REGULATION OF DIGITAL PLATFORMS: FREEDOM OF EXPRESSION OR EXERCISE OF POWER?

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Abstract: In a scenario in which digital platforms, understood in this paper as internet application providers, especially from the point of view of social networks, have gone beyond social interaction and reached business environments, issues related to the moderation of content posted by their users have taken on new contours. In the Brazilian legal system, the matter has been regulated by the Marco Civil da Internet (Civil Rights Framework for the Internet) and is defended on the basis of freedom of expression, whose background is constitutional. However, the discussion surrounding the constitutionality of article 19 of the Marco Civil has reached the Supreme Court, signaling the possibility of extending the responsibility of application providers for the content posted by users. The debate deserves reflection, though, because, as will be shown, the exercise of power by digital platforms can go beyond the discourse of guaranteeing individual freedoms.

Keywords: content moderation, application providers, Internet Civil Rights Framework.

INTRODUCTION

Recently, the controversial billionaire Elon Musk, CEO of Tesla Motors, founder of technology companies such as SpaceX, Neuralink, and Starlink, and purchaser of the former Twitter—now renamed "X"—entered into a direct clash with the Brazilian Federal Supreme Court (STF), accusing the court of promoting censorship in the use of the internet in Brazil. The controversy originated from a post made by Musk on his own social network, X, on April 6 of the current year, responding to a message published

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by Justice Alexandre de Moraes, in which he congratulated former Justice Ricardo Lewandowski. Musk asked: "Why are you demanding so much censorship in Brazil?"[1] In response, at the request of the Office of the Prosecutor General, Justice Moraes placed Musk under investigation in Inquiry No. 4957[2], which deals with so-called fake news and acts that threaten the democratic regime in Brazil.

This clash occurs in the broader context of Brazil's debate over the regulation of digital platforms, particularly through Bill No. 2,630/2020, authored by Senator Alessandro Vieira, which aims to establish the Brazilian Law on Freedom, Responsibility, and Transparency on the Internet—but which became widely known as the "Fake News Bill"[3]—as well as the review, by the STF, of Repetitive Themes Nos. 533 and 987[4].

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[1] X (formerly Twitter). Elon Musk (@elonmusk), X (Apr. 6, 2024, 7:44 PM), https://x.com/elonmusk/status/1776475718383534148. (last visited Apr. 22, 2024)

[2] "*Agora, a Procuradoria-Geral da República requereu o que segue: "Ao tempo em que dá ciência da decisão do dia 7 de abril último nestes autos, e tendo em vista o teor da deliberação e de notícias divulgadas na mídia desde ontem, o Ministério Público Federal entende pertinente que os representantes legais da rede "X" no Brasil sejam ouvidos para esclarecer se o Sr. Elon Musk detém, nos termos dos estatutos da empresa, atribuição para, sponte sua, determinar a publicação de postagens na rede referida e se o fez, efetivamente, com relação a perfis vedados por determinação judicial brasileira em vigor. Ainda, que sejam ouvidos para que possam dizer se a empresa realizou algum levantamento do bloqueio de perfil até agora suspenso por determinação judicial. Se isso ocorreu, que informem quem competente para tanto no âmbito da empresa determinou o ato. Da mesma forma, se houve levantamento do bloqueio determinado por ordem judicial em vigor, que informem quais os perfis proscritos que voltaram a se tornar operantes." Logo, para que a PGR melhor possa avaliar a situação objeto do Inq 4.957/DF, impõe-se o deferimento das medidas pleiteadas, haja vista que estão em conformidade com a investigação determinada para os fins da instauração de Inquérito, que objetiva apurar as condutas de Elon Musk, dono e CEO da provedora da rede social "X". Assim, DEFIRO o requerido pela PGR: a) A oitiva dos representantes legais da rede "X" no Brasil "para esclarecer se o Sr. Elon Musk detém, nos termos dos estatutos da empresa, atribuição para, sponte sua, determinar a publicação de postagens na rede referida e se o fez, efetivamente, com relação a perfis vedados por determinação judicial brasileira em vigor"; b) "Que sejam ouvidos para que possam dizer se a empresa realizou algum levantamento do bloqueio de perfil até agora suspenso por determinação judicial"; c) "Se isso ocorreu, que informem quem competente para tanto no âmbito da empresa determinou o ato. Da mesma forma, se houve levantamento do bloqueio determinado por ordem judicial em vigor, que informem quais os perfis proscritos que voltaram a se tornar operantes*". Supremo Tribunal Federal (STF), *Inquérito 4.957*, Rel. Min. Alexandre de Moraes. Available at https://portal.stf.jus.br/processos/detalhe.asp?incidente=6893258 (last visited June 17, 2024).

[3] Brazil. *Projeto de Lei No. 2.630/2020* (Chamber of Deputies). Available at https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2256735 (last visited June 17, 2024).

[4] Supremo Tribunal Federal (STF), *RE 1.057.258/MG*, Rel. Min. Luiz Fux, Tema 533 – Repercussão Geral, DJe June 27, 2017. Available at https://www.stf.jus.br/portal/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=5217273&numeroProce

Thus, in Brazil, the debate surrounding the regulation of digital platforms involves, among other factors, the analysis of the constitutionality of Article 19 of Law No. 12,965/2014—better known as the Marco Civil da Internet—currently under review in the aforementioned Repetitive Themes; the potential threats to freedom of expression that such regulation might represent; and numerous legislative proposals already under consideration, such as Bill No. 2,630/2020 and the now-revoked Provisional Measure No. 1,068/2021, in addition to countless public debates.

Discussion around digital platforms has reached unprecedented scale, given the growing use of virtual spaces—especially social networks—not only as communication tools but also as instruments of work and social influence. These platforms have enabled global interaction, blurring borders and dramatically expanding the possibilities for cultural, philosophical, and social experiences.

What emerged is what Manuel Castells called "mass self-communication," understood as mass communication due to its potential for diffusion across the entire internet and, consequently, its propagation around the globe. It is "self-generated" because it is "generally initiated by individuals or groups themselves, without the mediation of the mass media system."[5]

If, on the one hand, networked communication has had positive impacts by enabling cross-border interlocution, on the other hand, it has given rise to large-scale harms resulting from misinformation, so-called hate speech, and interference with individual decision-making—including but not limited to electoral processes. This has intensified debates on the moderation of content posted by third parties on application providers, including social networks.

Freedom of expression thus becomes the constitutional backdrop for those who see the regulation of digital platforms as a threat to the democratic rule of law. It has taken on a central role in the debate, given the need to preserve and guarantee individual, collective, social, and political rights—also enshrined as foundational principles of the Marco Civil da Internet. However, other relevant aspects of the debate have been neglected, as will be shown below. Public statements by major economic actors, such as Elon Musk, defending freedom of expression amid complex regulatory discussions, demonstrate the prominence of this issue.

The objective of this study, therefore, is to demonstrate that freedom of expression—despite its undeniable importance—is only one of the aspects to be considered in the debate surrounding digital platform regulation. To this end, the next section introduces the Marco Civil da Internet and its provisions

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sso=1057258&classeProcesso=RE&numeroTema=533 (last visited May 26, 2024).

[5] Castells, Manuel, and Gustavo Cardoso eds., *A Sociedade em Rede: Do Conhecimento à Ação Política* (Imprensa Nacional 2005), 22.

concerning the regulation of digital platforms in Brazil. Subsequently, a brief overview of the STF's review of the constitutionality of Article 19 of the Marco Civil in Repetitive Themes Nos. 533 and 987 will be provided. Next, the study will examine the freedom-of-expression debate in this regulatory context, analyzing not only the Brazilian experience but also the U.S. experience, especially under Section 230 of the Communications Decency Act (CDA). Finally, in concluding remarks, it will be argued that freedom of expression is not the only issue at stake in discussions about digital platform regulation.

Moreover, considering the broader legal aspects involved in regulating digital platforms, it is possible to uphold the constitutionality of Article 19—or, at the very least, its interpretation in accordance with the Constitution—which is essential for maintaining a safe and democratic internet environment in Brazil.

This conclusion also highlights the challenges ahead in adopting concrete regulatory measures to ensure that companies operating digital platforms structure themselves to guarantee users' rights—not only freedom of expression but also a range of other individual and collective rights at stake.

I. *MARCO CIVIL DA INTERNET* AND REGULATION OF DIGITAL PLATFORMS

Law No. 12,965 of 2014, known as the Marco Civil da Internet, was enacted in Brazil under the careful scrutiny of the national and international legal community. Its purpose was to establish principles, guarantees, rights, and duties for the use of the internet in Brazil. After active participation by civil society, market actors, jurists, and other experts, the Marco Civil was regarded, at the time of its publication, by some as a law that could serve as a benchmark for internet regulation not only in Brazil but also in other countries[6].

As Chiara Spadaccini de Teffé and Carlos Affonso Souza[7] rightly point out, the statutory text was inspired not only by Brazil's 1988 Constitution—given the explicit incorporation of constitutional principles as foundational to internet use in the country—but also by guidelines issued by the Brazilian Internet Steering Committee (CGI.br)[8], which sought to establish directives

[6] Saldías, Osvaldo. *Coded for Export! The Contextual Dimension of the Brazilian Marco Civil da Internet*, Alexander von Humboldt Discussion Paper 2014–06 (2014).

[7] Teffé, Chiara Spadaccini de, and Carlos Affonso Souza, *Responsabilidade Civil de Provedores na Rede: Análise da Aplicação do Marco Civil da Internet pelo STJ*, 1 Rev. IBERC 1 (2019). https://doi.org/10.37963/iberc.v1i1.6

[8] CGI.br. *Resolução CGI.br/RES/2009/003/P*. Available at https://www.cgi.br/resolucoes/documento/2009/003 (last visited June 26, 2024).

for resolving potentially conflicting issues by guaranteeing rights and duties in the digital world through the inclusion of both general and specific rules.

Among the principles enshrined in the Marco Civil da Internet, one of the most notable is network immunity, under which internet intermediaries at the time—especially connection providers and application providers—should not be held liable for unlawful acts committed by their users. This principle was codified primarily in Article 19 of the Marco Civil:

> Art. 19. With the purpose of ensuring freedom of expression and preventing censorship, an internet application provider may only be civilly liable for damages arising from content generated by third parties if, after receiving a specific judicial order, it fails to take steps, within the technical scope and operational limits of its service and within the designated timeframe, to make the content identified as infringing unavailable, except where otherwise provided by law.
> §1 The judicial order referred to in the caput must clearly and specifically identify the content alleged to be infringing, under penalty of nullity, permitting the unequivocal location of such material.
> §2 The application of this article to violations of copyright or related rights depends on specific statutory provision, which must respect freedom of expression and other guarantees provided for in Article 5 of the Federal Constitution.
> §3 Cases involving compensation for damages arising from online content relating to honor, reputation, or personality rights, as well as cases involving the removal of such content by internet application providers, may be brought before small claims courts.
> §4 A judge, including in the procedure provided for in §3, may grant full or partial preliminary relief if unequivocal evidence of the facts exists and given the collective interest in the availability of the content online, provided that the allegations appear credible and there is a well-founded fear of irreparable harm or harm that is difficult to repair[9].

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[9] Freely translated. Originally: "*Art. 19. Com o intuito de assegurar a liberdade de expressão e impedir a censura, o provedor de aplicações de internet somente poderá ser responsabilizado civilmente por danos decorrentes de conteúdo gerado por terceiros se, após ordem judicial específica, não tomar as providências para, no âmbito e nos limites técnicos do seu serviço e dentro do prazo assinalado, tornar indisponível o conteúdo apontado como infringente, ressalvadas as disposições legais em contrário.*

§ 1º A ordem judicial de que trata o caput deverá conter, sob pena de nulidade, identificação clara e específica do conteúdo apontado como infringente, que permita a localização inequívoca do material.

§ 2º A aplicação do disposto neste artigo para infrações a direitos de autor ou a direitos conexos depende de previsão legal específica, que deverá respeitar a liberdade de expressão e demais garantias previstas no art. 5º da Constituição Federal.

§ 3º As causas que versem sobre ressarcimento por danos decorrentes de conteúdos

From this provision, it appears that network immunity—grounded in the protection of freedom of expression and the prohibition of censorship within digital platforms—created a secure environment for internet application providers responsible for making such content available. Their liability for damages stemming from content posted by users was removed, except when a specific judicial order mandated removal within the technical constraints of the services provided.

Thus, under the new legislation, Brazilian law clearly adopted subjective liability for digital platforms as application providers, since liability is linked to judicial control over the legality of third-party content and depends on a specific court order regarding whether moderation is required, except where a statute provides otherwise[10].

However, it is important to clarify that discussions on content moderation in digital platforms long predate the Marco Civil da Internet. The mass adoption of social networks in Brazil dates back to 2004 with the arrival of Orkut, which had already given rise to understandings different from those later codified.

The Superior Court of Justice (STJ) addressed the issue when, in the absence of a special statutory rule, disputes were governed by the Consumer Defense Code (CDC) and its concepts of suppliers and consumers. In this

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disponibilizados na internet relacionados à honra, à reputação ou a direitos de personalidade, bem como sobre a indisponibilização desses conteúdos por provedores de aplicações de internet, poderão ser apresentadas perante os juizados especiais.

§ 4º O juiz, inclusive no procedimento previsto no § 3º, poderá antecipar, total ou parcialmente, os efeitos da tutela pretendida no pedido inicial, existindo prova inequívoca do fato e considerado o interesse da coletividade na disponibilização do conteúdo na internet, desde que presentes os requisitos de verossimilhança da alegação do autor e de fundado receio de dano irreparável ou de difícil reparação".

[10] In this sense, the wording given to Article 21 of the Brazilian Internet Civil Framework (Marco Civil da Internet) stands out: "Art. 21. The internet application provider that makes third-party generated content available shall be subsidiarily liable for violations of privacy arising from the disclosure, without the authorization of those involved, of images, videos, or other materials containing scenes of nudity or sexual acts of a private nature when, after receiving a notification from the participant or their legal representative, it fails to diligently make such content unavailable within the scope and technical limits of its service" (freely translated). [Originally: "*Art. 21. O provedor de aplicações de internet que disponibilize conteúdo gerado por terceiros será responsabilizado subsidiariamente pela violação da intimidade decorrente da divulgação, sem autorização de seus participantes, de imagens, de vídeos ou de outros materiais contendo cenas de nudez ou de atos sexuais de caráter privado quando, após o recebimento de notificação pelo participante ou seu representante legal, deixar de promover, de forma diligente, no âmbito e nos limites técnicos do seu serviço, a indisponibilização desse conteúdo. Parágrafo único. A notificação prevista no caput deverá conter, sob pena de nulidade, elementos que permitam a identificação específica do material apontado como violador da intimidade do participante e a verificação da legitimidade para apresentação do pedido*".]

context, in Special Appeal No. 1,501,603/RN (2014/0290071-6)[11], the STJ held that given the nature of the activities carried out by internet application providers, reviewing user-generated content was not within their operational scope. Therefore, such service could not be considered defective under Article 14 of the CDC due to a lack of moderation, leading the Court to apply subjective liability at that time[12].

Nevertheless, in lawsuits based on events that occurred prior to the Marco Civil's entry into force, courts occasionally recognized solidary liability of digital platforms when they became aware of rights violations—even through extrajudicial notification—and remained inactive in removing the content. A relevant example is Special Appeal No. 1,512,647/MG (2013/0162883-2)[13], reported by Minister Luís Felipe Salomão, in which the Court held that, for events predating the special statute, a platform's liability for third-party content did not depend on a judicial notice; proof of the platform's awareness and failure to act within a reasonable time was sufficient. Although platforms were not required to actively monitor user content, once they became aware of illegality—even extrajudicially—they had a duty to remove the content.

The distinction between pre- and post-Marco Civil contexts deepened the debate and intensified divergences, especially as social media platforms such as Facebook and Instagram became increasingly central actors in business models grounded in content targeting through data processing.

This discussion grows even more sensitive as digital platforms, relying on broad self-regulatory power, often prioritize economic interests over constitutional values. As Ana Frazão[14] notes, platforms have increasingly adopted opaque moderation criteria based on their own terms of use, in ways

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[11] Superior Tribunal de Justiça (STJ), *REsp 1.501.603/RN*, Rel. Min. Nancy Andrighi (Dec. 2017). Available at https://processo.stj.jus.br/processo/pesquisa/?aplicacao=processos.ea&tipoPesquisa=tipoPesquisaGenerica&termo=REsp%201501603 (last visited June 26, 2024).

[12] In this regard, the judgment referenced in the text makes mention of the decisions issued in the following cases: REsp 1,308,830/RS (Third Panel, judged on 05/08/2012, DJe 06/19/2012), REsp 1,316,921/RJ (Third Panel, judged on 06/26/2012, DJe 06/29/2012), REsp 1,568,935/RJ (Third Panel, judged on 04/05/2016, DJe 04/13/2016), AgRg in AREsp 614,778/RJ (Third Panel, judged on 02/05/2015, DJe 02/12/2015), AgRg in AREsp 308,163/RS (Fourth Panel, judged on 05/14/2013, DJe 05/21/2013), and AgRg in REsp 1,402,104/RJ (Fourth Panel, judged on 05/27/2014, DJe 06/18/2014).

[13] Superior Tribunal de Justiça (STJ), *REsp 1.512.647/MG*, Rel. Min. Luís Felipe Salomão, DJe Aug. 15, 2015. Available at https://processo.stj.jus.br/processo/revista/documento/mediado/?componente=ATC&sequencial=45693836&num_registro=201301628832&data=20150805&tipo=91&formato=PDF (last visited June 26, 2024).

[14] Frazão, Ana. *Plataformas Digitais e os Desafios para sua Regulação Jurídica*, in *Direito, Tecnologia e Inovação* (Editora D'Plácido 2018)

that may contradict the Marco Civil da Internet[15].

Thus, real doubts arise as to the actual benefits of assigning such responsibilities to digital platforms. Gabriel Ribeiro Brega[16], comparing Germany's controversial NetzDG law—which established specific procedures and significant fines for moderation failures—with Brazil's experience, found no direct relationship between stricter moderation frameworks and effective results. He also highlighted the concrete risks to freedom of expression when the legal system delegates to digital platforms the hermeneutic task of interpreting the law and determining the legality of content, thereby removing such authority from the Judiciary.

Nevertheless, Brega also recognized the need to improve platform governance structures in Brazil to ensure clearer, faster, and more transparent procedures for users—complementing the Brazilian model, which restricts platform self-policing and assigns legality assessments and removal orders to the State:

> The Brazilian statute has the merit of privileging the user's freedom of expression, rejecting the logic of requiring prior censorship by the provider—although it does not prevent internal controls based on the platforms' own policies. However, it does not impose requirements regarding these internal controls. Some scholars criticize this solution because, given the slow pace of judicial analysis and the speed at which content spreads on social networks, harmful publications can propagate and intensify damage. Still, it is precisely this logic that prevents the delegation of judicial authority to private parties. Providers may remove content because it violates internal policies (which may or may not reflect legal rules), but not because they have been legally assigned the task of determining legality. The German system, by contrast, relies on internal controls by the providers themselves, increasing speed and preventing further harm. Yet this logic also assigns to private actors the power to determine legality, including the interpretation of criminal law provisions, and increases the risk of over-blocking due to fear of fines.[17]

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[15] On this subject, the judgment issued in AREsp No. 1,595,492/SP is noteworthy, in which the Superior Court of Justice upheld the conviction of Facebook to pay a fine totaling 254,000 Brazilian reais, due to its failure to comply with a court order requiring the reactivation of an Instagram profile that had been removed without adequate justification. Available at: https://processo.stj.jus.br/processo/pesquisa/?aplicacao=processos.ea&tipoPesquisa=tipoPesquisaGenerica&termo=AREsp%201595492. Accessed on June 26, 2024.

[16] Brega, Gabriel Ribeiro. *A Regulação de Conteúdo nas Redes Sociais: Uma Breve Análise Comparativa entre o NetzDG e a Solução Brasileira*, 19 Rev. Direito GV e2305 (2023). https://doi.org/10.1590/2317-6172202305

[17] Freely translated. Originally: "*A norma brasileira tem o mérito de privilegiar a liberdade de expressão do usuário, repelindo a lógica da exigência de censura prévia dos*

Given such conflicting contexts and interpretations, digital platforms' capacity to fuel episodes of misinformation, hate speech, and interference in electoral processes[18] has produced significant political and social consequences, reinforcing the idea that new regulatory mechanisms are necessary.

At the forefront of this movement, the European Union approved the final text of the Digital Services Act[19], which seeks to ensure the proper functioning of digital services by creating a safer and more transparent digital environment.

Regarding online content moderation, the DSA assigns primary responsibility to intermediary service providers[20], imposing graduated due-diligence obligations according to their category[21]. Applicable as of February 2024, the regulation may serve as a model for future frameworks due to its

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conteúdos pelo provedor - embora não impeça a adoção de controles internos pelas plataformas com base em suas próprias políticas. Não há, porém, exigências relativas a essas estruturas de controles internos. Parte da doutrina critica essa solução, pois, dada a morosidade da apreciação judicial, e, inversamente, a celeridade dos compartilhamentos em redes sociais, a publicação pode se propagar e o dano se intensificar (Teffé e Moraes, 2017). No entanto, é justamente essa lógica que impede que a decisão a respeito do que é ou não ilegal seja delegada a agentes privados. Os provedores podem remover conteúdos porque estes violam suas políticas internas (que podem, em maior ou menor medida, refletir disposições legais), mas não porque foram incumbidos, pela lei, de aferir se determinadas condutas são ou não ilegais. Todavia, a norma alemã aposta nas estruturas e nos controles internos dos próprios provedores. Com isso, garante maior celeridade à análise e à eventual remoção de conteúdos, e evita o aprofundamento do dano com a permanência ou replicação da publicação. Entretanto, essa lógica acaba por atribuir aos agentes privados a decisão sobre a legalidade das publicações, encarregando-os, inclusive, de associar as condutas a tipos penais previstos no ordenamento jurídico alemão. A isso, soma-se o risco de over-blocking, anteriormente exposto, diante do receio de recebimento de multas".

[18] Brega, Gabriel Ribeiro. *A Regulação de Conteúdo nas Redes Sociais: Uma Breve Análise Comparativa entre o NetzDG e a Solução Brasileira*, 19 Rev. Direito GV e2305 (2023). https://doi.org/10.1590/2317-6172202305

[19] Examples of these events were mentioned in the Jornal da USP on March 10, 2023, available at: https://jornal.usp.br/atualidades/e-possivel-combater-a-desinformacao-e-os-discursos-de-odio-na-internet/. Accessed on June 14, 2024.

[20] The law was approved in November 2022, and its full text is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2022%3A277%3ATOC&uri=uriserv%3AOJ.L_.2022.277.01.0001.01.ENG. Accessed on June 14, 2024.

[21] In Article 3, the law defines "content moderation" as "the activities, automated or not, undertaken by providers of intermediary services, aimed in particular at detecting, identifying, and addressing illegal content or information incompatible with their terms and conditions provided by the service's recipients, including the measures taken that affect the availability, visibility, and accessibility of such illegal content or information, such as demotion, demonetization, disabling access, or removal thereof, or measures that affect the ability of the service's recipients to provide such information, such as the termination or suspension of a recipient's account."

pioneering nature, though it is too early to assess its real impact on digital markets.

Returning to the Brazilian context, regulation remains governed by Article 19 of the Marco Civil da Internet. However, unlike the EU, Brazil now faces a constitutional challenge to that provision before the Supreme Court, based on two cases—one predating and one postdating the statute—mirroring the divergences highlighted throughout this section.

The aim of this section, therefore, was to explore how, over the ten years of the Marco Civil's effectiveness, the principle of network immunity has become increasingly complex, as internet intermediaries—especially digital platforms operating social networks such as Facebook and Instagram—have assumed a more active role in business models involving content targeting through data processing. This evolution ultimately led to the current debate over the constitutionality of Article 19 of the Marco Civil da Internet.

II. THE CONSTITUTIONALITY OF ARTICLE 19 OF THE *MARCO CIVIL DA INTERNET* IN LIGHT OF THEMES 533 AND 987 OF THE FEDERAL SUPREME COURT

Given the prominent role attained by digital platforms in the market, as demonstrated, even before the entry into force of the Marco Civil da Internet, there was already debate on the civil liability of application providers for damages arising from content generated by their users against third parties, in view of the undeniable profitability of this activity. This is the discussion framed under Theme No. 533 before the Federal Supreme Court.

Among the possible approaches, some argued that application providers, as mere intermediaries of content, should bear no liability whatsoever, due to the absence of a causal nexus between their activity and the harm suffered as a result of posts made by third parties. However, this position ultimately came to be rejected in the Brazilian legal system, especially because such lawsuits routinely originated in small claims courts involving consumer relations, filed by consumers whose honor had been mocked on social networks without any intervention by the platforms, even when they had been notified extrajudicially.

Thus emerged the theory of strict (objective) civil liability, grounded not only in the Consumer Defense Code, which establishes the duty of suppliers of products and services to compensate for damages caused in connection with their business activity, regardless of fault in any form, but also in the already consolidated theory of the risk inherent in business activity, set out in the sole paragraph of Article 927 of the Civil Code, according to which the exercise of an enterprise carries inherent risks.

However, with the entry into force of the Marco Civil da Internet, the

debate took a new direction in light of the wording given to Article 19 of that statute, which began to delimit the civil liability of application providers to situations in which their inertia in removing the content at issue is established after receipt of a court order, and provided that the technological limitations of the respective platform are observed. In other words, from the enactment of the statute onwards, by express legislative provision, the civil liability of application providers was limited and became subjective, to be assessed only after judicial review of the legality of the content.

On the basis of this new regulatory framework, attention turned to the possible restriction of consumer rights and, consequently, to the very constitutionality of Article 19 of the Marco Civil da Internet, which is currently under review by the Federal Supreme Court in Theme 987.

It is important to note that the arguments made by those who advocate a declaration of unconstitutionality of this provision go beyond consumer protection and ultimately reach the 1988 Federal Constitution itself, more specifically its chapter on fundamental rights. From this perspective, the rule in Article 19 of the Marco Civil da Internet would collide with the principles of intimacy and privacy, as well as undermine personality rights such as honor and image, also protected by the Constitution. The discussion becomes even bolder when we consider that, on the other hand, those who uphold the validity of the infraconstitutional rule also rely on established constitutional principles strongly defended in the Brazilian context, such as freedom of expression and the prohibition of censorship.

Despite the strength of the arguments on both sides, a closer analysis reveals that the discussion goes beyond these principles and reaches other issues related to the power of social influence and norm-setting attributed to platforms in contemporary society.

This is because, in the current social context, application providers have reached a level of importance that was once unimaginable, positioned at the center of the information market, capable of influencing people, deciding which information reaches them, imposing patterns and opinions, and thereby being able to substantially alter markets and societies.

The issue of civil liability of providers was one of the most debated topics in the participatory process that preceded the approval of the final text of the Marco Civil da Internet. In the second phase of the online public consultation alone, 1,168 contributions were received, of which more than 200 specifically addressed the civil liability regime applicable to providers[22].

The "notice and counter notice" model set forth in the initial draft Bill was criticized at the time for dispensing with judicial filtering, which could

[22] The law classifies providers into four categories: intermediary services, hosting services, online platforms, and very large online platforms.

lead to excessive removals of content in violation of freedom of expression[23]. In that scenario, the provider would act merely as an intermediary between the parties involved (the notifier and the notified party). By contrast, the proposal included in the final text received broad support from civil society, as illustrated by the manifesto "In Defense of the Marco Civil" signed by several national entities[24]. Furthermore, the UN recorded in its report on freedom of expression that the Marco Civil stands out for "striking a balance between internet freedoms and the repression of unlawful acts."[25]

The ordinary legislator, in fact, sought to strike a balance between the interests at stake and, starting from the premise of freedom of expression and the prevention of censorship, conditioned the liability of application providers[26] for harmful content generated by third parties on their failure to comply with a judicial decision.

Thus, Article 19 of the statute established the subjective civil liability of providers and privileged the judicial-reservation rule (*reserva de jurisdição*) with respect to content moderation, contrary to the case law of the Superior Court of Justice (STJ) prior to its enactment. As a result, the Judiciary "came to be regarded as the legitimate forum to determine whether the content in question is unlawful and to construct more legitimate limits for expression on the network."[27]

As previously mentioned, the judicial-reservation rule is expressly excepted in Article 21 of the Marco Civil, which provides differentiated treatment for the sharing of "images, videos, or other materials containing scenes of nudity or sexual acts of a private nature" without the authorization of the persons involved, commonly known as revenge porn. In this scenario,

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[23] Jobim, Nelson, and Renato Lemos, *Parecer – Recurso Extraordinário Questiona Marco Civil da Internet no STF*, ConJur (Dec. 9, 2019). Available at https://www.conjur.com.br/wp-content/uploads/2023/09/clique-aqui-ler-parecer-ronaldo-lemos.pdf (last visited June 25, 2024).

[24] Jobim, Nelson, and Renato Lemos, *Parecer – Recurso Extraordinário Questiona Marco Civil da Internet no STF*, ConJur (Dec. 9, 2019). Available at https://www.conjur.com.br/wp-content/uploads/2023/09/clique-aqui-ler-parecer-ronaldo-lemos.pdf (last visited June 25, 2024).

[25] "As entidades ressaltaram que a medida adotada no art. 19 delimita de forma justa e lúcida a responsabilidade dos intermediários na internet, evitando a censura prévia de conteúdos e privilegiando a liberdade de expressão e o direito à informação" Intervozes, *Em Defesa do Marco Civil*, available at https://intervozes.org.br/em-defesa-do-marco-civil/ (last visited June 28, 2024).

[26] Jobim, Nelson, and Renato Lemos, *Parecer – Recurso Extraordinário Questiona Marco Civil da Internet no STF*, ConJur (Dec. 9, 2019). Available at https://www.conjur.com.br/wp-content/uploads/2023/09/clique-aqui-ler-parecer-ronaldo-lemos.pdf (last visited June 25, 2024).

[27] Law 12,965/14 adopted a dichotomous classification, dividing actors into connection providers and application providers, as set forth in Article 11, caput and paragraph 3. Nonetheless, there are broader classifications, such as those defined by Marcel Leonardi.

the logic is that of "notice and take down."[28]

In 2017, Senator Paulo Bauer (PSDB/SC) introduced Bill No. 323, seeking to amend Article 21 of the Marco Civil by expanding the situations that would constitute exceptions to the rule set forth in Article 19. However, when the bill was made available for public consultation through the e-cidadania platform, it received only 155 votes in favor and 2,862 votes against, and in 2018 the proposal was withdrawn from the agenda by its sponsor[29].

Indeed, the framework defined in Article 19 appears balanced and consistent with the constitutional principles and prevailing concerns at the time of the Law's enactment[30], when efforts were focused on "preserving the foundations for promoting freedoms and rights on the Internet in Brazil, thus steering away from repressive regulation of the network."[31] Nevertheless, the debate over the civil liability of application providers took a new direction with the cases now under review by the Federal Supreme Court.

In Theme 533, which predates the entry into force of Law 12,965/14, the Supreme Court must decide whether a company that hosts a website has a duty to "monitor the content published and remove it when deemed offensive, without judicial intervention."[32]

Theme 987, arising from the leading case RE No. 1,037,396/SP, in turn, centers on whether a prior and specific court order to delete content is necessary to establish civil liability on the part of internet providers, websites, and managers of social network applications for damages resulting from unlawful acts committed by third parties[33].

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[28] Souza, Carlos Affonso, and Ronaldo Lemos, *Marco Civil da Internet: Construção e Aplicação* (Editar 2016), 102.

[29] This framework conditions the imposition of civil liability on providers upon their failure to remove or moderate content after merely receiving a notice from a user who feels harmed. In doing so, it delegates the monitoring and decision-making regarding content removal to the providers themselves. This model was adopted, for example, by the German legislation NetzDG and by the U.S. Digital Millennium Copyright Act (DMCA).

[30] Brazil. Senado Federal. *Projeto de Lei No. 232/2017*. Available at https://www25.senado.leg.br/web/atividade/materias/-/materia/130820 (last visited June 28, 2024).

[31] In 2015, the model adopted in Article 19 of the Marco Civil was incorporated into the Manila Principles, which sought to promote practices to limit the liability of intermediary service providers and to enable freedom of expression and innovation. Available at https://manilaprinciples.org/pt-br. Accessed on May 25, 2024.

[32] Souza, Carlos Affonso, and Ronaldo Lemos, *Marco Civil da Internet: Construção e Aplicação* (Editar 2016), 16.

[33] Supremo Tribunal Federal (STF), *RE 1.057.258/MG*, Rel. Min. Luiz Fux, Tema 533 – Repercussão Geral, DJe June 27, 2017. Available at https://www.stf.jus.br/portal/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=5217273&numeroProcesso=1057258&classeProcesso=RE&numeroTema=533 (last visited May 26, 2024).

In this case, the lawsuit was filed by a user against Facebook Serviços Online do Brasil and was based on the creation of a fake profile in the plaintiff's name on that platform. Through this profile, posts were disseminated that, according to the plaintiff, undermined her image and honor[34]. In light of this, she requested interim relief for the immediate deletion of the fake profile, subject to a fine in case of noncompliance, as well as the disclosure of information identifying the person who created the page, including the originating IP (Internet Protocol), and compensation for moral damages.

The single-judge court of the Small Claims Court of Capivari granted the preliminary injunction and ordered the immediate removal of the fake profile. In the final judgment, it ordered Facebook to provide the IP address associated with the deleted profile and confirmed the previously granted injunction. Relying on Articles 18 and 19 of the Marco Civil da Internet, the court dismissed the claim for moral damages, reasoning that the content was not clearly unlawful and that the platform had acted appropriately in waiting for judicial review[35].

Following this outcome, both parties filed appeals (*recurso inominado*), which were assigned to the 2nd Civil Appeals Panel of the Recursal Collegiate Court of Piracicaba/SP. The panel partially modified the judgment to include an award of moral damages against Facebook, on the ground that such damages were present *in re ipsa*.

The judgment shows that the panel inverted the logic of the judicial-reservation rule set forth in Article 19 of the Marco Civil, relativizing its application under the justification that it would empty the right to "effective prevention and reparation of property and moral damages,"[36] as illustrated in

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[34] Supremo Tribunal Federal (STF), *RE 1.037.396/SP*, Rel. Min. Dias Toffoli, Tema 987 – Repercussão Geral, DJe Apr. 5, 2017. Available at https://www.stf.jus.br/portal/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=5160549&numeroProcesso=1037396&classeProcesso=RE&numeroTema=987 (last visited May 26, 2024).

[35] It was reported in the complaint that "the account purportedly belonging to the plaintiff contains information such as that she is waiting for people to gossip with her because it improves her blood pressure, that she is going to travel with the circus, that she is a drunk, that she used to take her mother's retirement money and failed to pass it on, instead using it to renovate her own property, among numerous other statements." (freely translated). Supremo Tribunal Federal (STF), *RE 1.037.396/SP*, Rel. Min. Dias Toffoli, Tema 987 – Repercussão Geral, DJe Apr. 5, 2017. Available at https://www.stf.jus.br/portal/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=5160549&numeroProcesso=1037396&classeProcesso=RE&numeroTema=987 (last visited May 26, 2024).

[36] Supremo Tribunal Federal (STF), *RE 1.037.396/SP*, Rel. Min. Dias Toffoli, Tema 987 – Repercussão Geral, DJe Apr. 5, 2017. Available at https://www.stf.jus.br/portal/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incide

the following excerpt:

> For indemnification purposes, however, conditioning the removal of the fake profile solely on a specific judicial order, according to the wording of that article, would mean exempting application providers, such as the defendant, from any and all liability for damages, thereby rendering meaningless the protective system drawn from the Consumer Defense Code, which would, in fact, offend a constitutional provision (Article 5, item XXXII, of the Federal Constitution). Moreover, such a provision would, as it were, force and compel the victimized consumer to bring a lawsuit in order to have a claim satisfied that could surely be met by the provider itself, with safeguards aimed ultimately at preserving freedom of expression. Before that, the provider remains in a comfortable—albeit disproportionate—position of inertia in the face of the victim of the abuse of that same right of expression and thought, generating a paradoxical imbalance in relation to the inviolable rights to intimacy, private life, honor, and image (Article 5, item X, of the Federal Constitution) of the latter (victim). It is undeniable that, in the relationship between the parties, the plaintiff, due to her clear status as victim, is equivalent to a consumer (Article 17 of the Consumer Defense Code). (…) Thus, conditioning the defendant's liability on prior judicial action by the plaintiff, in accordance with Article 19 of the Marco Civil da Internet, would nullify her fundamental right to effective prevention and reparation of property and moral damages, whether individual, collective, or diffuse (Article 6, item VI, of the Consumer Defense Code). Therefore, compensation for moral damages is required (…) (emphasis added)[37].

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nte=5160549&numeroProcesso=1037396&classeProcesso=RE&numeroTema=987 (last visited May 26, 2024).

[37] Freely translated. Originally: "*Para fins indenizatórios, todavia, condicionar a retirada do perfil falso somente após ordem judicial específica, na dicção desse artigo, significaria isentar os provedores de aplicações, caso da ré, de toda e qualquer responsabilidade indenizatória, fazendo letra morta do sistema protetivo haurido à luz do Código de Defesa do Consumidor, circunstância que, inclusive, aviltaria preceito constitucional (art. 5º, inciso XXXII, da Constituição Federal). Ademais, tal disposição como que quer obrigar, compelir o consumidor vitimado, a ingressar em Juízo para atendimento da pretensão que, seguramente, poderia ser levada a cabo pelo próprio provedor cercando-se de garantias a fim de preservar, em última análise, a liberdade de expressão. Antes, o provedor fica em confortável, mas não menos desproporcional, posição de inércia frente à vítima do abuso desse mesmo direito de manifestação e pensamento, gerando paradoxal desequilíbrio em relação aos invioláveis direitos à intimidade, a vida privada, a honra e a imagem (art. 5º, inciso X, da Constituição Federal) desta última (vítima). Inegável que na relação entre as litigantes a autora, diante de sua notória condição de vítima, equipara-se à figura do consumidor (art. 17 do Código de Defesa do Consumidor).*

For the judges, the framework created by Article 19 exempts "application providers from any and all indemnity liability." This view does not seem accurate. Although the framework adopts a less stringent liability model than that of the Consumer Defense Code, which is grounded in strict liability, this does not mean that the provider is immune within the legal relationship.

The legislator, in fact, favored the principle that judicial review cannot be denied in the event of injury or threat of injury, as prescribed in Article 5, item XXXV of the Constitution. Thus, the duty to compensate was assigned to the direct wrongdoer, while the provider's liability is subsidiary, arising only in the event of noncompliance with a court order.

In this regard, the idea that "a constitutionally recognized right does not necessarily translate into a stricter model of civil liability under infraconstitutional law"[38] seems significant. Along these lines, Rodrigo Leonardo points out that, even though the Constitution enshrines the fundamental right to life in the caput of Article 5, compensation for death, often in tragic circumstances, is typically governed by subjective liability, which is less stringent than other models[39].

Another aspect to consider is that a more stringent liability model may discourage the availability of "tools open to public editing and manipulation," hindering the development of new business models based on new technologies, thus stifling innovation and violating the principle of free enterprise (Article 170 of the Federal Constitution)[40].

The court also argued that the Law seeks to "compel the victimized

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(...) Destarte, condicionar a responsabilização da ré à prévia tomada de medida judicial pela autora, na conformidade do art. 19 do Marco Civil da Internet, fulminaria seu direito básico de efetiva prevenção e reparação de danos patrimoniais e morais, individuais, coletivos e difusos (art. 6º, inciso VI, do Código de Defesa do Consumidor). Logo, a indenização pelos danos morais é medida que se impõe (...) (grifo nosso)". Supremo Tribunal Federal (STF), *RE 1.037.396/SP*, Rel. Min. Dias Toffoli, Tema 987 – Repercussão Geral, DJe Apr. 5, 2017. Available at https://www.stf.jus.br/portal/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=5160549&numeroProcesso=1037396&classeProcesso=RE&numeroTema=987 (last visited May 26, 2024).

[38] Leonardo, Rodrigo Xavier. *Controle de Constitucionalidade do Marco Civil da Internet*, ConJur (Apr. 3, 2023). Available at https://www.conjur.com.br/2023-abr-03/direito-civil-atual-audiencia-publica-stf-controle-constitucionalidade-marco-civil-internet/ (last visited May 28, 2024).

[39] Leonardo, Rodrigo Xavier. *Controle de Constitucionalidade do Marco Civil da Internet*, ConJur (Apr. 3, 2023). Available at https://www.conjur.com.br/2023-abr-03/direito-civil-atual-audiencia-publica-stf-controle-constitucionalidade-marco-civil-internet/ (last visited May 28, 2024).

[40] Jobim, Nelson, and Renato Lemos, *Parecer – Recurso Extraordinário Questiona Marco Civil da Internet no STF*, ConJur (Dec. 9, 2019). Available at https://www.conjur.com.br/wp-content/uploads/2023/09/clique-aqui-ler-parecer-ronaldo-lemos.pdf (last visited June 25, 2024).

consumer to bring a lawsuit in order to have their claim satisfied." In that sense, it appears to start from the premise that Article 19 makes redress contingent upon judicial involvement, forcing users always to resort to the courts to have their rights respected.

However, the Marco Civil does not preclude application providers from creating their own content-moderation rules in their terms of use, in which case the analysis and potential removal of harmful material will occur without intervention by the State-judge. In such cases, the provider alone is responsible for evaluating shared content.

Transparency reports issued by the providers themselves offer a quantitative overview of moderation activities, from which it is possible to infer that there is substantial action in this field. For example, between July and December 2021[41], Twitter (now "X") autonomously suspended 1.3 million accounts and removed 5.1 million pieces of content in accordance with its internal use policies[42].

During the same period, the report also indicates that the platform directly contacted certain users, requesting the removal of 4 million posts published in violation of platform rules[43]. The document categorizes the platform's direct interventions in moderation into three broad areas: (1) security (violence, terrorism/violent extremism, sexual exploitation of minors, abusive behavior, hate conduct, promotion of suicide and self-harm, sensitive content including graphic violence and adult content, illegal goods or services); (2) privacy (private information and non-consensual nudity); and (3) authenticity (civic integrity, impersonation, misleading information about COVID-19)[44]. It follows that providers already adopt an active posture with respect to filtering the content circulated on their platforms.

In addition, in the scenario envisaged in Article 21 and in cases of infringements of copyright or related rights[45], the provider must act immediately upon receipt of extrajudicial notice. This legislative strategy is carefully calibrated, as it modulates the judicial-reservation regime in specific situations where the illegality of the content can be detected through simple

[41] Although the data provided refer to the year 2021, transparency reports have been issued since 2012, that is, during a period prior to the filing of the judicial action under discussion.

[42] X (formerly Twitter), Transparency Reports. Available at https://transparency.x.com/pt/reports/rules-enforcement.html#2021-jul-dec (last visited Apr. 22, 2024).

[43] X (formerly Twitter), Transparency Reports. Available at https://transparency.x.com/pt/reports/rules-enforcement.html#2021-jul-dec (last visited Apr. 22, 2024).

[44] X (formerly Twitter), Transparency Reports. Available at https://transparency.x.com/pt/reports/rules-enforcement.html#2021-jul-dec (last visited Apr. 22, 2024).

[45] In cases involving copyright or related rights, §2 of Article 19 provides that the rule set out in specific legislation must be applied. However, the absence of such specific regulation results in the provider being held liable upon mere notification.

visual inspection, as it does not depend on contextual analysis[46].

The most sensitive argument in the judgment lies in the idea that the judicial-reservation rule empties the "basic right to effective prevention and reparation of property and moral damages, whether individual, collective, or diffuse." On that basis, the judges argued that the provider could have adopted a diligent posture to fulfill the plaintiff's request without undermining freedom of expression. This seems to be the core of the main criticisms leveled at the liability model established in Article 19.

In this vein, Dantas and Neto contend that requiring judicial action as a precondition for imposing civil liability on application providers constitutes an obstacle to the protection of the personality rights of potential victims[47]. Furthermore, they argue that judicial intervention does not necessarily help to reduce the risk of censorship or undue state interference with freedom of expression[48].

In defending a regime of solidary liability *ex delicto*, Eduardo Tomasevicius explains that "this protective system imposes a duty of vigilance on application providers in view of the possibility that they may be held directly liable for the acts of users." He concludes that the system adopted by the Marco Civil—under which providers bear only subsidiary liability—tends to facilitate the commission of unlawful acts[49].

Similarly, Marcelo Bechara Hobaika argues that the text of Article 19 is not compatible with the effective protection of human dignity and that the requirement of judicial involvement adds a layer of complexity to the moderation process, possibly "allowing defamatory or abusive content to remain online for an extended period, causing additional harm to the reputation and emotional integrity of affected individuals."[50]

What we see here is a shift in focus to the situation of the victim, aimed at ensuring economic compensation for violations of rights to intimacy, private life, honor, and image.

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[46] Nitrini, Rodrigo Vidal. *Liberdade de Expressão nas Redes Sociais: O Problema Jurídico da Remoção de Conteúdo pelas Plataformas* (Ph.D. Dissertation, Univ. of São Paulo, 2020).

[47] Dantas, Juliana de Oliveira Jota, and Leonardo Lima Mota Neto, *Liberdade de Expressão versus Responsabilidade dos Provedores no Marco Civil da Internet*, 21 Rev. AGU 143 (2022).

[48] Dantas, Juliana de Oliveira Jota, and Leonardo Lima Mota Neto, *Liberdade de Expressão versus Responsabilidade dos Provedores no Marco Civil da Internet*, 21 Rev. AGU 143 (2022).

[49] Tomasevicius Filho, Eduardo. *Marco Civil da Internet: Uma Lei sem Conteúdo Normativo*, 30 Estudos Avançados 269 (2016).

[50] Hobaika, Marcelo Bechara de Souza. *A Lei do Atrito e a Inconstitucionalidade do Art. 19 do Marco Civil da Internet*, JOTA (May 17, 2024). Available at https://www.jota.info/opiniao-e-analise/artigos/a-lei-do-atrito-e-a-inconstitucionalidade-do-art-19-do-marco-civil-da-internet-17052024 (last visited May 25, 2024).

The concern with safeguarding redress for non-pecuniary damage suffered by the notifying user is, of course, legitimate. However, it appears to overlook other interests at stake and, more importantly, the consequences that may overshadow this one-dimensional view.

The legal relationship in question involves interests, rights, and duties that affect four distinct poles: (a) the person who posts content on the platform; (b) the application providers; (c) users who feel offended by certain content; and (d) other users who access the platform in search of the content posted. It must therefore be acknowledged that all poles in this relationship embody legally protected interests that are constitutionally significant and worthy of protection[51].

In fact, when the State-judge decides to apply the strict liability regime set forth in the Consumer Defense Code instead of the specific rule in the Marco Civil, the provider is effectively given two options: remove the content as soon as it receives a notice, following the "notice and take down" logic, or keep the content on the platform on the assumption that it does not pose a risk to the notifier's rights[52].

Given that a private entity will rarely choose to expose itself to this level of risk, the practical result is that prior control of user-generated content is transferred to the application provider. Consequently, the weighing of personality rights and freedom of expression is placed in the hands of the private entity.

Additionally, the platform is encouraged to monitor content driven by an economic factor—namely, the desire to avoid potential judicial condemnation for damages—which may circumvent any serious balancing of fundamental rights in conflict. Indeed, the most cautious approach from the provider's perspective is to act on any indication of illegality without engaging in a sophisticated balancing of competing rights[53].

In this way, the Judiciary ends up tacitly granting private entities the power to monitor all content posted by users and, ultimately, to interpret the law, effectively delegating authority to the "court of the Big Techs."[54] That

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[51] Hobaika, Marcelo Bechara de Souza. *A Lei do Atrito e a Inconstitucionalidade do Art. 19 do Marco Civil da Internet*, JOTA (May 17, 2024). Available at https://www.jota.info/opiniao-e-analise/artigos/a-lei-do-atrito-e-a-inconstitucionalidade-do-art-19-do-marco-civil-da-internet-17052024 (last visited May 25, 2024).

[52] Souza, Carlos Affonso, and Ronaldo Lemos, *Marco Civil da Internet: Construção e Aplicação* (Editar 2016), 82.

[53] Frosio, Giancarlo. *The Oxford Handbook of Online Intermediary Liability* (Oxford Univ. Press 2020), 527.

[54] Leonardo, Rodrigo Xavier. *Controle de Constitucionalidade do Marco Civil da Internet*, ConJur (Apr. 3, 2023). Available at https://www.conjur.com.br/2023-abr-03/direito-civil-atual-audiencia-publica-stf-controle-constitucionalidade-marco-civil-internet/ (last visited May 28, 2024).

is, intermediaries are placed in a position where they are essentially required to decide on competing rights and interests[55].

If we recall that application providers—particularly social networks—built their business model and scale on the free circulation of data online, the assignment of strict liability does not only entail the virtuous aspect of civil redress and the protection of personality rights. In parallel, it magnifies the power of platforms over users and facilitates arbitrariness.

In this sense, Carlos Affonso de Souza and Arnaldo Lemos caution that imposing on providers the duty to assess whether content causes harm to the alleged victim may empower them to decide what should or should not be displayed according to criteria that go beyond those contained in their terms of use[56].

Likewise, Teffé and Souza warn that:

> (...) a disproportionate increase in platform liability for third-party content could lead to a scenario of severe censorship, in which platforms would preemptively opt to remove controversial content and profiles that are not necessarily harming others. This would affect freedom of expression and the diversity of opinions on the network. The logic of damage prevention must be aligned with the protection of constitutional freedoms, so that immunities and duties are critically developed depending on the severity of the risks. The assessment of which content exceeds or does not exceed the limits of freedom of expression should be, predominantly, a public process with multisectoral discussions, not an exclusively private process conducted by departments within digital platforms[57].

Content moderation is already carried out by providers under their own

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[55] Frosio, Giancarlo. *The Oxford Handbook of Online Intermediary Liability* (Oxford Univ. Press 2020), 527.

[56] Souza, Carlos Affonso, and Ronaldo Lemos, *Marco Civil da Internet: Construção e Aplicação* (Editar 2016), 85.

[57] Freely translated. Originally: "*(...) eventual aumento desproporcional da responsabilidade das plataformas por conteúdos de terceiros poderia conduzir a um cenário de censura severa, no qual as plataformas preventivamente optariam por remover conteúdos e perfis controversos, os quais não necessariamente estariam causando danos a outrem. Fato esse que atingiria a liberdade de expressão e a diversidade de opiniões na rede. A lógica da prevenção de danos deve caminhar conjuntamente com a proteção das liberdades constitucionais, de forma que as imunidades e deveres sejam desenvolvidos criticamente a depender da gravidade dos riscos. A consideração sobre quais conteúdos ultrapassam ou não os limites da liberdade de expressão deve ser um processo, predominantemente, público e com discussões multisetoriais, e não um processo exclusivamente privado, conduzido por departamentos de plataformas digitais*". Teffé, Chiara Spadaccini de, and Carlos Affonso Souza, *Responsabilidade Civil de Provedores na Rede: Análise da Aplicação do Marco Civil da Internet pelo STJ*, 1 Rev. IBERC 1 (2019). https://doi.org/10.37963/iberc.v1i1.6.

terms of use, which grant them broad power to regulate speech. In this sense, platforms are not neutral and make value judgments as part of their core activity.

In practice, these actors increasingly operate as new governors, building governance systems similar to the justice system itself, in which content moderators act in a capacity very similar to that of judges[58].

The creation of the Oversight Board by Meta and the Advisory Council by Google illustrates this process of mimicking state power. Although these symbolic structures seek to incorporate public values into their activities and implement transparency and accountability measures, they are not necessarily capable of remedying the democratic deficits of private content moderation.

With respect to Google's Council, it is not possible to ascertain the extent to which the participation of various social actors through public consultations contributes to internal deliberations[59].

The Meta Oversight Board, in turn, while composed of independent experts, has a mandate restricted to reviewing decisions to remove specific content, which limits its substantive value[60]. Furthermore, if the recommendations issued by the Board regarding the company's content policies are not binding[61], it is unclear whether its activity is merely formal or whether it effectively contributes to improving the provider's moderation policy.

Now, ten years after the enactment of the Marco Civil, new situations have emerged, and the issue of online content moderation has taken on new dimensions. Since then, episodes involving the dissemination of fake news and hate speech, for example, have intensified the problem and even served as a basis for Bill 2630/2020, which aims to regulate social media platforms, including measures related to content moderation. The Bill's progress in Congress, however, has been halted due to disagreements over its wording[62].

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[58] Klonick, Kate. *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598 (2018).

[59] Mulligan, Deirdre K., and Kenneth A. Bamberger, *Allocating Responsibility in Content Moderation: A Functional Framework*, 36 Berkeley Tech. L.J. 1091 (2021), 1173.

[60] Mulligan, Deirdre K., and Kenneth A. Bamberger, *Allocating Responsibility in Content Moderation: A Functional Framework*, 36 Berkeley Tech. L.J. 1091 (2021), 1177-1178.

[61] Section 7.3 of the Oversight Board Charter provides: "Independent of any pending case, Facebook may request policy guidance from the board. This guidance may concern the clarification of a previous decision by the board or guidance on possible changes to Facebook's content policies. All guidance will be advisory." Available at: https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf. Accessed on June 15, 2024.

[62] Machado, Caio Vieira, Victor Durigan and Laura Pereira, *PL das Fake News: Entenda o que é, Seu Impacto e as Principais Críticas*, JOTA (Apr. 18, 2022). Available at

In a recent debate held by the University of São Paulo, at a seminar entitled "Democracy and Digital Platforms," Professor Laura Schertel stated that the discussion surrounding Article 19 is important because, by establishing punctual and *ex post* judicial liability, the Marco Civil effectively leaves the major decisions about content in the hands of platforms[63].

Continuing her reflection, she added that it is necessary to develop a regulatory model aligned with the characteristics of the new internet, in which platforms are not neutral, and that it falls to Congress to set the parameters within which decisions should be made[64].

The Commission of jurists responsible for drafting the proposed reform of the Civil Code suggested in its final report the repeal of Article 19 of the Marco Civil, in order to introduce a new front in the regulation of online content by digital platforms[65].

Professor Ricardo Campos, a member of the Subcommittee on Digital Law, argues that Article 19 is anachronistic and inconsistent with the structure of the internet and, for that reason, does not reflect the global regulatory agenda. The Subcommittee's proposal is that providers should assume a duty of content curation[66], inspired by the European Union's Digital Services Act.

Content moderation is a complex activity, and any intervention—whether regulatory or judicial—must take into account the current social context, in which application providers have reached a previously unimaginable level of importance, positioned in the information market with the ability to influence individuals, decide which information reaches them, impose standards and opinions, and substantially alter markets and societies.

Although there is significant pressure to expand the civil liability of application providers—especially in light of the massive use of social networks as examples of application providers—the declaration of unconstitutionality of Article 19 does not appear to be the solution. Any dissatisfaction with, or perceived insufficiency in, the legal framework

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https://www.jota.info/opiniao-e-analise/artigos/pl-das-fake-news-entenda-o-que-e-seu-impacto-e-as-principais-criticas-18042022 (last visited May 27, 2024).

[63] Mendes, Laura Schertel. Remarks at USP Seminar *Democracia e Plataformas Digitais* (2024), available at https://youtu.be/ANfK8RIY1ho (last visited May 24, 2024).

[64] Mendes, Laura Schertel. Remarks at USP Seminar *Democracia e Plataformas Digitais* (2024), available at https://youtu.be/ANfK8RIY1ho (last visited May 24, 2024).

[65] Nunes, Dierle, and Matheus Miranda Maciel, *O Polêmico Artigo 19 do Marco Civil da Internet e o Dilema da Moderação de Conteúdo*, ConJur (May 11, 2024). Available at https://www.conjur.com.br/2024-mai-11/o-polemico-artigo-19-do-marco-civil-da-internet-e-o-dilema-da-moderacao-de-conteudo/ (last visited May 24, 2024).

[66] Nunes, Dierle, and Matheus Miranda Maciel, *O Polêmico Artigo 19 do Marco Civil da Internet e o Dilema da Moderação de Conteúdo*, ConJur (May 11, 2024). Available at https://www.conjur.com.br/2024-mai-11/o-polemico-artigo-19-do-marco-civil-da-internet-e-o-dilema-da-moderacao-de-conteudo/ (last visited May 24, 2024).

governing content moderation should be addressed through legislative, not judicial, means.

If the Federal Supreme Court ultimately concludes that Article 19 is unconstitutional in order to broaden the liability imposed on application providers, it can be said that we will witness a paradigm shift in the very role played by these private actors in society.

III. THE DISCUSSION ON THE CONSTITUTIONALITY OF ARTICLE 19 OF THE *MARCO CIVIL DA INTERNET* FROM THE PERSPECTIVE OF FREEDOM OF EXPRESSION AND THE RISKS ARISING FROM THE INCREASE IN THE EXERCISE OF POWER BY DIGITAL PLATFORMS

As explained above, the defense of freedom of expression has emerged as the main line of argument used by digital platforms to advocate for a literal application of Article 19 of the Marco Civil, thereby exempting themselves from liability for content posted by their users and amplified on their platforms.

Freedom of expression is enshrined in Brazil's Federal Constitution through a series of provisions, notably Article 5, item IV, which guarantees the freedom of expression of thought, with anonymity forbidden; item VI, which guarantees freedom of conscience and belief; and item IX, which guarantees the freedom of intellectual, artistic, scientific, and communication-related expression, regardless of censorship.

The thesis of exempting digital platforms from liability in the name of freedom of expression has been defended from several perspectives. In "The Reverse Spider-Man Principle: With Great Responsibility Comes Great Power," Eugene Volokh adopts a liberal perspective and, in brief, argues against holding digital platforms liable for online content moderation, based on a principle he calls the "reverse Spider-Man principle," represented by the maxim that "great responsibilities attract great powers."

In general terms, Volokh argues that the requirement of monitoring would open the door for companies to exercise increased power over their customers:

> Imposing legal responsibility on such companies can thus pressure them to exercise power even when they otherwise wouldn't have. And that is so in some measure even if responsibility is accepted just as a broad moral norm, created and enforced by public pressure (likely stemming from influential sectors of society, such as the media or activists or professional organizations), and not a legal norm. That moral norm would increase the countervailing costs of non-policing. It would decrease the costs of policing: For instance, the norm and the corresponding pressure would likely act on all major competitors, so

> the normal competitive pressures encouraging a "the customer is always right" attitude would be sharply reduced. And at some point, the norm might become the standard against which the reasonableness of behavior is measured as a legal matter.(...) One might approve or disapprove of such power exercised by large business corporations over public discourse; but my point here is simply that calls for great responsibility have indeed increased the exercise of such power[67].

Finally, Volokh concludes with the argument that, with Big Data and the increased monitoring capacity of digital platforms, if they are held indefinitely liable for the actions of their clients, this would tend to push them to actually exercise this power[68].

However, there are also critics of this approach. Evelyn Douek, in an article published in the *Harvard Law Review*, offers a critical view of the debate surrounding content moderation on digital platforms. According to the author, the "state of the art" of the discussion on content moderation treats moderation as a transposition of offline logic into the online world. That is: moderation, as conceived and debated by most lawmakers, courts, and jurists today, is based on individual cases and a proceduralist view of moderation, whereby moderation would follow a process similar to judicial proceedings, with adversarial participation and a decision made by the moderating party.

This transposition, according to the author, would be a transfer of the debate on freedom of expression and the First Amendment[69] into the digital context. In this setting, platforms are frequently viewed as a new kind of government[70], responsible for implementing substantive and procedural rules for content control.

The problem, according to the author, is that this traditional view of content moderation contains blind spots that lead to poor policy proposals for solving the problems involved. For example, in practice, content moderation takes place in many broader ways than the individualized analysis of content, such as: prohibiting spam, fake accounts, and certain uses of bots; automated search and detection; outsourcing to subcontracted companies; trade-offs

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[67] Volokh, Eugene. *The Reverse Spider-Man Principle: With Great Responsibility Comes Great Power*, 3 J. Free Speech L. 197 (2023).

[68] Volokh, Eugene. *The Reverse Spider-Man Principle: With Great Responsibility Comes Great Power*, 3 J. Free Speech L. 197 (2023).

[69] "First Amendment. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Wikipedia, *Primeira Emenda à Constituição dos Estados Unidos da América*, https://pt.wikipedia.org/wiki/Primeira_Emenda_%C3%A0_Constitui%C3%A7%C3%A3o_dos_Estados_Unidos (last visited July 3, 2024).

[70] Douek, Evelyn. *Content Moderation as Systems Thinking*, 136 Harv. L. Rev. 526 (2022), 529.

involving false positives and false negatives; among others.

> "Content moderation," especially but not exclusively at the largest platforms, now includes many more things than it did even a few years ago: increased reliance on automated moderation; sticking labels on posts; partnerships with fact-checkers; greater platform and government collaboration; adding friction to how users share content; giving users affordances to control their own online experience; looking beyond the content of posts to how users behave online to determine what should be removed; and tinkering with the underlying dynamics of the very platforms themselves. The people and processes that determine how user-generated content is treated on online platforms are therefore far more heterogeneous than depicted in the standard account. Content moderators include engineers, product managers, authorities outside platforms, teams monitoring behavioral signals, industry peers, and government partners. In short, content moderation is a complex and dynamic system, much of which will not be examined if the focus is on reviewing individual cases rather than their institutional context and interrelationships[71].

Moreover, this scenario creates a requirement for digital platforms to grant procedural rights to their users, since such rights are guaranteed in the offline world and, in general, by constitutions. The author makes a statement that corroborates Eugene Volokh's thesis that if platforms have the power to moderate content, they will certainly use these powers beyond what the law prescribes:

> Regulators turn to platform procedure because constitutional and practical limitations on governmental power mean that the job of setting most substantive content moderation rules cannot be taken away from private companies. Platforms can and will engage in content moderation beyond what the law could proscribe[72].

In addition, the author makes an interesting observation: the State does not have the practical capacity to replace platforms in the role of moderating the content that exists within them[73]. Thus, according to her, regulators are right to focus on the moderation process and not on the specific content to be

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[71] Douek, Evelyn. *Content Moderation as Systems Thinking*, 136 Harv. L. Rev. 526 (2022). 531.

[72] Douek, Evelyn. *Content Moderation as Systems Thinking*, 136 Harv. L. Rev. 526 (2022). 531.

[73] "This is a descriptive, not normative, observation: the state simply does not have the capacity to usurp platforms as the frontline of content moderation." Douek, Evelyn. *Content Moderation as Systems Thinking*, 136 Harv. L. Rev. 526 (2022). 532.

regulated, but the current focus on individual cases is misguided[74].

Considering these points, one can see the advantages of the thesis defended by Douek, namely that society should adopt a second wave of proposals for regulating content moderation based on moderation systems, not on case-by-case content moderation, given the scale, speed, and precision required to regulate the issue. In this scenario, application providers should be held responsible for creating *ex ante* regulatory systems and held accountable for the functioning of these systems, rather than being held liable only *ex post* for the correctness of decisions in individual cases. This would be an anti-perfectionist and practical approach that would take the focus off the freedom of expression debate.

CONCLUSION

The issue of content moderation in Brazil took a new direction after Appeals RE 1,067,258 and RE 1,037,396 were selected for review under the general repercussion procedure, and both cases remain pending judgment before the Federal Supreme Court. The disputed matter in the second case concerns the constitutionality of Article 19 of the Marco Civil da Internet, which established a regime of subjective liability for application providers by privileging judicial oversight (*reserva de jurisdição*) for the moderation of online content.

Although there is a strong push to expand the civil liability of application providers for content posted by third parties, the issue must be evaluated carefully. As shown, these providers already take an active stance in moderating online content pursuant to their terms of use; however, removing the judicial filter and transferring to private entities the responsibility for exercising this activity would significantly increase the power these actors hold over us.

Nevertheless, as demonstrated in this study, although the regulation of Digital Platforms in general—and Themes 533 and 987 before the Supreme Court—entails multiple complex debates, the defense of freedom of expression has often been used as a straw-man argument by those who oppose regulation.

Focusing solely on this point of the debate is insufficient for thinking about platform regulation. Issues involving consumer (user) rights, competitive markets, democracy, and the very limits of the exercise of freedom of expression must also be considered. It is not possible to answer existing dilemmas through purely technical, or purely idealistic, approaches.

Responding to the question “who are the intermediaries” of the internet

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[74] Douek, Evelyn. *Content Moderation as Systems Thinking*, 136 Harv. L. Rev. 526 (2022). 532.

is essential. In this sense, both Article 19 of the Marco Civil da Internet and Section 230 of the U.S. DSA refer to an internet that no longer exists—an internet in which service providers acted far more as genuine intermediaries, offering spaces for authentic user-generated content. Clear and frequently cited examples include Orkut, blogs, and similar early platforms.

Today's internet is dominated by the world's largest media corporations, whose business model is based on clustering and other forms of user data processing to sell to advertisers. In this business model, platforms profit above all from engagement—even when such engagement arises from illegal content.

Moreover, platforms profit from the amplification of fake news, political opinions, and actions that challenge democratic stability, as has been extensively documented. Opposing the need for platform regulation solely in the name of freedom of expression cannot, for jurists, serve as an impasse in the debate. On the contrary, we must embrace the challenge of continuing to study the topic deeply in order to find appropriate solutions.

In this sense, declaring Article 19 of the Marco Civil da Internet unconstitutional does not appear to be the most appropriate path. This is both because the regime it establishes aligns with constitutional principles and because such a declaration would establish a new social paradigm in which application providers would begin to exercise surveillance powers very similar to police powers. On the other hand, there is no doubt that this statutory provision must be interpreted in harmony with the rest of the legal system, so as to prevent the outsourcing of responsibilities and the mistaken belief that Platforms are completely neutral—an assumption already disproven in several cases.

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