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Injunction Decision

Appeals Court Judge Cezário Siqueira Neto (Judge on duty): - This is about a *writ of mandamus* with preliminary injunction grant requested by *Whatsapp Inc.* in face of the decision of *HH Law Judge of the Criminal District of Lagarto/SE*, in the records of the process nº 20165509002, that determined the block for 72 (seventy-two) hours of the *Whatsapp*, by the following highlighted facts.

The plaintiff company affirms that the criminal procedure that motivates the present *mandamus* is the ascertainment of possible crimes committed and provisioned in the Law nº 11.343/2006 (Law of Drugs) and in Law nº 12.850/2013 (Brazil's Internet Bill Of Rights).

The petitioner clarifies that, during the aforementioned investigation, in which the company is not investigated, there was the judicial determination for the breach of telephonic and telematic seal of 36 (thirty-six) users, owner of devices with the *Whatsapp* application, discriminated one by one.

The petitioner adds that the breach of seal was conditioned to the unrestricted access to text conversations, photos, videos, voice conversations, contact list, as well as the content of the groups in which the involved parties took part, and was directioned to Facebook Brasil LTDA (hereinafter Facebook Brasil), under que misconceived argument that it was subsidiary shareholder of Whatsapp Inc, without representation in Brazil.

It occurs that, before a supposed daly from the plaintiff, the first degree magistrate, after a favorable opinion of the Public Attorney's Office, determined the suspension for 72 (seventy-two) hours of the *Whatsapp* application in the terms of article 12, item III of the Law 12.965/2014.

Refusing the decision, *Whatsapp* questions the present *writ* arguing its illegality under the following aspects: disproportionality, juridical impossibility of ordaining the interception of content, *ad impossibilita nemo tenetur* and the inexistence of noncompliance of judicial order. Lastly, it speaks on cryptography and the technical impossibility of intercepting private messages by *Whatsapp.*

It requests, ex parte, the suspension of the impugned decision, determining the immediate notice until the making of the merit sentence in the present *writ.*

Finally, it asks the rendering of security, conforming to the injunction decision, reforming the decision that determined the suspension of *Whatsapp* services.

This is the report.

I hereby decide.

It is know that, for the granting of a *writ of mandamus*, aside from the general conditions of the action, it is necessary the concomitant existence of *periculum in mora* e of *fumus boni iuris*, in the terms of article 7, item III, of Law nº 12.016/2009, in verbis:

Article 7 - When dispatching the initial petition the judge will order:

I - (...)

III - that the act that gave reason to the request, when that is a relevant basis and of the impugned act can result the inefficiency of the measure, in case it is finally accepted, being provided to demand pledge, surety or deposit from the petitioner, with the goal to assure the compensation to the legal person.

Furthermore, it is ordinary rule of the suitability of the writ of mandamus provisioned in the Summary Statement nº267 of the Supreme Court: "*A writ of mandamus is not fit against a judicial act susceptible of appeal or correction*".

However, the jurisprudence of the Supreme Courts admits, exceptionally, the petition of writ of mandamus against jurisdictional act, since this one is flagrantly illegal or misconceived, liable of causing irreparable damage to the party.

In this sense; appeal for writ of mandamus 34.181/SP, Rap. Minister Paulo de Tarso Sanseverino, Third Panel, judged on 04/09/2012, DJe 11/09/2012 e AgRg in MC 20.757/RJ, Rap. Minister Humberto Martins, Second Panel, judged on 02/05/2013, DJe 16/05/2013 e AgRg in MS 16.007/DF, Rap. Minister Arnaldo Esteves Lima, Special Court, judged on 05/12/2011, DJe 27/04/2012.

On the other side, it has to be settled that the expression "clear and perfect right" should be understood as the condition in which the writ of mandamus becomes the adequate action for the petitioner tutelar affirmation of their right, not needing probational deferment.

On this theme, the master Hely Lopes Meirelles teaches:

"Clear and perfect right is what shows itself manifested in its existence, limited in its extension and apt to be exercised in the moment of its petition. In other words, the law raised, to be supported by writ of mandamus, has to be expressed in legal rule and bring in itself all of the requisites and conditions of its enforcements to the petitioner: if its existence is doubtful; is its extension is not yet delimited, if its exercise depends of situations and facts yet undetermined, it does not leave the opportunity to security, although it can be defended by other judicial means.

When the law alludes to the clear and perfect right, it is demanded that this right shows itself with all the requisites to its acknowledgement and exercise in the moment of the petition. In a last analysis, clear and perfect right is proven of plan. If depending on subsequent comprobation, it is not clear nor certain, to means of security" (in Mandado de Segurança, Ação Popular, Ação Civil Pública, Mandado de Injunção, Habeas Data, 20th Edition, Ed. Malheiros, São Paulo, pages 34/35).

Analysing the probationary set of records, I do not visualize misconception or illegality in the fought decision.

Otherwise.

The records deal with a non-resignation writ in face of the decision of the Law Judge of the Criminal District of Lagarto that determined the suspension of the "Whatsapp" application, of propriety of Whatsapp and of its collaborator Facebook Inc, for the term of 72 (seventy two) hours, with order for the telecom companies to temporarily suspend the trafficking of any data of the referred app, with the purpose to detain its use by any means.

Compulsing the records, it is verified that the decision fought was rendered in a criminal procedure that investigates a supposed crime of interstate drug trafficking, and the justification for the measure was precisely the need for interception of communications sent via Whatsapp, in face of the proven use of the application, offered by the representative Facebook, by the components of the criminal organization, consigned that all other previous measures were not complied.

I - OF THE ALLEGED DISPROPORTIONALITY OF THE DECISION

The first argument of the petitioner company is the supposed disproportionality of the decision, because, in their understanding, the suspension of the service used by dozen of millions of users in Brazil was motivated by the practical unit stemming from the interception of "only 36 numbers of mobile phones".

To my understanding, the petitioner company uses the allegation that the right to privacy of the app's users should be guarded to refute the judicial order, covering the patrimonial interests of the Company Facebook.

In truth, the right to privacy of the app's users finds itself in apparent conflict with the right to public security and the free acting of the Federal Police and of the Judiciary Branch in the ascertainment of crimes, in favor of the whole society.

Well, according to article 144 of the Federal Constitution, "Public security, the duty of the State and the right and responsibility of all, is exercised to preserve public order and the safety of persons and property."

In the terms of jurisprudence of the Supreme Federal Court, "the right to security is a indisponible constitutional prerogative, ensuring in face of the implementation of public policies, imposing to the State the obligation to create objective conditions that allow the effective access to such service. It is possible for the Judiciary Branch to determine the implementation by the State, when defaulting, of constitutionally provisioned public policies" (RE 559.646-AgR, rap. min. Ellen Gracie, judged on 7-6-2011, Second Panel, DJE de 24-6-2011.)

Now for the right to personality, provided in item X of article 5 of the Federal Constitution, emanates the protection to intimacy, to the private life, to honor and the image of a person, even after deceased, in benefit of their relatives. Preaches the quoted provision:

"the privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured"

Youssef Said Cahali (in *Dano Moral*, 1998, p.544-545) defines this last one as being:

"*The right for the individual to conduct their own life protected against the interference in their private and family life; interference in their physical or mental integrity or their moral and intellectual freedom; attacks to their honor and reputation; their improper exhibition; the disclosure of irrelevant and embarrassing facts related to their private life; use of their name, identity or similarity; lurking, spying; interference in their correspondence; improper use of their private communications; disclosure of information given or received by them in professional secrecy.*"

Considering that there cannot be formal antinomia between constitutional precepts, with the aim to harmonize the apparently conflicting principles, one should use the "**pondering" method** as have well fundamented the Supreme Federal Court Judge Gilmar Mendes:

"*In the process of 'pondering' developed to solve the conflict of individual rights, absolute primacy to one or other principle or right. On the setback, the Court makes the effort to ensure the enforcement of conflicting rules, even if, in the concrete case, one of them suffers attenuation.*"

From this study, Minister Celso de Melo delivered the decision in the Bill of Review nº 595395/SP, in which he complements:

"It's worth highlighting, at this point, considering the analysed context, that the surpassing of antagonisms existing between constitutional principles -- like those concerning freedom of information (which does not cover itself of an absolute character, put that inexist, in our juridical system, absolute rights), from one side, and preservation of honor, on the other -- has to result of the use, by the the Judiciary Branch, of criteria that allow it to ponder and assess, 'hic et nunc', in function of a determined context and under a concrete axiological perspective, whatever right to prevail in the case, considered the situation of occurring conflict, since that, however, the usage of the ponderation method of goods and interests does not matter for the emptying of essential content of the fundamental rights."

That being, one can conclude, according to the positioning of the Supreme Federal Court, that the overcoming of antagonisms existing between fundamental rights is solved, in each occurring situation, by the method of the concrete ponderation of interests, it is the role of the Judiciary Branch to define, upon pondered assessment of the constitutional prerogatives in conflict, in each occurring situation, once configured this context of dialectic tension, the freedom that should prevail in the concrete case.

Having such prejudice in mind, at this first moment, I realize that the petitioner, in truth, minimizes the importance of the criminal investigation of components of a criminal organization that use the application in question, concealing the gravity of the supposedly

committed crime (interstate drug trafficking), under the excuse to ensure the right to privacy of their users.

Well, the use of the application by whomever it is or for whatever means cannot be tolerated without reservations. It should indeed suffer restrictions when it affects other constitutionally assured rights, like in discussion.

In the words of the judge who issued the decision, "the private interest can be mitigated when the pretension is to secure the fundamental rights, having in sight the guarantee of social order. In terms of right to privacy, it is known that none of the fundamental rights is absolute, even the one to life, in case of declared war, article 5, item XLVII, of the Federal Constitution/88. "

Thus, the framed case goes way beyond the interception of "just 36 numbers of mobile cellphones". In the hypothesis of the records, I see that the social order and the right to security of a whole society are at stake.

It is worth mentioning that other previous measures were determined, aiming the access to interception the interception of communications, in real time, by the application, among the investigated, as example of the enforcement of daily fees, subsequently being increased, in disfavor of the recidivist company, culminating with the order of arrest of its Vice-President in Latin-America, Sr. Diego Jorge Dzordan, reformed in injunction character of *habeas corpus*, still pending on the definitive trial. However, all without the intended outcome.

Therefore, it is clear that the Judiciary Branch cannot have its hands tied in face of the resistance of international companies, acting in Brazilian territory, to comply with legitimately emanated judicial orders.

Furthermore, the relevance of the application for the most diverse daily activities is undoubtful. Nevertheless, I repeat, there are rights and constitutional principles that should be privileged, always aiming the common good.

II - OF THE ALLEGED ABSENCE OF LEGAL PROVISION FOR THE SUSPENSION

In respect to the allegation of the inexistence of a legal provision able to authorize the suspension of Whatsapp, I consider that this is not sustainable.

Law nº 12.965, of April 23rd 2014, known as "*Marco Civil da Internet*, was created in virtue of the rising increase of online communications and establishes principles, guarantees, rights and duties for the use of Internet in Brazil.

Its article 12 provides the temporary suspension of the activities that involve activities provisioned in article 11, according to which, "In any operation of collection, storage, retention and treating of personal data or communications data by connection providers and Internet applications providers where, at least, one of these acts takes place in the national territory, the Brazilian law must be mandatorily respected, including in regard the rights to privacy, to protection of personal data, and to secrecy of private communications and of logs."

In a systematic interpretation of its provisions, the suspension of a service should be admitted not only when the application itself with careless with privacy of communications and data of those who use it, but also when there is a risk to the security of all users.

By opportunity, I here transcribe the provisions of the referred legislation that authorize the violation of communications, since supported by judicial order, like in the disputed case:

Art. 7o The access to the internet is essential to the exercise of citizenship, and the following rights are guaranteed to the users:
(...)

II – inviolability and secrecy of the flow of users's communications through the Internet, **except by court order**, as provided by law;

III – inviolability and secrecy of user's stored private communications, **except upon a court order**;

Art. 10. The retention and the making available of connection logs and access to internet applications logs to which this law refers to, as well as, of personal data and of the content of private communications, must comply with the protection of privacy, of the private life, of the honor and of the image of the parties that are directly or indirectly involved.

§1° **The provider responsible for the retention of the records as seth for in art. 10o shall only be obliged to provide them, whether separately or associated with personal data or other information that allows the identification of the user or of the terminal, upon a judicial order, as provided in Section IV of this Chapter, in compliance with what is set forth in art. 7º.**

§2° **The content of private communications may only be made available by court order, in the cases and in the manner established by law, and in compliance with items II and III of art. 7º.**

In this diapason, I consider that the assessed decision does not offend the *Marco Civil da Internet*. On the contrary, the allusion to the legislation gives support to the imposed measure.

In addition, the Telephone Interception Law (nº9296/96), since 1996, already predicted the possibility of imposing the breach of telecommunications seal (article 1, paragraph 1).

Certainly the impugned decision will upset most Brazilians, who don't know the real reasons of its determination. However, it should be considered that there are inumerous other applications with similar functions to Whatsapp, like those cited by the first instance judge (Viber, Hangouts, Skype, Kakaotalk, Line, Kik Messenger, Wechat, GroupMe, Facebook Messenger, Telegram etc).

Besides, the judge cannot decide against the juridical order, thinking only of pleasing certain sector of society. He should, actually, guide his work by the fulfillment of our ordeal, even if for that it is necessary to adopt unpopular measures.

III - OF THE JURIDICAL IMPOSSIBILITY OF CONTENT INTERCEPTION

The petitioner party is mistaken when pleading *wide and unrestricted discretion* of the judge when authorizing the breach of communications through the Internet.

Every judicial decision should be based in terms of the article 93, item IX, Federal Constitution: "*all judgements of the bodies of the Judicial Power shall be public, and all decisions shall be justified, under penalty of nullity, but the law may limit attendance, in given acts, to the interested parties and to their lawyers, or only to the latter, whenever preservation of the right to privacy of the party interested in confidentiality will not harm the right of the public interest to information.*"

Consulting the records, we can notice that the refuted decision was based on the Democratic State of Right and in the Fundamental Rights.

Another mistake is in mentioning the "*undiscriminated breach*" of seal of communications. We can observe that the breach of data refers to strictly specified users, thirty-sex users, for the assessment of crimes predicted in the Federal Laws nº 11.343/2006 and nº 12.850/2013.

The petitioner brought up items X and XIII of article 5 of the Federal Constitution mirrored by items I, II and III of the *Marco Civil da Internet* that tend to right to privacy.

However, the *Marco Civil da Internet* itself brings the possibility of the responsible Internet provider to make available the connection and access logs, as well as the content of communications, as provisioned in paragraphs 1 and 2 of article 10.

Furthermore, the constitutional principles of intimacy, private life, honor, image, as well as seal of correspondence and communications cannot be superimposed to the fundamental objectives of the Federative Republic of Brazil nor to its principles.

Thus, the individual rights cannot serve as safe-conduct to the violation of other rights, as the right to life, physical integrity, to health and to public security. The Federative Republic of Brazil has as a goal to build a free, fair and solidary society, having as one of the principles the prevalence of human rights.

Hence, as affirmed, there is no need to talk about disproportionate or prejudicial measure to privacy, without legal basis, and of anti juridical character, once the supremacy of the public interest in the safeguard of the rights of all society to life, freedom, public safety should prevail.

Notwithstanding, the allegation that the decision hurts the constitutional free initiative, provisioned in article 170, caput, of the Federal Constitution, forcing the petitioner to change its technical standards of operation, was not proven in this sense.

If the petitioner itself creates a system of cryptography, it is not believable that the company is unable to have access to this 'keys', not having a technical basis to refute the fought decision.

A situation well pondered by the magistrate when considering: *"According to technical informative of the Federal Police, n. 31/2016 – SRCC/DICOR/DPF, fl. 18, elaborated after a supposed implementation of 'end to end' cryptography, '... there is no indicative of which cryptographic protocol is used, how the managing of the keys is done, not even if this cryptography really is end to end or if it is just between customer and provider... As the implementation of end to end cryptography was incremental and considering the implementation of third party custumers found online, there are strong traces that end to end cryptography is optional and theoretically could be disabled upon configurable parameters in equipments and company servers... Additional resources, like Whatsapp Web and the notification service theoretically could be used to allow the duplication of messages and subsequently the interception upon judicial order."*

IV - OF THE *AD IMPOSSIBILITA NEMO TENETUR*

The petitioner sustains, yet, that it could only comply with the order if it were in the possession of the requested data. It argues that according to the Brazilian laws, the companies providers of Internet are only forced to maintain the respective Internet access logs for the period of six months, and that the data is not of mandatory maintenance. It pleads that the service is used by approximately 1 billion people. It affirms that such demand constitutes into an impossible obligation compliance.

Such arguments do not deserve to prosper.

The fought decision is clear enough when disposing that it does not refer to peripheral data, but to real time data: "According to the document found in the records, fls. 14/7, by the Federal Police Authority; (...) The interception of messages ... in real time, properly decrypted, is essential for the state's role... dismissing the deepening of greater comments on the damage that all society suffers with such resistance of the company Facebook in complying with the judicial determinations under the most varied arguments, several of them even of doubtful sincerity... the technical possibility of the app to transmit such data in real time for investigation bodies when judicially stated, there is no doubt of its possibility... the mirroring of such images in real time was solicited... with the purpose to give following to the investigations, as it usually happens with a SMS message and telecommunications breach... in any moment previous messages were solicited... among the various and shallow arguments widely spread by the company... " (I highlighted)
The quantity of service users, approximately 1 billion people, also is not a reasonable reason for the non compliance with the judicial order, if such pleading is only about thirty-six users, all being identified.

So, the arguments of impossible obligation compliance are refuted.

V - OF THE ALLEGED INEXISTENCE OF NON COMPLIANCE WITH THE COURT ORDER

When it comes to the inexistence of non compliance with the court order, for the petitioner was never the recipient of the judicial order, better luck does not support the claim of the petitioner.

As it is well pointed by the website wikipedia, *Whatsapp* is a subsidiary company of Facebook, along side with Oculus, VR, PrivateCore e Instagram. These compose a powerful Cybernetic Economic Group, being responsible for the acts made in unconformity with the Brazilian law.

We can observe, in this case, it already was of the petitioner's knowledge the court orders for the interception of *Whatsapp* telematic data, as it has occurred in the trial of the fining and imprisonment of the Vice-President of Facebook.

Therefore, one should not talk about lack of knowledge or absence of notification of the petitioner, as the previous court orders of the constraining authority were always directed to having access to telematic data of determined accounts.

IV - OF THE CRYPTOGRAPHY

Lastly, the cryptography is not an obstacle for the fulfillment of the court order defined by the constraining authority.

As it was elucidated on the fought decision, cryptography would be a set of techniques to conceal information from unauthorized access.

As it happens, cryptography is not a reason to not supply the telematic data requested in the criminal procedure. This is what we take from the technical information delivered by the police authority Renato Beni da Silva:

"... the technical possibility of the application to transmit such data in real time for bodies of investigation when called upon in court, there is no doubt of its possibility... between the various and shallow arguments widely publicized by the company... there is the impossibility of mirroring such dialogues, which yet again does not match reality, just check the sending tool for conversations via email and the Web Whatsapp option, where the system user can have access to their application on a computer in the same way of their Smartphone. Another issue widely publicized by Whatsapp representatives is the impossibility of forwarding such decrypted messages, being an argument again unmasked considering it was the company itself responsible for producing the system, it is not reasonable to expect the creature to overcome the creator and to become an autonomous system in which the company is itself unaware of its engineering program..."
The Federal Police technical report went in the same sense: "*As the implementation of end to end cryptography was incremental and considering the implementation of third party custumers found online, there are strong traces that end to end cryptography is optional and theoretically could be disabled upon configurable parameters in equipments and company servers... Additional resources, like Whatsapp Web and the notification service theoretically could be used to allow the duplication of messages and subsequently the interception upon judicial order.*"

Thus, there is the recalcitrance of Whatsapp to cooperate with criminal investigations, facts that have already occurred with Google and Blackberry, but that were obliged to respect the Brazilian laws.

In spite of all the petitioner's argumentation on their concern for the security of informations that they transmit on their apps, through cryptography protocols, I use the words of the first instance magistrate, who highlighted: "*It is not imaginable that an interstate drug trafficking investigation, covering the national territory in various states, is prevented from continuing for the (ir)responsibility of a billionaire company with merely commercial purposes in detriment of the national soberany.*"

Furthermore, from the manifestation of the police authority we can verify the possibility of mirroring the messages sent by users, with the duplication of the recipients number, a technique that would allow the messages to be received in the cell phones of the involved, as well as the duplicated number. This would not result in a breach of cryptography.

Anyway, the technical possibilities are the most diverse, and it need to be emphasized that the app, even in face of a problem of this magnitude, that has been dragged since 2015, and that could impact millions of users as the app itself affirms, never had the sensibility to send experts to discuss with the magistrate and with the interested police authorities on the viability or not of the decision's execution. It preferred the inertia, maybe to create chaos, and, with that, pressure the Judiciary to agree with its will in not complying with the Brazilian legislation.

VII - CONCLUSION

This way, not envisioning the juridical plausibility to support the denial of the preventive measure sought, I **deny** the preliminary injunction requested.

Notify the constraining authority to deliver the information, in the period of 10 (ten) days, in the terms of article 7, item I, of Law nº 12.016/09.

After, forward the current records to the Public Attorney's Office, for the emission of the report.

To be summoned.

Aracaju, May 3rd 2015.

CEZÁRIO SIQUEIRA NETO
Appeals Court Judge On Duty