well, and, on the other hand, people’s security in themes related to pornography, child abuse, unlawful tort practices and many other actions.6

4. Peace threatening and means of combating it

In remote times peace used to be threatened by invasions. It was not uncommon that States invested on armies to protect their frontiers as well as tried to fortify their boundaries with great walls. Despite the fact that States

6 The problem about “porousness of frontiers” is viewed by André-Jean Arnaud, making a quotation of Commission on Global Governance, asserting that “Technological progress have conducted to a porousness of frontiers. States maintain their sovereignty but government authority has been decaying. They are less capable of, for example, controlling monetary flows and transnational information.” (Free translation). **Governar sem fronteiras**: entre globalização e pós-globalização. Crítica da Razão Jurídica. v. 2. Rio de Janeiro: Editora Lumen Juris, 2007. p. 16
nowadays increase their budget on armies and walls have seemed to be a solution for conjuncture situations to some peoples in constant conflict, the limits of security have spread since insecurity depends on more than only protecting one’s territory.

It is known that some war strategies have always been used and trying to stop means of necessary supplies is one of them. Rome succeeded in various conquers because the empire guaranteed its water resources building aqueducts throughout its domains, preventing that conquered people used the lack of this natural source against the government. This strategy of cutting one’s resources off may be associated to our days in which concerns communications aspects.

One other way of preventing peace threatening, if this could be so called, is the institution of radical regimes which impede their nationals to contact the exterior world. This used to happen within the socialist world until the fall of the Berlin wall, and as contact nowadays has become simpler than before due to the internet, some countries prohibit their citizens to use this means of communication or if they allow it, some sites are not available. One other form of preventing people from having notices from the exterior world is to forbid some classes of people, such as women, to achieve education as it may seem dangerous for the continuation of some sorts of regime. All these ways of restraining people’s freedom might be summed up in the cave myth, described by Plato, as one could never or would hardly desire something which to his or her is unknown and this, connected with the fear element, is capable of perpetuating status quo in different places and for a very long time.
Related to the internet theme in times of expanding terrorist actions, especially after September 11th, one may not deny the importance of Sates’ actions in order to obstruct attacks, which has generated a range of measures taken and one of them, in the United States soon after 2001 was to limit people’s privacy and that meant even the break of personal mail. All these measures have been questioned by a huge amount of citizens especially researchers in human rights, since the United States have been created under the flag of freedom.

As terrorist attacks have not stopped and some extremist groups show themselves convinced of the great cause on behalf of which they fight and die for, some countries have increased their control over their frontiers and communications and it must not be denied that some terrorist actions have been prevented due to interception of emails and to double agents within criminal groups. At this point we insist that these are not recent practices among states. What has been modernized is the way States act infiltrating in crime organizations, since law and Sates actions follow society, which shows that before

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7 In a dissertation on terror, Eric Hobsbawm mentions bomb men and asserts: "the range of television since then led that politically more effective actions were no longer the ones whose aim was directly political leaders, but the ones that had more impact in their divulgence." (Free translation) Globalização, democracia e terrorismo. Trad. José Viegas. São Paulo: Companhia das Letras. Original title: Globalisation, democracy and terrorism. p. 131.

8 “It is part of any culture of people working in telecommunications interception and access that criminals are the first users of any new communication technology and have the ability to develop any new techniques for telecommunication. Since 11 September, 2001, for example, government agencies have insisted that the new techniques of hiding images that are sent from person to person need to be interceptable.” KISSWANI, Nazzal M. Telecommunications (interception and access) and its regulation in Arab countries. In: Journal of International Commercial Law and Technology. v. 5. Issue 4, 2010. p. 228-229.

9 Althoug Luciana Emirena Santos Carneiro and Maurício Barcellos Almeida expose the problem of the human factor in organisations, this fator may also turn out to be a problem when terrorists believe the legitimacy of their cause and at the same time governments and their agents believe they play an indispensable role in the world, trying to save it from all evil. Gestão da Informação e do Conhecimento no âmbito das práticas de Segurança da Informação: O fator humano nas organizações. In: Encontros Bibli: revista eletrônica de biblioteconomia e ciência da informação. v. 18, n. 37, p. 175-202, mai./ago., 2013. ISSN 1518-2924. DOI: 10.5007/1518-2924. 2013 v.18 n.37 p.175.
Sates initiate their measures, private power, mainly illegal groups, has already dominated brand new technologies to facilitate their own interests.10

5. Surveillance in communications

As it has been mentioned before, States use some strategies to maintain their security and, as a consequence, their sovereignty.

It has also been reminded that these strategies vary from a wide range of actions, such as infiltrated agents in some organizations and telecommunications interference.

In this last situation, it is valid to state that telecommunications interception may occur both in the internal and the exterior politics.

When talking about internal politics, the most serious question relates to breach of privacy, in a measure that might be accused of State abuse since privacy, freedom of expression and all their results are disrespected, which puts constitutionalism, democracy and fundamental rights in jeopardy.

Opposed, however, to the issue of fundamental rights as human rights established in the States´ Constitutions, people´s security in an age of terrorism should be considered far more important than privacy. In this aspect, some policies are used in a less controversial context, which can be illustrated by

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10 About security, Georges Lamzière writes that survival of nations precedes any other values and that the incentives to cheat are higher in the theme of security. He asserts that the lack of balance could be characterized as a form of legitimate trespass, especially when security is based on armies and nuclear power, in a kind of “peace through strength”, reminding the notion that the lack of trust is more powerful than the trust itself. This could be understood as cooperation in spite of the lack of trust. Although the author exposes his ideas in a context of power by force and by arms, discussing topics connected to the Security Council and military wars, lack of trust may be used in this paper since surveillance is justified in the maintenance of security and when it is joined with the human factor, it is possible to understand why some countries interfere on others’ issues and why the others act justifying theirs actions on their beliefs. **Ordem, hegemonia e transgressão**: A Resolução 687 (1991) do Conselho de Segurança das Nações Unidas, a Comissão Especial das Nações Unidas (UNISCOM) e o regime internacional de não-proliferação de armas de destruição em massa. Coleção Curso de Altos Estudos do Instituto Rio Branco. Brasília: Instituto Rio Branco; Fundação Alexandre de Gusmão; Centro de Estudos Estratégicos, 1998. p. 46-49.
telephone tapping with previous judicial authorization.\textsuperscript{11} For this and other forms of cooperation among nations to prevent crimes and to break criminal organizations, mutual legal assistance treaties are firmed.\textsuperscript{12}

In the theme of interception due to the kind of regime a State adopts, some laws may be enforced to legitimate official actions. Telecommunication interception and access law exist in the following Arab countries: Jordan, Barahrain, Lebanon, Morocco and Egypt\textsuperscript{13} and in other nations, according to Kisswani.

In the case of international politics, except from treaties, one may face a deeper problem, once international relations are based on the formal and conventional equality of States, in a balance that helps to guarantee world and institutions security.

When telecommunications interception transcends internal politics and begin to interfere in others’ subjects the notion of trust that supports

\textsuperscript{11} “The development of the concept of 'Lawful Interception' has its origins in the European Council Resolution of January 1995 which outlined the International Requirements for the Lawful Interception of Communications now recognized widely as the International User Requirement (IUR). The Council lists the requirements to be met by the Member States for the lawful interception of communications traffic. As far as possible, these requirements should ensure a common technical standard for the intercepting of telecommunications. Comparable standards are needed, on the one hand because of the importance of monitoring telecommunications in the fight against international organized crime and, alternatively, to make easy interception on the basis of authorization from the courts. […] The development of telecommunications interception and access law was the result of several years of work by the European governments in collaboration with Australia, New Zealand, Canada and the USA. Countries in Asia and South America are beginning to consider mandating similar laws to those in the US and Europe that support the use of standards-based technical implementations for lawful interception.” KISSWANI, Nazzal M. Telecommunications (interception and access) and its regulation in Arab countries. \textit{In: Journal of International Commercial Law and Technology}. v. 5. Issue 4, 2010. p. 228. Also, by the same author: “it is clear that purposes of interception are for the preservation of national security, investigating serious criminal activities, combating terrorism or even for some other announced purposes. Certain countries base their licensing in the grounds of the capacity of that telecommunication company for Lawful Interception.” p. 227. KISSWANI, Nazzal M. Telecommunications (interception and access) and its regulation in Arab countries. \textit{In: Journal of International Commercial Law and Technology}. v. 5. Issue 4, 2010. p. 227.


international relations becomes fragile and the menace of imperialist actions is capable of ruining or, at least, weaken diplomatic relations between or among States.\textsuperscript{14}

Even if interception is officially justified in preventing terrorist acts due to previous notices or police investigations, phone tapping and official telecommunications interference must not put sovereignty and peace among long friendly States relationship in jeopardy.

As mentioned in the introduction of this paper, relations between German and Brazil towards the United States in 2013 suffered with unofficial notices that the first ones had been subjected to surveillance by the last one. Brazil’s 1988 Constitution secures freedom of expression and privacy, although national security demands special treatment with information access law and orders count with phone tapping consented by courts. Based on the guiding principles of international relations, all of them established in the 1988 Constitution, after the notices that the president of the country had had her mail under surveillance, authorities enforced a law called “Marco Civil da Internet” – “Civil Internet Landmark” – Lei nº 12.965, from 23\textsuperscript{rd} April 2014,\textsuperscript{15} trying to difficult surveillance actions by means of making internet enterprises accountable when

\textsuperscript{14} On the theme of imperialism and what a State really means, Hans J. Monrgenthtau concludes: “Finally, imperialism brings a problem by itself shared with any kind of international politics - and that presents itself, however, in a particularly specific way. It is a problem of making a difference between the real nature of international politics which hides its ideological disguises. Actors in the international scenery rarely show themselves with their true intentions and an empire practically never reveals its true face in the discourses it adopts.” (Free translation). \textit{A política entre as nações:} a luta pelo poder e pela paz. Trad. Oswaldo Biato. Brasília: Editora Universidade de Brasília: Imprensa Oficial do Estado de São Paulo: Instituto de Pesquisa de Relações Internacionais, 2003. Original title: Politics among nations: the struggle for power and peace. p. 144-145.

\textsuperscript{15} Salete Oro Boff; Vinicius Borges Fortes. \textit{A Privacidade e a Proteção dos Dados Pessoais no Ciberespaço como um Direito Fundamental:} perspectivas de construção de um marco regulatório para o Brasil. Doi: http://dx.doi.org/10.5007/2177.7055.2013v35n68p109. The following articles are related to the respective issues: Article 2º: Respect to freedom of expression, human rights free enterprise, free competition, consumer protection. Article 3º: Guiding principles for the use of the internet: freedom of expression and communication, privacy and personal data protection, net security, accountability due to illegal actions.
private information is illegally used and also submitting these kind of problems to Brazilian courts. Although this consists of a valid way to try to guarantee one’s sovereignty, this is a not sufficiently effective action to maintain international relations or to prevent break of international laws.

6. Possible alternatives to prevent “undue” surveillance

While in the internal scenery "legal surveillance" must be established in laws correlated with phone tapping, information access laws and other types of telecommunications interception, the theme of sovereignty demands respect among States and territories, nations’ communications may be considered an extension of territories, also obliging the observance of limits.

This reminds that States are equal and treaties show themselves the only way to ensure that international relations will not suffer porousness. This would prevent some States from trying to trespass other’s interests in a supposedly temptation to save the world with imperialist actions. This indicates that the adoption of international treaties and related punishment for crimes that

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17 On the theme of equality and peace, Raymond Aron mentions Wilson’s pacifism and the Society of Nations and asserts that after the Second World War the notion of sovereignty equality justified the recognition of formal equality of all peoples, leaving behind unequal treaties and this was influenced by International Law and is worldwide accepted. Paz e Guerra entre as nações. Trad. Sérgio Bath. Brasília: Editora Universidade de Brasília, Instituto de Relações Internacionais; São Paulo: Imprensa Oficial do Estado de São Paulo, 2002. Original title: Paix et guerre entre les nations. p. 892.


use the international network to be committed are the only way to prevent illegal international actions by means of communication. This would contribute to secure fundamental rights\textsuperscript{20} as well as official mail in what may be considered a problem of “global responsibility”.\textsuperscript{21}

7. CONCLUSIONS

We may conclude, with this paper, that the internet have turned States´ defense more difficult. The lack of frontiers to this means of communication demands that States take not only internal but also international and cooperation measures to prevent crimes, mainly in this terrorist era and treaties seem to be the most adequate means of achieving a situation of relative security. This seems to be more powerful than solely condemn other nations violations to human rights when they take place within their own frontiers.\textsuperscript{22}

\textsuperscript{20} About the right to information and its security and loyalty among nations, especially in commerce, conducting to the thought that nations isolated could not prevent unlawful practices, Pedro Ivo Ribeiro Diniz asserts: "Freedom of information as a human right guarantees each person the right to have access to information or, on the terms of article 19 of the Universal Declaration on Human Rights of 1948, every person has the freedom, without interferences, of having his or her own opinions and of looking for, receive and transmit information or ideas by any means, independently of frontiers.” (Free translation). A problematização do sistema internacional de proteção à propriedade intelectual frente às novas tecnologias de transferência de informação. \textit{In:} Anuário Brasileiro de Direito Internacional. n. IV-2, jul. 2009. p. 123-138. Id. vLex: VLEX-214195001. http://vlex.com/vid/214195001

\textsuperscript{21} On the problem of international protection of fundamental rights and their connection with telecommunication technologies, Jorge Pegado Liz shows the importance of global responsibility. Direitos fundamentais e tecnologias de informação e comunicação. \textit{In:} Revista Luso-Brasileira de Direito do Consumo, n. II-3. set. 2012. Id. vLex: VLEX-438548886. http://vlex.com/vid/438548886. Although the paper emphasizes privacy and respect, mainly for minors and their parents, it may be used in the present paper, as it is certain that being a worldwide means of communication that encounters no frontiers, information through the internet must not be an issue isolated treated by States. It demands international treaties in order to achieve cooperation among nations. Also, when talking about security, André-Jean Arnaud emphasizes that global security offers to States multiple motives for intervention in issues which once would mean no worry. He states that nations are obliged to take part in the anticipation of problems and preventing crises, although individually they would not wish to engage themselves in questions outside their frontiers. Da regulação pelo direito na era da globalização. \textit{In:} MELLO, Celso de Albuquerque (coordenador do dossiê). \textit{Anuário de direito e globalização:} a soberania. v. 1. Rio de Janeiro: Renovar, 1999. p. 33.

\textsuperscript{22} On the effectiveness of fundamental rights, Konrad Hesse exposes: “All this diversity is evidence that universal validity of fundamental rights does not imply uniformity. The reason is known: the concrete substance and the significance of fundamental rights for a State depend on various non juridical factors, mainly culture and peoples’ history. Then, only if these factors are considered it turns possible to objectively understand tasks, conformation and efficiency of fundamental rights in a concrete constitutional State

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Understanding communications as an extension of territory and State sovereignty, which includes its nationals, whenever the internet is used to commit crimes and to get more people to contribute with them, there should be punishment and this would be valid both for criminals and States that use surveillance to interfere in other nations politics.
References


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