



# Disrupting the disruptive: making sense of app blocking in Brazil

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**Abstract:** Brazil has a record of judicial orders demanding that intermediaries such as local internet access providers and app stores administrators “block” user access to social media applications (such as YouTube, Facebook, Secret, and WhatsApp), because the application allegedly either provides an illegal service or has failed to comply with a court order. This paper reflects on this phenomenon and adds to a body of literature that tries to understand why internet blocking practices are enacted by looking at the context in which they happen. Upon review of episodes of social media blocking in Brazil, it argues that the blocking orders issued by Brazilian judges can be connected with a scenario of “regulatory disruption”, that is, a context of regulatory frameworks unfit to deal with innovative internet applications. This context expands the role of the judiciary in resolving legal disputes. Given that this disruptive scenario is not per se exclusive to Brazil, the paper suggests that the practice is further associated with the country’s legal culture, judicial behaviour, and level of social and institutional development.

**Keywords:** Internet filtering, Internet blockings, Disruption, WhatsApp

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## INTRODUCTION

There will be no nation that has no speech that it wishes to regulate on the Internet. Every nation will have something it wants to control. Those things, however, will be different, nation to nation” (Lessig, 2006, p. 297). The quote from Lawrence Lessig’s classic *Code 2.0* draws attention to how desire for control is a global phenomenon. The basic variation is that, under democratic regimes, state interventions are held to be more clearly backed by the rule of law and reasonably protective of human rights (Wright & Breindl, 2013); these are the grounds of their purported legitimacy.

Indeed, Brazil has no history in shutting down, blocking, or filtering the internet for the purpose of preventing citizens from having access to content that is considered subversive or, frustrating online and offline political movements and silencing dissent. It does, however, have a record of judicial orders demanding that intermediaries such as local internet access providers and app stores administrators “block” user access to specific internet applications, because the application either provides an illegal service or has failed to comply with a court order. These kinds of decisions have affected internet applications such as YouTube, Facebook, and WhatsApp.

This paper reflects on this phenomenon and adds to a body of literature that tries to understand why internet blocking practices are enacted through contextual knowledge, that is, by looking at the context in which they happen (Crete-Nishihata; Deibert; Senft, 2013). Upon review of episodes of internet blocking of social media in Brazil, it argues that the blocking orders issued by Brazilian judges can be connected with a scenario of “regulatory disruption”, that is, a context of regulatory frameworks unfit to deal with innovative internet applications which expands the role of the judiciary in resolving legal disputes. The main contribution of this study is exposing this important explanatory factor behind Brazilian blocking practices, adding to a more comprehensive understanding of the use of these measures in Western states.

## BLOCKING AND FILTERING PRACTICES AROUND THE WORLD

The terms “blocking” and “filtering” are used to refer to an array of technical measures that either partially or totally restrict the flow of data on the internet. That is, they interfere with the freedom to seek, receive, and impart ideas and information through this medium of mass communication. As such, they are a means of regulation of behaviours and, thus, a form of control. This section briefly navigates through various types of blocking and filtering practices around the world to both shed light on their shared features and distinctive elements and highlight the different contexts in which blocking and filtering of internet applications, services, and content occur. This is a necessary step toward understanding the nature of blocking measures documented in Brazil.

In many countries, the act of implementing technical restraints to block access to internet applications, services, and content is part of ambitious state policies of information control. It is a measure that serves the purpose of preventing citizens from having access to content that is considered subversive, and, thus, to information considered culturally and/or politically sensitive by the nation state in question (Zittrain & Palfrey, 2008, p. 32). For this reason,

blockades are often associated with authoritarian regimes that institutionalise national policies of censorship.

The most paradigmatic case is that of China, whose government implements a sophisticated system of filtering and blocking websites and internet content, coined in the West as the "Great Firewall of China" (Goldsmith & Wu, 2006, pp. 85–104; Freedom House, 2015, pp. 195-8; Mackinnon, 2012). The restrictions are implemented by Chinese internet connection providers based on a directory organised by the "Internet Police" and reach not only any publications of content explicitly critical to the regime, but also pornographic content and webpages about democracy, public health, and religion. There is also documented evidence that access to websites of foreign government entities (such as Australia, the United Kingdom, the United States, Taiwan, and Tibet) and educational institutions, social media, and news portals is restricted (Zittrain & Edelman, 2003). Similar schemes can be found in Saudi Arabia (Zittrain & Edelman, 2002) and North Korea (Talmadge, 2016).

In other countries, blocking and filtering take different forms: they are not permanent, as in China, but temporary during strategic periods of political importance. Indeed, internet shutdowns and blocking or throttling of internet applications have been provisionally implemented around elections, to frustrate online and offline political movements and silence dissent. That was the case in Uganda, for example, during the February 2016 presidential elections, when social media platforms and mobile financial services were blocked (Mugume, 2017). Other examples, within the past two years include shutdowns in Chad, the Congo, Gambia, Gabon, and Montenegro (Paradigm Initiative Nigeria, 2016). In other instances, blockages and internet disruptions are implemented in regions and periods of rising political tensions and during "emergency situations", for "national security" reasons. In Cameroon, for instance, English-speaking areas faced internet shutdowns during periods of political unrest with the French-speaking majority at the beginning of 2017 (BBC News, 2017). During growing protests over the economic marginalisation and political persecution of Ethiopia's largest ethnic group, Oromos, in April 2016, WhatsApp, Facebook Messenger, and Twitter also became inaccessible in the city of Oromia, the centre of the political uprising (Davison, 2016). Turkey also has a well-documented history of politically charged and strategic blockages of this kind (Yesil, Kerem Sözeri, & Khazraee, 2017). So does India (Human Rights Watch, 2017).

Blocking and filtering practices are also found in western liberal democracies. Most common are those within the "child pornography" and "copyrighted material" realms (Blakely, 2014; Berghofer & Sell, 2015). In Germany, the penal code also prohibits the use and dissemination of Nazi and Holocaust denial materials, implicating a responsibility to eradicate this content from the web (Freedom House, 2015, p. 350; Goldsmith & Wu, 2006, p. 75). In France, internet connection providers, following notification, must block websites that contain materials that incite terrorism (Wright & Breindl, 2013; Freedom House, 2015, pp. 311-2.). In the United States, the practice of "domain seizure" is used as a method to impede access to websites that disseminate content in violation of copyright law and that provide illegal services, such as sales of drugs and smuggled goods (Freedom House, 2015, p. 879; Goldsmith & Wu, 2006, p. 75; pp. 77-79; DeNardis, 2012, p. 728). In the same country, internet service providers receive thousands of take-down notices daily under the Digital Millennium Copyright Act. Across Europe, search engines must consider requests for search results to be de-indexed following the recognition of the so-called "right to be forgotten" after the 2014 ruling of the Court of Justice of the European Union (2014).

All these illustrate that blocking and filtering practices, and the motivations underlying them,

vary around the world. They range from the order of removal of specific content considered illegal to the total restriction of access to a certain application, or even, in certain cases, to complete internet shutdown in a country or region for a certain period of time. The actors at the frontline of these practices also vary: the practices can not only be implemented by platforms themselves, such as when Google filters its search results for a certain name or when Twitter's Periscope takes down a user's live-broadcasting of a UFC (Ultimate Fighting Championship) fight, but also through domain registrars, when a website is seized, and by internet access providers, when internet applications are shut down, for example. Most significantly, the stated motivations for these practices clearly vary: from protecting community interests through the outright control of information of a particular content (related to pornography, religion, human rights, and democracy, etc.) and dismantling political uprisings, to safeguarding children, preventing crime, and guaranteeing data protection rights. There are, therefore, several ways by which governments impact information and services available on the internet, and access to these data. <sup>1</sup>

## BLOCKING IN BRAZIL

### SOCIAL MEDIA BLOCKING IN BRAZIL

This research focused on a particular kind of blocking measure that has been experienced in Brazil. It looked at eight publicly known cases in which Brazilian judges ordered either a temporary or a permanent blockage of entire social media platforms, to be executed either by internet connection providers or by app store administrators, which ultimately functioned as “points of control” (Goldsmith & Wu, 2006, viii; Zittrain, 2002; DeNardis, 2012; Hall, 2016). The study of these cases is specially interesting for the internet policy literature and contributes to a holistic understanding of internet blocking practices around the world, as it facilitates comparison and the identification of new or persisting trends.

Based on the review of the legal issues underlying the decisions, this section shows that a common thread in all these Brazilian blocking cases is the scenario of “regulatory disruption”, a term borrowed from Nathan Cortez (2014, p. 177). Here it is used to refer to a context of lack of convention on how to solve a legal conflict, either because current regulation fails to deal with a new set of facts posed or affected by technology or because the *prima facie* applicable legal regime is in contradiction with policy considerations and/or outdated in light of new technologies. The phenomenon of legal uncertainty resulting from the non-existence of convention is closely connected with social changes and has occupied legal philosophers concerned with “judicial discretion” in “hard cases” (when no settled rule disposes of the particular case) for decades (Hart, 1961; Dworkin, 1963). Under these disruptive scenarios, adjudication gains importance and relevance over the outcome of the case, because the answer to the case is not clearly stated either in legislation or precedents.

The innovations that services like YouTube, Facebook, Secret, and WhatsApp brought about and popularised disrupted not only markets but also the legal equilibrium. The Brazilian blocks are closely connected with a pressing legal challenge in the internet age: dealing with novel internet applications that do not square well with existing regulatory frameworks. While this challenge is not exclusive to Brazil, it is however one of the main reasons why social media were occasionally blocked in that country. The analysis of these blocking decisions and the context in which they are inserted shed light on how some members of the Brazilian judiciary have dealt with challenges imposed by technology, the internet in particular: disrupting - *blocking* - disruptive

applications.

In the next subsection, a short summary of the cases affecting four social media applications is provided: each subsection describes the regulatory context in which they are inserted, unravels the motivations asserted by the courts, and identifies trends in the legal arguments used to ground blocking decisions. Thereby, the operation of “regulatory disruption” is demonstrated. The purpose is to help *explain* these decisions, not *justify* them. Criticism of these blocking orders and their impact on infrastructure, economy, and human rights may still be in order, even if not addressed here.

Date	Application	Motivation
5 January 2007	YouTube	Failure to remove illegal content
9 August 2012	Facebook	Failure to remove illegal content
19 August 2014	Secret	Violation of constitutional ban on anonymity
25 February 2015	WhatsApp	Failure to comply with user data demands
16 December 2015	WhatsApp	Failure to comply with user data demands
2 May 2016	WhatsApp	Failure to comply with user data demands
19 July 2016	WhatsApp	Failure to comply with user data demands
5 October 2016	Facebook	Failure to remove illegal content

Source: [bloqueios.info](http://bloqueios.info)

## MAKING SENSE OF THE BLOCKING ORDERS

### YouTube

In September 2006, Brazilian celebrity Daniella Cicarelli and her boyfriend Renato Malzoni were caught on camera having sex on a beach in Spain. The video was immediately all over the internet. The couple brought suit against media companies disseminating pictures and the video of the incident. These companies included YouTube Inc., then a one-year old video-sharing start-up, which was soon-to-be acquired by Google Inc.

After some back-and-forth grappling with the fact that the video was recorded in a *public* environment and that no intrusion upon seclusion had taken place, the couple obtained an injunction ordering media outlets (and YouTube) to takedown the video, as it violated the couple’s constitutional right to privacy. Without specifying URLs, a higher court judge at the São Paulo State Court determined that the video be erased from the internet (Tribunal de Justiça de São Paulo, 2006).

Despite the positive outcome for the plaintiffs, and the immediate compliance by traditional media outlets, the video could still be found online. In fact, that was the very first time the Brazilian internet experienced a so-called “Streisand effect” —a term used to describe how efforts to either hide, remove, or censor a piece of information online have the accidental consequence of making it more visible—to its full extent. The phenomenon was largely enabled by the exact innovative feature that made video-sharing platforms so popular: the possibility of uploading content to the website without editorial control, a power granted to any user of the platform.

Users reposted the prohibited material on YouTube continuously. After months of unsuccessful efforts, the couple filed a motion for complete blockage of YouTube, since the company could not guarantee that the video would not be found on its platform. In very ambiguous language, the competent judge then ordered that the “video be made inaccessible to Brazilian Internet users” and that internet access providers implement “technical measures” to prevent access to the video. The basis claimed for such an order was Art. 461, §5º of the former Code of Civil Procedure, <sup>2</sup> which grants judges a general writ power to demand any action that will help put their decisions into practice. Following the decision, a lower court judge issued letters to backbone providers to filter the illegal content, leading to the blockage of the entire platform on 5 January 2007, affecting at least five million internet users at the time (Agência Estado, 2007).

Unsurprisingly, the blockage caused a huge public outcry and received extensive media coverage. Within a few days, the state court judge determined that the ban on YouTube be suspended, claiming that his decision had been misinterpreted, but insisting that YouTube Inc. had neglected his previous orders to takedown the couple’s video and had to implement technical measures to prevent users from uploading it (Tribunal de Justiça de São Paulo, 2007).

This first incident is perhaps the most telling with regards to the “regulatory disruption” aspect of internet blocking in Brazil. Are internet platforms liable for user generated content? If so, then when and how? The existing regulatory model at the time did not provide clear answers to these new questions. The blocking order originated in this complicated legal scenario with an inexperienced (in internet matters) judge looking for an effective solution to a new problem. It is even said that blocking YouTube brought to light the need to regulate the liability of internet applications for user generated content (Souza, Moniz, & Branco, 2007) and that the episode ended up bolstering conversations that originated the Civil Rights Framework for the internet (Federal Law no. 12.967/14, the MCI), which then prescribed rules establishing the regime of intermediary liability (Souza, 2015, pp. 391-6).

### **Facebook**

During municipal elections in 2012, and then again in 2016, city counselor candidate Dalmo Meneses and mayoral candidate Udo Döhler filed suits against Facebook requesting the removal of pages on the social media platform that were allegedly harmful to their reputation and supposedly compromised their runs for seats at the City Council and the City Hall, respectively. In the first case, the page in question was “Reage Praia Mole”, which brought environmental threats endangering a beach in the state of Santa Catarina to the attention of the local population and contained critiques of the local administration. In the second, more recent case, the targeted page was “Hudo Caduco”, which made humorous references to the mayor of Joinville, a city in Santa Catarina.

In both cases, electoral judges granted the takedown requests (Justiça Eleitoral, 2012a; Justiça Eleitoral, 2016a). They considered these pages illegal because their content provided “degrading advertisement” to the reputation of electoral candidates in an (immediately) “anonymous” fashion, i.e., by pseudonym, violating Brazilian electoral law. As a matter of fact, Brazilian electoral law regulates campaign ads strictly. It contains subjective language that goes as far as to say that “advertisements that may degrade or ridicule candidates is prohibited” (Art. 53, §1º of Federal Law no. 9504/97) and that the “Electoral Justice will prevent the re-presentation of advertisements offensive to the candidate’s honour, to morality, and to good manners” (Art. 53, §2º of Federal Law no. 9504/07). <sup>3</sup> The two judges did not differentiate individual opinions and parodies from advertising and interpreted the provisions in a manner favorable to the plaintiffs.

Facebook failed to carry out the takedown orders in both cases. As a result, the judges also

issued blocking orders against the entire platform, to be implemented by internet access providers (Justiça Eleitoral, 2012b; Justiça Eleitoral, 2016b). The legal basis was Article 57-I 4 of the Elections Act (Federal Law no. 9504/97), added by Law no. 12.034/09, which provides for the possibility of suspending electronic sites that violate the electoral law. They claimed that the suspension of the platform was apt, both to put a stop to the reputational harm caused by the pages, which also had a negative effect on the candidates' chances in the coming elections, and to punish the company for the failure to comply with the previous judicial orders.

However, the orders were not implemented, because Facebook, under the imminent threat of blockage of the entire platform, complied with the decisions to remove the prohibited content (Justiça Eleitoral, 2012c; Tribunal Regional Eleitoral, 2016). In regards to the 2012 case, the Brazilian subsidiary of Facebook Inc., Facebook Brasil Serviços Online Ltda., explained in court it had failed to immediately comply with the request because it did not have the technical ability to takedown the page. In the 2016 case, Facebook Brazil had decided to keep the page online while it challenged the takedown order in a higher court on grounds that the content was legal, but the threat of blocking the entire platform forced the company to review this approach to the case.

These two blocking decisions against Facebook are associated with a scenario of regulatory disruption. Both decisions are closely connected to the Elections Act's failure to account for individual political opinions posted on social media platforms and distinguish them from campaign "ads" within the meaning of the law. Case law and scholarship also failed to offer any clear guidance. In the two cases, criticisms and parodies were interpreted as insults and offenses—an "advertisement" that was held as being unlawful—and the lack of immediate identification of authorship, a form of "anonymity". Lack of clear standards in the face of new social practices of civic engagement online and challenges associated with setting up clear guidelines in highly ambiguous cases seem to help explain why the judges declared the pages illegal and ordered their takedown. Limited understanding of the internet's social impact and the technical, economical, and human rights implications of shutting down a social media platform may also figure as potential reasons of their decision to block the entire platform, which could have affected 40 million Brazilian users in 2012 and 90 million in 2016.

### **Secret**

The mobile application Secret allowed users to post comments without indication of authorship. The messages could be viewed by the users' circle of friends, connected to the platform in an (outwardly) anonymous fashion. Upon the launch of the app in Brazil and its instant success, the Public Prosecutor's Office in the state of Espírito Santo (Ministério Público do Espírito Santo) brought a civil suit against the platform and formally requested that the app store administrators Google, Apple, and Microsoft <sup>5</sup> remove the service from their virtual shops and remotely delete the app from user cellphones. According to the prosecutor that filed the action, the app violated the constitutional prohibition on anonymity, provided for in Art. 5, IV <sup>6</sup> of the Brazilian Constitution, and facilitated illegal activities, such as hate speech and defamation (Roncolato, 2014).

The lower court judge was persuaded by these arguments. He granted the request and banned the app (Justiça Estadual do Espírito Santo, 2014). <sup>7</sup> While Apple complied with the removal request, Google and Microsoft challenged it. The legal battle dragged on for almost a year, saw the late intervention of Secret Inc., and concluded with the majority of the Espírito Santo state court panel finding in favour of Secret, Google, and Microsoft, on the grounds that the app collected and retained IP addresses and other relevant metadata that could be used to identify users who engaged in criminal activities through the app (Tribunal de Justiça do Espírito Santo,

2015). Therefore, the app did not run afoul of the anonymity ban. By then, Secret Inc. had already discontinued its activities in Brazil.

The lack of developed scholarship and case law around the scope and meaning of the anonymity prohibition of the Brazilian Constitution of 1988 *on the internet* is a leading explanation for the decision to ban Secret (Monteiro, 2017, pp. 36-41; Souza, 2015, pp. 391-6), as this was the first case that directly presented the question of how the anonymity clause should be read in cyberspace – in another instance of “regulatory disruption”. Leading commentators and practitioners have for decades read the anonymity clause in Art. 5, V as imposing an identification requirement for the exercise of freedom of expression in Brazil (Monteiro, 2017, pp. 1-8). Accordingly, the mechanic application of this reading by the lower court judge is at the root of the blocking order here. However, this understanding and application of the identification requirement doctrine has bizarre implications on the internet, such as the idea that only people carrying with a verified name tag can access and use the internet (Monteiro, 2017, p. 6). This realisation triggered the review of the case and the blocking order was later overturned.

### **WhatsApp**

The US messaging service WhatsApp is a tremendous success in Brazil. The company has more than 120 million active users in the country and a penetration as high as 95% among smartphone holders. The app’s ever increasing popularity has led representatives of the Brazilian telecommunications industry to go as far as to call it a “pirate” telecom service (Folha de São Paulo, 2015), for it provides services akin to SMS-texting and calling without having to observe the strict regulatory framework applied to telcos. The comment highlights the industry’s concern that users have now started to prefer messaging and calling through WhatsApp to using their regular cell phone calling and texting plans.

The telecommunications industry was not the only interest group to worry about WhatsApp’s growing popularity though. As in other countries, law enforcement and intelligence officials share the same concern over the fact that people’s calling and texting habits are rapidly changing and now take place in and through WhatsApp. Unsurprisingly, the four publicly known blocking orders issued against the service raised from the failure to comply with judicial demands for user data relevant to criminal investigations related to child abuse, drug trafficking, and organised crime.

The clash between the company and Brazilian authorities that led to the blockages started off as a jurisdictional battle: data demands were served on Facebook Brasil Serviços Online, the Brazilian subsidiary of Facebook Inc., which claimed to have no relation to WhatsApp and did not provide any information; WhatsApp Inc., in turn, initially refused to accept that it was under obligation to comply with direct requests for user data made by Brazilian judges under Brazilian Law and insisted that authorities had to resort to mutual legal cooperation treaties. In regards to this point, Brazilian law enforcement argued that WhatsApp provides services in Brazil, attracting the application of Brazilian law, including the Wiretap Act (Federal Law 9.296 of 1996) and the Marco Civil da Internet (“MCI”, Federal Law no. 12965 of 2014, known as the Brazilian Civil Rights Framework for the Internet). The full implementation of end-to-end encryption in March 2015, establishing the technical impossibility of performing wiretaps, added another layer of complexity to the battle and intensified tensions, which has now become the centre of the discussion (Abreu, 2016; Antonialli & Brito Cruz, 2015). The company claims it *cannot* provide the content data Brazilian law enforcement wants, as it does not hold the key to decrypt communications. Many Brazilian authorities refuse to believe this assertion. Others demand the company change its current end-to-end architecture.



With regards to the legal arguments cited to ground the blocking orders, some judges made explicit reference to art. 12, III 8 of the Marco Civil da Internet, which provides for "temporary suspension" as a kind of sanction to application providers, to justify the blocking orders (Justiça Estadual de Sergipe, 2016). Others have also relied on the general writ power to demand any action that will help judges enforce their decisions (here, requiring user content data disclosures), found in the Code of Civil Procedure (Justiça Estadual de São Paulo, 2016c).

In all cases, the blocking orders were reversed by appellate courts, because of their "disproportionality" (Tribunal de Justiça do Piauí, 2015; Tribunal de Justiça de São Paulo, 2015; Tribunal de Justiça de Sergipe, 2016; Supremo Tribunal Federal, 2016). In the last two cases, political parties even brought suit before the Brazilian Supreme Court (Barros, 2016; Mansur, 2016), seeking a declaration that blocking WhatsApp is unconstitutional, based on the theory that such blocking violates freedom of communication of a hundred million Brazilian WhatsApp users. Many have also argued that the blocking orders had no legal basis, challenging the judges' interpretation of the "temporary suspension" clause (Abreu, 2017). Final decisions are still pending. Meanwhile, legislators have proposed several bills and amendments to the MCI, seeking to either create an explicit legal basis for blocking orders or declare them unlawful (Kira, 2016).

WhatsApp's implementation of end-to-end encryption and its pervasive popularity deeply compromised legal equilibria among law enforcement and "surveillance intermediaries" (Rozenshtein, 2018), causing a regulatory disruption. The technology changed a *default* condition that was taken for granted by public security agents in Brazil: the possibility of recovering the content of user communications and using the data as evidence when following the procedure and requirements established in law. The technical impossibility of the company's compliance fundamentally departed from traditional practices, whereby telecommunications companies would cooperate with law enforcement to perform wiretaps, provided they followed the regular procedure established by the Wiretap Act and the Marco Civil da Internet. It posed challenging legal questions: is a communication service that is not 'wiretappable' constitutionally protected? Is there the legal obligation to build internet applications capable of surveillance? The regulatory disruption has triggered a heated debate on the constitutionality of end-to-end encryption (Abreu, 2016) and even prompted the Ministry of Justice to announce that it would propose legislation to regulate encrypted messaging services (Passarinho, 2016).

## CONCLUSION

Nation states act to intervene and exercise control over the internet to neutralise unwelcomed uses of the internet, according to the nation states' points of view and societal values (Zittrain & Palfrey, 2008, p. 44; Belli, 2016, p. 19). Some countries will base their actions on human rights standards and democratic values, whereas others will not.

In Brazil, internet applications have been entirely blocked for their disruptive character. Blocking orders have been based on alleged violations of legal and constitutional provisions—as in the Secret case—or non-compliance with previous court orders—as in the YouTube, Facebook, and WhatsApp cases—indicating that some Brazilian judges assume an assertive role when found in a scenario of regulatory disruption, that is, when long-standing legal equilibria is disturbed by technology. The consideration of this factor is a necessary piece of any account on blocking of social media in Brazil and its identification may facilitate comparisons with and illuminate analyses of blocking practices in other countries.

Concededly, however, regulatory disruption, as defined here, is a worldwide phenomenon existent in all legal systems. While crucial to understanding the Brazilian blocking orders against YouTube, Facebook, Secret, and WhatsApp, it is insufficient to fully explain why the practice does not always repeat in other jurisdictions found in similar scenarios. Even inside Brazil, other judges have dealt with the same challenges, but not resorted to blocking measures against entire social media platforms. Similarly, in most western countries facing the same disruptions, blockages did not take place. For example, WhatsApp has been in the spotlight in the United States, the United Kingdom, France, and in many other countries where it is popular, but has not been blocked in those countries. This suggests that Brazil's legal culture, judicial behaviour, and level of social and institutional development may be critical elements that came into play in the context of regulatory disruption. These aspects require further attention and research.

## REFERENCES

- Abreu, J. S. (2016, October 17). From Jurisdictional Battles to Crypto Wars: WhatsApp vs. Brazilian courts. *The Bulletin*. Retrieved from <http://jtl.columbia.edu/from-jurisdictional-battles-to-crypto-wars-brazilian-courts-v-whatsapp/>.
- Abreu, J. S. (2017, March 7). Is there legal support for WhatsApp blocks? Interpretative disputes and their advocates". *bloqueios.info*, InternetLab. Retrieved from <http://bloqueios.info/en/is-there-legal-support-for-whatsapp-blocks-interpretative-disputes-and-their-advocates/>.
- Agência Estado. (2007, January 9). Pelo menos 5 milhões estão sem acesso ao YouTube. Estadão. Retrieved from <http://www.estadao.com.br/noticias/geral,pelo-menos-5-milhoes-estao-sem-acesso-ao-youtube,20070109p13497>.
- Antonialli, D.; Brito Cruz, F. (2015, December 17). Entenda a decisão que bloqueou o WhatsApp no Brasil. *Deu nos Autos*. Retrieved from <http://link.estadao.com.br/blogs/deu-nos-autos/entenda-bloquei-whatsapp-brasil/>.
- BBC News. (2017, February 8). Why has Cameroon blocked the internet?, *BBC News*, <http://www.bbc.com/news/world-africa-38895541>
- Barros, P.P. (2016, November 18). "ADPF 403 in STF: Are WhatsApp blockings constitutional?". *bloqueios.info*, InternetLab. Retrieved from <http://bloqueios.info/en/adpf-403-in-stf-are-whatsapp-blockings-constitutional/>
- Blakely, M.R. (2014, June 4). Injunction Function: internet service providers and fair balance in web-blocking. *Internet Policy Review*. Retrieved from <https://policyreview.info/articles/news/injunction-function-internet-service-providers-and-fair-balance-web-blocking/293>.
- Belli, L. (2016). End-to-end, Net Neutrality, and Human Rights. In: L.Belli, P. De Filippi (Eds.), *Net Neutrality Compendium* (pp. 13-29). Cham: Springer. doi:10.1007/978-3-319-26425-7\_2
- Berghofer, S. & Sell, S. (2015). Online debates on the regulation of child pornography and copyright: two subjects, one argument?. *Internet Policy Review*, 4(2). doi:10.14763/2015.2.363
- Branco, S.(2016, October 13). How a supermodel helped to regulate the Internet in Brazil, *Droitdu.net*. Retrieved from <http://droitdu.net/2016/10/how-a-top-model-helped-to-regulate-brazilian-Internet/>
- Court of Justice of the European Union. (2014, May 13). Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González, C-131/12.
- Cortez, N. (2014). Regulating Disruptive Innovation. *Berkeley Technology Law Journal*, 29(1), 175-228. doi:10.15779/Z38NM5G
- Crete-Nishihata, M., Deibert, R. J. & Senft, A. (2013). Not by Technical Means Alone: The Multidisciplinary Challenge of Studying Information Controls. *IEEE Internet Computing*, 17(3): 34-41. doi:10.1109/MIC.2013.29 Retrieved from SSRN: <https://ssrn.com/abstract=2265644>

- Davison, W. (2016, April 12). Twitter, WhatsApp Down in Ethiopia Oromia Area After Unrest. *Bloomberg Technology*. Retrieved from <https://www.bloomberg.com/news/articles/2016-04-12/twitter-whatsapp-offline-in-ethiopia-s-oromia-area-after-unrest>
- DeNardis, L. (2012). Hidden Levers of Internet Control. *Information, Communication & Society*, 15(5), 720-738. doi:10.1080/1369118X.2012.659199
- Dworkin, R. (1963). Judicial Discretion. *The Journal of Philosophy*, 60(21), 624-638. doi:10.2307/2023557
- Folha de São Paulo. (2015, August 7). “WhatsApp é ‘pirataria pura’, diz presidente da Vivo”. *Folha de São Paulo*, <http://www1.folha.uol.com.br/mercado/2015/08/1666187-whatsapp-e-pirataria-pura-afirma-presidente-da-vivo.shtml>
- Freedom House. (2015). *Freedom on the Net 2015*. Retrieved from <https://freedomhouse.org/sites/default/files/FOTN%202015%20Full%20Report.pdf>
- Hall, J.L. (2016). A Survey of Worldwide Censorship Techniques, Center for Democracy and Technology. Retrieved from <https://tools.ietf.org/html/draft-hall-censorship-tech-04> .
- Human Rights Watch. (2017, June 15). India: 20 Internet Shutdowns in 2017, <https://www.hrw.org/news/2017/06/15/india-20-internet-shutdowns-2017>
- Goldsmith, J.; Wu, T. (2006). *Who controls the Internet? Illusions of a borderless world*. Oxford: Oxford University Press.
- Hart, H.L.A. (1961). *The Concept of Law*. Oxford: Oxford University Press.
- Lessig, L. (2006). *Code 2.0*. New York: Basic Books. Available at <http://codev2.cc/download+remix/>
- Kira, B. (2016, December 2). Finding a “silver bullet”: Brazilian Congress analyses draft bills about website and application blockings. *bloqueios.info*, InternetLab. Translation by Ana Luisa Araujo. Retrieved from <http://bloqueios.info/en/finding-a-silver-bullet/>.
- Mackinnon, R. (2012). *Consent of the Networked: The Worldwide Struggle For Internet Freedom*. New York: Basic Books.
- Mansur, F. (2016, November 18). ADI 5527 and appblocks: a problem in the wording of the law or in its interpretation?”. *bloqueios.info*, InternetLab. Retrieved from <http://bloqueios.info/en/adi-5527-and-appblocks-a-problem-in-the-wording-of-the-law-or-in-its-interpretation/>.
- Moneiro, A. P. L. (2017). *Online anonymity in Brazil: Identification and the dignity of wearing a mask* (Master’s Thesis). University of São Paulo, São Paulo, Brazil.
- Mugume, P. (2017, March 15). ‘UCC Dragged to Court Over ‘Unlawful’ Social Media Shutdown in 2016 Elections, Date Set for Case Hearing’. *PC Tech Magazine*, <http://pctechmag.com/2017/03/ucc-dragged-to-court-over-unlawful-social-media-shutdown-in-2016-elections-date-set-for-case-hearing/>
- Paradigm Initiative Nigeria (2016, December). Choking The Pipe: How Governments Hurt

Internet Freedom On A Continent That Needs More Access. Retrieved from [http://pinigeria.org/2016/wp-content/uploads/documents/research/Digital%20Rights%20In%20Africa%20Report%202016%20\(HR\).pdf](http://pinigeria.org/2016/wp-content/uploads/documents/research/Digital%20Rights%20In%20Africa%20Report%202016%20(HR).pdf)

Passarinho, N. (2016, July 19). Governo elabora projeto para regular acesso a informações do WhatsApp. *G1*. Retrieved from <http://g1.globo.com/politica/noticia/2016/07/governo-elabora-projeto-para-regular-acesso-informacoes-do-whatsapp.html>.

Roncolato, M. (2014, August 19). Justiça do ES determina suspensão do Secret no Brasil. O Estado de S. Paulo. Retrieved from <http://link.estadao.com.br/noticias/geral,justica-do-es-determina-a-suspensao-do-secret-no-brasil,10000030685>.

Rozenshtein, A.Z. (2018). Surveillance Intermediaries. *Stanford Law Review*, 70(1), 99-189.

Souza, C.A.P.; Moniz, P.P.; Branco, S. (2007). Neutralidade de rede, interesse público e filtragem de conteúdo: reflexões sobre o bloqueio do site Youtube no Brasil. *Revista de Direito Administrativo*, 246, 50-78.

Souza, C.A.P. (2015). As Cinco Faces da Proteção à Liberdade de Expressão no Marco Civil da Internet. In N. De Lucca, A. Simão Filho, C. R. P. Lima (Eds.), *Direito & Internet III - Marco Civil Internet* (Volume II) (pp. 377-408) São Paulo: Latin Quarter.

Talmadge, E. (2016, April 1). 'North Korea announces blocks on Facebook, Twitter and YouTube, *The Guardian*. Retrieved from <https://www.theguardian.com/world/2016/apr/01/north-korea-announces-blocks-on-facebook-twitter-and-youtube>.

Wright, J. & Breindl, Y. (2013). Internet filtering trends in liberal democracies: French and German regulatory debates. *Internet Policy Review*, 2(2). doi:10.14763/2013.2.122

Yesil, B.; Kerem Sözeri, E.; and Khazraee, E. (2017). Turkey's Internet Policy After the Coup Attempt: the Emergence of a Distributed Network of Online Suppression and Surveillance. *Internet Policy Observatory*. Retrieved from <http://repository.upenn.edu/internetpolicyobservatory/22>

Zittrain, J. (2002). Internet Points of Control. *Boston College Law Review*, 44: 653-688.

Zittrain, J.; Edelman, B. (2002). Documentation of Internet Filtering in Saudi Arabia. Cambridge, MA: Berkman Center for Internet & Society. Retrieved from <http://cyber.harvard.edu/filtering/saudi-arabia/>

Zittrain, J.; Edelman, B. (2003). Internet Filtering in China. *IEEE Internet Computing*, 7(2), 70-77. doi:10.1109/MIC.2003.1189191 Retrieved from <http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan011043.pdf>.

Zittrain, J. (2008). *The Future of the Internet - And How to Stop It*. New Haven: Yale University Press.

Zittrain, J., & Palfrey, J. (2008). Internet filtering: the politics and mechanisms of control. In R. Deibert, J. Palfrey, R. Rohozinski, & J. Zittrain (Eds.), *Access denied: the practice and policy of*

*global Internet filtering* (pp. 29–56). Cambridge, MA: MIT Press. Available at <https://mitpress.mit.edu/books/access-denied>

**List of court decisions** (available at [bloqueios.info/en](http://bloqueios.info/en)):

Tribunal de Justiça de São Paulo. (2006, September 29). Agravo de Instrumento no. 472.738-4, judge Ênio Santarelli Zuliani (blocking order against YouTube).

Tribunal de Justiça de São Paulo. (2007, January 9). Agravo de Instrumento no. 488.184-4/3, judge Ênio Santarelli Zuliani, January 9th 2007 (order suspending the block of YouTube).

Justiça Eleitoral. (2012a, July 26). Ação Cautelar no. 86-37.2012.6.24.0013, 13ª Vara Eleitoral, judge Luiz Felipe Siegert Schuch (content takedown order).

Justiça Eleitoral. (2012b, August 9). Ação Cautelar no. 86-37.2012.6.24.0013, 13ª Vara Eleitoral, judge Luiz Felipe Siegert Schuch (blocking order against Facebook).

Justiça Eleitoral. (2012c, August 11). Ação Cautelar no. 86-37.2012.6.24.0013, 13ª Vara Eleitoral, judge Luiz Felipe Siegert Schuch (reconsideration of order suspending the block on Facebook).

Justiça Eleitoral. (2016a, September 19). Representação no. 0000141-28.2016.6.24.0019, 19ª Vara Eleitoral, judge Renato L. C. Roberge (content takedown order).

Justiça Eleitoral. (2016b, October 5). Representação no. 0000141-28.2016.6.24.0019, 19ª Vara Eleitoral, judge Renato L. C. Roberge (blocking order against Facebook).

Justiça Estadual do Espírito Santo. (2014, August 19). Processo nº 0028553-98.2014.8.08.0024, 5ª Vara Cível de Vitória, judge Paulo César de Carvalho (blocking order against Secret).

Justiça Estadual do Rio de Janeiro. (2016, July 17). Inquérito Policial 062-00164/2016, 2ª Vara Criminal de Duque de Caxias, judge Daniela Barbosa Assumpção de Souza, July 17, 2016 (blocking order against WhatsApp).

Justiça Estadual de São Paulo. (2016, December 6). Processo de Interceptação Telefônica n. 0017520-08.2015.8.26.0564, 1ª Vara Criminal de São Bernardo do Campo, judge Sandra Regina Nostre Marques (blocking order against WhatsApp).

Justiça Estadual de Sergipe (2016, April 26). Processo n. 201655090143, Vara Criminal da Comarca de Lagarto, judge Marcel Maia Montalvão (blocking order against WhatsApp)

Tribunal de Justiça do Espírito Santo. (2015, July 2015). Agravo de Instrumento no. 003518628.2014.8.08.0024, rapporteur Robson Luiz Albanez, July 21<sup>st</sup> 2015 (Secret).

Tribunal de Justiça do Piauí. (2015, February 26). Mandado de Segurança n. 2015.0001.001592-4, rapporteur Desembargador Raimundo Nonato Costa Alencar (order suspending ban on WhatsApp).

Tribunal de Justiça de São Paulo. (2015, December 17). Mandado de Segurança n. 2271462-77.2015.8.26.0000, rapporteur Xavier de Souza (order suspending ban on WhatsApp).

Tribunal de Justiça de Sergipe (2016, May 3). Mandado de Segurança n. 201600110899,

rapporteur Ricardo Múcio Santana de Abreu Lima (order suspending ban on WhatsApp).

Tribunal Regional Eleitoral. (2016, October 26). Recurso Eleitoral no. 0000141-28.2016.6.24.0019, judge Antonio do Rego Monteiro Rocha (order suspending the block on Facebook).

Supremo Tribunal Federal. (2016, July 17). Medida Cautelar na ADPF 403, justice Ricardo Lewandowski (order suspending ban on WhatsApp).

## FOOTNOTES

1. Conceptually, blocking and filtering practices can be broken down to at least three different phenomena: (a) content removal or filtering; (b) shutdown or total restriction of an internet application; and (c) complete network shutdown. These measures can be implemented through cooperation with several players: (a) transportation intermediaries (e.g., backbone providers, access providers, hosting services); (b) information intermediaries (e.g., search engines and app store holders), (c) financial intermediaries (e.g., credit card companies); (d) membership and domain names registrars; and (e) platforms. See Goldsmith & Wu, 2006, p. 72. For technical methods of implementation at the infrastructure level, see Hall, 2016. □

2. Art. 461, §5º In order to carry out specific protection or to obtain the equivalent practical result, the judge may, on his own initiative or upon request, determine the necessary measures, such as the imposition of a fine for delay, search and seizure, the removal of persons and things, the dismantling of works and the prevention of harmful activity, if necessary with support of police force. □

3. Art. 53. Instant cuts or any type of prior censorship shall not be allowed in free electoral programmes. // § 1 Advertising that may degrade or ridicule candidates is prohibited; the offender party or coalition shall lose the right to advertise in the free election hours on the following day. // § 2. Without prejudice to the provisions of the preceding paragraph, at the request of a party, coalition or candidate, the Electoral Justice shall prevent the re-presentation of advertising that is offensive to the candidate's honour, to morality, and to good manners (original in Portuguese). □

4. Art. 57-I. Upon a candidate party or coalition's request and in attention to art. 96, the Electoral Court may order the suspension, for twenty-four hours, of access to all informational content of the websites that fail to comply with the provisions of this Act. // § 1 Each reiteration of conduct will double the period of suspension. // § 2 In the period of suspension referred to in this article, the company will inform all users attempting to access its services that it is temporarily inaccessible due to failure to comply with the electoral law (original in Portuguese). □

5. Microsoft was ordered to remove and delete Secret's equivalent app, called 'Cryptic'. □

6. Art. 5, section IV – the expression of thought is free, and anonymity is forbidden (original in Portuguese). □

7. There are no statistics available on how many Brazilian users were affected by the measure. Some suggest the app had hundreds of thousands of users, especially kids and teenagers. □

8. Art. 12. Without prejudice to any other civil, criminal, or administrative sanctions, the infringement of the rules set forth in arts. 10 and 11 above are subject, on a case-by-case basis,

*to the following sanctions, applied individually or cumulatively: I – a warning, which shall establish a deadline for the adoption of corrective measures; II – fine of up to 10% (ten percent) of the gross income of the economic group in Brazil in the last fiscal year, taxes excluded, considering the economic condition of the infringer, the principle of proportionality between the gravity of the conduct, and the size of the sanction; III – the temporary suspension of the activities that entail the acts set forth in art. 11; or IV – prohibition to execute the activities that entail the acts set forth in art. 11. Sole paragraph. In case of a foreign company, the subsidiary, branch, office or establishment located in the country will be held jointly liable for the payment of the fine set forth in the main section of art. 12. □*