

THE INSENSITIVE INTERNET

Brazil and the Judicialization of Pain

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1. Without the usual diatribes of the political process; without the bickering and finger-pointing, earmarks and pork barrel provisions, a new Bill is being introduced in Brazil. The lawmakers are not the usual suspects. They are the suspects. The [Civil \[Rights\] Framework for the Internet in Brazil](#) is a project initiated by the [Brazilian Ministry of Justice](#) together with a [famous Law School in Rio de Janeiro](#) – but ultimately it is a project being undertaken by society at large.

2. During 45 days, until the upcoming 23 May, every citizen in Brazil has been having the [possibility of contributing](#) to define how the Civil Framework, as it is nicknamed, will be written; to give their two cents on how normative expectations regarding the Brazilian information environment will be stabilized. Which criteria will be adopted to choose amongst contributions, how truly democratic the process will be remains to be seen. The fact that the Ministry of Justice of Brazil is ahead of this project, however, already invites us to take its current content extremely seriously. Such content, [originally worded](#) under the auspices of an organ of such stature as the Ministry, provides us with a detailed picture of the Brazilian Government's understanding about issues that are deeply related to the protection of fundamental rights and the development of the democratic process in Brazil.

3. Though there is much to laud the Civil Framework for, in spirit and scope, there are provisions in it that should definitely not prosper. [One of these](#), which will be discussed at greater length, came as a result of two infelicitously partial reactions by the press –

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one [from Globo Organizations](#); the other, [from the Committee to Protect Journalists](#). Such a pressing contribution is, interestingly, the only one to which the organizers have acquiesced so far. The headline above is named after it. Besides such provision, the article will tackle two other major ones. There is a reason for the three of them having been singled out: their pervasive impact on the sort of political structure, on the sort of liberal principle to be embraced by Brazilian society. The choice is between a liberal model that genuinely enables each actor in the information environment to pursue his own conception of the good within the wider web of convictions of his community and another, only supposedly liberal model that, per principle, neutralizes the scope of reasons that a certain suspected actor – Governments, Internet Access Providers, Online Service Providers – may choose to act upon.

4. The provisions criticized in this article embrace the latter model. Altogether, they create a complex system of restraint for such actors. Conversely, they also work as a mechanism for the expansion of an unencumbered, anti-social, technologized conception of a self whose liberty, it is thought, should not face any effective form of autonomous resistance – even when more urgent values are at stake. Each of these provisions, in its own way, reflects an ideal of neutrality; each excludes the possibility of action by those actors even when there are sound reasons for action or, at the very least, severely reduces the incentives for actions for sound reasons being undertaken. Though the Bill does embrace other deeply valuable principles, the image that comes out of the provisions discussed in this article is that of an **insensitive Internet**: one that disregards not only that agents in the information environment, in choosing their reasons for action, do pursue certain conceptions of the good; it also disregards that they should be expected to do so – if only in face of the horror.

I. The Judicialization of Pain

5. If there is an iniquitous provision in the proposed Bill it is the one that renders Online Service Providers liable for third parties' content **only** if such content is not taken down by the OSP **after** it receives **a court order** commanding it to do so ([see Art. 20 of the new text](#), in a hasty translation). On the one hand, it is fair to say that such provision does not prevent an OSP from taking down content it understands to be infringing of the OSP's Terms of Service or violating the law in general. On the other hand, however, it is imperative to notice that such provision does **not** oblige an OSP to remove content even of the most conspicuously illegal nature. The OSP 'can', but nothing says it 'ought to'. Abhorrent violations of the most fundamental human rights are thus allowed to remain online until the person whose rights are being violated manages to find a lawyer (or to obtain assistance from a small claims tribunal), file a lawsuit and obtain a Court order determining that such violating content be taken down. There are a number of problems with that.

6. The first, obvious, is the problem of timing. It is true that in an extremely serious case – Child Porn – Brazilian law does provide for harmful content being taken down by an OSP as soon as this officially learns of the existence of such harmful content ([see Art. 241-A, § 2^o](#)). But that is the only circumstance in which a specific takedown procedure is established in Brazilian law. In all other cases the general procedure of the now proposed Bill would apply. That is to say, victimization events, for instance – what we here in China, though this happens everywhere, would call the [Human Flesh Search Engine](#) (*renrou sousuo yinqing*)– would be allowed to be carried out through which lives are [unfairly destroyed by the Internet crowd](#). One day, one hour can make a huge difference in a web that does not forget. People's reputations can be devastated quasi-instantaneously, with long-lasting impacts in their lives. The consequences of many of these cases of public lynching are irreversible. To assume that any court can prevent the process from

developing further is to completely misunderstand the nature of the Internet. Once Pandora's box is open no herculean court can close it.

7. What results from all that is not only a web which is extremely insensitive to the protection of individual, fundamental rights – it is also a web that does not reflect an [integral appreciation](#) of the human condition; a web that takes things out of context and amplifies them to posterity; a web that chooses to err in the things that matter the most, instead of entrusting individuals and society to make timely choices in a joint pursuit of the truth (OSPs inclusively; why not?). It is also a web that chooses to unveil all that which individuals may have chosen to keep for themselves. For to wait for a court order to reverse the most serious violations of privacy, instead of enjoining societal actors to promptly inhibit these, is to ask for lights to be shed on the intimacy of people of all ages and all different attitudes towards their zones of solitude. The system of judicialization of grievous and, at times, embarrassing matters also ignores that people may refrain from openly exposing their wounds before the judicial system, afraid of boosting the amplitude of their tragedies in a battle which, only for its beginning, is already lost.

8. The second problem is thus related to this erring web that the Civil Framework seems to elicit. It affects our normative order and manifests itself in a twofold way. On the one hand, as the inaction before individual grievances persist, as the law does not bring any incentive whatsoever for intermediaries to try to remedy an injustice which is there, right before their eyes, the process of cruelty against individuals promises to walk towards barbarousness at the societal level. This is so as the normative order is corroded by the inability of law to stabilize our expectations. In Luhmann's tautological truth '[I]aw is only law if there is reason to expect that normative expectations can be expected normatively' ([see p. 158](#)). Here there is no such reason to expect, only a social surrendering to the untimely orders of feeble, only formally competent courts.

9. On the other hand, an opportunity is lost to create incentives for OSPs to devise contractual policies that specify and support the goals of the law. If everything is left to the discretion of OSPs we will have no guarantees that the network contracts established by their Terms of Service will reflect at least the reasons that, collectively, we have decided to embed in our institutional normative order – let alone take these reasons further. Paradoxically, by leaving everything up to OSPs the law reduces the likelihood that they will reason; that they will reflect upon the nature of societal harms and contribute to the development of the normative order. Rather, invulnerability heightens the incentives for evasion of the rule of law and, with it, the likelihood that law will fail to live up to its function as a social system – that of stabilizing normative expectations. With the normative randomness brought about by the proposed Civil Framework, there will actually be a surge in complexity and risk in relations in the ‘Brazilian’ information environment, threatening social justice and any project of cohesion of Brazilian social institutions. And one could surely expect this to be a cross-jurisdictional challenge as other OSPs decide to move to Brazil so as to benefit from the gratuitousness of the proposed law.

10. The third problem is not particular of the Civil Framework itself but is also strongly related to it. It is the problem of Brazilian society’s mistrust in the political processes of its representative democracy, coupled with its tendency to judicialize everything. Brazil is no common law system but it much prefers its courts to its lawmakers. Fraught with one scandal over the other, Brazilian Congress may be believed by some (not myself) to have lost the legitimacy needed to address this that is seen as a virgin, holy, pious territory – the Internet. The Civil Framework then offers a fresh start for the quasi- if not thoroughly constitutional matter of designing the Brazilian information environment. One of the organizations ahead of the Civil Framework had also been [strongly involved](#) in criticizing an earlier Bill introduced in the Congress, which sought to establish a series of criminal sanctions for

networked misconduct in Brazil (the infamous [Law Azeredo](#), named after its protagonist in the Brazilian Senate, Senator Eduardo Azeredo). Thus, the message is clear: citizens are now invited to develop *their own*, Civil Framework (instead of the earlier, heteronomous, criminal one); congressmen are expected to acquiesce. Dare they change anything that has been decided by the people... The intentions of the organizations chairing the process may be noble, elevated, but the challenge to Brazilian institutions is clear. What other explanation can there be for a Civil Framework to be handed in with such a bumptious authority to Brazilian congressmen if not the mistrust in the good intentions and capability of these? Why is this not a project of interaction between Brazilian society and its elected representatives, rather than a prevenient manifest of the [Redpills](#)?

11. The mistrust is patent. In effect, as Brazilian sociologist Bernardo Sorj remarks, '[t]he increasing transference of the solution of social conflicts to the Judiciary reflects a background problem of the democratic society of the end of century and the new millennium, which is that of the difficulty of the representative system, in particular of political parties, of transforming themselves in mediators of the new social subjects' ([see p. 110](#)). In Brazil, in particular, the 'demoralization of the Executive and Legislative powers has transferred to the Judiciary Power the expectations of protection and exemplarity' (p. 111). Still, as Sorj further notes, '[t]he contradiction which presents itself in Brazil is that the '*juridification*' of society ... is quite limited, but as a process of *judicialization* of social life, that is, of transference of social conflict to the judiciary, Brazil is, conversely, a very advanced case' (p. 118) [my translations]. One needs to look no further than into the significant anomy in the Brazilian information environment to understand the problem of a lack of *juridification* that the Civil Framework tries to address; though neither one needs to look further than into [Google's recent numbers](#) to see how incredibly mistaken is the response the Civil Framework has found to the problems it intends to solve. The already heavy burden on the

Brazilian justice system promises to increase exponentially if the new provision is turned into law.

II. The Demise of Reason and the Technologizing of the World

12. The lack of confidence in legislators (and overconfidence in courts) may also be seen as part of a wider tendency reflected in the provisions of the Civil Framework that this article addresses – that of a rampant individualism, as noted in para. 4 above. Such a tendency is certainly not reflected in many of the auspicious overarching principles expounded by the Civil Framework. But in these specifics that the Bill goes into there is a clear egotistic orientation from which the overall scepticism of the mentioned provisions springs. What appears from these is that individuals should trust no others but their very selves, or those, the courts, whose Justinian existence, as they see it, vows ‘to give every man his [individual] due’. It is indeed nothing but the Roman, egotistic conception of justice that lies in the subtext. Why care for victimized others? Why care for the future of those who commit one single mistake in public and, like Prometheus, must be punished eternally and disproportionately for it? Think of the Daniela Cicarelli case – which, *de jure*, was won by her before the [Sao Paulo Court of Appeals](#) but, *de facto*, is now [lost for good](#) in the many times virtuous but often also ruthless avenues of the information environment.

13. There is a choice to be made here between an unfettered, self-centred modality of freedom of expression and the establishment of private forms of due process that prevent the conduction of public ordeals. The drafters of the original text had rightly (albeit imperfectly) chosen the latter; but it was a merciless choice for the former that motivated both Globo Organizations and the CPJ to, on behalf of journalists, fight an earlier provision of the Bill ([see Arts. 20-24](#)). Such provision, which I discuss below, would have established an extra-judicial procedure that, though in serious need of some improvements, was far better than the judicialization of

everything that now marks the Civil Framework. The truth may even be that judicialization is nothing but a pretext to allow (even harmful) individual manifestations to remain online for as long as possible, only because these reflect the expansion of an individual soul that was predestined to expand itself and its personal capriciousness. One does not trust OSPs, one does not trust Legislators; one only trusts himself, (perhaps) his courts and (definitely) his iPad.

14. The second provision which I briefly would like to address is one which, without saying it explicitly, embraces a technologized conception of society and an ideal of neutrality of governments towards technology. Such is the provision that establishes as an objective of the regulation of Internet in Brazil ‘to promote innovation and the ample diffusion of new technologies and models of use and access’ ([see Art. 3, IV](#)). Note that the provision has two parts. One, rightly, as already expressed in the Brazilian Constitution ([see Arts. 218-219](#)) and more [specific legislation](#), aims at promoting innovation; the other, more problematic, turns Brazilian regulatory bodies into official promoters of every new technological gewgaw. Should the Government do so without scrutinizing the social repercussions of new technologies? Why is it that every new technology should be amply diffused? If that was true, Brazil should then readily promote the diffusion of the iPad, in spite of all the architectural concerns [noted by scholars](#) who see in the diffusion of tethered devices such as the iPad a menace to the wider generative possibilities of the information environment. Barack Obama’s recently expressed [concern](#) with the pressures that technologies of distraction rather than empowerment pose to the construction of our democracies may run much deeper than it seems on its face. Let alone the fact that the promotion of newly invented technologies may create network effects which, at a later stage, are difficult to reverse.

15. Governments do not and should not have the duty to promote the diffusion of every new technology just because of a self who

wants ever more fun, pleasure, feverish utility – all these consequentialist virtues which are better left for markets. What governments do have the duty to promote is the diffusion of technologies that strengthen the social glue, that protect individual *and* collective rights and conceptions of the good. To understand that technologies need to be diffused only due to the sheer fact that they exist is to transform those which should be means in ends; it is to flatten, to dissolve social values in the dystopian normativity of an Ellulian [technological society](#). The principle reflected in such provision is thus a disguised principle of technological neutrality. It sounds much more lucid indeed to say that technologies should be promoted, full stop, than to condition this on abstract conceptions such as social justice or, more amply, the good. Another related provision of the proposed Bill speaks of ‘collaboration’ as a regulatory foundation of the Internet in Brazil ([see Art. 2](#)), reflecting nothing but the same non-deontological idea of people being operatively assimilated by multitudinous networks rather than the other way round. One should not forget that victimization processes are collaborative through and through, and that collaboration, in itself considered, is neither the double of solidarity nor a fundamental of friendship.

16. But it is easy to dismiss all that as highbrow lucubration. Such forms of scepticism about moral reasoning and, conversely, naive optimism about technologies are not exclusive of Brazilian society. They are part of a wider movement of neutralization that, already in 1929, was formidably described by Carl Schmitt in his ‘The Age of Neutralizations and Depoliticizations’. Though one has every reason to suspect Schmitt’s evaluative choices in other regards, his words here sound strikingly current today:

‘The evidence of the widespread contemporary belief in technology is based only on the proposition that the absolute and ultimate neutral ground has been found in technology, since apparently there is nothing more neutral.

Technology serves everyone, just as radio is utilized for news of all kinds or as the postal service delivers packages regardless of their contents [!], since its technology can provide no criterion for evaluating them. Unlike technological, metaphysical, moral, and even economic questions, which are forever debatable, purely technical problems have something refreshingly factual about them. They are easy to solve, and it is easily understandable why there is a tendency to take refuge in technicity from the inextricable problems of all other domains' ([see p. 88](#)).

However, as he also cautioned:

‘[T]he neutrality of technology is something other than the neutrality of all former domains. Technology is always only an instrument and weapon; precisely because it serves all, it is not neutral. (...) [T]echnology itself remains culturally blind. Consequently, no conclusions which usually can be drawn from the central domains of spiritual life can be derived from pure technology as nothing but technology – neither a concept of cultural progress, nor a type of *clerc* or spiritual leader, nor a specific political system’ ([see pp. 89-90](#)).

17. It follows that we need to think of the normative values we want to embed in the technological infrastructure of our societies. Most importantly, such is a process which every actor should be engaged in. And here we should talk more specifically of Internet Access Providers. For as much as the promotion of sheer technological diffusion by Governments is incautious, as much as the acceptance of Online Service Providers possible neutrality before iniquity is

repugnant, the same goes for the idea that Internet Access Providers should not discriminate packets of bits on the Internet according to their source, content or destination, even when they understand there are fair reasons for their doing so. This latter principle of general restraint for IAPs has been referred to by its [maundering advocates](#) under the name of ‘network neutrality’ and is also reflected in the Civil Framework as a fundamental to be promoted ([see Art. 2, IV](#)). It is the third provision I would like to comment on in this article.

18. The words above from Schmitt are extremely telling about network neutrality and its pretence of political significance. We can make no complete normative sense out of the idea of an unfettered flow of information through the information environment enabled by high technology. Activities ranging from the prevention of cyberterrorism and general preservation of data security to the combat of child pornography and informational nuisances such as SPAM will demand strong degrees of reasoning by Internet Access Providers. Network neutrality is of no avail here; it prevents IAPs from reasoning in practical terms and provides them with no clear reasons for action. As Christopher Yoo very pertinently notes, network neutrality is a ‘naked normative commitment’ ([see p. 26](#)) – no one can come up with a precise definition for it, even if, adopting the USSC’s famous obscenity threshold, they know it when they see it.

19. Rather than being neutral, gatekeepers do have important normative roles to play, even if such roles need to be regulated to prevent abuse. IAPs should thus be expected to reason and to act upon their reasons. The regulation of IAPs’ activities should not demand a complete inversion of the liberal principle. Network neutrality implies that, for IAPs, only what is explicitly permitted should not be prohibited. However, for IAPs as for everyone, only what is explicitly prohibited should not be permitted. In other words, law should not establish a general prohibition for any agent on the Internet to reason about that which constitutes the very core

of their activities; as such, it should not prevent IAPs from reasoning about how to route data through the Internet, even if expecting from them a general commitment towards isonomy.

20. The Civil Framework has a number of other provisions that promptly unveil how impossible the commitment towards the neutrality it demands from IAPs is. In one of these provisions, it speaks of **preserving network stability and security** ([see Art. 2, V](#)); in another it mentions that the **interpretation** of the Civil Framework should **take into account** the nature of the Internet and its specific **usages and costumes** ([see Art. 5](#)); in a third one, still, which is thought to embody the principle of network neutrality, the Civil Framework **prohibits IAPs from discriminating** or degrading informational traffic **if not according with** technical requirements aimed at preserving the **contractual quality of the service** ([see Art. 7, II](#)). All this raises so many evaluative questions that one immediately wonders how IAPs can find the boundaries between these specific commitments and a more general commitment towards neutrality.

21. For instance, what is security of the Internet? Does this mean security of the Internet according to its usages and costumes? Is there any general costume of non-discrimination in the Internet coming from its dominant actors, such as [Google](#)? SPAM and viruses are bad because they harm the network itself or because they cause prejudices of various, even psychological natures to users? Can IAPs discriminate packets of data containing SPAM, viruses or BadWare in general? If so, what is BadWare? The [definition given by the StopBadWare project](#) is lengthy and evaluative, carrying evident moral tints. Google exhibits interstitial pages that prevent users from accessing websites containing programs classified as BadWare according to SBW's definition. Can IAPs do the same? According to the Civil Framework the answer is vague, for IAPs can only care for the contractual quality of the service. Do BadWare harm 'the service'? What is the service, actually? Is it the service from one IAP to its user or also the

services contracted from other IAPs by their respective users; all of these that get together to make of the Internet a network of networks, normalized according to the standards of the Internet Engineering Task Force?

22. As standards do matter profoundly, we are reminded of Kathy Bowrey's observation on IETF's [RFC 2026](#) – the IETF meta-standard on how standards should be made. According to Bowrey, RFC 2026 is 'designed to help facilitate best practice in terms of [inter alia] fairness' ([see p. 1](#)). In its section 1.2, RFC 2026 indeed defines that one of the goals of the Internet Standards Process is, precisely, fairness. Note that establishing fairness as a goal is different from determining that IETF's procedures themselves should be fair, which section 1.2 does in a separate limb. The former concerns the output of those processes: the standards and the reasons they provide us with. Hence, as Internet Standards have as one of their goals the promotion of a **fair Internet**, one in effect cannot help but wonder how IAPs can on the one hand be committed to neutrality and on the other hand to IETF standards and thus to fairness. Both are entirely different avenues. In observing the, in his words, 'confused notion that to act neutrally is to act fairly', Joseph Raz remarks that 'there are circumstances in which it is unfair to act neutrally, where there are not even prima facie reasons to be neutral' ([see p. 114](#)). In all of the circumstances described in this article that is the case.

23. Beyond standards, as IAPs contracts with users are always inserted in a wider normative, legal framework, one is also challenged to think of how things like 'the contracted quality of service' can be understood without resorting to contractual hermeneutics vis-à-vis the law. And, in identifying what the law is, are network neutralists going to side with legal positivism, interpretivism or contemporary natural law traditions? Are network neutralists going to assume, as the former, that the mission of identifying the law is just 'like the scientific project of identifying the true nature of a tiger in its genetic structure or the true nature of gold in its atomic structure'? ([see p. 9](#)) If they conceive of the

existence of hard cases in which moral evaluation is required – we spoke of so many in the lines above, they are unlikely to side with legal positivists. As they do not, they may be entreated to abandon their first principles, following Dworkin’s recent appeal to those who plan to take up legal philosophy: ‘when you do, take up philosophy’s rightful burdens, and abandon the cloak of neutrality’ (ibid, p. 37).

III. Reclaiming the Good

24. The problem of identifying the law actually underlies the concerns expressed in all the provisions we discussed above. Those who advocate such provisions have a clear worry about demanding gatekeepers to profess their own understanding about the law and about the good. The problem is that those advocates completely ignore how implausible their demand is. Why prevent or render it senseless for any actor, who reasons, to pursue an understanding about the very standards that guide their behaviour? Interestingly, however, there is, occasionally, a [waveringly expressed agreement](#) that, in extreme, unmistakable cases of heinous illegality, gatekeepers *can* perhaps reason about the law. Child Porn is here the only example with which no one ever dares to disagree – and the agreement comes normally followed by the qualification that OSPs would take content down in these cases *any way*; that is, even if they had no obligation of doing so. It is also easy, insincere and non-courageous to express agreement in this regard since, as we have noted above, there is already specific legislation in Brazil providing extra-judicial redress for rights infringed by online Child Porn. No other cases are mentioned by those advocates, no thresholds are defined, but it appears that, at least in very extreme cases, OSPs would be ‘allowed’ to take harmful content down, IAPs to refrain from routing it through and Governments from steering the diffusion of wicked technologies.

25. Thresholds of lawfulness and harm are always a debatable issue. The US Federal Communication Commission’s now deceased

[Policy Statement on Internet and broadband](#), for instance, provides that ‘consumers are entitled to access the **lawful** Internet content of their choice’ as well as that ‘consumers are entitled to connect their choice of legal devices that **do not harm the network**’. What is lawful and not harmful here? By enabling access to be thwarted even in cases that do not appear to present a more **severe** threat of harm or unlawfulness FCC’s Policy Statement seems far more complacent than what neutrality cheerleaders would generally advocate. On another front, it is doubtful that neutrality advocates would acquiesce with even patently defamatory (and thus illegal) content being obligatorily taken down by an OSP – that is, before a court order. ‘Speech is never heinous enough’, we can hear them saying. But their pretence of unambiguousness in identifying the heinous is none the less implausible than an eventual pretence of unambiguousness in identifying the lawful. Neither can be achieved without some degree of moral evaluation, in which every actor of the Internet ought to be engaged.

26. In all these cases, practical reason invites OSPs, IAPs, Governments to think about what to choose and do. There is no reason to demand their neutrality. A commitment towards the good should not only be available to but also expected from each of these actors. Against the background of insensitiveness that the Civil Framework (perhaps unsuspectedly) seeks to instil, we are reminded of Vittorio Frosini’s remarks that the ‘ethics of the rule’ should not ignore the ‘ethics of the situation’. As Frosini reminds us in his [L’Uomo Artificiale](#), ‘[a]ny general reflection about ethics cannot but have as a necessary point of departure and reference, through the itinerary of conscience, the situation in which such a reflection stands, and which asks for an answer towards the common conscience in which it takes part. It is not possible to reflect, to decide, to act in consequence, pretending that we are in an abstract or imaginary and also diverse situation from that which really stands, in its springing emotivity, sometimes in its contradictory complexity, and always in its strict adherence to the being’ [my translation]. In all these cases, the Civil Framework

provides for the ethics of the situation's being infringed through and through.

27. And the problems seem to get worse by the day. Before the attacks by Globo Organizations and the CPJ led to the first problematic provision discussed in this article, the Civil Framework would have provided a more sensible mechanism for redress in the case of damaging content made available by OSPs. Having received a notice from an apparently offended party, OSPs would be required to take the apparently offensive content down in a 'reasonable time frame' ([see Art. 20](#)), but maintain it or reinstate it if a counter-notice was provided by the apparent offender ([see Art. 23](#)). The avoidance of the word 'expeditiously', which is used in analogous provisions in both the DMCA ([see § 512\(c\)\(1\)\(C\)](#)) and the European Directive on Electronic Commerce ([see Art. 14](#)), would allow some margin of discretion for OSPs in determining what a reasonable time frame is. That is to say, nothing would oblige an OSP to take contentious content down while it waited for a counter-notice. This would enable OSPs to reflect upon the nature of the content hosted by them and have some room for manoeuvre for taking it down or not.

28. There were some limitations about the earlier provision, however. It is important that we address them here in case the Ministry of Justice decides to resuscitate the provision. First, and most seriously, whenever a counter-notice ensued even the most repugnantly illegal content would need to be kept online – the OSP would not be able to remove it at all according with the part of the earlier provision ([see Art. 23](#)). As wicked as the new provision may be in rendering OSPs invulnerable, at least now they can, if so they wish, remove nasty content ([see Art. 20](#)). On the flip side, they can remove good content too, under pains of the provision's being, besides wicked, completely illogical. In any event, it is fortunate that the part of the earlier provision that would forcefully enable iniquitous content to remain online is gone; though it is unfortunate that all the sensible contributions of the provision have gone together with that part.

29. The second problem with the earlier provision is that it would treat in the same way fundamental, human rights, on the one hand, and rights with lesser degrees of priority, on the other hand. For instance, it is known, and the [General Comment n. 17](#) of the UN Committee on Economic, Social and Cultural Rights has confirmed, that intellectual property rights are not, in themselves, human rights. As noted by the CESCR, ‘[i]t is ... important not to equate intellectual property rights with the human right [to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author]’ (Art. 15(1)(c) of the [IECSR](#)). The latter does enjoy some degree of priority, though only to the extent outlined by other human rights frameworks, such as, by analogy, the [American Declaration of the Rights and Duties of the Man](#), which limits the right to own property to that minimum which ‘meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home’ (Art. XXIII).

30. Dignity, the essential needs of decent living, this is clearly not the scope served by DMCA-style notice-and-takedown procedures. Though it goes beyond the scope of this article to discuss more in-depth the incongruous relation between human rights and copyright, what we do need to observe is how unsound it is to assign the same kind of redress to, for instance, copyrights infringed through Youtube and children’s rights violated by adults’ bullying behaviour on social networking sites. Content of the latter kind, some minimal elements obtaining, should have its illegality presumed per caution – and thus be taken down *in limine*, subject to ulterior reinstatement if a very plausible counter-notice is served. There is no reason, however, to presume with such degree of urgency the infringement of copyrights. Rather, freedom of expression and the right to access should rank higher in the scale of priority. Should the earlier provision of the Civil Framework be reinstated to revive the notices system, it would be of fundamental

importance to set two different procedures apart, in accordance with the nature of the rights apparently violated.

31. For copyright-related (and other similarly economic) matters, the Civil Framework should provide that, after a notice having been served by the copyright owner, only in the absence of a counter-notice by the apparent infringer should the apparently infringing content be taken down by the OSP. This would be built upon the Canadian [notice-and-notice system](#), though with the advantage that, no resistance being offered by the apparent infringer, a presumption would be formed about the infringing nature of the content. Abuses of the notices system by copyright owners, however, should be controlled by regulatory bodies and liability should result whenever notices in bad faith are issued. Obviously, however, such a system of deferred takedown does not work for more serious violations, of urgent redress. Here, a brief, clear timeline must be established for content to be taken down whenever, the allegation seeming plausible, damages of a possibly irreversible nature may ensue. The circumscription of such a procedure of urgency to issues of a fundamental nature would prevent the abuses which are characteristic of the DMCA and the European Directive on Electronic Commerce, both which facilitate the issuance of insincere notices on copyright-related issues and, with them, the production of [chilling effects](#) with regard to speech.

32. Finally, the establishment of internal systems of decision making on notices should be required from OSPs, as much as the development and adoption of collective platforms to aid (and perhaps, in the long run, to replace) decision making processes should be encouraged. These platforms should be open to engagement by society at large, though an open system of evaluation of the quality of and assignment of weight to contributions and contributors, also by society at large, could be devised. Its fundamental principles should be defined by law, but its regulation should be open to development and specification by society. While a platform as such does not fully exist, however, if it

ever will, the seriousness of situations that demand urgent redress calls for the responsibility of OSPs – always subject, of course, to a deferred official adversarial system before Brazilian courts. What needs to be defined is that OSPs, who profit from their activities, should be expected to also bear, to a regulated extent, the risks associated with such activities. It is not possible to understand that businesses can develop at the expense of fundamental rights – let alone be rendered invulnerable over their conscious contribution to the violation of these, as the Civil Framework now proposes.

33. It is important, however, not to raise the bar too high on the nature of the duties expected from an OSP upon the receipt of a notice apparently related to the violation of fundamental rights. The responsibility of OSPs should be one of assessing and weighing notices and counter-notices against each other with diligence and in good faith, whenever serious violations of fundamental rights are apparently at stake. Their obligation should be of means, of employing their best efforts, according to codes of practice to be approved by independent bodies – through procedures in which OSPs could also have a say. What is necessary is to prescribe all this as obligation rather than as liberality.

Conclusion

34. In their “[Who Controls the Internet?](#)”, Harvard and Columbia Professors Jack Goldsmith and Tim Wu, speaking of the famous [Gutnick](#) decision in Australia, noted the following:

“[i]f Australia had not applied its laws to redress the harm to Gutnick in Australia, U.S. First Amendment law and speech-protective U.S. libel laws would have produced harmful and unwanted effects in Australia. This point it invariably missed by the critics of government control over the Net, who believe the U.S. First Amendment reflects universal values and is somehow written into the

architecture of the Internet. But the First Amendment does not reflect universal values; to the contrary, no other nation embraces these values, and they are certainly not written into the Internet's architecture" (see p. 157).

35. I close this article to lawyers in an apparently nonsensical way: with an appeal to the press, in Brazil and abroad. I do so in the hope that at least some words here will spill over. It could have been the other way round, but the brevity increasingly needed from instant journalism does not, on occasions that demand the surmounting of deep-rooted prejudices, do justice to the seriousness of issues such as those discussed in here. The press had been hasty and egotistic in condemning innovations of the Civil Framework that would have helped in the prevention of cruel behaviour in the Internet. Now that that provision is gone, the press has been remiss in criticizing the absurdity of what was put in its place. In a [recent article about the process](#), Brazilian magazine *Veja*, ranked Brazil as "yellow" in a three-coloured table where the only country to be green lighted was the United States of America. So I cannot resist extending my thoughts to all those who ignore that these are times in which words become flesh; in which peoples become multitude.

36. Such is an inexorable process. The only choice left for us is also the most basic one; of which kind of multitude we are going to be. In Antonio Negri's words, "[w]ithin each of us resides a legion of demons or, perhaps, of angels – this is the basic foundation, the degree zero of the multitude. (...) We can perhaps, mingling together the flesh and the intellect of the multitude, generate a new youth of humanity through an enormous enterprise of love" ([pp. 93, 95](#)). If we are to embark on such an enterprise we must start from our very understanding of liberty. Whatever it may be, at a minimum we must come to see that there is nothing less liberal than the infliction of human suffering – and no greater abuse of words than the silence before it.