ARTIGO19

TECHNICAL NOTE

Judgment on the Constitutionality of Article 19 of the Brazilian Civil Rights Framework for the Internet by the Federal Supreme Court

Summary

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INTRODUCTION

The Supreme Federal Court (*Supremo Tribunal Federal*, STF) has ruled that Article 19 of the Brazilian Civil Rights Framework for the Internet (known in Brazil as *Marco Civil da Internet*, MCI) – Law 12.965/2014 – is partially unconstitutional. The provision provides that so-called "internet application providers"[1]– such as social media platforms – can only be held civilly liable for content produced by third parties if they fail to comply with a court order requiring the removal of the material.[2]

As an exception to this general rule in article 19, article 21 of the MCI stipulates that victims of unauthorized dissemination of images, videos, or other materials containing nudity or private sexual acts may request removal of the content directly from the application provider by means of an out-of-court notice. If the material is not removed after this notification, the application provider may be held liable, even without a prior court order.

With the STF's new understanding, however, new and different liability regimes come into effect, defined in a position established by the Court.[3] One of the main changes, for example, is that the rule of article 21, previously exceptional, now

[1]According to the MCI, internet applications are defined as “the set of functionalities that can be accessed through a terminal connected to the internet”.

[2]Civil liability concerns the obligation to repair damages caused to third parties—such as paying compensation for moral or material damages. This is a central concept of civil law, present in many everyday situations: for example, a company may be held liable if it supplies a defective product that causes harm to the consumer, just as someone who negligently causes a traffic accident may be required to compensate the victim. When discussing the civil liability of application providers, what is at stake is whether, and under what conditions, these companies should be held liable for damages caused by content they did not produce, but hosted and distributed, such as a user's post on a social network.

[3]For the full text of the position, visit: https://noticias-stf-wp-prd.s3.sa-east-1.amazonaws.com/wp-content/uploads/wpallimport/uploads/2025/06/26205223/MCI_tesesconsensuadas.pdf . Topic 5 of this document mentions the sole paragraph of article 296 of the Penal Code, but the correct text is the sole paragraph of article 286, as stated in the respective judgment decision.

applies to content related to any crimes or unlawful acts, except crimes against honor, for which the rule of article 19 remains in effect.

Article 19 itself already contained the justification for the regime then in force: “to ensure freedom of expression and prevent censorship” – based on the premise that, if platforms could be held liable without a prior court decision, they would tend to preemptively remove legitimate content to avoid possible convictions, creating an environment of private censorship.

Therefore, any change in the original logic of accountability provided for by the MCI requires an analysis of its consequences for freedom of expression and the regulatory architecture of the internet in Brazil.

It's important to highlight that the Supreme Federal Court's position emerges in a context marked by the widespread perception that large social media platforms should be subject to regulations capable of addressing serious problems in the digital environment, such as the consequences of the mass dissemination of disinformation and hate speech against protected groups. However, as the following section will show, the National Congress failed to develop such regulations, which led the Supreme Court, following two appeals challenging the constitutionality of article 19 of the Brazilian Civil Rights Framework for the Internet, to assume this role.

ARTICLE 19 is a non-governmental human rights organization that promotes and defends freedom of expression. Its name was inspired by Article 19 of the Universal Declaration of Human Rights, which establishes the right of every human being to freedom of opinion and expression and access to information. The organization participated in a public hearing held by the STF as part of this ruling, contributing funding to protect freedom of expression and other fundamental rights in the digital environment. [4]

With this technical note, ARTICLE 19 aims to describe and analyze the position established by the STF and the new liability regimes, with special attention to their implications for the exercise of freedom of expression.[5]

[4]For more information, visit: https://artigo19.org/2023/04/28/posicionamento-da-artigo-19-sobre-regulacao-das-plataformas-digitais-em-audiencia-publica-sobre-o-marco-civil-da-internet-no-stf-28-03-2023/ .

[5]This technical note was conceived before the publication of the judgments and is based primarily on the final wording of the position released by the Supreme Federal Court on June 26, 2025. Excerpts from the ministers' votes were consulted on a case-by-case basis, with the aim of assisting in the interpretation of aspects of the position that seemed unclear to us.

HISTORY AND CONTEXT

The discussions that led to the creation of the Brazilian Civil Rights Framework for the Internet arose in a context of intense debate over the protection of rights in the digital environment. Some iconic episodes contributed to this scenario. In 2007, for example, a court ruling ordered the blocking of YouTube nationwide due to the difficulty in removing a video featuring intimate scenes of a TV show host.[6] Furthermore, Congress was reviewing the so-called "Azeredo Law" — a bill with a strong punitive bias that drew widespread criticism for threatening fundamental rights.

With all these controversies, the understanding emerged that Brazil needed a regulatory framework that guaranteed a free and open Internet, capable of ensuring freedom of expression and access to information, fostering innovation, promoting a diverse and plural public arena, and catalyzing political and economic development.[7]

The MCI drafting process was innovative, marked by broad public consultations and multisectoral participation, and resulted in a text guided by values such as freedom of expression, free competition, interoperability, network neutrality, and privacy protection.[8] Enacted in April 2014, the law became an international benchmark for innovative and pioneering legislation.

Throughout the 2010s, as large social media platforms established themselves as major communications oligopolies, controlling key information flows and becoming central spaces for public debate, concern grew about the dissemination of certain types of content, such as disinformation, hate speech, and attacks on vulnerable groups. The regime established by article 19 then began to be cited as one of the main causes of the phenomenon, based on the argument that, by conditioning the civil liability of intermediaries on the failure to comply with a court order, the rule discouraged platforms from acting more effectively in moderating illegal or harmful content.

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[6]In 2006, an intimate video of TV host Daniella Cicarelli, recorded on a beach in Spain, was released online. Following court rulings ordering the content's removal, the São Paulo State court ordered a temporary blockade of YouTube across Brazil in January 2007, due to the difficulty in removing the video. The episode sparked widespread debate about disproportionate removals and the lack of clear rules for holding platforms accountable.

[7]Internet Steering Committee. *CGI.br and the Internet Civil Rights Framework: Defending the privacy of all Internet users; Network neutrality; Network non-imputability* . Available at: https://www.cgi.br/media/docs/publicacoes/4/CGI-eo-Marco-Civil.pdf .

[8]The process of formulating the Brazilian Civil Rights Framework for the Internet had as one of its central references the *Decalogue of Principles for Internet Governance and Use in Brazil*, prepared by the Brazilian Internet Steering Committee (CGI.br) in 2009. The document establishes ten fundamental principles – such as freedom, privacy, diversity, innovation and network neutrality – that guided the drafting of the MCI. Available at: https://www.cgi.br/resolucoes/documento/2009/003 .

The debate over the constitutionality of the provision reached the STF in 2017, through two extraordinary appeals (*recursos extraordinários*, RE) with recognized general repercussions. One of them (RE 1,037,396, Topic 987 of general repercussion) involves the creation of a fake Facebook profile using the name of someone who did not have an account on the platform, which was then used to offend third parties. The platform was alerted through its reporting channel but did not remove the profile. In 2014, months after the MCI was edited, the victim filed a lawsuit requesting the deletion of the account and compensation for moral damages. The first instance ordered the removal of the profile, which Facebook complied with, but the claim for compensation was denied. In the appeal, the company was ordered to pay moral damages, on the grounds that it should have removed the profile after the out-of-court notice. Facebook appealed to the STF, claiming that, according to article 19 of the MCI, compensation was not due, since it had complied with the court order for removal.[9]

The other case (RE 1,057,258, Topic 533 of general repercussion) concerns a community created on the social platform Orkut, where members shared disparaging remarks about a teacher. She requested the platform to remove it, alleging a violation of her honor and image. Orkut refused the removal, considering there was no violation of the law or its internal policies. In 2010, the teacher filed a lawsuit, which ordered the community's removal and the payment of damages. The company appealed to the STF, arguing that it should not pay damages because it removed the content after the court order.[10]

Beyond the debates surrounding the cases reviewed by the STF, the public perception has consolidated that large social media platforms should be subject to broader legislative regulation—regulation that goes beyond merely altering the civil liability regime established by the MCI. This perception has been fueled, among other factors, by the way the far-right has exploited these platforms, with profound impacts on the rights of vulnerable groups, access to information, freedom of expression, and democracy itself—including the orchestration of an attempted coup d'état.

Added to this is the growing understanding that these platforms control the main flows of online communication, without minimum guarantees of neutrality, transparency, or accountability, which has heightened the urgency for a new regulatory framework.

[9]For more information, visit: https://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/Informac807a771oa768SociedadeArt19MCI_vRev.pdf .

[10]For more information, visit: https://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/Informac807a771oa768SociedadeArt19MCI_vRev.pdf .

In this context, the Supreme Court itself began to exert indirect pressure on the National Congress, by signaling that it could soon judge the two extraordinary appeals regarding the constitutionality of article 19.

The main legislative initiative being processed in the National Congress that dealt with the issue was bill (*projeto de lei*, PL) 2,630/2020, approved in the Federal Senate and substantially modified during its discussion in the Chamber of Deputies.

In its most recent version, the proposal established two hypotheses of civil liability for damages arising from content generated by third parties: (i) in case of promoted content, regardless of out-of-court notice; and (ii) in case of non-compliance with duties of care by platforms, but only during predetermined periods in which there was an imminent risk of damage to the collective dimension of fundamental rights.

The text also imposed a series of procedural obligations on platforms, such as observing due process in content moderation activities, in addition to duties of transparency regarding their policies and practices.

Following intense lobbying by big tech companies and escalating rhetoric from Elon Musk—owner of the X platform—against decisions handed down by minister Alexandre de Moraes, the Supreme Court's reporting judge on several sensitive investigations related to disinformation and attacks on democratic institutions, Bill 2,630/2020 was eventually withdrawn from the agenda. At the time, then-Speaker of the Chamber of Deputies, Arthur Lira, announced the creation of a working group to revisit the proposal, which, however, remained inactive and produced no concrete results.

This entire scenario, marked by the tension between a possible change in the civil liability regime by the Judiciary and the so-far frustrated attempts at legislative regulation, served as a backdrop for the STF's ruling on the extraordinary appeals. This context helps explain why the Court's position can be understood not only as a binding judicial precedent, but as a true regulation of application providers—even though the Judiciary lacks, technically, the institutional and operational capabilities necessary to formulate public policies.

PROBLEM IDENTIFICATION

By altering the interpretation of article 19 of the MCI, the STF's position is based on the premise that strengthening content moderation – a process aimed at removing or restricting content that violates platform guidelines or current legislation – would allow for more effective confrontation of problems such as disinformation, hate speech, and attacks on democracy.

While relevant, moderation only acts at the final stage of the speech production and dissemination chain, without addressing the structure that encourages the generation and widespread dissemination of harmful content. The core of this structure lies in content curation: an algorithmic, opaque, and commercially driven process that determines which content will be promoted or amplified.

Content curation is intrinsically linked to the business logic of these companies, as recognized by some ministers in their votes. These are not neutral mechanisms, but systems designed to maximize user engagement and thus expand the collection of personal data. This data, in turn, feeds back and refines recommendation algorithms and is used to sell targeted advertising, the main source of profit for these companies. The problem is that harmful content—even if not illegal—tends to generate more engagement, more data, and, therefore, more profit.

This logic is exacerbated by the sector's high economic concentration. A small number of companies dominate the market globally, thereby consolidating business models centered on this vicious cycle. This concentration, in turn, is reinforced by technical and commercial barriers that hinder interoperability and portability of data and content between platforms. Today, for example, curation services are tied to content hosting within closed ecosystems. This "tied selling" prevents other players from offering curation, restricts user migration, imprisons producers and advertisers, and undermines competition and innovation.

Therefore, addressing the problems associated with social media must focus on the structural causes of the phenomenon, not just its symptoms. The MCI itself, from its inception, has been pointing the way forward: regulating internet use in Brazil is based on plurality, diversity, free enterprise, free competition, and interoperability.

In this sense, it is essential to promote measures that break the monopoly of digital markets and change the economic logic that structures technological solutions. This includes encouraging the entry of new players, competition, and a more equitable distribution of information space. Notable among these measures are mandatory interoperability and the provision of independent content curation.[11] In

[11]The unbundling of content hosting and curation services is one of ARTICLE 19's main proposals to promote more competition in this sector and thus protect and promote freedom of expression and the right to access information. For more information, see the report "Taming Big Tech – A pro-competitive solution to protect free expression." Available at: https://www.article19.org/taming-big-tech-protecting-expression-for-all/ .

other words, it involves proposing legal frameworks and public policies that expand access to the means of producing and circulating information, breaking the constraints imposed by large platforms.

Economic regulation could be a tool to advance toward a freer, more pluralistic, and democratic society. By promoting a diversity of voices, especially from historically silenced populations, it allows us to reclaim the internet and freedom of expression as banners for those who defend democracy as synonymous with participation, social justice, and inclusion. Getting to the root of the problem is the only way to build solutions that don't imply sacrificing rights, but that prioritize the protection of human rights above the economic interests of a small group that currently controls the digital civic space.

OVERVIEW OF THE STF'S LEGAL POSITION

The Supreme Federal Court declared article 19 of the Brazilian Civil Rights Framework for the Internet partially unconstitutional, recognizing the existence of a "state of partial omission" resulting from the lack of "sufficient protection for highly relevant constitutional legal interests, such as fundamental rights and democracy." Based on this understanding, the Court redefined the civil liability regimes for intermediaries, including creating hypotheses not provided for by law, and imposed additional obligations on platforms. The table below summarizes the main points of the STF's legal position, which will be detailed later.[12]

	Situation	Liability regime	Legal basis
1	Crimes or unlawful acts, with the exception of crimes against honor	Civil liability after simple out-of-court notice	Article 21 of MCI (new incidence hypotheses)
2	Crimes against honor (slander, insult and defamation)	Civil liability after court order	Article 19 of MCI (incidence restriction)
3	Replication of content "identical" to material already recognized in court as illegal (any crime or illegal act, including crimes against honor)	Civil liability following judicial or out-of-court notice	Article 21 of MCI (new incidence hypothesis)
4	Any unlawful content propagated via advertisements, paid boosts or through an "artificial distribution network (chatbot or robots)"	"Presumption of liability" regardless of notification	New regime
5	Systemic failure: massive circulation of content related to a pre-defined list of serious offenses	Civil liability for systemic failure (breach of duty of care), regardless of out-of-court notice	New regime
6	Email, videoconferencing, and instant messaging providers (solely for interpersonal communications)	Civil liability after court decision	Article 19 of MCI

[12]This breakdown seeks to interpret the main points of the position, although in some cases the STF's position is not clear.

7	Marketplaces	Civil liability according to the Consumer Protection Code (*Código de Defesa do Consumidor*, CDC)	CDC
8	Electoral context	Provisions defined by electoral legislation and normative acts of the Superior Electoral Court (*Tribunal Superior Eleitoral*, TSE)	Electoral legislation and TSE normative acts
9	Additional duties of transparency and accountability		

1. Crimes or unlawful acts, with the exception of crimes against honor

Originally, article 21 provides for the possibility of application providers being held civilly liable for violations of privacy resulting from the non-consensual dissemination of material containing nudity or sexual acts, if they fail to remove the content after out-of-court notice of the person participating in the disseminated scene. In this case, the notified intermediary assesses the merits of the request and decides whether or not to remove it. By opting to keep the content live, the intermediary assumes the legal risk of being ordered to pay damages if the notifying party files a lawsuit and the court finds that the removal was warranted.

One of the central aspects of the position established by the STF, however, is the expansion of this regime, which now encompasses matters related to any crimes or unlawful acts—except crimes against honor (see the next section). What was previously an exception—the regime of article 21—thus becomes the new general rule of liability, and a substantially broader range of matters may give rise to liability based on simple out-of-court notice. In the following section, we analyze the implications of this change.

2. Crimes against honor (slander, insult, defamation)

As a general rule, the MCI provided that "application providers"—such as social media platforms—could only be held civilly liable for damages arising from content generated by third parties if they failed to comply with a court order ordering the removal of the content. It is important to note that this requirement for a court order did not prohibit the removal of content by providers themselves, whether proactively or in response to out-of-court notices. What was limited was the possibility of automatic civil liability without a prior court order.

With the new position established by the STF, this regime ceases to be the general rule and is now applied exclusively to cases involving crimes against honor—slander, insult, and defamation. This was precisely the context of the case analyzed

in one of the appeals that reached the Court—which involved a community created on Orkut to insult a teacher. The Supreme Court granted the platform's appeal, overturning the court decision that had ordered it to pay damages.

3. Replications of an “offensive fact” already recognized by a court decision

Another point of the position established by the STF is the understanding that, in the face of “successive replications” of an “offensive fact” already recognized as unlawful by a court decision, social media providers now have the duty to remove publications with identical content, after a new notification — whether judicial or extrajudicial.

Although the position is not explicit, it is reasonable to assume that it applies to any content previously recognized as illegal by the Judiciary, including in cases of crimes against honor. The measure seeks to prohibit the re-dissemination of such material on the same social network or even on others, eliminating the need for new lawsuits to once again analyze the legality of the same content.

4. Paid ads and boosts; artificial distribution network (chatbot or robots)

Another liability regime created by the STF—and therefore absent from the text of the Brazilian Civil Rights Framework for the Internet—is the so-called "presumption of liability." In this case, what determines liability is not the type of illegality of the content, but how it was disseminated. There are two scenarios: (i) paid advertisements and boosts; and (ii) content disseminated through an "artificial distribution network (chatbots or robots)." In both situations, intermediaries can be held liable even without a court order for removal or out-of-court notice. However, providers can prove that they acted diligently and within a reasonable timeframe to remove the content, which may eliminate their liability.

The exact scope of the second hypothesis was not clarified by the Court. The interpretation that seems most plausible to us is that it refers to content disseminated through automated accounts. In this sense, "chatbots or robots" would be examples of mechanisms through which an "artificial distribution network" can operate.

Another, though perhaps less likely, possibility is that the reference to “chatbots” actually denotes content generated by generative artificial intelligence systems, such as ChatGPT. A third interpretation is that the expression "artificial distribution network" refers to algorithmic recommendation systems—which expand the reach of publications, with or without payment. However, this would constitute a

form of dissemination already covered, at least partially, by the first hypothesis (paid boosting)—which makes this interpretation less convincing.

5. Systemic failure: massive circulation of serious unlawful content

Another regime introduced by the STF's position is liability for "systemic failure," characterized by the massive circulation of content that constitutes certain crimes or serious unlawful acts, as previously listed by the Court. In this case, civil liability arises from the platform's failure to adopt appropriate prevention and removal measures, compatible with the state of the art and capable of ensuring the highest possible level of security.

Among the contents that constitute serious crimes, the following stand out:

(a) crimes against democratic institutions;
(b) terrorist crimes;
(c) instigating or aiding suicide or self-harm;
(d) crimes committed against women because of their gender;
(e) incitement to racism; and
(f) child pornography.

This regime differs from the general model provided for in article 21 of the MCI in three main aspects.

First, regarding the type of content: under the general regime, any unlawful content (except crimes against honor) can give rise to liability. "Systemic failure" refers to a specific list of serious offenses.

Second, under the general regime, liability only arises after out-of-court notice and the provider's failure to remove the content. In the case of a systemic failure, the provider has a duty to adopt preventive measures, regardless of prior notice, to prevent the dissemination of certain content—although the objective criteria for this prevention have not been detailed by the STF.

Third, while the general regime applies to specific publications, the systemic failure presupposes the massive dissemination – "wholesale" – of content related to certain criminal offenses.

These are, therefore, two autonomous regimes, which coexist and can be applied simultaneously.

The STF also established that third parties responsible for content removed due to an alleged systemic error may seek restitution in court, provided they prove the absence of illegality. In this case, the provider will be exempt from the obligation to pay compensation.

6. Email, videoconferencing, and instant messaging providers (solely for interpersonal communications)

The STF also established a liability criterion based on the type of service offered, regardless of the nature of the unlawful content or the manner in which it is disseminated—unlike other regimes. This criterion applies to three categories of services:

(a) email providers;
(b) applications primarily aimed at closed video or voice meetings;
(c) instant messaging services, when used exclusively for interpersonal communications.

In these cases, the rule of article 19 of the MCI applies, according to which the civil liability of the provider depends on the existence of a specific court order determining the removal of the content.

However, the practical application of this regime is still uncertain, given that such services generally operate in environments of greater privacy — whether through individual use or restricted sharing with guests.

In the case of instant messaging services, by establishing that article 19 applies only when used for "interpersonal communications," it seems to imply that, in other situations, the rule of article 21 could apply. The position, however, does not precisely define what would cease to be considered "interpersonal communications." It is possible to interpret that situations such as broadcast lists, open channels, or very large groups, in which messages circulate more widely and publicly, no longer fall under this narrower definition.

7. Marketplaces

The position briefly mentions that "internet application providers that operate as marketplaces are civilly liable under the Consumer Protection Code (CDC)." As a general rule, liability under the CDC is objective, although there are specific cases of subjective liability. Furthermore, the decision does not clarify exactly what the STF understands by "marketplace," a concept that can encompass everything from mere advertising showcases to platforms that actively mediate payments, advertising, and logistics.

It is also worth highlighting that, at another point, the position itself states that “there will be no objective liability in the application of the position stated here”, which creates uncertainty about how to reconcile this guideline with the general rule of objective liability provided for by the CDC.

8. Electoral context

In succinct wording, the position stipulates that “until new legislation is enacted, article 19 of the MCI must be interpreted in such a way that internet application providers are subject to civil liability, except for the application of specific provisions of electoral legislation and normative acts issued by the Superior Electoral Court.”

At first glance, the use of "except for" may suggest that electoral regulations would or could preclude civil liability, rather than the application of article 19—especially since the provision itself does not preclude the possibility of civil liability. However, this does not appear to have been the STF's intention. The most plausible conclusion is that the Court intended to assert that electoral regulations may establish their own regimes that modify, complement, or even preclude the application of the regime provided for in article 19 of the MCI.[13]

9. Additional duties of transparency and accountability

In addition to redefining civil liability rules, the STF also established additional duties for application providers, with an emphasis on transparency and accountability. The Court determined that these providers must issue self-regulatory standards that address: (i) a notification system; (ii) due process; (iii) annual transparency reports on out-of-court notices, advertisements, and boosting. They must also provide specific customer service channels to users and non-users.

The position also establishes that providers operating in Brazil must maintain headquarters and a representative in the country, whose contact information must be disclosed in a simple and accessible manner. This representative—a legal entity headquartered in Brazil—must have the authority to:

(a) respond in the administrative and judicial spheres;

(b) provide the “competent authorities” with information about the provider’s operation, its rules and procedures for content moderation, complaints management, transparency reports, monitoring and management of systemic risks, as well as user profiling criteria (if any), advertising and paid content boosting;

(c) comply with court orders; and

(d) respond to and bear any penalties, fines and financial obligations arising from non-compliance with legal or judicial obligations.

There is no specific information on which body will be responsible for overseeing compliance with these additional duties—especially whether transparency reports are satisfactory. The position mentions only "competent authorities," without

[13]Renata Galf. STF decision on big tech leaves electoral scenario open and corroborates the power of the TSE. Folha de S.Paulo, June 28, 2025. Available at: https://www1.folha.uol.com.br/poder/2025/06/decisao-do-stf-sobre-big-techs-deixa-cenario-eleitoral-em-aberto-e-corrobora-poder-do-tse.shtml .

specifying which bodies these would be. However, by stating that providers are subject to penalties and fines "especially for noncompliance with legal and judicial obligations," the formulation suggests that the Judiciary itself—and, in particular, the STF—could act as one of these competent authorities for the purpose of overseeing these additional duties.

ANALYSIS OF THE STF'S POSITION

The STF's decision on the constitutionality of article 19 of the MCI should be understood as a key moment in defining the future of Internet regulation in Brazil. Recognizing the MCI's historical importance for building an open and pluralistic Internet, ARTICLE 19 Brazil and South America is concerned about the new interpretation of unconstitutionality by progressive omission, highlighting the risks and potential side effects of the decision. The Court's new understanding, while seeking to fill regulatory gaps, could produce undesirable effects on Internet governance, the protection of freedom of expression, and democracy itself.

Below, we present a critical analysis of the established position, divided between general observations and specific comments on the accountability regimes described in the previous section.

General observations

By making the rule of article 19 an exception, the STF's position creates the risk that the new liability regimes will encourage the preemptive removal of lawful content, effectively functioning as a form of prior censorship. In other words, application providers, fearful of being held civilly liable for third-party content, will tend to remove more content, even if it is not illegal, which could lead to a chilling effect.[14]

Despite the Court's intention to improve regulation, this logic inverts the principle of the exceptionality of restrictions on freedom of expression, compromising not only the exercise of this right, but also the right to access information.

It is worth remembering that, according to international jurisprudence in human rights, any restriction on freedom of expression must cumulatively meet three criteria: (i) be provided for by law; (ii) pursue a legitimate objective recognized by international law; and (iii) be necessary in a democratic society, complying with the requirements of adequacy, necessity and proportionality. [15]

Furthermore, the new scenario intensifies the concentration of power in the hands of a few internet application providers, especially large social media platforms, by assigning them the initial assessment of content legality. This represents a shift in the decision-making function to private agents, who now perform an activity

[14]LEITE, Fábio Carvalho. Freedom of Expression and the Right to Honor: New Guidelines for an Old Problem. In: Clèmerson Merlin Clève; Alexandre Freire. (Org.). *Fundamental Rights and Constitutional Jurisdiction: Analysis, Criticism, and Contributions*. 1st ed. São Paulo: Revista dos Tribunais, 2014, v., p. 395- 408.

[15]LIMA, Raquel da Cruz. Article 19's position on the regulation of digital platforms in a public hearing on the Brazilian Civil Rights Framework for the Internet at the STF. Available at: https://artigo19.org/2023/04/28/posicionamento-da-artigo-19-sobre-regulacao-das-plataformas-digitais-em-audiencia-publica-sobre-o-marco-civil-da-internet-no-stf-28-03-2023/ .

analogous to the judicial one, but without the constitutional guarantees, duties of impartiality, and oversight mechanisms to which judges are subject.

Even though the Judiciary remains the final authority for deciding the lawfulness of content and the liability of intermediaries, this position encourages private restrictions on freedom of expression, as already noted. It is therefore likely that the number of lawsuits seeking the restitution of preemptively removed content will increase. Even when a court decision recognizes the lawfulness of a publication, freedom of expression will already have been unduly restricted during the period in which the content was unavailable.

Freedom of expression is an essential right for the functioning of democracies, as it enables, for example, pluralistic public debate, access to information, the circulation of dissenting ideas, and criticism of authorities and institutions. It is healthy for speeches to emerge that question the *status quo* and challenge power structures, even if they cause discomfort, use forceful language, or create tension in public debate.

For this reason, in democracies, freedom of expression must enjoy special protection, even in extreme situations. However, assessing the illegality of such speeches is a far from trivial task, requiring contextual analysis, a balance between fundamental rights, and qualified legal expertise. It is unreasonable to assume that social media platforms would be willing to prioritize this dimension of freedom of expression, especially given the risk of civil liability if they choose to keep certain content available.

This task becomes even more complex given the lack of sufficiently clear case law in Brazil on the protection of freedom of expression and the legitimate limits of its exercise. A study by the São Paulo Law School of the Getúlio Vargas Foundation, conducted with the support of ARTICLE 19, revealed, for example, that Supreme Court justices do not share the same understanding of the scope of the Allegation of Breach of a Fundamental Precept No. 130 (*Arguição de Descumprimento de Preceito Fundamental*, ADPF 130), which declared the complete incompatibility of the Press Law (Law 5,250/1967) with the Constitution. Although this ruling is considered one of the Supreme Court's most relevant on freedom of expression and the press, subsequent decisions by the Court that invoke it have attributed different meanings to this precedent—sometimes reinforcing protection for free expression, sometimes limiting its application and thereby weakening the exercise of this right.

The uncertainty illustrated by the research is a paradigmatic example of an even deeper problem of judicial uncertainty and unpredictability in matters of freedom of expression. Decisions on the subject are often made without stable criteria and seem to be guided more by judges' personal impressions than by consistent legal

arguments. The problem worsens as new decisions fail to engage with solid precedents, hindering the formation of coherent and predictable jurisprudence.[16]

This scenario of interpretative instability and lack of clear parameters directly affects the digital environment. If judicial decisions on freedom of expression are unpredictable or inconsistent, it is unlikely that large private conglomerates will produce satisfactory decisions, especially since, as already stated, there will be a tendency to adopt more restrictive stances, leading to the preventive and disproportionate removal or limitation of publications, even when the speech is constitutionally protected.

Let us imagine the case of speeches that seek to defend or expand certain rights, such as movements in favor of sexual and reproductive rights or drug decriminalization. Although such expressions are constitutionally protected, they are often the target of controversy and moral or political opposition, making them especially vulnerable to preemptive removal by platforms. Since the new general rule, established in article 21, allows mere out-of-court notice to be sufficient to demand the removal of content, groups interested in censoring certain legitimate speeches can resort to orchestrated notification campaigns, overwhelming providers and increasing the likelihood of such content being removed.

Thus, instead of promoting a safer and more democratic environment, the position tends to contribute to the suffocation of the digital public space, restricting the plurality of ideas and compromising the exercise of fundamental rights. By legitimizing a moderation model based on the horizon of liability for harm caused by third-party content, the position may pave the way for arbitrary decisions and the silent erosion of freedom of expression on social media.

One final general observation concerns the fact that the position appears to use the terms "internet application providers" and "social networks" as synonyms. Although several oral arguments during the public hearings highlighted the complexity of the digital ecosystem, the decision appears to have been designed primarily to address large social media platforms. However, by using the broad term "internet application providers," the position ends up applying to the entire ecosystem of internet services.

It is true that the position recognizes the existence of certain application providers that should receive differentiated treatment, such as email services (item 6 of the previous section). However, this differentiation is insufficient to cover the multiplicity of existing services and the significant differences between them in terms of functionality, purpose, scale, and impact on content circulation.

This means that applications such as non-profit online encyclopedias, scientific and educational repositories, open-source software development and sharing

[16]Conrado Hübner Mendes. I don't know what I can say, and neither do you. Folha de S.Paulo, June 11, 2025. Available at: https://www1.folha.uol.com.br/colunas/conrado-hubner-mendes/2025/06/nao-sei-o-que-posso-falar-nem-voce.shtml .

platforms, comment chats on news portals, or federated networks are also subject to the new position, although, in general, they are not responsible for the phenomena the decision seeks to address, such as mass disinformation. In practice, there is a risk of making the continuity of these services unsustainable or discouraging smaller, innovative communication initiatives.

It's worth remembering that Bill 2630/2020 itself already provided for clearer limits on its application, defining not only services to which the law would not apply, but also asymmetric regulation based on the number of users—set at 10 million. Nor were considered studies that classify application providers according to their degree of influence over content circulation, such as the typology proposed by the Internet Steering Committee.[17]

Specific observations

A) Operation of the regime provided for in article 21 of the MCI

Considering the priority role of the article 21 liability regime established by the STF's position—in which mere out-of-court notice is the trigger for civil liability—platforms may evaluate the notifications they receive differently, depending on the notifier's profile. For example, it's plausible that a notification made by a well-known individual will lead to a greater likelihood of content removal, regardless of its illegality. However, a notification made by an ordinary individual—especially if belonging to a vulnerable group—risks being neglected, even if the content is blatantly illegal. Thus, there is a risk that the new general rule will reinforce existing power structures and perpetuate structural discrimination.

In this regard, it also remains unclear who will be considered a legitimate party to request removal through out-of-court notice. Originally, according to article 21, the victim of the unauthorized disclosure of intimate content could make this request. Now, with the expansion of article 21 to all crimes (except those against honor), there is no explicit definition of who will have the standing to make the notification: only the direct victim and their legal representatives, or other players, such as the Public Prosecutor's Office, civil society organizations, or even third parties who feel indirectly affected.

Regarding out-of-court notice, the sole paragraph of article 21 of the MCI provides that it must contain, under penalty of nullity, "elements that allow the specific identification of the material alleged to violate the participant's privacy and verification of the legitimacy to submit the request." However, considering that this regime was expanded by the STF's position to cover any crime or unlawful act (except crimes against honor), it would be appropriate to establish additional minimum requirements for the validity of the notification. These include, for

[17]Internet Steering Committee. Application Provider Typology. Published on March 18, 2025. Available at: https://dialogos.cgi.br/tipologia-rede/documento/ .

example, a clear statement of the facts, the legal basis for the request, a description of the alleged wrongdoing, and the connection between the alleged conduct and the notified content. The absence of these elements compromises the adversarial system, hinders technical analysis by providers, and may open the door to abusive or unfounded notifications, with disproportionate impacts on freedom of expression.

In this sense, it would also be important to consider introducing exceptions to the new general regime established by article 21. One possibility would be to exclude the liability of application providers when, upon receiving an out-of-court notice, they choose not to remove the content based on a reasonable interpretation of the applicable law and the content in question. In such cases, even if a court decision subsequently recognizes the unlawfulness of the publication, liability should only arise upon failure to comply with a specific court order, as provided for in article 19. In other words, the provider would not automatically be liable for damages if its conduct was based on plausible criteria.

Suggestions along these lines were included in the votes of some ministers, and their adoption would be important to ensure greater legal certainty and protect freedom of expression in the face of legitimate doubts about the legality of certain content. This exception could even apply to other regimes, such as the "presumption of liability" and the "systemic failure" regime, in addition to encompassing certain types of speech, such as journalistic content and claims of constitutional rights and guarantees.

B) Limits of algorithmic content moderation

Considering that, in some regimes, application providers can be held liable regardless of prior judicial or out-of-court notice—as in cases of "systemic failure," "presumption of liability," and replication of an offensive fact already recognized by a court decision—it is likely that the assessment of content's legality will be performed primarily by moderation algorithms. This would imply that these systems would have to operate with a very high degree of precision, and risk removing legitimate content or, conversely, failing to remove blatantly illegal content.

However, although algorithms are highly effective at detecting statistical patterns, they face significant limitations in understanding the nuances of language and human context. And determining the lawfulness of a post requires precisely this understanding—something that, for now, exceeds the capabilities of machines.[18]

[18]Franciele de Campos and Elder Maia Goltzman. The regulatory labyrinth created by the STF in the Civil Rights Framework for the Internet: the electoral exception. Jota, July 10, 2025. Available at: https://www.jota.info/opiniao-e-analise/artigos/o-labirinto-regulatorio-criado-pelo-stf-no-marco-civil-da-internet-a-excecao-eleitoral#ftnt1 .

In the absence of tools capable of capturing these nuances, content that uses irony, political satire, electoral criticism, journalistic reports that reproduce offensive statements, or simple rhetorical criticism may be improperly removed. Studies also show that algorithms tend to disproportionately silence certain social groups, especially those in vulnerable situations.[19] [20]

C) Uncertainties in the duty of care regime due to systemic failure

Given the severity of civil liability in cases of breach of the duty of care due to systemic failure, it would be essential for the STF to detail how this regime will operate in practice. Some points still require greater clarity, such as: (a) the objective criteria for characterizing the breach of the duty of care and the "systemic failure" itself; (b) the methods for assessing, identifying, and measuring this failure; (c) the applicable sanctions or convictions and who would be the beneficiary of any compensation; (d) the existence of a minimum interval between successive convictions; and (e) the standing to file lawsuits based on this regime. Furthermore, it is unclear which instance or authority will be responsible for monitoring compliance with the duty of care and verifying the occurrence of systemic failures.

Another aspect of this regime that deserves attention is the provision that social media platforms cannot be ordered to pay damages if a court decision orders the reinstatement of preemptively removed content. This rule ratifies the reversal of the principle that restrictions on freedom of expression should be exceptional, as it normalizes the prior removal of legitimate content without liability for damages caused. In practice, it shifts the burden of error to the affected user, discouraging the exercise of freedom of expression in the form of self-censorship and opening the door to abuse by providers, who operate in an environment with lower legal risk by choosing to remove content conservatively.

D) Problems of the “presumption of liability” regime

In the case of the new presumption of liability regime for content distribution via "artificial networks," its scope is unclear, as already mentioned in item 4 of the previous section. The STF expressly cited the use of " chatbots " and "robots," but

[19]Camila Tsuzuki, André Boselli, and Caio Vieira Machado. The TSE resolution and the risks of automation for freedom of expression online. Jota, March 10, 2024. Available at: https://www.jota.info/opiniao-e-analise/colunas/tecnologia-cultura-digital/a-resolucao-do-tse-e-os-riscos-da-automacao-para-a-liberdade-de-expressao-online

[20]GOMEZ, Juan Felipe; MACHADO, Caio; PAES, Lucas Monteiro; CALMON Flavio. Algorithmic Arbitrariness in Content Moderation. In: *Proceedings of the 2024 ACM Conference on Fairness, Accountability, and Transparency (FAccT '24)* . Association for Computing Machinery, New York, NY, USA, 2234–2253, 2024. https://doi.org/10.1145/3630106.3659036.

these terms are used in different contexts. It remains unclear whether the regime would also cover content produced by generative AI systems or amplified by algorithmic recommendation mechanisms. This is, therefore, a point where the Court could have better defined the boundaries of the new rule. In any case, if the intention was to encompass generative AI systems, it opens up a very complex discussion, so it would make more sense to leave it to the Legislature, where a bill regulating artificial intelligence is already under consideration (Bill 2338/2023).

Furthermore, still within the scope of the "presumption of liability," a possible material error in the use of the term is observed. According to Brazilian civil liability theory, there is no such thing as a "presumption of liability," but rather a presumption of fault—a characteristic element of subjective liability that distinguishes it from objective liability, which does not depend on proof of fault (i.e., proof of damage and a causal link is sufficient).

In this sense, the most appropriate approach would be to speak of a presumption of guilt, especially since the STF itself recognizes that providers can overturn this presumption by proving that they acted diligently and within a reasonable timeframe to remove the unlawful content—that is, without guilt. Thus, the formulation of the position could, by all indications, have been technically more precise. [2122]

Finally, another aspect of this regime worth highlighting concerns the dynamics of paid boosting on major social media platforms. While one might question the logic that only paid content achieves greater visibility, it's important to recognize that this isn't a problem exclusive to the digital environment. Furthermore, it may be desirable for certain types of content—such as claims regarding rights and constitutional guarantees—to gain greater visibility, even if paid for.

It's worth remembering that, for example, in traditional media, it's generally more difficult—and financially more costly—to disseminate speeches that aren't strictly commercial. The internet, in turn, allows for the dissemination of messages in a cheaper, more efficient, and targeted manner. These characteristics are an essential part of the business models of large social media platforms, although they're often operated with the sole purpose of maximizing profits, even if the promoted content is unlawful.

In any case, the logic of paid boosting already leads to the prohibition of certain types of speech, even when there is a financial reward. This is the case, for example, with content about sexual and reproductive rights, which is often blocked by some

[21]MULHOLLAND, Caitlin; FRAZÃO, Ana. EP#47: The STF judgment of art. 19 of the MCI. Digital Law, published on July 2, 2025. Available at: https://open.spotify.com/episode/5g6nr567lWblqu1k2L66FX?si=wvjVgPunQPauTQvP1fwqKw .

[22]Paulo Renã da Silva Santarém. Outstanding issues in the judgement of the Civil Rights Framework for the Internet. Jota, July 14, 2025. Available at: https://www.jota.info/opiniao-e-analise/artigos/questoes-pendentes-no-julgamento-do-marco-civil-da-internet .

platforms, restricting the activities of activists and the dissemination of essential public health information. While situations like this already occur in the current scenario, the situation is likely to become even more restrictive with the application of the presumption of guilt regime in cases of paid boosting—especially given factors already discussed in this technical note, such as the encouragement of excessively conservative moderation, the limitations of moderation algorithms, and the lack of clear case law to protect freedom of expression.

An alternative would be to create exceptions within this regime, along the lines of what has already been suggested for the general regime of article 21. For example, the presumption of guilt could be excluded when the provider chooses to publish content based on a reasonable interpretation of the applicable legislation and the content of the message, or even in certain types of speech, such as journalistic content and claims of constitutional rights and guarantees.

E) Application of article 19 to private communication services

As explained in item 6 of the previous section, the STF also established that article 19 of the MCI applies to email, videoconferencing, and instant messaging providers. While the indication that not every application provider is equivalent to a social media platform is positive, questions remain about how article 19 can be applied in practice in some of these contexts.

Take email and videoconferencing services as an example: since article 19 addresses the unavailability of content identified as infringing, it seems strange to imagine removing a message transmitted through them. Beyond the technical limitations involved, this is a type of communication in which the provider does not —and, in general, should not—exercise any prior control over the content of the messages.

It's true that the reality is more complex: email providers monetize their services by displaying targeted advertising within the platform interface, and messaging apps offer services that aren't limited to interpersonal communications, such as broadcast lists and open channels. In any case, it's important to distinguish these specific situations from the ordinary, private use of these services, otherwise fundamental guarantees, such as the confidentiality of communications and freedom of expression, could be compromised.

Still regarding this point of the position, it appears to contain a closed list of services subject to article 19 of the MCI. However, it would be more appropriate for the position to recognize the need for a broader category of exceptions, rather than simply listing specific types of services. As already mentioned, the Application Provider Typology proposed by the Brazilian Internet Steering Committee and the categories provided for in Bill 2630/2020 offer more consistent alternatives that are

open to technological evolution.[23] This approach would allow for greater interpretative flexibility and reduce the risk of misclassification, especially in contexts involving private communications or services with mixed functionalities.

F) Electoral context

Most likely, the STF's position establishes that electoral legislation and normative acts issued by the Superior Electoral Court may modify, supplement, or even exclude the application of the regime provided for in article 19 of the Brazilian Civil Rights Framework for the Internet. However, as noted in item 8 of the previous section, the adopted wording leaves room for doubt, which is why this point of the position could be rewritten for greater clarity.

In any case, an example helps illustrate that the STF did indeed intend to confer regulatory authority on the Superior Electoral Court (TSE) and the ordinary legislature to address specific liability regimes applicable to application providers. This is article 9-E of TSE Resolution No. 23,610/2019, according to which application providers will be jointly and severally liable, in the civil and administrative spheres, "when they fail to immediately disable content and accounts during the election period" in certain cases, such as misinformation about candidates or the electronic voting system, publications that constitute crimes against democratic institutions, and hate speech.

When article 9-E was inserted into the resolution in 2024, it was unclear whether the provision was intended to ratify or depart from the provisions of article 19 of the MCI—especially given the ambiguity of "immediate unavailability." It was unclear, for example, whether "immediate unavailability" referred to removal following a specific court order, after out-of-court notice, or immediately after the publication of the infringing content. [24]

Although this textual ambiguity persists, the STF's position appears to provide legal support for the interpretation that the TSE can waive the application of article 19 in electoral contexts. In this sense, the interpretation that article 9-E authorizes the liability of providers even in the absence of a court order becomes constitutionally valid.

In another statement, ARTICLE 19 expressed concern about the risks to freedom of expression associated with this provision of Resolution No. 23,610/2019. One of the main critical points is that the restriction hypotheses created by the TSE – that is, the abstract descriptions of content considered illegal – are relatively vague, which

[23]Internet Steering Committee. Application Provider Typology. Published on March 18, 2025. Available at: https://dialogos.cgi.br/tipologia-rede/documento/ .
[24]For more information, see: https://artigo19.org/2024/03/25/nova-regra-do-tse-gera-riscos-a-liberdade-de-expressao-online/.

makes enforcement of the rules difficult and, in practice, transfers even greater power to the platforms. [25]

G) Additional duties

One of the central questions surrounding the additional duties imposed on application providers concerns which body will be responsible for monitoring compliance—which, in practice, amounts to establishing a regulatory body, especially if the possibility of liability for systemic failures, as provided for in the duty of care regime, is considered. As already mentioned, it is possible that the STF itself will play this role, especially in the initial phase of implementing the position.

Regarding the content of these duties, it is desirable that platforms' transparency reports allow society to monitor how the position itself is being applied by application providers. This would include, for example, detailed and disaggregated information on the handling of out-of-court notices —especially regarding response time, the type of content affected, and the outcome of the case. It would also be important to provide in-depth data on content moderation and curation processes, including information on the automated systems used, the participation of human teams, and the criteria applied.

Finally, it would have been relevant for this section of the position to also consider the possibility of asymmetric regulation for the imposition of these duties—recognizing that the level of regulatory requirements can and should vary depending on the size, impact, and business model of different application providers. This would help avoid placing disproportionate burdens on smaller players.

[25] Idem.

FINAL REMARKS

By altering the general framework for holding application providers liable for content produced by third parties, the STF's position focuses primarily on expanding content moderation as a central mechanism for addressing problems generated by large social media platforms. This emphasis, while relevant, is insufficient to address the structural causes that drive the mass circulation of harmful content and may even have disproportionate impacts on freedom of expression, especially in contexts of legal uncertainty.

However, there is room for improvement in the new regimes proposed in the position, which is the central objective of this technical note. In this regard, we highlight three main suggestions:

Exceptions to the general regime of article 21: it would be important to ensure that intermediaries are not automatically held liable when, in the face of out-of-court notices, they maintain content based on a reasonable interpretation of the law, safeguarding the adversarial system and preventing abusive removals.

Differentiated treatment for social media platforms: considering the main problems that the position seeks to address, the position could not apply indistinctly to the entire ecosystem of application providers, recognizing differences in size, business models and impact on the circulation of content.

Robust transparency reports: in order to provide greater transparency regarding the activities of major social media platforms and to enable effective monitoring of the application of the position, the rules on transparency reports could include clearer parameters, so that they incorporate, for example, disaggregated data on out-of-court notices—particularly concerning response times, the type of content affected, and the outcome of the case.

Improving these points would help ensure that the changes determined by the STF are more aligned with the protection of freedom of expression, ensuring that any regulatory mechanisms strengthen democracy without unduly restricting the plurality of voices in the digital environment.

ARTIGO19

TECHNICAL NOTE

Judgment on the Constitutionality of Article 19 of the Brazilian Civil Rights Framework for the Internet by the Federal Supreme Court