

Brazil's Supreme Court and the Civil Rights Framework for the Internet

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Brazil's Supreme Federal Court (STF – Supremo Tribunal Federal) have started to trial two appeals dealing with the Civil Rights Framework for the Internet (CRF/I, Law 12.965/2014) on November 27, 2024. In both cases, the STF's decision will be binding on all lower courts.

The appeals (RE 1037396 and RE 1057258) deal with the liability of internet providers, websites and application managers for losses caused by the wrongful conduct of third parties. The expectation is that the STF will establish the criteria to be used in removing content from the web.

The question to be decided in Appeal RE 1037396 (Theme 987) deals with the constitutionality of article 19 of the CRF/I, which provides that *"in order to ensure freedom of expression and to prevent censorship"*, internet application providers will only be considered liable for losses resulting from content made available by third parties if *"after specific judicial order the provider fails to take action to make the content identified as offensive unavailable on its service by the stipulated deadline"*. Theme 933 in Appeal RE 1057258 addresses the same issue, but in the context of facts occurring prior to the CRF/I.

In March 2023, Justices Dias Toffoli and Luiz Fux, the reporting justices in the two appeals, ordered a public hearing to be held, with a view to encouraging public debate and providing the Court with technical information. Many sector players had the opportunity to be heard, and a range of issues were debated.

Justice Flávio Dino participated in the hearing as Minister of Justice and emphasized that the purpose of regulating the freedom of expression is to create a tool for establishing the frontier between use and abuse of that right and argued that risk theory offers the best approach to the problem. He stressed the duty of *"transparency and auditability, because if algorithms are human, then they are open to question and must therefore be accountable to society as a whole."*

The reporting justices voted to consider the internet application providers liable for *"damages resulting from content generated by third parties, when, notified by the offended party or their legal representative, preferably through customer service channels, they fail to take the appropriate measures within a reasonable time frame"*¹. Justice Fux also understood that *"If content generated by third parties promotes hate speech, racism, pedophilia, incitement to violence, and advocacy of the violent abolition of the Democratic State of Law and the coup, providers must actively monitor to remove the content from the internet regardless of notification"*². Justice Luís Roberto Barroso, the third to vote, proposed a different liability model: for general crimes, an extrajudicial notice would be sufficient for the content removal. Cases of crimes against someone's honor would be an exception, in

which art. 19 would apply, that is, the non-compliance with a court order would be a requirement for liability³.

Ten years after the CRFI came into force, it seems that the time has come for Brazil's Supreme Court to give meaning to the rules intended to govern new relationships in a society aware that the law will have trouble addressing the details of each case, especially given the speed of change in today's digital world. The task is a difficult one, but it falls to the courts and, in this case, the Supreme Federal Court, to establish the proper interpretation of the Civil Rights Framework for the Internet under Brazil's constitution.

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NOTES

¹ Excerpt taken from Min. Dias Toffoli lead opinion. Available at: <https://noticias-stf-wp-prd.s3.sa-east-1.amazonaws.com/wp-content/uploads/wpallimport/uploads/2024/12/05210439/RE-1037396-VOTO-RELATOR.pdf>

² Available at: <https://noticias.stf.jus.br/postsnoticias/para-ministro-fux-e-inconstitucional-responsabilizar-plataformas-somente-em-casos-de-descumprimentode-ordem-judicial/>

³ Justice André Mendonça is the next to vote. However, the trial shall be resumed only in 2025.

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