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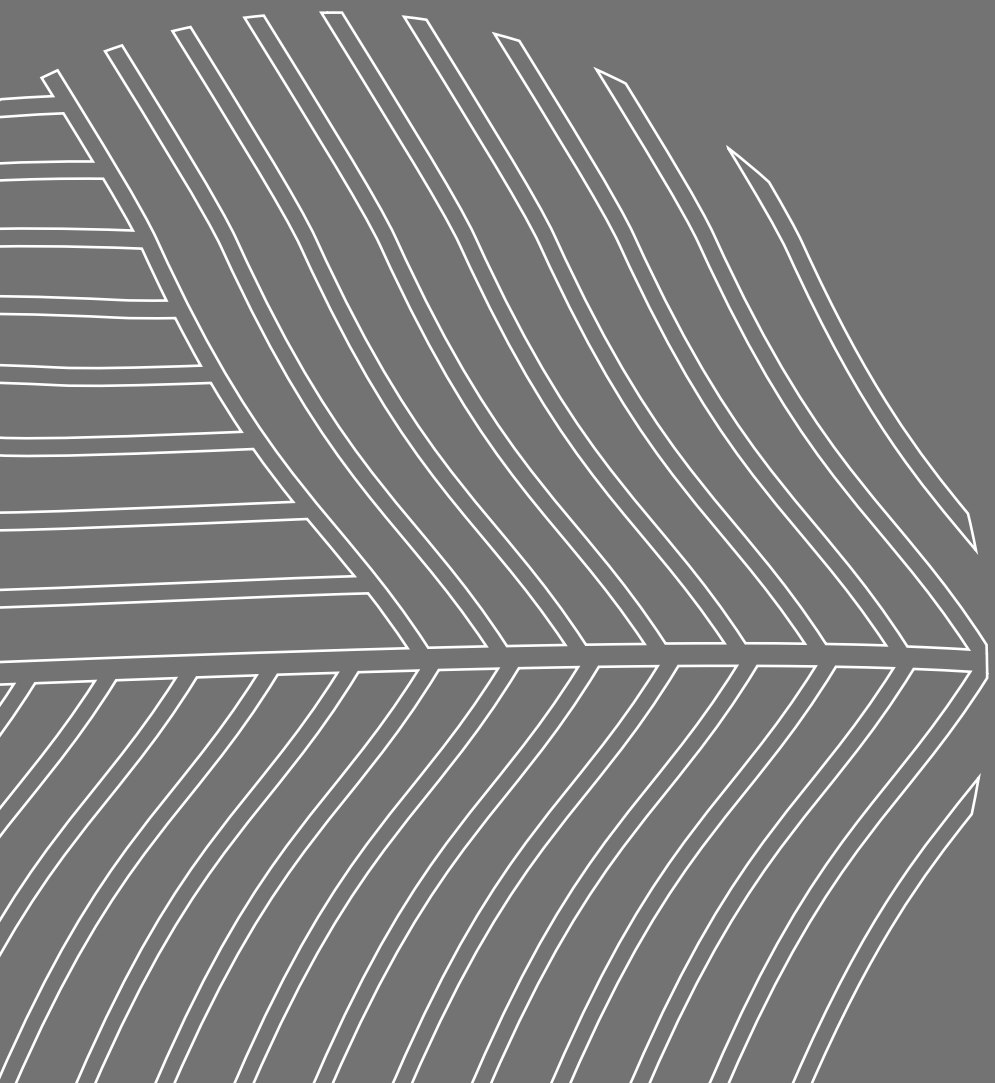
Why should the Draft Bill 1.595/2019 be rejected by the Brazilian Chamber of Deputies?



TECHNICAL NOTE

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Why should the Draft Bill 1.595/2019 be rejected by the Brazilian Chamber of Deputies?

Civic space is closing down in Brazil. Restrictions on civil liberties are on the rise. Harassment and criminalization of opponents and critics of the government are escalating. In this context, the Draft Bill 1.595/2019, proposed by Congressman Vitor Hugo, poses a significant risk to Brazilian democracy.

It "prescribes counter-terrorist" actions and adds other provisions, so amending Laws n. 10.257, of July 10 2001, and n. 9.807, of July 13 1999. The Bill was approved by a Special legislative commission on September 16, and is currently under discussion on the floor of the Brazilian Chamber of Deputies.

The Igarapé Institute lists five reasons why the Draft Bill 1.595/2019 must be rejected, as described below.

1 Excessively vague definitions: violation of the principles of legality and specificity

The vague definition of certain types of crimes opens the door to treating common crimes as terrorism, regardless of the connection with the concept of terrorism. This contradicts basic tenets of criminal law, such as the principle of specificity, which bars vague or imprecise laws and stipulates that only crimes clearly stipulated in the legal code may be subject to penalty, and the principle of legality, which means that only law can define a crime and prescribe penalty.

Paragraph 2 of Article 1, in particular, deserves attention. It defines that:

> *§ 2 This law will also be applied to prevent and suppress implementation of preparatory acts provided for in art. 5 of Law no. 13.260, of March 16th, 2016, and acts that, while* ***not typified as a crime of terrorism****, are* ***offensive to human life*** *or that damage* ***critical infrastructure, essential public service or a key resource****.*

By determining that the law may be applied to prevent and repress acts "not typified as crimes of terrorism", the wording in Paragraph 2 makes it clear that the anti-terrorism legislation is not limited to suppressing crimes of terrorism or even common crimes, but can also be invoked to encompass any act that falls within the broad characteristics presented in the Bill. This expanded scope for applying counter-terrorist

measures may ultimately threaten the exercise of fundamental freedoms for any citizen, while also increasing the risks for civil society actors engaged in safeguarding constitutionally protected rights.

Paragraph 2 defines for which acts the counterterrorism law may apply. Initially, the first section deals with acts that are purportedly "offensive to human life". From this brief excerpt, the excessive vagueness of the legal definition is evident: What constitutes an act "offensive to human life?" By the Bill's current wording, practically any act involving some level of violence against the person could potentially be treated as terrorism.

The second section of the proposal allows that anti-terrorism law and sanctions may be brought to bear on any "actually destructive" acts against certain critical infrastructure, essential public service or key resources.

Article 4 of the Draft Bill 1.595/2019 defines these concepts in an equally broad and generic way. According to item I, critical infrastructure refers to "facilities, services, goods and systems whose interruption or destruction, total or partial, provoke serious social, environmental, economic, political, international impact, or to the security of State and society". Item IV defines essential public services as any that are described in items I to XI of Law 7.783/1989, which sets limits for the right to strike. Some examples are public transport, data processing related to essential services, telecommunications, and the distribution and marketing of medicines and food. Finally, a key resource is defined by item V as "the good or system that guarantees the survival of human beings or their well-being".

Such overly broad definitions could theoretically apply to any form of damage to public property, public service or natural resources. They could also be stretched to proscribe organized public demonstrations, such as protests and strikes. Such imprecise legal instruments could be deployed to weaken social participation in the process of building public policies, or inhibit public monitoring and inspection of government actions.

Such legal provisions are inconsistent with the jurisprudence of the Superior Courts, which hold that a crime of terrorism presupposes a motive of xenophobia, discrimination or prejudice based on race, color, ethnicity and religion. Paragraph 2 of Article 1 of Draft Bill 1.595/2019 contradicts this interpretation of the law by allowing even such ambiguously defined acts to be treated under the anti-terrorism legislation, which is especially severe and punitive, precisely because of the gravity of the crimes to which it applies.

The Draft Bill also contradicts the understanding of the United Nations Special Rapporteur, which considers that in order to be classified as a terrorist act, the means used must be potentially lethal, the intention must be to cause fear among the population or compel the government or international organization to do something and the objective must be political, ideological or social.

2 Surveillance: risk of violating data protection and the right to privacy

The Draft Bill creates new ways of producing evidence and of applying existing techniques. These innovations would not be a problem if such evidence gathering were in accordance with legal and constitutional parameters. But that is not the case. Overly broad application of evidentiary techniques is contrary to the constitutional limits imposed on criminal investigation.

The incompatibility with international privacy and data protection parameters deserves to be highlighted, especially in regard to Articles 5, 6 and 11.

> *Art. 5.The Ordinary Preventive counter-terrorist Actions, without prejudice to other actions described in Regulation, include:*
> *(...)*
> *III. **monitoring**, **through intelligence operations**, associated facts or that **may be associated with terrorism**, to identify forms of terrorist groups, their funding sources and, in particular, their means of recruitment, advertising and apology;*
> *(...)*
> *Single Paragraph: The conduct of the actions mentioned in the caput presupposes the effective participation, as appropriate, of the entire Brazilian population, especially regarding **collaboration with the Government in obtaining information about suspicious attitudes**, in the **form of the regulation**, and the construction of an environment secure and peaceful social.*

Article 5, item III, lists "preventive counter-terrorist actions" as measures including the monitoring, by intelligence, of "associated facts or that may be associated with terrorism". Under this expansive interpretation of the law (Paragraph 2, Article I) counter-terrorist initiatives would also encompass monitoring allegedly suspect activity through surveillance operations.

As this type of surveillance can lead to restrictions on freedom of expression, and the right to privacy and intimacy, it is only allowed under exceptional circumstances. Under the pending Bill, however, this is clearly not the case. Hence, the legal provision of Article 5, item III, creates a serious risk of subjecting human rights defenders and organizations to irregular surveillance.

Furthermore, the absence of a clear definition of what "monitoring" under Article 5 really means, may well collide with the principles established by Law 9,296 of 1996, which regulates telephone interception.

The aforementioned law determines that the interception of communications, including over the telephone, computer and telematic devices, can only occur by means of a judicial order and only when there is evidence of the authorship or participation in a criminal offense. The mere "possibility" of terrorist activity would not be enough to order such intercepts.

The Single Paragraph of Article 5, in turn, holds that preventive counter-terrorist actions calls for the "effective participation" of "the entire Brazilian population," including by "collaborating with the government to obtain information about suspicious attitudes." Such legal provision encourages an environment of constant censorship and intimidation, as well as citizens spying on fellow citizens.

The fact that the ground rules for such collaboration are left to subsequent "regulation" is also worrisome; In other words, the Executive branch will ultimately have the last word on setting the limits on counter-terrorism actions. It is important to emphasize that assigning the Executive the power to create obligations and duties for common citizens violates the principle of legality, by which "no one shall be obliged to do or not to do anything except by virtue of the law".

> *Art. 6. The Public Power will make it possible to **protect the identity of counter-terrorist public agents** when employed in the counter-terrorists actions, including by means of **authorization to use the security related identity**, i**n the form of the regulation**.*

Article 6 creates a new type of infiltration by way of a "security related identity". State agents employed in counter-terrorist actions may work undercover with an assumed identity, the issuance of which has yet to be regulated. Here again, the prerogative of regulation would fall to the Executive branch.

Issuing this security related identity does not require judicial authorization or vetting by an independent Public Prosecutor's Office.

Given the overly broad definition contained in the language of Article 1, Paragraph 2 of the Bill, the cover ID may serve to authorize intervention even in cases where no explicit terrorist activity has been detected.

It is important to highlight that the security related identity can also be used to surveil "ordinary preventive terrorist actions" of the aforementioned Article 5, item III.

> *Art. 11. Counter-terrorist public agents involved in the preparation and employment for counter-terrorist actions may use specific* ***secret operational techniques*** *for the purposes of preventing or combating the terrorist threat.*
> *(...)*
> *II. infiltration into terrorist organizations will be authorized if there is* ***evidence of preparatory acts*** *in relation to the crime of terrorism or that described in § 2 of art. 1st;*
>
> *III.* ***access to the data*** *referred to in arts. 15, 16 and 17 of the Law no 12.850, of August 2, 2013, and* ***records of connection and access to internet applications****, which does not cover the content of private communications, pursuant to Law no 12.965, of April 23, 2014, the authorities will be allowed mentioned in item I, who will request them* ***directly from their respective holders****, provided that: (...)*

Article 11 creates a parallel system of surveillance, inverting the logic that secrecy is the exception and not the rule, in addition to not expressly providing for the need to carry out a preliminary investigation, leaving room for ambiguity.

Item II of the same article authorizes deployment of undercover agents "if there is evidence of preparatory acts," so lowering the bar to admit even circumstantial evidence of a potential crime to justify state intervention. This item applies not only to the crime of terrorism but also (per art. 1, §2) to the broad spectrum of acts that may be interpreted as such.

Subparagraph III introduces the possibility of requesting data directly from service providers — such as registration data, travel records, and phone logs — without the imprimatur of the Judiciary or the Public Prosecutor's Office.

This is yet another of the multiple attempts to undermine the guarantees enshrined in the Brazilian Civil Rights Framework for the Internet (*Marco Civil da Internet*), which determines that access to connection records and access to internet applications can only be ordered by a judge, based on evidence of unlawfulness.

It is concerning that a Bill drawn up with little input by civil society could alter one of the foundational provisions of a law such as the "*Marco Civil*", that was created after a broad public consultation.

It is important to highlight that such a law risks blurring the line between surveillance carried out by private security agencies and the actions of official intelligence services.

Finally, it is important to state that there is a considerable risk that investigations grounded on the dubious legal parameters discussed here may ultimately be counterproductive, as they are sure to be challenged and possibly overturned in the courts.

3 The concentration of powers in the Federal Executive branch, expansion of immunity from prosecution, and usurpation of competencies

The Draft Bill 1.595/2019, as written, places broad powers on the Executive branch at the Federal level and reduces the control mechanisms of civil society and other branches of the Republic regarding the actions that will ensue upon approval of the Law. In Article 16, the Bill creates a National Counterterrorism Authority, which is subject directly to the President of the Republic within the National Security Office.

> *Art. 16 The execution of the National Counterterrorism Policy (PNC), set by the National Defense Council, shall be carried out by the National Counterterrorist Authority,* ***under the supervision of the Cabinet of Institutional Security of the Presidency of the Republic.***

Tellingly, the Bill provides no clear and specific guidelines for which institutions will supervise the new National Counterterrorism Authority. One logical solution would be to assign the Public Prosecutor's Office to oversee the task, but there is no regulation on the matter.

In fact, the Draft Bill makes no mention of the public institutions already in place, such as the Armed Forces, the Federal Police or state security forces, that might play an oversight role. The Bill disregards the structure of the National System of Public Safety, creating a parallel structure, suggesting only the possible deployment of police and members of the Armed Forces to support the actions. Yet the Bill offers no details on how this would unfold. Not even the Brazilian Intelligence Agency rates a mention.

The lack of clarity on whether the provisions of this Bill would be subject to the scrutiny of the Judiciary is also troubling. Such omissions reinforce concerns that decision-making will ultimately fall to the Executive branch, with no checks and balances from other branches of the government. As drafted, this Bill violates the autonomy of the institutions, their powers, and the federal pact itself.

Furthermore, the Draft Bill unreasonably expands the criteria for granting immunity from prosecution. Immunity today is a legal mechanism provided in Article 23 of the Brazilian Penal Code that has the function of waiving culpability for illegal conduct according to three possible situations: 1. in a state of necessity; 2. in self-defense; 3. in strict compliance with a legal duty or in the regular exercise of a right. The Code also prescribes punishment for use of excessive force in any of these circumstances, whether intentional or not.

However, Article 13 of the Draft Bill distorts the Penal Code's standing justification by exempting agents for excesses committed in the service of counterterrorism.

> *Art. 13 For the purposes of this law, the following are considered:*
> *I. in legitimate defense of others, the counter-terrorist public agent who fires a firearm to protect the life of the victim, in real or imminent danger, caused by the action of terrorists, even if the result,* ***due to an excusable error in execution****, is different desired;*
> *II. in strict compliance with the legal duty or in self-defense of others, as the case may be, the counter-terrorist public agent composing a tactical team in the resumption of facilities and in the rescue of hostages that,* ***by excusable error****, produces a result different from that intended n the action; and*
> *III. in a state of need or in the context of unenforceability of adverse conduct, the infiltrator who practices conducts*

typified as a crime when the situation experienced imposes it, especially if characterized as a risk to his own life.

As written, the law provides a *laissez-passer* to the agents of counterterrorism, shielding them from any legal liability while pursuing putative terrorists.

4 Lack of evidence that the current regulatory framework for dealing with terrorism is insufficient

The drafting of the Bill 1.585/2019 was carried out with no evidence of current regulatory framework insufficiency or the need to strengthen the framework on counterterrorism in Brazil. This absence of of concrete evidence of a credible threat of terrorism on national soil raises the questions as to the real purpose and goal of the Bill.

There is, therefore, no solid evidence to support a new law on this topic, as there is nothing pointing to the insufficiency of the Anti-Terrorism Law (No. 13.260/2016) and other categories of crimes of our normative framework. There is also a clear disconnect between the Draft Bill, the reality on the ground in Brazil, and the evidence about what we need to build a safer country.

In an overall sense, the Bill broadens the criminal definition of terrorism and expands the right of the state apparatus to intervene in virtually any action or circumstance involving citizens. Especially at a time of escalating authoritarian threats in the country, the Bill increases the risks that the state apparatus will be used to intimidate political opponents and critics of the government, diminishing constitutional rights as freedoms and other guarantees.

5 Incompatibility with international commitments signed by Brazil

On June 15, 2021, seven UN rapporteurs sent a letter to the Brazilian Ministry of Foreign Affairs (Itamaraty), warning that, if the Draft Bill 1.595/2019 is approved, Brazil risks incurring the consequences of violating international law and of failing to meet its obligations. The rapporteurs pointed out that the Bill grants excessive powers to security and intelligence agencies and could pose a threat to social movements.

The UN rapporteur's concern is shared by many organizations. This is because the Draft Bill promotes new forms of control over civil society and, if approved, it may result in enormous setbacks and damage to democracy and the strengthening of civic space in our country.

The provisions contained in the Bill 1.595/2019 also contradict the understanding of the Inter-American Court of Human Rights, which provides that the crime of terrorism must be clearly distinguishable from ordinary categories of crimes, otherwise it would offend the principles of necessity and proportionality that need to guide any measure that may possibly restrict human rights.

The ambiguity in determining what the State understands as the crime of terrorism has the potential to undermine the exercise of human rights and fundamental freedoms. As we hereafter see, imprecise definitions of terrorism allow the deliberate misuse of the crime category. This creates an incompatibility of the Draft Bill with the international commitments assumed by Brazil, which also is a legal liability that may result in future international accountability.

Final remarks

The approval of Draft Bill 1.595 would result in the restoration of an outdated "logic of the enemy within/among us", besides the unacceptable concentration of powers in the Federal Executive branch, clearing the path for the strengthening of practices of intimidation, threats, silencing of critics and the opposition to the government, criminalization of social movements, as well as the restriction of fundamental freedoms.

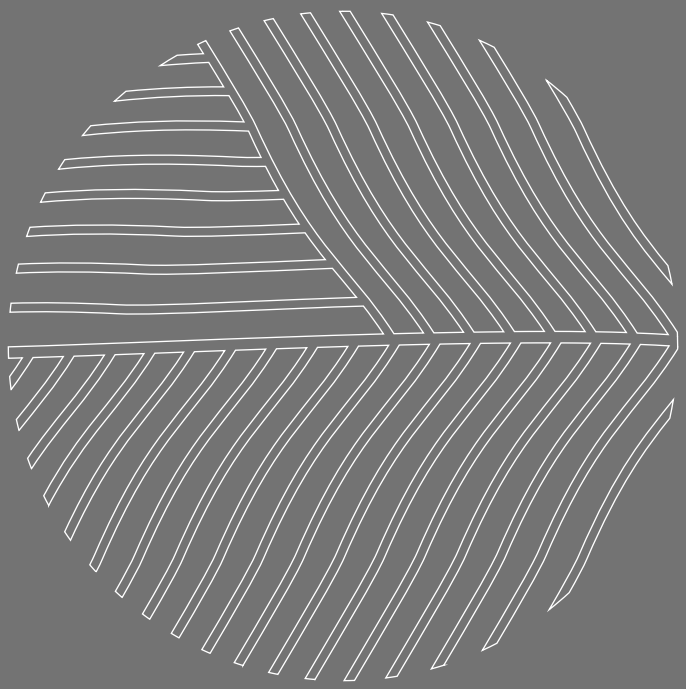
The excessively open and abstract definition of terrorism in the Draft Bill allows for its abusive application, as we have seen happen with other legislation. The lack of specific definitions, the vague and ambiguous legal norms, grant very broad discretionary powers to the authorities resulting in a scenario that is incompatible with our Federal Constitution and the obligations assumed internationally by Brazil.

The approval of the Draft Bill would create an environment of constant insecurity, intimidation, surveillance, and consequent self-censorship, which is in opposition to strengthening democracy and civic engagement in the country. When instruments capable of reducing the possibilities of dialogue and free and plural debate are created, the potential for the construction of consensus is diminished.

In addition to the manifestation of several civil society organizations, jurists, scholars, and international organizations, several entities representing the civil, federal,[1] military police forces, among others, expressed their disagreement with the Draft. In a joint technical note, they reinforced that the Draft Bill 1.595/2019 represents "serious unconstitutionality, invasion of constitutional attributions of public security bodies, and establishes extremely broad and elastic legal provisions" that "may be invoked with broad and very open discretion". In other words, there is a broad understanding among different sectors and actors in Brazilian society that the Draft is inadequate for its intended purposes. On the contrary, it gives a free pass to potentially undemocratic actions, with scant mechanisms for control or restraint.

All that said and presented, we trust that the Congress will reinforce its commitment to oppose laws that go against the strengthening of democracy. For all these reasons, the Draft Bill 1.595/2019 should be rejected and discontinued.

1 A month after criticizing the Draft Bill 1.595/2019, the Federal Police delegate who headed the Coordination for Combating Terrorism of the corporation's Police Inteligence was dismissed. Delegate José Fernando Chuy participated in a hearing at the Chamber of Deputies, where he stated that the Draft Bill contains "very open, elastic and broad typifications". Available at: https://blogs.oglobo.globo.com/malu-gaspar/post/lei-antiterrorismo-do-governo-bolsonaro-leva-mais-uma-exoneracao-na-pf.html



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