

POLICY BY JUDICIALIZATION

The institutional framework for
intermediary liability in Brazil

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November 2019

Marco Civil da Internet, art. 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 its service and within the stated time, make unavailable the content indicated as infringing, except as otherwise provided by law.

Intermediary liability

- Civil liability tests & contextual regulation (Gasser & Schulz, 2015)
- Different regimes, different incentives
- Legal concerns:
infringement, overblocking, innovation



Intermediary liability in Brazil

- Judicial scrutiny as the single state policy towards content regulation
- The public law debate: how the institutional characteristics of the judicial branch can affect broader policy contexts.



Policy, politics and courts

- The judicialization of politics (Hirschl, 2008)
- The judicialization of policies



3 critiques to policy adjudication (Pereira, 2015)

- Legitimacy
- Institutional capacities
- Selectivity



Legitimacy

- Lack of legitimacy: not the strongest critique
- Adjudication as legitimate way to elaborating tests for restrictions on freedom of expression + counter majoritarian role
- However: 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 have stronger role

Institutional capacities

- the lack of technical expertise to assess systematic effects has more relevant implications
 - systematic effects: courts end up exerting influence as the sole public scrutiny over intermediaries' content policies
 - even for individual cases: decisions that are oblivious to the technical and social characteristics of the online environment
- jurisprudence giving “regulatory contours” to article’s 19 provisions

Superior Court of Appeals

- intermediaries are not strictly responsible for illegal content generated by users;
- they cannot be required to pre-emptively filter information submitted by users;
- they should develop and maintain minimally effective mechanisms for identifying their users, and
- they should not be pressured with the expectation of prompt removal, as this could result in an incentive for them to censor legitimate content.

Superior Court of Appeals

- Courts are also defining the technical and factual conditions necessary for liability requirement. Ex.:
 - Liability claims shall not be recognized unless the plaintiff provides the court with “precise information on the infringing URL” (REsp 1.629.255/MG)
 - Reparation values can increase according to the platforms inaction or time of response.

Selectivity

- Selected scrutiny for people with means to access Courts
- Great space for content moderation, filters or whatever mechanism they see fit, according to their own criteria. Self regulation?
- Loss of transparency and accountability, notably in what comes to the claims that are not brought to courts

Conclusions

The Brazilian adjudication based liability system:

- Isolate public policies from democratic public choice (weakest claim)
- Allow the adjudication of technical matters by bodies without expertise (individual and collective effects)
- Leaves considerable space for content moderation – private/self regulation of online content
- Promotes a selective scrutiny over tech companies content policies

Thank you

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