

Chapter 11

Protection of the Communication and Digital Security of Mobile Phones as a Fundamental Right to Privacy: A Study of the Jurisprudence of the Brazilian Superior Court of Justice

Nestor Eduardo Araruna Santiago
Universidade de Fortaleza, Brazil

Ana Monica Anselmo Amorim
Universidade de Fortaleza, Brazil

ABSTRACT

The central idea of this chapter is to discuss the notion of privacy arising from the use and exchange of messages through the use of mobile phones and whether police officers in charge of patrolling and public security may have access to the messages contained therein without proper judicial authorization. The authors focused on the position of the Brazilian Superior Court of Justice (STJ) on the subject, based on the decision rendered in the Appeal in Habeas Corpus (RHC) n. 51.531/RO. At this trial, protection was given to the new forms of communication and data contained in mobile phones under the constitutional terms of protection of privacy and non-unlawful obtaining of evidence, so that it will be necessary to issue a court order to get any informational elements found in messaging applications installed on a smartphone.

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INTRODUCTION

The rights to privacy and intimacy (article 5, item X, of the Brazilian Federal Constitution of 1988 - CF) are protected as fundamental rights of individuals, so they can ensure the most intimate forum of the human being. The confidentiality of communications and data (article 5, item XII, CF) are aimed at preserving the fundamental rights referred to above, especially when there is state criminal prosecution activity targeted to obtain information contained in mobile phones or smartphones seized in situations of characterization of criminal offense.

In such cases, it is common for police officers to search text messages found on the device seized even without a court order, with the intention of verifying any information that may lead to the elucidation of crimes. It is important to say that the owners do not allow with the police practice, and in most cases they are “slightly threatened” to cooperate with law enforcement, providing the password to access the device.

It is discussed whether such behavior can be characterized as unlawful evidence, with the consequent breaking of the chain of custody. In order to do so, it is necessary to analyze the judgment of Appeal in Habeas Corpus (RHC) 51.531/RO from the Brazilian Superior Court of Justice (Superior Tribunal de Justiça, 2018), which considered *unlawful* to inspect the messages and data stored on the mobile phone of the person arrested without prior judicial authorization.

BACKGROUND

It should be emphasized that the present work is not intended to exhaust the topic of privacy and intimacy. The notions brought in are necessary to the aspiration of the research, considering that it is essential to conceptualize the right to privacy and intimacy and how it is related to the use of mobile phones. Or, being more specific, how technology is related to privacy and should be protected, taking for granted that this everyday relation brings some concerns, and the answers given by law and lawmakers not always are satisfactory.

Although the day-to-day use of smartphones rises, it seems important to accentuate it does not imply that the owners of this devices should give up the right to privacy. Protecting privacy should not be confused with hiding illicit behavior, once privacy and intimacy (as a narrower approach of privacy) are strictly linked to human dignity, which is protected by the Constitution (Vianna, 2004). The paradox is inevitable: the more we share our life experiences through the internet, the more we need to protect privacy, as it is a way to demonstrate freedom. Technological advances cannot

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