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Brief on Platform Responsibility in Brazil

Artur Pericles L. Monteiro

WORK IN PROGRESS

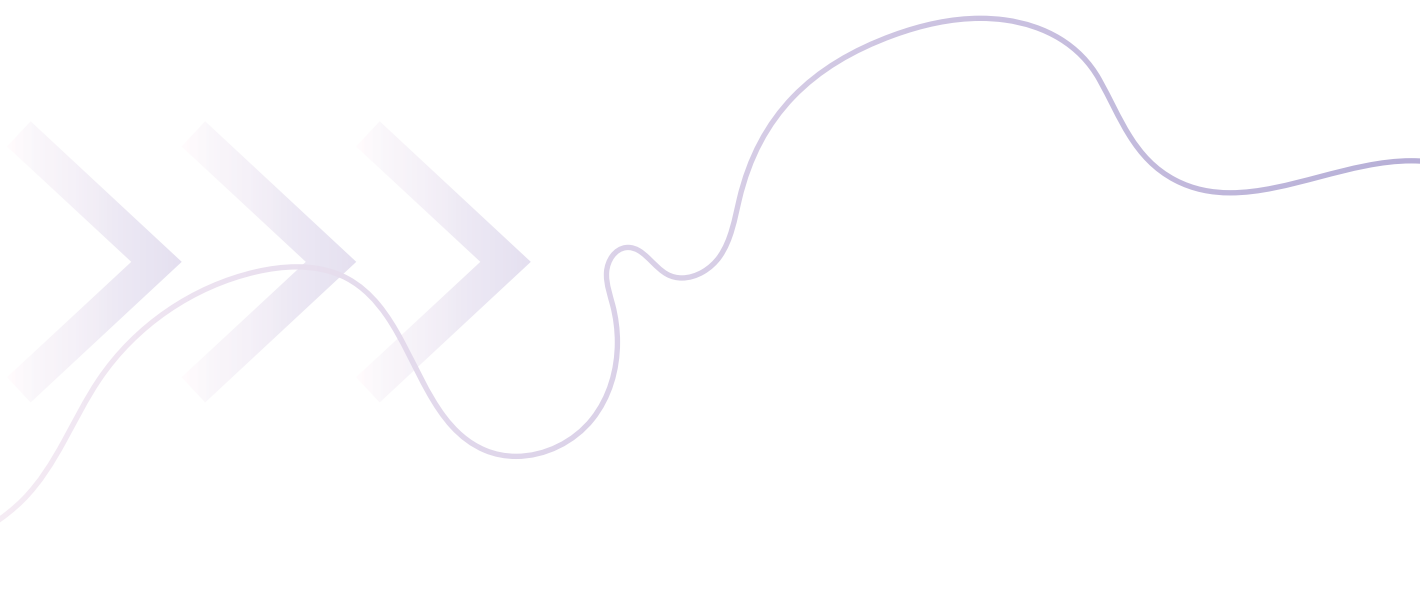
Authors

ARTUR PERICLES L. MONTEIRO, Wikimedia Fellow, the Information Society Project; Associate Research Scholar, Yale Law School.



He is an editor of the Digital Future Whitepaper Series. His work focuses on platform governance, anonymity, freedom of speech, privacy, and data protection. He has spoken at conferences at Yale Law School, the Knight First Amendment Institute at Columbia University, and George Washington University.

Previously, Art was head of research at InternetLab, an independent research center on law and technology in Brazil. He holds a doctorate in law, an M.Sc., and an LL.B., from the University of São Paulo (Brazil), where he led the clinic on free speech and the internet.

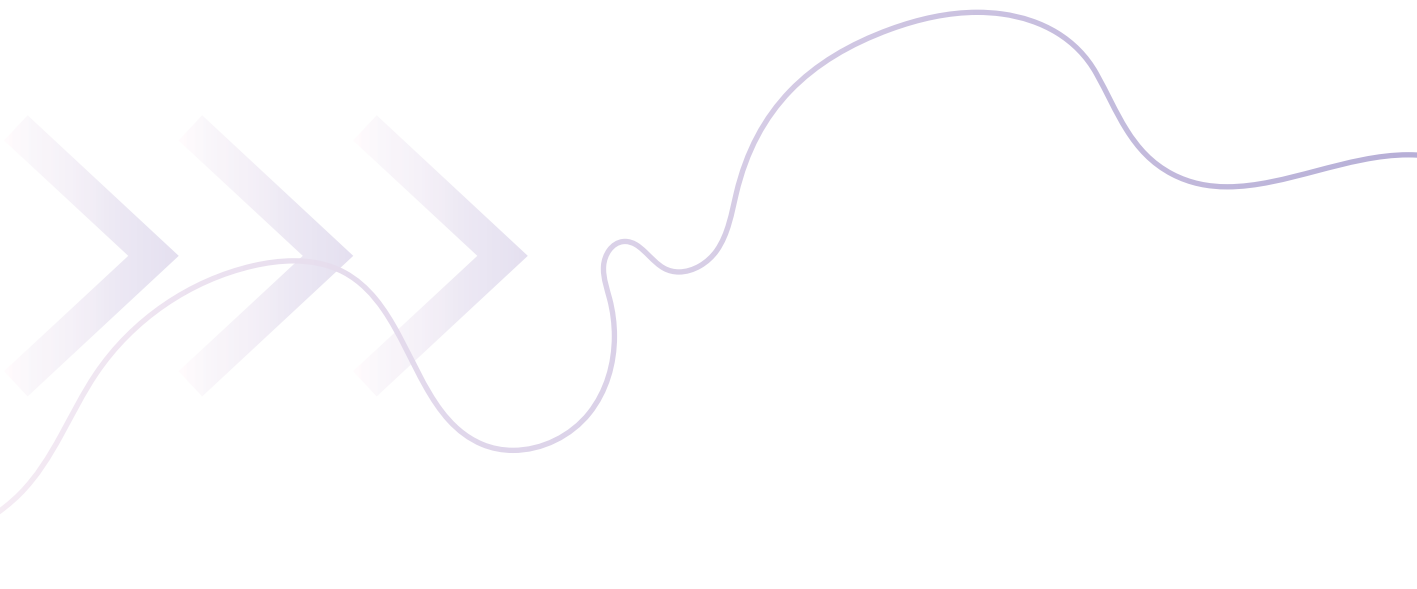


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Overview

BRAZIL HAS BEEN A BATTLEGROUND WHERE PROPOSALS FOR PLATFORM RESPONSIBILITY HAVE BEEN ADVANCED — AND DISPUTED. THIS BRIEF SEEKS TO PROVIDE AN OVERVIEW OF EXISTING AND PROPOSED FRAMEWORKS, AND OF RECENT DEVELOPMENTS WHICH HAVE BEEN TESTING THE ESTABLISHED CONSENSUS ABOUT RELATED LAW AND POLICY IN BRAZIL.



The Overarching Framework: Marco Civil Da Internet

Marco Civil da Internet (“Marco Civil”), often referred to as the Brazilian internet bill of rights,¹ is the main legislation defining platform responsibility. While the nickname might suggest otherwise, Marco Civil is an ordinary statute: law no. 12.965/2014.² Its drafting process, however, was anything but ordinary, following a years-long public consultation held online by the Ministry of Justice, which itself made use of the internet to gather comments and inputs from numerous civil society organisations and academics.³ Marco Civil was the result of a complex political process which included strong opposition from telecommunication companies, broadcaster and copyright holders, and law enforcement officials,⁴ and was picked up with renewed energy after the Snowden revelations showed President Dilma Rousseff was herself a target of surveillance by U.S. agencies.⁵ Partly because of this unusual constellation of engagement and participation from a wide range of sectors in Brazilian society, Marco Civil has been regarded as if possessing a distinct political status.⁶ Proposals for amending the statute are often met with concern with perturbing the viable consensus codified into law by Marco Civil.⁷

Under Marco Civil, platforms, like other internet application providers,⁸ are only liable for user-generated content if they fail to comply with a court order directing them to make the content unavailable. This was a response to prior case law, which reformers saw as incentivizing removal of content whenever a notice was served. Introduced in the second round of public consultations on the draft bill (i.e. before the bill was introduced in Congress) this safe harbour went beyond the notice-and-takedown model which had featured in the draft,⁹ itself a departure from a more stringent liability favoured in some cases¹⁰ and often regarded as flowing from tort law in Brazil.¹¹ Under art. 19 of Marco Civil, served with “a specific court order”, an internet application provider is required to “take the steps” to make the content unavailable, “within the scope and technical limits of its service”. Such orders must include “clear and specific identification” (art. 19, § 2, Marco Civil), which the High Court has interpreted as requiring plaintiffs provide URLs (uniform resource locators).¹²

There are two carveouts to this judicial safe harbour: copyright claims and non-consensual intimate content. Copyright claims were excluded from the general framework established in art. 19 to overcome the gridlock blocking Marco Civil from advancing in Congress because of intense lobbying from copyright holders.¹³ As Marco Civil was debated around the same time copyright reform was a hot topic, the applicable regime was deferred to a later time. That reform never came, however, so the interim rule included in Marco Civil applies till this day. Under art. 31, liability for copyright infringement resulting from user-generated content follows the Copyright Act (law no. 9.610/1998). Courts have still not settled on what the 1998 statute entails for online intermediaries, but have leaned towards, “the adoption of a notice-and-takedown regime for copyright infringement, following the model established in the United States by the Digital Millennium Copyright Act and in Europe by the e-Commerce Directive”.¹⁴

Non-consensual intimate content also operates under a notice-and-takedown model, though one provided explicitly by Marco Civil itself. Internet application providers are liable for losses resulting from such content if they fail to diligently make it unavailable “within the scope and technical limits of its service”, as provided by art. 21, Marco Civil, which also requires that the notice includes information that enables the “specific identification” of the infringing content, in addition to verification that the request is legitimate (i.e. is made, or authorized, by the victim).

Liability Beyond Marco Civil

Marco Civil concerns civil liability for user-generated content and so in its own terms does not cover other kinds of liability, such as criminal liability. Generally, failure with a court order can lead to charges for noncompliance with a legal order issued by an official, which under art. 330 of the Criminal Code is punishable with imprisonment of up to 6 months. Prosecution for noncompliance with removal orders is rare; in 2012, a Google executive was arrested in connection with an order to take down a YouTube video,¹⁵ but this was before Marco Civil went into effect. Noncompliance charges when platforms fail to provide data requested by courts are not unheard of, but also not common. A Facebook vice president was held in custody for about 24h in 2016 when WhatsApp did not provide data a court was seeking.¹⁶

In general, criminal legislation does not specify liability for online intermediaries or platforms, but scienter requirements applicable to most criminal offenses in Brazil prevent providers from being held liable for criminal content shared by third parties. Child safety legislation does establish a regime for provider liability for child sexual abuse material (CSAM), adopting a notice-and-takedown regime.¹⁷ “In practice, this means that service providers must respond to takedown notices to avoid criminal liability under [child safety legislation].”¹⁸

Electoral law was also not directly affected by Marco Civil, and indeed even after its entry into force electoral courts in Brazil sometimes held providers liable for infringements upon notice served by the affected person, party, or coalition. This was both the result of interpreting electoral legislation and of courts issuing regulation.¹⁹ More recently, however, both electoral legislation and its regulation have been adjusted to follow the judicial safe harbour found in Marco Civil.²⁰



Uncharted Waters: The Law of Content Moderation

Marco Civil did not address one of the most important current questions for platform responsibility: content moderation. Although it does provide safe harbour from civil liability arising from user-generated content, Marco Civil was not designed to regulate decisions platforms make when removing, restricting, labelling, or deciding not to act on content. Content moderation was not a primary concern in the drafting of Marco Civil; what drove the adoption of the intermediary immunity regime established in art. 19 of the statute was the risk that platforms would be forced to remove content to avoid costly damages awards being entered against them by courts not too protective of freedom of expression.²¹ Threats to freedom of expression — and to other democratic values — posed by platforms themselves were not the focus of the legislation.²²

This makes sense given that the 2014 Marco Civil was enacted prior to the turn towards platform responsibility and away from intermediary liability as the theoretical framework and regulatory toolkit favoured by policymakers since 2015.²³ As attention to the impact of content moderation has grown, however, Marco Civil has had little to say. The focus on liability has meant it “provides no scrutiny over the vast majority of online content related disputes”,²⁴ which are not brought before courts. Clara Keller, a Brazilian scholar, believes this shows how the celebrated internet bill of rights is insufficient, as it lacks mechanisms “to assure a responsive, transparent and human rights aware governance framework”.²⁵

In fact, what Marco Civil’s silence means for content moderation has been contested. Most have pointed to debates in the public consultation and to legislative history as clearly establishing that its intermediary liability regime should be read only as a rejection of a notice-and-takedown model, and therefore not as preventing providers from engaging in content moderation.²⁶ Prior to 2021, this seemed like the settled interpretation of the law. Yet, in 2021, President Bolsonaro adopted provisional legislation²⁷ which endorsed the opposite interpretation. Enacted on the eve of Brazil’s Independence Day, when protests endorsed by the President included calls for ousting and arresting members of the Supreme Court, the legislation dragged content moderation regulation to the centre of the political crisis in the country.²⁸ The explanatory memorandum to the provisional legislation, MP 1068/2021 (which would have amended Marco Civil), advanced the notion that under Marco Civil much of content moderation was illegal because it violated users’ free speech rights. The provisional legislation required social media to limit content moderation to a specified list of illegal content, which notably did not include misinformation.²⁹ Although the provisional legislation was quickly rejected by Congress, without ever been advanced to a vote, at the same night when the Supreme Court issued enjoined its enforcement,³⁰ other courts have adopted that interpretation of Marco Civil.

Even if that interpretation which outright bars content moderation is rejected, what rights users have against platforms when their content is removed or otherwise restricted is far from a settled question. In contrast to U.S. First Amendment doctrine, which is generally regarded as granting editorial rights to platforms,³¹ and to an expansive view of the Communications Decency Act that immunizes platforms from content moderation decisions

generally,³² under Brazilian law it would be unusual to claim that platforms have free speech rights— particularly trumping those of users. This is particularly true given that the Brazilian legal system is generally understood as recognizing that constitutional rights apply horizontally, that is, between individuals and other persons, not just against the state.³³ Marco Civil itself is evidence that users’ hold constitutional rights against providers abridging their freedom of speech or violating their privacy; contractual provisions infringing on such rights are “null and void” under art. 8.

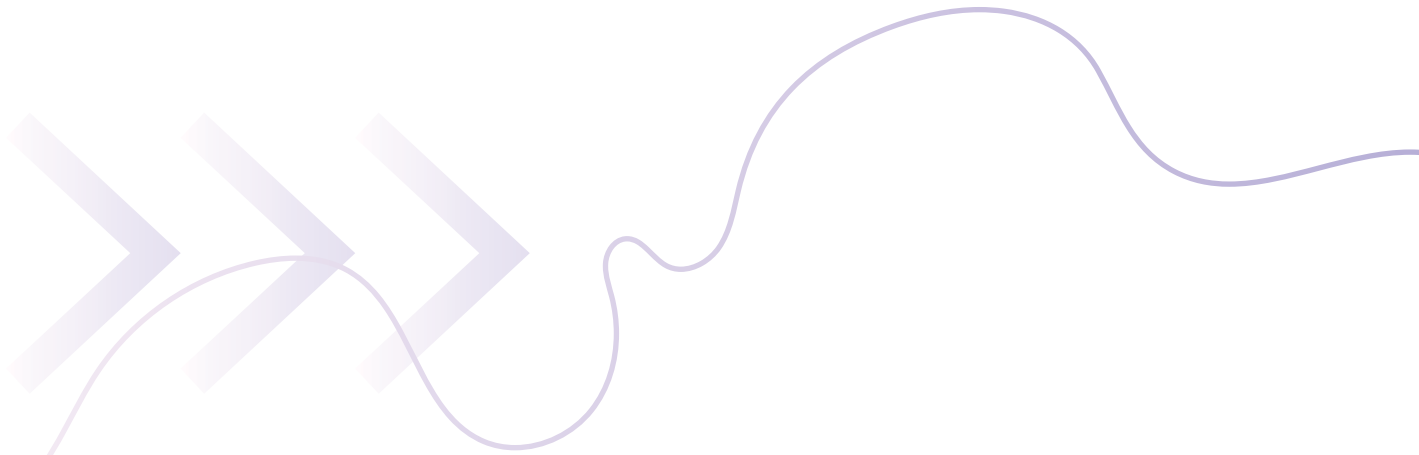
The scope and extent of users’ rights against platforms are not defined; one possibility would be to view those rights as equivalent to those individuals hold against the state.³⁴ This was arguably the view behind the provisional legislation issued by President Bolsonaro. Another possibility would be to try to reconcile users’ rights with platforms’ by admitting that platforms enact (and enforce) their own content policies and granting users due process rights, with judicial review of the justification offered by platforms for content moderation decisions.³⁵ A third possibility would look beyond fairness in content moderation and to constrain the latitude platforms have in establishing their content policies to restrict protected speech. Court cases where users seek to have their content or accounts reinstated — and prevail on their claims — are common, yet case law has so far not articulated a theory of users’ free speech rights against platforms, a question that is ordinarily left unaddressed.

Courts often rely on consumer protection law when deciding content moderation cases. Consumer protection has a wide scope in Brazilian law; especially after the enactment of the 1990 Consumer Protection Code (“CDC”, after Código de Defesa do Consumidor, law no. 8078/1990), consumer protection had a transformative impact in the legal system, affecting much of private law, as well as other areas of the law.³⁶ Consumer protection modifies the application of ordinary legal concepts and provisions, working from the premise that contract law, e.g., should apply differently given the highly asymmetrical character of the relationship between a consumer and a provider of (consumer) goods and services. Given that this asymmetry can also be said to be present in the relationship between users and platforms, and considering that Brazilian courts have long appreciated that consumer protection law should apply even for services nominally provided free of charge, it is no surprise that courts have turned to the CDC to adjudicate claims against platforms.

Consumer protection has recently also opened a new avenue for probing content regulation in court. Prosecutors are allowed to bring consumer protection claims, including class actions. A civil investigation often precedes the filing of such claims. In November 2021, a federal prosecutor in Brazil started an investigation into the content moderation practices of Facebook, Instagram, Telegram, TikTok, Twitter and YouTube, citing misinformation and online violence. The investigation has served subpoenas to the companies for information on their content policies and enforcement mechanisms, including the number of employees working with Brazilian users.

The theory behind the investigation seems to be that platforms are legally liable for losses resulting from insufficient measures to prevent misinformation, particularly covid-related, and violence online, as that violates users’ consumer-protection rights to accurate information and to safety. The prosecutor states this liability would not be covered by the Marco Civil safe harbour given that such measures are incumbent on platforms themselves, and do not implicate liability for losses resulting from user-generated content. Although, as noted, Marco Civil has

been interpreted as not regulating content moderation, the prosecutor has suggested that the “lack of a minimal content moderation policy” likely “violates constitutional rights”. This reading of the law has yet to be tested in court. Invoking consumer protection legislation would entail consumer protection agencies would have authority over platform content governance. Such agencies often have no insulation from the executive; the head of the federal agency serves at the pleasure of the President.



The “Fake News Bill”

In 2020, as the pandemic took over Brazil and many were concerned with covid-related mis- and disinformation, including notably from the President’s social media,[See Ricard.2020pw, p.3 (“President Bolsonaro’s recurring statements about COVID-19 have become one of the main vectors of misleading content.”); Monteiro³⁷ (“When the pandemic hit Brazil, Bolsonaro mirrored former U.S. President Trump’s approach in downplaying the seriousness of Covid-19.”)] Congress started considering the “fake news bill”, as Senate bill no. 2630/2020 came to be known. The bill has changed considerably since introduced and clearing the Senate in July 2020.

At one point it would make disinformation illegal and create a traceability mandate for messaging apps. Its current iteration seeks to combat disinformation by curbing the undisclosed use of bots in social media, requiring disclosure of adverts and boosted content, and increasing transparency over content moderation. Instead of traceability, the bill would provide for a data preservation procedure applicable to messaging apps. It would create due process requirements for content moderation, and demand information on content moderation processes and decisions.³⁸ Messaging apps would be required to limit forwarding and prevent users from being included in broadcast lists from people not in their contacts, and to adopt other measures endorsed by codes of conduct. It would also empower the multistakeholder Brazilian Internet Steering Committee (CGI.br) to request information, issue guidelines, assess transparency reports, and certify codes of conduct. Those codes of conduct would be established by a “corregulatory mechanism”, and providers would be incentivized to form a “self-regulatory entity” that would also operate a dispute resolution mechanism.

In late 2021, it seemed the bill was on the verge of passing. When the speaker of the House of Representatives hesitated, the bill’s main sponsor in the House tried to force a vote through a motion that failed to garner the requisite number of supporters. The bill has not seen movement since.



Scope and Jurisdictional Questions

Another important point related to platform responsibility that is not settled related to territorial and extraterritorial scope. The relevant provision on Marco Civil is the subject of an ongoing dispute. It states that any data processing operation shall comply “with Brazilian legislation and the rights to privacy, to personal data protection, and to confidentiality of private communication and of records” (art. 11, caput, Marco Civil). A further provision specifies that this applies to providers not incorporated in Brazil, provided they “offer services to the Brazilian public or at least one entity in the same business conglomerate is established in Brazil” (art. 11, § 2, Marco Civil). There are two contrasting views as to what this entails in terms of what overseas providers having to abide with Brazilian law, one more expansionist, the other more guarded.

The more expansionist interpretation of the scope of Marco Civil featured in a recent high-stakes case which led to an order for blocking access to Telegram nationwide, which was rescinded before it was implemented. Supreme Court justice Alexandre de Moraes had been unsuccessful in serving the app with orders directing it to disable accounts and remove content from public channels, and to provide data related to the accounts. The accounts belonged to supporters of President Bolsonaro who are the targets of an investigation, opened by the Supreme Court itself, looking into a possible conspiracy to defame members of the Court and organizing attempts to have them forcibly removed. Authorities elsewhere had likewise failed to reach Telegram, informally or through legal service. Morgan Meaker³⁹ Telegram had been sent official notices from the Court through its publicly-listed email accounts, but never acknowledge receipt. The Court also served a Brazilian firm representing the app on intellectual property matters. When all that failed, the order for the ban of the app until it complied with outstanding orders was entered in 17 March 2022.⁴⁰

The Court relied on a Marco Civil provision that subject noncompliance with personal data protection provisions on the statute to a range of sanctions, including suspension and ban of “activities implicating operations falling under art. 11”. It directed internet service providers to block connections to Telegram, and Apple and Google to “prevent users from using the app” and remove from their respective app stores. When Telegram CEO took note of the action against the app and posted an apology to the Court on his Telegram public channel, the Court gave it additional time to comply with outstanding orders, but conditioned lifting the nationwide ban on it also appointing a local representative. Telegram had also been ordered to report on “all the steps taken to fight disinformation and fake news”. The Court was satisfied Telegram had complied and eventually rescinded the order before it was implemented.⁴¹

The interpretation favoured by Justice Moraes in the Telegram ban case contrasted with that endorsed by another member of the Supreme Court in an ongoing case connected to the 2016 ban of WhatsApp, which the Supreme Court itself had stayed.⁴² In ADPF 403, which concerns the constitutionality of blocking messaging apps, Justice Rosa Weber concluded that sanctions such as those adopted against WhatsApp in 2016 (and later Telegram in 2022) went beyond what Marco Civil provided, which on her view limited the suspension or ban of a provider’s

operations to infringements of provisions related to data protection and the confidentiality of communications. This represents a narrower view of the extraterritorial scope of Marco Civil. The courts have not discussed what is meant by “offering services to the Brazilian public” under art. 11, § 2, Marco Civil; although this could be read as any services accessible from users in Brazil, a similar provision in the European Union’s General Data Protection Regulation (art. 3(2)) has been interpreted by the European Data Protection Board as requiring targeting of residents of the EU, e.g. accepting payment in a currency of a EU member-state, or operating under a top-level domain level of a EU member-state (e.g. “.de”), mentioning dedicated addresses or phone numbers to be reach from an EU country, among other factors.⁴³



Endnotes

- 1 See, e.g., Carlos Affonso Souza, Fabro Steibel & Ronaldo Lemos, Notes on the creation and impacts of Brazil's internet bill of rights, 5 *THE THEORY AND PRACTICE OF LEGISLATION* 1-22 (2017).
- 2 An unofficial English translation of Marco Civil da Internet was published by the Brazilian House of Representatives: *THE BRAZILIAN CIVIL FRAMEWORK OF THE INTERNET* (Fernanda Belotti Alice tran., 2016), https://bd.camara.leg.br/bd/bitstream/handle/bdcamara/26819/bazilian_framework_%20internet.pdf
- 3 See CAROLINA ROSSINI, FRANCISCO DE BRITO CRUZ & DANILO DONEDA, The strengths and weaknesses of the Brazilian internet bill of rights: examining a human rights framework for the internet, 3-5 (2015), https://www.cigionline.org/sites/default/files/no19_0.pdf (describing the lead-up to Marco Civil and the public consultation); Francisco Carvalho de Brito Cruz, *Direito, democracia e cultura digital: a experiência de elaboração legislativa do Marco Civil da Internet*, 2015 (master's degree thesis discussing the drafting of Marco Civil from a policy perspective) (in Portuguese); Paulo Rená da Silva Santarém, *O direito achado na rede: a emergência do acesso à Internet como direito fundamental no Brasil*, 2010 (master's degree thesis describing the background, the drafting process and how the public consultation took place) (in Portuguese).
- 4 "Telecommunication companies fiercely attacked the net neutrality provisions; broadcasters lobbied against any change that could amount to making copyright more flexible; and public authorities lobbied for longer data retention periods and reduced safeguards and controls in their access to users' data." Luiz Fernando Marrey Moncau & Diego Werneck Arguelhes, *The Marco Civil da Internet and digital constitutionalism*, in *THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY* 189-213, 197 (Giancarlo Frosio ed., 2020).
- 5 Souza, Steibel, and Lemos, *supra* note 1 at 11-12; Moncau and Arguelhes, *supra* note 4 at 197.
- 6 E.g. Nicolo Zingales, *The Brazilian approach to internet intermediary liability: blueprint for a global regime?*, 4 *INTERNET POLICY REVIEW* 1-14, 7 (2015), <http://policyreview.info/articles/analysis/brazilian-approach-internet-intermediary-liability-blueprint-global-regime> (emphasis added): "the Marco Civil is known as a 'constitution for the internet' in light of its focus on fundamental rights. [...] While the prioritisation of fundamental rights is not enshrined in a document with force superior to that of ordinary legislation, as it is usually the case for national constitutions, the fact that the amendment of the Marco Civil does not require a reinforced procedure is of secondary importance for our purposes: the symbolic value of this law is enormous."
- 7 ROSSINI, CRUZ, AND DONEDA, *supra* note 3 (citation omitted): "... although there were compromises, the final approved text was mostly the product of the public, multi-stakeholder consultation process. Most — although perhaps not all — stakeholders saw it as a uniquely legitimate piece of law."
- 8 Art. 5, VII, Marco Civil, defines internet applications as "a set of functionalities which are accessible by a terminal connected to the internet".
- 9 Souza, Steibel, and Lemos, *supra* note 1 at 10-11 (noting that the safe harbour was introduced at the second round of public consultations).
- 10 Moncau and Arguelhes, *supra* note 4 at 193-195 (summarising those cases as endorsing "a common rationale: internet platforms should bear the full risks of illegal activities by their users").

Endnotes

- 11 Anderson Schreiber, Civil Rights Framework of the Internet (BCRFI; Marco Civil da Internet): Advance or setback? civil liability for damage derived from content generated by third party, in PERSONALITY AND DATA PROTECTION RIGHTS ON THE INTERNET 241-266, 249 (Marion Albers & Ingo Wolfgang Sarlet eds., 2022) (describing “the theory of notice and takedown” as departing from “the Brazilian civil liability system”).
- 12 Clara Iglesias Keller, Policy by judicialisation: the institutional framework for intermediary liability in Brazil, INTERNATIONAL REVIEW OF LAW, COMPUTERS & TECHNOLOGY 1-19, 11 (2020).
- 13 Souza, Steibel, and Lemos, supra note 1 at 13.
- 14 Moncau and Arguelhes, supra note 4 at 200.
- 15 T. C. Sottek, Google executive arrested in Brazil as the company resists orders to freeze political speech on YouTube, THE VERGE (2012), <https://www.theverge.com/2012/9/26/3413476/google-brazil-you-tube-arrest>.
- 16 Brad Haynes, Facebook executive jailed in Brazil as court seeks WhatsApp data, REUTERS (2016), <https://www.reuters.com/article/us-facebook-brazil-idUSKCN0W34WF>.
- 17 See art. 241-A of law no. 8.069/1990, the main act for the protection of minors in Brazil.
- 18 Moncau and Arguelhes, supra note 4 at 201.
- 19 Electoral courts in Brazil discharge “all powers related to the electoral process”: “in addition to deciding electoral cases and controversies (rule adjudication), the electoral justice system organises all elections in Brazil (rule application) and has broad regulatory powers (rulemaking).” VIRGÍLIO AFONSO DA SILVA, THE CONSTITUTION OF BRAZIL: A CONTEXTUAL ANALYSIS 72 (2019).
- 20 FRANCISCO BRITO CRUZ, NOVO JOGO, VELHAS REGRAS 337-339 (2019) (describing the disputes surrounding intermediary liability for electoral law infringements); FRANCISCO BRITO CRUZ ET AL., DIREITO DIGITAL NA ERA ELEITORAL 112 (2017) (noting that as of 2017 the Marco Civil model was adopted by electoral legislation).
- 21 ARTUR PERICLES LIMA MONTEIRO ET AL., Armadilhas e caminhos na regulação da moderação de conteúdo, 8 (2021), <https://www.internetlab.org.br/pt/liberdade-de-expressao/armadilhas-caminhos-moderacao/>.
- 22 BRUNA MARTINS DOS SANTOS, An assessment of the role of Marco Civil’s intermediary liability regime for the development of the internet in Brazil, 27 (2020), https://isoc.org.br/files/Study_on_the_Marco_Civil.pdf (“... Marco Civil’s focus was on the issue of the moderation of third-party content and not on the autonomous decisions made by applications vis-à-vis such content or user behavior in general.”).
- 23 Giancarlo F Frosio, Why keep a dog and bark yourself? From intermediary liability to responsibility, 26 INTERNATIONAL JOURNAL OF LAW AND INFORMATION TECHNOLOGY 1-33, 32 (2018) (“Intermediary responsibility has become the latest trend in online governance. Terminologically first, it is slowly displacing the notion of intermediary liability. Responsibility of intermediaries is all over the literature and a powerful slogan for policy-makers.”).

Endnotes

- 24 Keller, *supra* note 12 at 13.
- 25 *Id.*
- 26 SANTOS, *supra* note 22 at 9 (“The absence of specific provisions with respect to the development of content moderation rules by the providers of Internet applications themselves also indicates that the removal of content is not restricted to the existence of a judicial order, and the provider may remove content that deliberately breaches its policies and terms of use”); Keller, *supra* note 12 at 12 (noting under Marco Civil providers “are free to apply their product policies through content moderation, i.e. according to their criteria”).
- 27 Under the Brazilian Constitution, the President has the authority to issue provisional measures, which are equivalent to statutory law, go into effect immediately and are then reviewed by Congress. See SILVA, *supra* note 19 at 220–221. Provisional measures cease to have effect if Congress fails to review them within 60 days (this period may be extended once). In that case, Congress may pass a resolution regulating the effects of that implicit repeal during the period it was effective; if Congress fails to pass such a resolution, the provisional measure applies to facts during its effective period.
- 28 See Artur Pericles Lima Monteiro, Brazilians are desperately fighting against Bolsonaro’s digital tactics, REST OF WORLD (2021), <https://restofworld.org/2021/brazil-bolsonaro-social-media/>.
- 29 For a translation of the now-repealed provisional legislation is available, see Artur Pericles Lima Monteiro, Unofficial English Translation of Brazilian Provisional Measure 1068, on Content Moderation, (2021), <https://dx.doi.org/10.2139/ssrn.3922992>.
- 30 See Jack Nicas, Bolsonaro’s ban on removing social media posts is overturned in Brazil, THE NEW YORK TIMES (2021), <https://www.nytimes.com/2021/09/15/world/americas/brazil-bolsonaro-social-media-ban.html>; see Monteiro, *supra* note 28, for a discussion of the grounds adopted by Congress and the Supreme Court in holding the provisional legislation unconstitutional. A bill with the same language the provisional legislation was introduced by the President shortly thereafter, and has seen little movement in Congress since.
- 31 See DAPHNE KELLER, Who do you sue? State and platform hybrid power over online speech, 17 (2019), <https://www.lawfareblog.com/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech> (noting that First Amendment rights arguments have “carried the day for platforms in a number of recent cases”); Ashutosh Bhagwat, Do platforms have editorial rights?, 1 JOURNAL OF FREE SPEECH LAW 97–138, 137–138 (2021) (concluding that “under both extant doctrine and first principles, social media firms should be entitled to significant First Amendment ‘editorial rights’ to control the content that is carried and highlighted on their platforms”).
- 32 Danielle Keats Citron & Benjamin Wittes, The internet will not break: denying bad Samaritans § 230 immunity, 86 FORDHAM LAW REVIEW 401–423 (2017) (describing the development of the case law, criticizing the immunity as too broad, and advancing language restricting it to Good Samaritans).

Endnotes

- 33 See SILVA, *supra* note 19 at 116 (discussing the “horizontal effects of fundamental rights” in Brazil).
- 34 Moncau and Arguelhes, *supra* note 4 at 210 (“While the MCI states that freedom of expression will be protected online, it does not explicitly state that private parties must respect internet users’ freedom of expression to the same extent that state actors are bound. However, in article 19 the MCI seems to at least hint in that direction.”).
- 35 Matthias C. Kettemann & Anna Sophia Tiedeke, Back up: can users sue platforms to reinstate deleted content?, 9 INTERNET POLICY REVIEW, 11 (2020) (discussing incipient German case law recognizing platform ‘house rules’ including resulting in content removal, provided that “deletion is not performed arbitrarily, and users are not barred from the service without recourse.”).
- 36 For a discussion of consumer protection law and contract law, see Ronaldo Porto Macedo, Relational consumer contracts: new challenges for Brazilian consumer law, 12 SOCIAL & LEGAL STUDIES 27-53, 32-35 (2003).
- 37 *Supra* note 28.
- 38 See Artur Pericles Lima Monteiro, Juliana Fonteles da Silveira & Anna Martha Cintra Araújo, Unofficial translation of bill 2630/2020, “Brazilian law for freedom, responsibility and transparency on the internet”, (2022), https://docs.google.com/document/d/1dPESQICWYFY_VhN3ETIIWrkKoOvFDox7fnC_JgClb9Y/. Art. 9. Providers of social networks and instant messaging services must produce semi-annual transparency reports, made available on their websites, in Portuguese, so as to provide information on procedures and decisions regarding the active intervention on accounts and third-party generated content resulting in removal, disabling of access, downranking, labeling and other [decisions] restricting freedom of expression, as well as on measures adopted to comply with this law.

Paragraph 1. Reports must contain:

- I The total number of users accessing the providers from connections established in Brazil in the reporting period;
- II The total number of measures applied to accounts or content, as defined in the heading of this article, adopted in compliance with the providers’ own policies and terms of use and with this Law, categorized by applied rule and by type of measure adopted;
- III The total number of review requests submitted by users regarding measures applied to accounts and content, as defined in the heading of this article, on the grounds of providers’ own policies and terms of use, and in compliance with this Law, as well as the [number of] measures reversed after analysis of the appeals [seemingly meaning the “review requests”], categorized by applied rule and type of measure adopted;
- IV The total number of measures applied to accounts and content, and their motivations [seemingly the reasoning of the court order], pursuant to a court order, specifying the legal bases on which the removal decision was grounded, without prejudice to information sealed by court;

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- V [information on the] general features of the teams involved in the enforcement of policies and terms of use concerning third-party generated content, including number of people involved in the activity, the mode of contractual engagement, as well as statistics on their working language, qualifications, indicators of diversity[,] demographic attributes and nationality;
- VI The total number of labeling measures, removals or suspensions reversed by the provider;
- VII Aggregate information about the compared reach of the content deemed as infringing by the provider, in comparison to other content in dissemination in the [reporting] period;
- VIII Information on the deployment of automated systems in the enforcement of providers' own policies and terms of use, including:
- a) Proactive detection rate of content identified for removal by automated systems, by type of content; and
 - b) Description of the types of automated detection tools involved in ensuring proper enforcement of content policies.
- IX Updates to [providers'] own policies and terms of use in the [reporting] semester, the date of modification and the general basis for the change; and
- X The total number of measures applied to accounts referred to in art. 22 of this Law [defining accounts held by certain government officials as "public interest accounts"], categorized by rules applied, in what proportion, and by type of measure adopted.
- Paragraph 2: Data and reports published [by providers] must be made available under open technological standards which allow communication, accessibility and interoperability between applications and databases.
- Paragraph 3: Transparency reports must be made available to the public within 60 (sixty) days after the end of the semester in question, and prepared in clear language, whenever possible providing accessibility tools.
- 39 Germany has picked a fight with Telegram, WIRED (2022), <https://www.wired.com/story/germany-telegram-covid/>
- 40 Other authorities had discussed similar measures. See Brazil electoral court could ban Telegram app for not fighting fake news, REUTERS (2022), <https://www.reuters.com/technology/brazil-electoral-court-could-ban-telegram-app-not-fighting-fake-news-2022-01-20/>
- 41 See Jack Nicas, Brazil lifts its ban on Telegram after two days, THE NEW YORK TIMES (2020), <https://www.nytimes.com/2022/03/20/world/americas/brazil-telegram-bolsonaro.html>

Endnotes

- 42 Luciana Magalhães, Brazil's Supreme Court lifts block on WhatsApp, WALL STREET JOURNAL (2016), <https://www.wsj.com/articles/court-orders-block-to-whatsapp-chat-service-in-brazil-1468952805>; For a discussion of that case and preceding orders blocking access to WhatsApp, see Jacqueline de Souza Abreu, Disrupting the disruptive: making sense of app blocking in Brazil, 7 INTERNET POLICY REVIEW 1-16 (2018), <http://policyreview.info/articles/analysis/disrupting-disruptive-making-sense-app-blocking-brazil>.
- 43 See European Data Protection Board, Guidelines 3/2018 on the territorial scope of the GDPR (Article 3), 17-18 (2019), https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_3_2018_territorial_scope_after_public_consultation_en_1.pdf (describing factors for determining the extraterritorial scope of the GDPR).



RESEARCH PARTNER

