

Policy by judicialization: the institutional framework for intermediary liability in Brazil

Clara Iglesias Keller¹

Abstract:

This paper offers an institutional assessment of the intermediary liability system currently operative in Brazil. According to article 19 of the Marco Civil, content sharing platforms can only be liable for third party infringement if they fail to act upon it under court ruling. It is a court-centred system, and as such, it is commonly praised for its benefits to freedom of expression, assuming that such a safe harbour should prevent intermediaries from overblocking. The goal of the paper is to analyse this regulatory choice beyond the freedom of expression trade off, considering the institutional characteristics of the judicial decision making process and how they can affect the broader online content regulation context. It builds on the literature dedicated to the relationship between judicialization and public policies in order to accrue the practical implications of the judiciary's legitimacy, institutional capacities and selectivity for the aforementioned governance system.

Introduction

As most digital policy fields, online content regulation is affected by a diffuse chain of actors and practices. Beyond code, legal frameworks, soft law instruments and police functions delegated to private parties are some of the most popular mechanisms that play a part as both objects and means of governance², contributing for the opportunities and limitations on freedom of expression that accrue from the digital environment. Even though all of these diverse elements participate on the content intermediary governance structure, their levels of interference on such systems will vary according to their binding nature and characteristics.

In this context, intermediary liability systems play a central role as one of the most common and influencing state-based policies towards internet platforms. From a legal point of

¹ Research fellow at the Leibniz Institute for Media Research | Hans-Bredow-Institute. Associate researcher at the Alexander von Humboldt Institute for Internet and Society. Doctor of public law at the Rio de Janeiro State University – UERJ. L.LM in IT, Media and Communications Law at the London School of Economics and Political Science. Lecturer, researcher and legal counsel for media and communications regulation.

² Jeanette Hofmann, Christian Katzenbach and Kirsten Gollatz, *Between coordination and regulation: Finding the governance in Internet governance*. New Media & Society, [s.l.], v. 19, n. 9, p. 1-18, 31 mar. 2016.

view, they state the boundaries within which these companies can be lawfully responsible for material reparation in the face of third party infringement. From a regulatory perspective, they function as “model[s] for contextual regulation”³ that, instead of directly prohibiting a specific behaviour, set a series of “conditions under which the operator will be liable for third party content”⁴.

In this regard, they directly affect intermediaries’ internal policies and guidelines, shaping the way a diversity of user uploaded content is addressed by the online environment. Ultimately, they influence the design of pivotal online policy fields, addressing matters related to copyright, right to be forgotten and online terrorism, among others. Ideally, a well crafted liability system would manage such claims while also removing “under certain conditions, the internet platforms’ incentive to interfere with their users’ rights and activities”⁵.

The implementation of an intermediary liability system can take different forms. Urs Gasser and Wolfgang Schulz divide them in two broad groups⁶: the ones where intermediaries are explicitly addressed through a governance system especially designed to deal with them; and the ones that rest on the application of general rules to intermediaries. Even though this second type of systems also exert relevant influence, this paper focuses on more structural regulations, that usually institute some sort of procedure to guide intermediaries’ removal policies - like procedures known as *notice-and-take-down*, *notice-to-notice procedures* or judicial adjudication based liability tests. Specifically, I propose an assessment of the court-centred system adopted in the Brazilian experience.

Brazil has adopted a framework where intermediaries can only be liable for third party harmful content if they do not act on it after being notified of a judicial decision telling them to do so. This was a regulatory choice taken in the context of the drafting of Law 12.965/2014, widely know as the “Marco Civil da Internet” (usually translated to english as the “Internet Civil Rights Framework”), and it applies to all sorts of content, excepted copyright and non-

³ Urs Gasser, Wolfgang Schulz, Schulz, *Governance of Online Intermediaries: Observations from a Series of National Studies*, Berkman Center Research Publication, no. 2015-5, 18 feb. 2015, p. 8. Available at: <http://bit.ly/2JzCUx3>.

⁴ Gasser et al, p. 7.

⁵ Luiz Fernando Marrey Moncau and Diego Werneck Arguelhes, *Marco Civil da Internet and Digital Constitutionalism*, *The Oxford Handbook of Intermediary Liability Online*. Oxford University Press: Oxford, 2019. Forthcoming.

⁶ Gasser et al, p. 7.

consensual sharing of intimate images. As I will show in the next section, this context is important because the Marco Civil was shaped as a *bill of rights* that would guide and limit both private and state powers in the realm of internet regulation. In this sense, the wording chosen for its text is centred on the preservation of individual rights, liberties and substantive values assumed to be democratic and therefore desirable, granting the law the label of *Constitution of the Internet*⁷.

In such a context, the choice for a judicialization based framework was celebrated⁸ as a privilege to user's liberties, as it was assumed that the requirement of court ruling to generate liability would give less incentives for companies to overblock user's content. I do not argue with that assumption in this paper; in fact, I state that the judiciary is the appropriate instance for individual rights adjudication, specially regarding freedom of expression. Also, the courts are more qualified to assess the scope of this right than administrative authorities and private companies (as it happens in systems based on private notification). Nevertheless, I understand that the assessment of the Brazilian intermediary liability system has been limited to the *trade-off* between freedom of expression and the efficient removal of infringing content⁹ while there are important institutional implications of this regulatory choice that are being overlooked¹⁰.

Despite of the different forms that these systems take, they are mostly analysed through the perspective of a rights clash , e.g. freedom of expression vs right to honour, or vs

⁷ Edoardo Celeste, Terms of service and bills of rights: new mechanisms of constitutionalisation in the social media environment? *International Review of Law, Computers & Technology*, [s.l.], pp. 1-17, p. 2, 21 may 2018. Available at: <http://dx.doi.org/10.1080/13600869.2018.1475898>.

⁸ Ronaldo Lemos and Carlos Affonso Souza, *Marco Civil da Internet – Construção e Aplicação*. Juiz de Fora: Editar Editora Associada, 2016, p. 16.

⁹ E.g.: Ronaldo Lemos and Carlos Affonso Souza, *Marco Civil da Internet – Construção e Aplicação*. Juiz de Fora: Editar Editora Associada, 2016; Nicolo Zingales, The Brazilian approach to internet intermediary liability: blueprint for a global regime? *Internet Policy Review*, 2015, 4(4). DOI: 10.14763/2015.4.395, and Daphne Keller, *Internet Platforms: Observations on Speech, Danger and Money*. Aegis Series Paper, No. 1807. Hoover Working Group on National Security, Technology, and Law, 13 june 2018. Available at: https://www.hoover.org/sites/default/files/research/docs/keller_webreadypdf_final.pdf.

¹⁰ National literature has also developed important works regarding the current framework's compatibility with pre-existent consumer guarantees and civil liability rules, and on the jurisprudential evolution that lead to the current state of affairs. See: Chiara Antonio Spadaccini de Tefé. *A responsabilidade civil de aplicações de internet pelos danos decorrentes do conteúdo gerado por terceiros, de acordo com o Marco Civil da Internet*. R. Fórum de Dir. Civ. – RFDC | Belo Horizonte, ano 4, n. 10, p. 81-106, set./dez. 2015; Anderson Schreiber, *Marco Civil da Internet: Avanço ou Retrocesso? A responsabilidade civil por dano derivado do conteúdo gerado por terceiro*. Available at: <http://tiny.cc/hi9jez>.

right to be forgotten. In this scope, many authors have addressed the importance of avoiding incentives for overblocking lawful content¹¹ or the technical and timely limitations in the face of urgent removal cases¹². These analysis are also relevant to the Brazilian case and should be taken into account.

However, they do not encompass greater governance natured ramifications, i.e., they rarely address the bigger institutional picture that derives from such a regulatory choice. In this paper, I propose an analysis of these implications based on the literature dedicated to the relationship between courts and public policy. A relevant segment of such studies is dedicated to reckoning the institutional limitations of courts to decide on essential public policy matters and how they can affect the decision making process and wider regulatory contexts.

As I will argue in this paper, regardless of its benefits towards guaranteeing freedom of expression online, intermediary liability systems that rely only in judicial action promote a selective scrutiny over tech companies content policies (leaving a considerable unaccountable space for content moderation); allow the adjudication of technical matters by bodies without expertise; and isolate public policies effects from democratic public choice. Even though these analysis can be pertinent to other judicialization based liability regimes, I will focus on the Brazilian experience, considering political context, general regulatory framework and evolution of jurisprudence.

The paper will be divided in three sections. Following this Introduction, the first section will present the current intermediary liability system operative in Brazil, with a brief contextualization of its implementation within the Marco Civil. In the second section, I will shortly present the debates on the effects of policy judicialization, emphasizing what are considered to be the main institutional limitations of courts for addressing such matters. For these purposes, I will adopt the classification of Jane R. Gonçalves¹³, who framed the main

¹¹ Daphne Keller, Empirical evidence of “over-removal” by internet companies under intermediary liability laws. The Center for Internet and Society at Stanford Law School Blog, 12 oct. 2015. Available at: <http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>.

¹² see Colin Lecher, YouTube took down an ‘unprecedented volume’ of videos after New Zealand shooting - The platform disabled functions to stop the videos. The Verge, 18 mar. 2019. Available at: <https://www.theverge.com/2019/3/18/18270814/youtube-new-zealand-shooting-videos-moderation>. Also: Shibani Mahtani, Facebook removed 1.5 million videos of the Christchurch attacks within 24 hours — and there were still many more. The Washington Post, 17 mar. 2019. Available at: <https://wapo.st/2JA2Toc>.

¹³ Jane R. Gonçalves, Direitos sociais, Estado de Direito e desigualdade: reflexões sobre as críticas `a judicialização dos direitos prestacionais. *Quaestio Iuris*, 2015, vol. 08, n. 3, p. 2080-2114. DOI: <http://dx.doi.org/10.12957/rqi.2015>.

critiques towards judicial review in three groups: those related to *legitimacy*, to *institutional capacity* (where she includes lack of technical expertise) and claims of unequal effects derived from *selectivity*. In the third section, I will apply these three lines of arguments to the courts-based intermediary liability system chosen by the Brazilian legislator, in order to draw how the institutional characteristics that define the judicial branch can affect the broader intermediary governance system. My goal here is not to discredit judicialization as a safe harbour for intermediary liability, but to show that some institutional implications of the Brazilian system can jeopardize the very foundations of its election - therefore, they should be accounted for in the current literature.

1. Intermediary liability in Brazil

The online intermediary liability regime currently operative in Brazil is provided by articles 18 to 21 of the “Marco Civil da Internet”. After several years of debate in Congress that involved a broad range of political actors, the Marco Civil’s approval provided legal certainty to a series of political and legal disputes surrounding Internet regulation, and “was praised internationally as a model legislation for the protection of freedom of expression and other human rights”¹⁴.

Indeed, the Marco Civil’s approval was a turning point on how the Brazilian legal order dealt with digitalization. It settled a framework for both private sector action and future regulations of the Internet based first and foremost on a series of fundamental rights, such as freedom of expression and communications, privacy, pluralism and commercial freedoms (article 3o). Also, the law institutionalized a series of values that are usually associated with the idea of an open and global Internet. In this sense, one can find among the foundations of the law depicted by article 2o “openness and collaboration”, “neutrality” and “global scale”. There are also express provisions regarding the preservation, for instance, of open standards and interoperability (article 4) besides a series of other articles that aim at the promotion of innovation. As I mentioned previously, this narrative led the Marco Civil to be labeled as a

¹⁴ see Luiz Fernando Marrey Moncau and Diego Werneck Arguelhes, Marco Civil da Internet and Digital Constitutionalism, *The Oxford Handbook of Intermediary Liability Online*. Oxford University Press: Oxford, 2019. Forthcoming.

Constitution for the Internet, based on a guarantees-system that “provides an overarching set of principles to guide future regulation of digital rights in Brazil”¹⁵.

Within this framework, the Marco Civil addresses a series of specific policy issues that had been under public and legislative debate for years, so that its promulgation also provided closure to other bills of law tackling diffused specific matters. In this spirit, the law addresses the assurance of net neutrality (article 9), data retention (articles 13 and 14) and a few provisions related to privacy and data protection (Art 7o, VI, VIII and article 10).

Regarding intermediary liability, it introduced in sections 18 to 21 the first liability regime known to Brazilian legislation, based on judicial review. According to this provision, intermediaries can only be liable for third party harmful content if they fail to act upon it in the face of a court ruling.

Before the Marco Civil’s enactment there was no structural policy informing disputes over infringing content posted on online sharing platforms, what contributed to a legal uncertainty context that gave room for disproportionate measures both by the public power (mostly through adjudication) and private companies. Among the lawsuits that promoted the first intermediary liability debates, the *Cicarelli case* is usually pointed out as a symbol of the harm and insecurity generated by the legal void. It was originated by a claim of a famous tv personality and her boyfriend against Youtube for the depiction of an intimate video and it led to a judicially imposed blockage on the website that lasted almost 48 hours¹⁶. The case generated discussions over several of its aspects, such as the disproportionate restrictions on speech and commercial freedoms, the efficacy of the decision (in view of the immediate replication of the content in other websites) and the limits of the plaintiffs’ right to privacy (considering that the video had been recorded in a public space)¹⁷.

Together with similar claims, copyright disputes and others, cases like this one turned experts’ attention to the importance of defining to what extent internet platforms should bear risks of infringement perpetrated by their users. As the complexity and scope of the platform

¹⁵ Carlos Affonso Souza, Fabro Steibel & Ronaldo Lemo. Notes on the creation and impacts of Brazil’s Internet Bill of Rights, *The Theory and Practice of Legislation*, Routledge, 2017, p. 3 DOI: 10.1080/20508840.2016.1264677.

¹⁶ See Fernando Porfírio, ‘Justiça confirma veto ao vídeo de Cicarelli na internet’ (2006) <https://www.conjur.com.br/2006-set-28/justica_confirma_veto_video_cicarelli_internet>.

¹⁷ For a detailed description of this and other cases that drew attention for the necessity of intermediary regulation, see MONCAU et al, 2019.

based economy grew in Brazil – together with the risks enhanced by legal uncertainty -, this discussion became one of the main inputs for the Marco Civil’s drafting and incentive to its approval¹⁸.

As stated by article 19,

In order to ensure freedom of expression and to prevent censorship, the internet application provider may only be held liable for damages from content generated by third parties if, after a specific court order, it does not take steps to, within the scope and within the technical limits of your service and within the stated time, make unavailable the content indicated as infringing, except as otherwise provided by law.

The law excludes from this rule copyright claims (that, as per paragraph 2o, shall follow specific rules to be established by the legislator)¹⁹ and the unauthorized disclosing of intimate images (that under article 21 must be removed after simple user notification). Other than that, platforms cannot be held liable with base on knowledge of infringement, as it happens in some jurisdictions. This leaves space for them to handle private notifications according to their internal policies, which does not mean that the content will not be taken down; however, they do not incur in reparation duties by choosing not to act²⁰.

Overall, this approach has been celebrated by its privilege of freedom of expression, in the sense that conditioning liability to a judicial decision would give less incentives for platforms to overblock content. On an opposite sense, a full liability regime (where reparation is due upon mere extrajudicial notification) would encourage private monitoring and the exclusion of potentially controversial material, which has great potential for limiting legitimate content. In this sense, authors such as Ronaldo Lemos and Carlos Affonso Souza praised the Brazilian legislator’s choice:

*this would be a balance between creating a space where it was possible to cultivate freedom of expression and information while at the same time guaranteeing the victim the availability of harmful content the means to identify their offender and remove material contested.*²¹

¹⁸ MONCAU et al, 2019.

¹⁹ Following a global tendency identified by Gasser et al, 2015, p. 5.

²⁰ I will further address the institutional implications of this governance model in the next section; as per the descriptive function of this section, it is important, for now, to notice that platforms cannot be civil or criminally condemned for their inaction towards those.

²¹ Ronaldo Lemos, Carlos Affonso Pereira Souza. Marco Civil da Internet: Construção e Aplicação. Juiz de Fora: Editar Editora Associada, 2016, p. 16.

Indeed, court-centric liability systems are associated with democratic countries²² for their privilege of freedom of expression. Judicialization of liability claims has been adopted as a freedom of expression standard in documents such as the “Manila Principles on Intermediary Liability”²³ according to which “content must not be required to be restricted without an order by a judicial authority”; and the 2013 UN special report on the promotion and protection of the right to freedom of opinion and expression²⁴. The assumption here is that by creating incentives for liability claims to be brought to the judiciary, intermediaries will be less likely to remove content simply because a notification has been received²⁵.

In addition to this, article 19 is also considered to be an innovation friendly policy choice, since the framework provides companies with legal certainty to experiment with new business models based on less unknown risks. This is consistent with other provisions of the Marco Civil that aim at the promotion of innovation by assuring “business models freedom” (article 3o) and freedom of commerce (article 2o, V).

Regardless of its popularity and straightforward logics, article’s 19 enforcement has not been smooth. First, preliminary studies point out a first instance judge’s tendency to not apply article 19’s terms²⁶. A quantitative study focused on demands brought against Facebook at the Rio de Janeiro Court of Appeal showed that in 65% of the cases investigated the judges granted plaintiff’s with financial reparation despite of the exemption provided by the Marco Civil²⁷.

Second but foremost, the mechanism’s constitutionality is currently under examination of the Brazilian Supreme Court (STF), regarding its compatibility with the right to reparation

²² Gasser et al, 2015, p. 12.

²³ Manila Principles on Intermediary Liability: Best Practices Guidelines for Limiting Intermediary Liability for Content to Promote Freedom of Expression and Innovation,, v. 1.0, 24 march 2015. Available at: https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf.

²⁴ Frank de la Rue. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Human Rights Council, United Nations, 2013. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf.

²⁵ Ronaldo Lemos and Carlos Affonso Souza, NoC Internet Governance Case Studies Series: A Bill of Rights for the Brazilian Internet (“Marco Civil”) – A Multistakeholder Policymaking Case, in Urs Gasser and Wolfgang Schulz,

²⁶ Fábio Carvalho Leite, Por que juízes não aplicam o art. 19 do marco civil da Internet?, 22 jul. 2019. Available at: <https://www.plebpub.science/post/por-que-ju%C3%ADzes-n%C3%A0o-aplicam-o-art-19-do-marco-civil-da-internet>.

²⁷ Leite, 2019.

provided by the Federal Constitution and Consumer Protection's Act. Appeal n. nº 1.037.396/SP was brought by Facebook against a decision of the Court of Appeal of Piracicaba/SP, which declared article 19 unconstitutional and ordered the company to pay compensation for moral damages due to omission, after extrajudicial notification, to exclude from its virtual platform a false profile created on behalf of the plaintiff. This ruling is in the exact opposite sense of the Marco's Civil provision, framed to exempt intermediaries of this exact kind of risk. So far, the Supreme Court has only stated its jurisdiction over the case by recognizing the appeal has "general repercussion", which means that "before a final decision is reached by the STF, all similar litigation on this topic throughout the country must be suspended"²⁸. Also, the Attorney General has already taken a stand in favour of the constitutionality of the provision.

While this paper offers a critical perspective on the Brazilian intermediary liability system, it does not dispute the constitutionality of article 19. What I do argue is that, due the judicial branch's institutional characteristics, this mechanism (i) provides public scrutiny only towards a limited portion of the greater online content regulation sphere, leaving a lot of space for unaccountable and opaque private regulation of speech; (ii) it can generate effects on the broader context of online content governance (leaving a whole lot of unaccountable space for content moderation); (iii) it allows the adjudication of technical matters by bodies without expertise; and (v) it isolates public policies effects from democratic public choice.

In order to better understand these implications, I propose an approach to this system through an institutional analysis built on the literature about the dynamics among courts, politics and public policies. There is a wide range of studies dedicated to approaching this relationship from different perspectives; to this study, I find particularly useful the critiques towards adjudication of public policy matters.

2. Policy by judicialization: the theoretical framework

Some form of separation of powers is inherent to the establishment of democratic regimes²⁹. In theory, the split of functions among legislative, executive and judicial branches is

²⁸ Moncau et al, 2019.

²⁹ Ran Hirschel, The judicialization of mega-politics and the rise of political courts, *Annu. Rev. Polit. Sci.* 2008. 11: 93-118 doi: 10.1146/annurev.polisci.11.053006.183906, p. 22.

one of the pillars of stable political processes, responsible for parting public functions and providing interbranch control instruments. In such arrangements, courts are attributed with functions related to enforcement of the legal order while also serving as controllers of the legislative and executive branches activities.

In this sense, modern constitutionalism arms courts with a range of judicial review procedures and competences that allow the adjudication of matters as various as the diversity of constitutionally based fundamental rights. As one of the results of this, issues that would have been primarily addresses by the legislative or executive branches are often defined through adjudication (specially in high courts), such as “the scope of expression and religious liberties, equality rights, privacy and reproductive freedoms, public policies pertaining to criminal justice, property, trade and commerce, education, immigration, labor, and environmental protection”³⁰.

Even though the academic literature already accepts that courts have an inherent political role³¹ there is still a lot of scrutiny over the political effects of judicialization. These studies are one of the central debates in the contemporary public law field, where a lot of efforts have been dedicated towards understanding the complex relationship between courts, politics and policies, as well as the implications of interference of the first ones in broader regulatory frameworks.

These efforts encompass different aspects of and perspectives on these intricate institutional dynamics. On one hand, there are discussions on the impacts of the “judicialization of politics”, which Ran Hirschl understands as “the reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies”³². These issues relate to the adjudication by higher courts of matters that the author classifies as “mega-politics”, which refers to “core political controversies that define the boundaries of the collective or cut through the heart of entire nations”. This level of judicialization includes different subcategories of political intervention performed by the judiciary, like “scrutiny of executive-branch prerogatives in the realms of macroeconomic planning or national security;

³⁰ Hirschel, 2008, p. 2.

³¹ Even though this acception comes in different degress. See: Hirschel, 2008, p. 2.

³² Ran Hirschel, The judicialization of mega-politics and the rise of political courts, *Annu. Rev. Polit. Sci.* 2008. 11: 93-118 doi: 10.1146/annurev.polisci.11.053006.183906, p. 2.

judicialization of electoral processes (...) fundamental restorative-justice dilemmas; and above all (...) struggles over the very definition or *raison d'être* of the polity as such – arguably the most troubling type of judicialization from a participatory democracy standpoint”³³.

Through another perspective, the political role of courts also refers to the effects of judicial review on broader regulatory frameworks. In these cases, most of the disputes revolve around the institutional limitations of the judiciary to evaluate and determine how their decisions on individual cases will affect broader policy contexts traditionally designed and monitored by the legislative and executive branches.

In the Brazilian context, this discussion is centred on the widespread practice of social rights litigation and its effects on structural policy fields, notably regarding the impacts of right to health adjudication on the national health care system³⁴. Most of these cases are based on “individualized claims demanding curative treatment”³⁵ aiming to impose on the state an “obligation to provide a particular service to a particular individual”³⁶.

There are a lot of academic discussions on the implications of such processes, mostly concerning, on one side, “the qualification of these rights as fundamental rights and the ability of the judiciary to determine their implementation on the basis of the Constitution alone”³⁷. On the other side, some authors will claim that the expansion of litigation demanding social care provisions can lead to an “arbitrary allocation of public resources by judicial bodies that are ill-suited for this task”³⁸, generating “potential broader effects of judicial disputes on the

³³ Ran Hirschel, The judicialization of mega-politics and the rise of political courts, *Annu. Rev. Polit. Sci.* 2008. 11: 93-118 doi: 10.1146/annurev.polisci.11.053006.183906, p. 5.

³⁴ Mariana Motta Prado, ‘The Debatable Role of Courts in Brazil’s Health Care System: Does Litigation Harm or Help?’, *The Journal of Law, Medicine and Ethics*, 2015, Volume: 41 issue: 1; Jane Pereira Gonçalves Reis, *Direitos sociais, Estado de Direito e desigualdade: reflexões sobre as críticas à judicialização dos direitos prestacionais*. *Quastio Iuris*, vol. 08, n. 03, 2015, pp. 2080-2114, p. 2084.

³⁵ Prado, 2015, p. 3.

³⁶ The general narrative in these cases is the following: an individual sees themselves in need of a medication, special hospital care or medical procedure that is not available at the public health care system (for reasons that go from lack of financial resources to the procedure being unavailable or unprecedented in the country). Based on the constitutionally provided right to health (article 196 of the Federal Constitution reads that “Health is a right to all citizens and a duty for the state”), they file a lawsuit (usually through the procedural form of injunctions) requesting that the judge mandates a certain public hospital facility or administrative authority to provide them with their demand.

³⁷ Prado, 2015, p. 3.

³⁸ Prado, 2015, p. 2.

country's institutional environment"³⁹. The relevance of social rights and the courts competence to apply them are not under dispute. The controversy lays on the limits for direct application of constitutional commands in the context of limited material resources. Such decisions depend not only on normative conditions given by traditional instances of democratic representation, but also on factual conditions and technical evaluations, with relevant impacts on the management of public services⁴⁰.

One can see from this short explanation that these discussions involve analysis that range from constitutional interpretation to public goods managements, transcending the scope of this paper. However, we also find among the studies inspired by this scenario insightful inputs on the institutional limitations of the judiciary branch and its impacts of policy nature. These are useful lenses through which one can understand and measure the effects of a court centred intermediary liability regime.

In her contribution to the debate on social rights litigation, Jane R. P. Gonçalves organizes the critiques on the adjudication of public policies in three groups⁴¹. The first group includes claims related to the *lack of legitimacy* of the judicial branch to interfere with the allocation of public resources. Given that this a function peculiar to democratic elected institutions, judicial review could violate the democratic principle, since courts decisions on such matters would be bypassing the ones of people's chosen representatives.

In the second group of claims are the ones relates to the *lack of institutional capacities* of the judiciary. These critiques are mostly related to the fact that the judges, or the judicial processes, are not designed to address matters which require highly technical expertise. That is valid both to deciding on the necessity and legitimacy of individual claims as well as for measuring systemic effects on the broader policy framework. Specially regarding the second case, social rights adjudication has the potential to poorly impact policy plans for a determined sector and on the countries' institutional environment⁴². Considering the right to health

³⁹ See Prado, 2015, p. 3 and Gonçalves, 2015, p. 2085.

⁴⁰ Gonçalves, 2015, p. 2086.

⁴¹ The author divides these arguments in three groups in order to challenge them, i. e. to offer a different spin on the critiques towards policy effects of social rights judicialization. I will not challenge this discussion in the paper, but use the classification proposed as lenses through which the critiques towards the Brazilian intermediary liability system are approached.

⁴² Prado, 2015, p. 2.

litigation example, the diffuse granting of right to health provisions devoid of a medium to long term perspective can intervene with pre-existing actions and budgetary plans, jeopardizing the macro health care police.

In the third and last group, Gonçalves includes the critiques towards the unequal effects of *selectivity*. Since judicial action is inherently conditioned to provocation by a plaintiff, the ones that actually engage in litigation towards access to a certain medication, for instance, end up being granted provisions systemically denied to the vast majority of citizens in the same situation. Considering that access to justice in Brazil presumes a series of material resources this would also be a means of increasing social inequality, as judicialization would favour middle and upper class citizens with financial means to pursue legal action.

As mentioned previously, these discussion are organized by Jane R. P. Gonçalves in the context of social rights litigation, that demand active provisions from the states and whose policies involve complex planning, monitoring and execution of the elected public policies. Hence, it is important to notice that some of the consequences extractable from this argumentation do not apply to or have a different impact on the subject matter of this paper (like, for instance, the management of budget restrictions). However, it can profit from the institutional perspective over courts, as I will approach in the next section.

4. Policy by judicialization: the effect of intermediary liability litigation

Considering the three lines of arguments described above, it is possible to approach some of the institutional implications of the judicialization based intermediary liability system provided by the Brazilian legislation. As I intend to show in this final section, these arguments can provide us with perspectives that are currently overlooked by the national literature, allowing a step forward towards a holistic and realistic take of such systems.

Considering the hereinabove described policy litigation literature, it is possible to draw some important practical implications for the intermediary governance system. Starting with the claims of *lack of legitimacy*, the first argument used in the social rights litigation debates also apply to the subject matter: the judicial branch is not essentially informed in the popular representation flow that should base public policy choices. And considering that the adjudication of intermediary liability can generate “policy like” effects on the online content governance framework (as I will further address herein below), one could consider that this

institutional design bypasses the government branches that are originally responsible for implementing policies towards speech.

However, judicial control over such matters is not displaced from courts legitimacy sphere. As much as the assurance of the right to freedom of expression can demand positive states provisions⁴³, it is indisputably an individual right, whose protection is under courts' competence. In fact, courts have a pivotal role in the protection fundamental rights⁴⁴, which can be linked to (i) solving disputes where they clash among with each other or with other interests, or (ii) to a counter majoritarian function of rectifying the shortcomings of democracy⁴⁵. Either way, adjudication is a legitimate way to “elaborate the precise meaning of the test for restrictions on freedom of expression”⁴⁶, as well as a promising path towards regulatory environment provided with legal certainty.

In this sense, freedom of speech centred intermediary liability litigation finds on courts a legitimate forum, but that does not mean that there are no legitimacy issues. As mentioned previously, freedom of expression can also require positive state provisions that are inherently under the legislative and executive original competences, in which case institutional limitations on their decision making processes can take a stronger claim. But they certainly do not apply here in the same extent that in the context social rights cases.

In the context of this paper, the critiques towards *institutional capacities* are more relevant, since the lack of technical expertise to assess systemic impacts has important implications in the field of intermediary regulation. As a matter of fact, this should be considered not only in relation to collective effects, but also in the realm of the individual demand-based adjudication process. As per their design, it is presumed that lawsuits are built in a way that assures they will contain all the information necessary for judges to reach good decisions, which includes a number of procedural mechanisms that allow experts opinions on

⁴³ As opposed to the “subjective” or “individual” dimension of freedom expression (that requires a negative provision of states, in the sense of no interference on speech), the “objective” or “collective” dimension demands positive provisions aiming at the conditions necessary for informed expression. In this spirit, this the approach is one of the foundations of structural media regulation policies, notably the ones based on diversity, pluralism, participation and access to information requirements. Jónatas M. Machado, *Liberdade de Expressão. Dimensões Constitucionais da Esfera Pública no Sistema Social*. Coimbra: Coimbra Editora, 2002, p. 379.

⁴⁴ It should be pointed out that the extension of this role is another layered public law dispute, whose outlines are approached by Jane R. Gonçalves in *O judiciário como impulsionador dos direitos fundamentais: entre fraquezas e possibilidades*, *Revista da Faculdade de Direito RFD-UERJ*, Rio de Janeiro, n. 29, jun. 2016.

⁴⁵ Gonçalves, 2015, p. 2105.

⁴⁶ <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>

technical matters. Nevertheless, the Brazilian scenario is familiar with decisions that are either disproportional or oblivious to the technical and social characteristics of the online environment, affecting or even jeopardizing its originally intended results. See, for instance, the *Cicarelli case* previously mentioned, where a court of appeal determined the blockage of Youtube in the whole territory in order to prevent a video from being spread, which did not prove effective. An extremely restrictive and disproportionate measure that did not even prove to be effective.

Concerning a collective perspective, the lack of expertise can also affect the broader policy scenario where these decisions take place, since they “are not designed to anticipate the secondary effects of their judgements”⁴⁷. And yet, they end up exerting great influence as the sole public scrutiny over intermediaries content policies.

In this sense, jurisprudence is already giving “regulatory contours” to article 19’s provision. The Superior Court of Justice - STJ extracted from the analysis of 98 of its decisions on the matter a few understandings regarding the liability of intermediaries⁴⁸, such as: (i) intermediaries are not strictly responsible for illegal content generated by users; (ii) they cannot be required to preemptively filter information submitted by users; (iii) they should develop and maintain minimally effective mechanisms for identifying their users, and (iv) they should not be pressured with the expectation of prompt removal, as this could result in an incentive for them to censor legitimate content.

As much as this jurisprudence is a result of a very basic and functionally inherent exercise of legal interpretation – which is clear by statements such as “intermediaries are not strictly responsible for illegal content generated by users” - it is certainly a blurred line that separates it from policy decisions – such as “intermediaries cannot be required to preemptively filter information submitted by users”. Furthermore, beyond the definition of the article’s 19 scope, courts are also defining the technical and factual conditions necessary for liability requirement. STJ has determined, for instance, that liability claims shall not be recognized unless the plaintiff provides the court with “precise information on the infringing URL” (REsp 1.629.255/MG), or that reparation values can increase according to the platforms

⁴⁷ Gasser et al, 2015, p. 8.

⁴⁸ Moncau et al, 2019.

inaction or time of response⁴⁹. As simple as they may sound, rulings as such require a full comprehension of specific technical matters and of the set of different instruments and practices through which platforms interfere with users content. It is legitimate to expect that this decision is taken by a body endowed with this required expertise, regardless of agreeing with their result or not.

Regarding the last class of critiques, judicial *selectivity* is an inherent characteristic of the judiciary, since courts act upon individual demands that are brought to them by individual claims. Even when a demand is presented on a collective action, the circumstances to be considered are the ones delimited on the scope of that action, as should be the results of the judge's decision. This means that a series of cases that were not brought to courts (by choice or lack of material means) are left outside of the only scrutiny mechanism that the Brazilian framework provides for intermediary liability. There are three main consequences for the governance framework that can be extracted from this plea.

The first one concerns the unequal effects of this selectivity. Only citizens that have the material means to access the judicial system will be assured public scrutiny over how internet platforms dealt with their content. Therefore, these are also the ones who will be entitled to reparation if platforms are to blame for eventual misconduct or inaction. In a country where income concentration is as significant as in Brazil, this is not to be undermined.

Another consequence is that much of the regulation of online content is left to the discretion of intermediaries, that are free to apply content moderation, filters or whatever mechanism they see fit, according to their own criteria. That approximates the Brazilian framework of a self regulation arrangement, since a relevant part of online speech regulation is led by these companies.

The only public scrutiny over whatever internal policy they decide to implement comes from courts, if they are provoked to act, and even so, with the limitations of their institutional design as shown herein. By basing the policy on a court-based liability test towards intermediaries, the Brazilian regulator left a wide field for private action - which is not to be

⁴⁹ Superior Tribunal de Justiça. Provedores, redes sociais e conteúdos ofensivos: o papel do STJ na definição de responsabilidades, Available at: http://www.stj.jus.br/sites/STJ/default/pt_BR/Comunicação/noticias/Not%C3%ADcias/Provedores,-redes-sociais-e-conteúdos-ofensivos:-o-papel-do-STJ-na-definição-de-responsabilidades/. Acesso em 06/06/2019.

assumed as a negative or positive regulatory choice per se. What matters is that private regulation is highlighted as an essential characteristic of the Brazilian framework, that shifts it to the sphere of self regulation, rather than state regulation, as may be assumed by a legal regime.

Indeed, it can be argued that governments actually can “prompt platforms to take down their users’ speech, even if that speech is protected by the US Constitution or international human-rights law” using regulation, political pressure or cross border influences⁵⁰. However, many authors have already explored “a set of fundamental problems with delegating complex decisions about free expression and the law to private companies”⁵¹, specially danger of over removal⁵² and arbitrary removal of lawful content⁵³. The Brazilian intermediary liability system provides no scrutiny over the vast majority of online content related disputes. Due to selectivity, it delegates the definition of these policies to private actors, without any other policy to establish removal criteria or monitoring of these policies implementation.

Which leads me to the last consequence that can be extracted from selectivity, which is that the system that the results from it lacks on transparency and accountability, notably in what comes to the claims that are not brought to courts. This result is also in the opposite direction of what is recommended in terms of intermediary liability best practices; see, for instance, the sixth Manila Principle, according to which “transparency and accountability must be built into laws and content restriction policies and practices”⁵⁴.

⁵⁰ Daphne Keller, Who do You Sue? State and platform hybrid power over online speech. Aegis Series Paper No. 1902. Hoover Working Group on National Security, Technology, and Law, pp. 1-39, 29 jan. 2019. Available at: https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf

⁵¹ Keller, 2018.

⁵² Twenty years of experience with these laws in the United States and elsewhere tells us that when platforms face legal risk for user speech, they routinely err on the side of caution and take it down. This pattern of over-removal becomes more consequential as private platforms increasingly constitute the “public square” for important speech. Intermediary liability law also tells us something about the kinds of rules that can help avoid over-removal. Keller, 2019, p. 3.

⁵³ *“Some platforms simply remove anything that an accuser claims is illegal. Others attempt to weed out invalid claims, but nonetheless comply with far too many. Human-rights literature and widely endorsed best-practices guidelines suggest that the best corrections for over-removal come from robust platform takedown procedures—giving accused users notice and an opportunity to defend their speech, for example, or penalizing those who make bad-faith accusations. Laws that lack such protections and foreseeably lead platforms to silence lawful speech may violate internet users’ rights to free expression.”* KELLER, 2019.

⁵⁴ https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf

Conclusions

Intermediary liability systems play a crucial role in the online content governance framework. By shaping intermediaries' policies towards user uploaded content they end up functioning as contextual regulation models, setting a series of conditions that influence the opportunities and limitation for expression in online platforms.

In Brazil, the operative system provided by articles 18 to 21 of the Marco Civil is based on judicial ruling; that is to say that an intermediary can only be held liable for third party infringing content if they fail to take it down in the face of a judicial order telling them to do so. This system is recognized for its privilege of freedom of expression, specially because the possibility of financial loss only under court order is assumed to generate less incentives for platforms to overblock lawful materials. It is also associated with innovation friendly policies, since it would provide online companies with legal certainty to experiment with different business models. This regulatory choice was taken on the context of the drafting of the Marco Civil, a law distinguished by its constitutional rights centered approach.

In order to provide an assessment of the Brazilian intermediary liability regime beyond the trade off between freedom of expression and efficient removal of infringing content, this paper built on social rights litigation literature to extract a few institutional implications of such a regulatory choice.

Beyond these arguments, the paper offered an institutional analysis of this system, built on the public law literature dedicated to the relationship between courts and public policies. Specifically, I based my analysis on the limitations inherent to the judiciary's institutional design to evaluate and determine how decisions on individual cases can affect broader policy contexts (originally designed and monitored by the legislative and executive branches).

Regarding *lack of legitimacy*, it is possible to accuse courts of not being informed in the popular representation flux while also deciding on matters that have public policy effects. However, this is not the strongest claim to the paper's context, because individual rights litigation is not displaced from courts legitimacy sphere and they do have pivotal role in the protection of fundamental rights, including freedom of expression.

Institutional capacities claim give base for more consistent critiques on the election of judicially based liability systems. The lack of expertise can affect the results of the litigation in an individual and in a collective perspective. In the second case, there is a risk that this limitation will poorly affect the broader policy scenario, since courts are not designed to anticipate the systemic effects of their judgements. Also, in the Brazilian framework they end up exerting great influence at the public policy design, as shown by the most recent jurisprudence on the application of article 19. Beyond the definition of this provision's scope, courts are also defining technical and factual conditions necessary for liability, including matters where technical expertise is required.

Last, there are three consequences for the Brazilian intermediary regulation context that accrue from *selectivity*. The first one refers to the unequal effects of such a system, considering that only citizens with material means to access justice will be granted with public scrutiny over their claims against internet platforms. Another consequence is that much of the regulation of online speech is left to the discretion of these intermediaries, that are free to apply content moderation as they see fit (and, who know, even incur in overblocking). For this reason, the Brazilian systems ends up being closer to selfregulation than to a proper structural state police towards content regulation. The third and last consequence from selectivity is linked to this one: while there a considerable amount of content dispute that is not brought to the only public scrutiny mechanism provided by legislation, the final policy result is a system an accountable and opaque system of liability.

References:

Anderson Schreiber, *Marco Civil da Internet: Avanço ou Retrocesso? A responsabilidade civil por dano derivado do conteúdo gerado por terceiro*. Available at: <http://tiny.cc/hi9jez>.

Carlos Affonso Souza, Fabro Steibel & Ronaldo Lemo. Notes on the creation and impacts of Brazil's Internet Bill of Rights, *The Theory and Practice of Legislation*, Routledge, 2017, p. 3 DOI: 10.1080/20508840.2016.1264677

Chiara Antonio Spadaccini de Teffé. *A responsabilidade civil de aplicações de internet pelos danos decorrentes do conteúdo gerado por terceiros, de acordo com o Marco Civil da Internet*. R. Fórum de Dir. Civ. – RFDC | Belo Horizonte, ano 4, n. 10, p. 81-106, set./dez. 2015;

Daphne Keller, Empirical evidence of “over-removal” by internet companies under intermediary liability laws. The Center for Internet and Society at Stanford Law School Blog, 12 oct. 2015. Available at: <http://cyberlaw.stanford.edu/blog/2015/10/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>.

Edoardo Celeste, Terms of service and bills of rights: new mechanisms of constitutionalisation in the social media environment? *International Review of Law, Computers & Technology*, [s.l.], pp. 1-17, p. 2, 21 may 2018. Available at: <http://dx.doi.org/10.1080/13600869.2018.1475898>.

Fábio Carvalho Leite, Por que juízes não aplicam o art. 19 do marco civil da Internet?, 22 jul. 2019. Available at: <https://www.plebpu.com.br/post/por-que-juizes-nao-aplicam-o-art-19-do-marco-civil-da-internet>.

Frank de la Rue. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. Human Rights Council, United Nations, 2013. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf.

Jane R. Gonçalves, Direitos sociais, Estado de Direito e desigualdade: reflexões sobre as críticas à judicialização dos direitos prestacionais. *Quaestio Iuris*, 2015, vol. 08, n. 3, p. 2080-2114. DOI: <http://dx.doi.org/10.12957/rqi.2015>.

Luiz Fernando Marrey Moncau and Diego Werneck Arguelhes, Marco Civil da Internet and Digital Constitutionalism, *The Oxford Handbook of Intermediary Liability Online*. Oxford University Press: Oxford, 2019. Forthcoming.

Manila Principles on Intermediary Liability: Best Practices Guidelines for Limiting Intermediary Liability for Content to Promote Freedom of Expression and Innovation,, v. 1.0, 24 march 2015. Available at: https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf.

Mariana Motta Prado, ‘The Debatable Role of Courts in Brazil’s Health Care System: Does Litigation Harm or Help?’, *The Journal of Law, Medicine and Ethics*, 2015, Volume: 41 issue: 1

Ran Hirschel, The judicialization of mega-politics and the rise of political courts, *Annu. Rev. Polit. Sci.* 2008. 11: 93-118 doi: 10.1146/annurev.polisci.11.053006.183906, p. 22.

Ronaldo Lemos and Carlos Affonso Souza, Marco Civil da Internet – Construção e Aplicação. Juiz de Fora: Editar Editora Associada, 2016, p. 16.

Urs Gasser, Wolfgang Schulz, Schulz, Governance of Online Intermediaries: Observations from a Series of National Studies, Berkman Center Research Publication, no. 2015-5, 18 feb. 2015, p. 8. Available at: <http://bit.ly/2JzCUx3>.