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PUBLIC AGENTS IN SOCIAL MEDIA REGULATION: THE BRAZILIAN CASE IN A COMPARATIVE PERSPECTIVE

Abstract

The use of social media by public agents, including politicians, is an ordinary practice throughout countries, part of the daily life of the public administration and States are currently dealing with the challenge of social media regulation. This article aims to show how social media has become a government toll throughout the years and how public agents and institutions are using this mechanism as part of the administrative routine. One of the key points is that the use of social media by governments is part of the movement to transform transparency and publicity, both from an internal point of view and for the public arena's engagement in social participation.

Based on this, the article presents the results of a research conducted to identify if social media regulation is dealing with this scenario. In Brazil, the issue of social media use in the public sector is relevant because the country has approximately 9 million public agents, and around 242 million smartphone users. Brazilian politicians have personal accounts with loads of followers. A general social media regulation in the country is being drafted – while Courts deals with content control and blocking cases.

This article analyses how rules and regulations are assessing the matter, specifically if its text includes provisions for public agents or public institutions. The main goal is to identify whether there is a differentiation by the rules on the author of the content or content sharing. It investigates if there are differences on how regulations handle public and private persons. The comparative research was conducted in 8 countries and in the European Union sphere and has identified two models regarding social media regulation design. The results were compared to the Brazilian case, which presented some particularities in a comparative perspective. The research adopted the concept of regulation in an extended way.

In the conclusion, a roadmap for regulators in Brazil is proposed, with three elements to be considered when drafting a social media regulation. The roadmap intends to provide guidance for regulators when dealing with the challenge of regulating social media, considering the importance of properly identifying its subject.

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SUMMARY

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1 Introduction

On January 6, 2021, the Capitol in Washington, USA, was invaded by supporters of former President Donald Trump, driven by false claims that there had been electoral fraud in the election of Joe Biden – the “Rally to Save America”¹ episode. The movement was the result of a series of posts on the former President’s personal account on Twitter, who was suspended from the network. To circumvent the suspension, Trump used an official account of the presidency to go against Twitter, claiming a violation of his freedom of speech. It resulted in the definitive banning of Trump.

In Brazil, the story is not different. Since the 2018 elections, when there has been a large movement of fake news and social media engagement for electoral purposes, the use of social media by politicians has been consolidated.

There are 242 million smartphones in use in Brazil, an average of more than 1 per inhabitant, as calculated in 2021.² On the spectrum of social media, there are around 127 million active users on the *Facebook* in the country, and it is estimated that by 2025 more than 72% of the population will be active in the social network.³ These data are a sample of the potential for capillarity and relevance of digital media for State-Society interaction.

Social media has become the central tool for coordinating political movements around the world,⁴ whether from liberal or authoritarian governments. Under the guise of the protection of freedom of speech, there are government demands from different fronts against content restrictions by providers.⁵

¹ Dan Barry, Mike McIntire and Matthew Rosenberg, “Our President Wants Us Here’: The Mob That Stormed the Capitol’ (*The New York Times*, 9 January 2021) <<https://www.nytimes.com/2021/01/09/us/capitol-rioters.html>> accessed 15 July 2022.

² See data by Fernando de Souza Meirelles, ‘Pesquisa Anual do Uso de TI’ (FGV EAESP, May 2022) <<https://eaesp.fgv.br/producao-intelectual/pesquisa-anual-uso-ti>> accessed 6 December 2021.

³ See data available on the website Statista, Stacy Jo Dixon, ‘Leading countries based on Facebook audience size as of January 2022’ (*Statista*, 15 July 2022) <<https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/>> accessed 25 July 2022.

⁴ Clay Shirky, ‘The Political Power of Social Media: Technology, the Public Sphere and Political Change’ *Foreign Affairs* (New York, January/February 2011) 28, 30.

⁵ *ibid* 32: ‘Despite this basic truth - that communicative freedom is good for political freedom - the instrumental mode of internet statecraft is still problematic. [...] Dissidents can be exposed by the unintended effects of novel tools. A government’s demands for Internet freedom abroad can vary from country to country, depending on the importance of the relationship, leading to cynicism about its motives’.

The complexity of the issue invites us to analyse the subject of the regulation, considering that social media platforms are usually provided by private actors, and, at the same time, the use of those networks is widely spread for public and private parties.

This article aims to present an overview current scenario of how public agents are addressed in social media regulation,⁶ with special focus on the Brazilian case and considering social media as a government tool. As for the research methodology, the definition of *public agent* adopted includes civil servants and political agents (including politicians and public agents or political staff such as Ministries, State Secretaries, among others).⁷

Through a literature review on the topic, it was possible to conclude that (i) social media regulation seems to be a relevant topic for legal scholars, under the lens of public and private law; (ii) most of the findings were related to free speech or freedom of information themes and if a private party could promote content regulation or restrictions; and (iii) a legal analysis of how social media regulation is handling or intends to handle the public agents' behaviour was not found.

Based on this review, it was relevant to conduct research on selected rules and regulation, in force or under construction, to investigate if there are special rules for public agents' behaviour in social media regulation or if regulation handles equally content sharing, regardless of who is the author.

In addition to this introduction, this paper has four paragraphs. First, it is briefly presented and justified how social media became a government tool, as a mean of fostering transparency and a new way for States to relate with their civil society. Second, the main results of the regulation research are presented, focused on the legal models found. Third, the Brazilian case is described, considering the research scenario of the previous topic. The conclusion, then, presents a roadmap for Brazilian regulators encompassing parameters for social media regulation.

2 The use of social media as a government tool

In the book *The Structural Transformation of the Public Sphere*, Habermas describes the movement of expansion of the public sphere, with the evolution of the press and advertising. The author explains that the political use of advertisements became a new

⁶ This work adopts the concept of regulation in an extended way. By way of example: '[the] regulation is broadly defined, referring to the diverse set of instruments by which governments establish requirements for companies and citizens. Regulations include laws, formal and informal rules and subordinate rules issued at all levels of government, as well as rules issued by non-governmental or self-regulated bodies to which governments have delegated regulatory powers' (OECD, *Council Recommendation on Regulatory Policy and Governance* (OECD Publishing 2012)).

⁷ It does not include public persons, such as influencers, celebrities, technical experts or others.

mode of political action.⁸ This movement gave a new final meaning to the publicity principle, through the consolidation of a new apparatus, "which meets the new need and publicity of the State and federations."⁹

Habermas reflects on the unexpected effects of advertising on political action and how this has become crucial as a mechanism of political pressure¹⁰ that requires the State itself to rethink its structures.¹¹ This ideal was reinforced by other authors as a precursor of the possibility of citizen engagement by the State in the democratic context.¹²

The use of social media by governments is part of the movement to transform transparency and publicity, both from an internal point of view and for the public arena's engagement in social participation. As for the government structure, the current scenario is part of the incorporation of social media to the administration tools, as an element of the digital government strategies.

In 2014, the Organisation for Economic Co-operation and Development (OECD) published a document to discuss trends in the use of social media by governments.¹³ In Ecuador, the United Kingdom and Chile, for example, 4% of the population follow the most popular institutional accounts on Twitter.¹⁴ If, at the time of the survey, half of the OECD countries¹⁵ had expectations of creating a strategy for the use of social media for government purposes, it is possible that this number has increased in recent years.

The moment of change driven by digital government, heated during the Covid-19 pandemic, could mean an opportunity to rethink and redesign administrative structures, their processes, and actions.¹⁶ The fact is that Social media has become part of the administrative toolbox for Governments.

The World Bank, in the release of the latest report of the *ranking* of digital government ("GovTech")¹⁷ stressed that although investments are growing, they are still

⁸ Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Thomas Burger tr, MIT Press 1962) 408 and 414.

⁹ *ibid* 420.

¹⁰ *ibid* 429.

¹¹ Habermas (n 8) 443.

¹² Shirky (n 4) 32.

¹³ Arthur Mickoleit, 'Social Media Use by Governments: A Policy Primer to Discuss Trends, Identify Policy Opportunities and Guide Decision Makers' OECD Working Papers on Public Governance No. 26 (OECD, 22 December 2014) <<https://www.oecd-ilibrary.org/docserver/5jxrcmghmk0s-en.pdf?expires=1658706113&id=id&accname=guest&checksum=23F6043CB5EE25E036B83E1F0C50B28D>> accessed 25 July 2022.

¹⁴ *ibid* 2.

¹⁵ *ibid* 14.

¹⁶ Bouchaïb Bounabat, 'From e-government to digital government: stakes and evolution models', (2017) 10 EJIT 1, 12.

¹⁷ Cem Dener, Hubert Nii-Aponsah, Love E. Ghunney and Kimberly D. Johns, GovTech Maturity Index: The State of Public Sector Digital Transformation (World Bank, 2021).

The World Bank, in the release of the latest report of the *ranking* of digital government (“GovTech”)¹⁷ stressed that although investments are growing, they are still below expectations.¹⁸ The report expressly mentions the use of social media by the public sector as a way of increasing State-citizen communication,¹⁹ despite not bringing data on the degree of regulation in this area of the countries evaluated.

One of the problems of digital government in Brazil is the overlapping of regulatory frameworks on the subject. Excessive regulation does not necessarily generate more effectiveness - in practice, the effect tends to be the opposite. And, at the same time, there is a regulatory gap for topics such as social media regulation that could ordinate its use by the government.

The potential of digital government must consider several challenges – one of them being the difficulty of creating adequate regulatory frameworks, not curbing innovation, but, at the same time, protecting guarantees in the digital universe. Regulatory frameworks should be useful in this context to: (i) ensure legal certainty; (ii) promote efficiency in the use of digital instruments by the public sector; and (iii) structure mechanisms for coordination between the public and private sectors, given the difficulty of drafting standards in a technically complex field.

These three points aim to establish a regulatory environment for knowledge reducing asymmetries. The environment must be built continuously and gradually, in the achievement of defined goals.²⁰

Clear, well-defined rules and adequate monitoring systems are needed for a quality regulation, which serves as an instrument for the development of public policies.²¹ It is also important to incorporate relevant local and organisational aspects into regulation, considering there is no single model for government strategy around the use of social media.²²

How public agents are addressed in social media regulation

¹⁷ Cem Dener, Hubert Nii-Aponsah, Love E. Ghunney and Kimberly D. Johns, *GovTech Maturity Index: The State of Public Sector Digital Transformation* (World Bank, 2021).

¹⁸ *ibid* 92.

¹⁹ *ibid* 45.

²⁰ Diogo R. Coutinho and Pedro S.B. Mouallem, ‘*O Direito Contra a Inovação? A persistência dos gargalos jurídicos à inovação no Brasil*’ in Helena Lastres, José Eduardo Cassiolato, Gabriela Laplane and Fernando Sarti (eds), *O futuro do Desenvolvimento: ensaios em homenagem a Luciano Coutinho* (Unicamp 2016) 193, 197.

²¹ OECD, *The Governance of Regulators* (OECD Best Practice Principles for Regulatory Policy, OECD Publishing 2014).

²² Cf Mickoleit (n 13) 3: ‘Social media have the potential to make policy processes more inclusive and thereby rebuild some confidence between governments and citizens. But there are no “one size fits all” approaches and government strategies need to seriously consider context and demand factors to be effective”’.

Considering social media as a government tool, the current challenge is to how to design a proper regulation for the use of social media by public agents and institutions, in the State structure. As defined in the introduction, part of the effort regarding this challenge must respond to the question on how social media regulation addresses public agents' behaviour.

In this topic, regulation research was conducted to seek how some countries are providing for public agents' behaviour in their own legal order. For the analysis, two parameters were considered: what is the nature of the regulation (e.g., formal rule or bill, soft law, regulatory agency rule or other type); and if the regulation differentiates its' application by considering who is the author of the content (if it is a private person or a public agent or a public institution/entity/body).

The selection in the analysis included the European Union and eight countries: (i) Brazil, as it is the central jurisdiction of this study; (ii) European Union, due to its high developed discussion in the subject of data protection/privacy and its multilateral character; (iii) Germany, for having a regulation focused on networks already consolidated since 2018 and used as a reference for other proposals; (iv) United Kingdom, due to the fact that its proposal is currently considered broad and paradigmatic on the subject by specialists; (v) Australia, which has an advanced proposal in progress; (vi) China, for having a social media regulation block and being a peculiar case in the regulatory arrangement of the subject; (vii) Nigeria, as it is a restrictive and relevant experience in Africa, whose network regulation is not yet widely developed; (viii) United States, for the option of not assigning the State responsibility for regulation and opting for the self-regulation of platforms; (ix) Colombia, as it is, in Latin America, the country with the most interventionist proposal, from the point of view of creating a formal legal relationship between the State and Providers for the responsibilities regarding content control.

The results led to the conclusion that social media regulation is handled by two legal models governing the matter in the jurisdictions: (i) a normative model, which do not have specific provisions for public agents, but not differentiating content sharing from public and private parties, and (ii) a non-normative model, in which was possible to identify specific reference to public agents' behaviour. Those models are presented in the following topics.

It is important to note that the relevant finding of the research was not the existence of two models, which is quite common in regulation designs, but that normative and, so, binding models do not differ the subject element for the purpose of defining who is entitled to the regulation and at what level. The Brazilian case will be presented in paragraph 4.

2.1 The normative model

The first model is focused on the normative regulation of the activity of digital services and places platforms, providers, and applications as their regulated subject, in greater or lesser scope depending on the jurisdiction. Normative is understood as the traditional regulation, whether a command-and-control type or more flexible models, but always grounded on a binding rule.²³

For this normative model, differentiations between public and private persons, as content authors, were not found in the European Union or in any of the countries part of the research. Regulation is focused on the content control by the providers and platforms, but not with who is their author.

In the European Union and its institutions, the proposal for the *Digital Services Act*²⁴ scope is wider than social media. In the preamble to the proposal, social networks are just part of the broader core of information services. The proposal is part of a package, which includes the *Digital Markets Act*, aimed at containing unfair competition from platforms.²⁵ The regulation turns against the concentration and closing of the platform market, with a view to increasing the sector's efficiency. Also, no reference to the author as part of the content control parameter is made.

For other countries in Europe, regulation scope may vary, but do not consider, again, the subject part of the issue. Germany approved the *Network Enforcement Act* (*Netzwerkdurchsetzungsgesetz*), in force since 2017, which is intended to fix the limit of social media accountability against the spread of hate crime and the spread of *fake news*.²⁶ The Act applies to media service providers that, for profit, operate internet platforms designed to allow users to share any content with other users or make it available to the public (which would be social media).²⁷ The regulation came to contain the spread of *hate speech* and criminal content on the internet in Germany.²⁸ In June 2021, the Act was amended²⁹ to improve the procedure for users regarding the removal of content, so that it is clear and transparent, allowing an appeal right to a higher instance.

²³ Glen Hepburn, *Alternatives to Traditional Regulation* (2018) OECD Regulatory Policy Report, 4 <<https://www.oecd.org/gov/regulatory-policy/42245468.pdf>> accessed 25 July 2022.

²⁴ European Commission [2020] Proposal 2020/0361 (COD).

²⁵ European Commission [2020] Proposal 2020/0374 (COD).

²⁶ Bundesministerium der Justiz und für Verbraucherschutz, *Act to Improve Enforcement of the Law in Social Networks* 2017.

²⁷ The following are excluded from the scope of the Act: (i) journalistic or editorial content platforms, the responsibility of which lies with the service provider itself; and (ii) platforms that are designed to allow individual communication or dissemination of specific content.

²⁸ Amélie Heldt, 'Germany is amending its online speech act NetzDG... but not only that' (*Policy Review*, 6 April 2020) <<https://policyreview.info/articles/news/germany-amending-its-online-speech-act-netzdg-not-only/1464>> accessed 4 December 2021.

²⁹ Act to Amend the Network Enforcement Act 2021.

of content, so that it is clear and transparent, allowing an appeal right to a higher instance.

In the UK, the proposed *Online Safety Bill* is being discussed and aims to repress harmful content in the digital environment. The problem that the Bill sought to solve, according to the Impact Assessment Report, is the lack of transparency for consumers regarding potential harm in the digital environment and to enable them to adopt more informed choices. The Bill is justified by the need for state intervention to ensure compliance with laws to mitigate the damage scenario.

The Bill focuses on two digital service types: user-to-user services and search services. The first type is considered an internet service through which content is generated/shared by a user, making it accessible to other users. This scope also covers content forwarding - which attracts instant messaging services to regulation. The second type covers platforms with search services in a broad way.

The proposal is consistent with the UK's record of protecting privacy and inherent rights of the personality, weighing them against the right to freedom of speech.³⁰ This differs from the US case, in which freedom of speech, as a fundamental right, is protected almost in an absolute way by the Supreme Court.

This structure focused on a rule or binding regulation, providing standards for content control will be the same in other continents.

In Australia, regulation is also in progress, for drafting standards for content remove, in the form of an amendment to the Privacy Act (Regulating in the digital age - Report. 2019).³¹ The standard will aim at "OP" organizations (*Organizations providing social media services*), defined as those that are providers of online services.

The creation of a monitoring and inspection entity is expected (*Digital Platforms Ombudsman*), whose competence would encompass solving conflicts between users and platforms.³² It should be noted that the Competition and Consumer Commission of Australia - ACCC is currently active in monitoring and controlling the services provided by digital platforms, not just social networks, but search engines and others.³³

³⁰ Alexandra Paslawasky, 'The Growth of Social Media Norms and the Governments' Attempts at Regulation' (2017) 35 *Fordham Int'l L.J.* 1485, 1501.

³¹ The Draft Bill aims to protect consumers, from the point of view of their privacy on social networks, considering the increase in the use of platforms in recent years.

³² 'The Government will develop a pilot external dispute resolution scheme, the outcomes of which will inform whether to establish a Digital Platforms Ombudsman to resolve complaints and disputes between digital platforms and individual consumers and small businesses using their services': Australian Government, 'Regulating in the digital age' (2019) 7 <https://www.aph.gov.au/-/media/Estimates/ec/add1920/Tabled_documents/Tabled_Doc10.pdf?la=en&hash=25B37672EA2225DAB544A15B3C67EE9FD7C2E14E> accessed 9 December 2021.

³³ As per reports made available by the Australian Government: Australian Competition & Consumer Commission, Digital platform services inquiry 2020-2025 <<https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-2025>> accessed 9 December 2021.

In Asia, China has a particular example, as its' model differs from the others as the countries rules and regulations impose restrictions on free competition and the use of private capital, with the service of social networks being offered by domestic platforms, controlled by the regulator,³⁴ called the *Cyberspace Administration of China* (CAC). Chinese regulations differ in their object regarding the scope of control, with a dozen standards in force.³⁵ There is a regulation of platforms in general, focused on controlling the content of comments, groups, technological security assessment of applications and technologies, and official profiles on platforms. Others focus on specific types such as instant messaging apps (which in China is WeChat, equivalent to WhatsApp), applications that aggregate news, streaming, among others.

As for Africa, Nigeria is a country with a relevant number of internet users, who progressively become politically active, especially after 2014.³⁶ In regulatory terms, there is not a regulation specifically approved for social media, only the Cyber Crimes Law of 2015.³⁷ A 2019 Bill is currently under discussion in the Nigerian Senate (*The Protection from Internet Falsehood and Manipulation Bill*), focused on repressing user behaviours that are harmful to national security, health, finances and that may negatively influence elections (Senate Bill n. 32). The Bill is aimed at users and intermediaries and is of a criminal nature, with a provision for fines and a prison sentence of up to three years.³⁸ Responsibilities are foreseen for both the authors of the content and for the intermediaries in the sense of the duty to repress conduct prohibited by the standard.

This is not the first attempt to regulate social networks in Nigeria, but, according to the news, there is resistance as to the model to be adopted. In 2021, the Government banned the *twitter* to operate in Nigeria,³⁹ after the network deletes a post from the President Muhammadu Buhari for violating the rules on abusive language. The ban lasted for months, until the network reached an agreement with the Government.⁴⁰ After the episode, the expectation of regulation of the subject in the country remains.

³⁴ Jufang Wang, 'Regulation of Digital Media Platforms: The case of China' (The Foundation for Law, Justice and Society, in association with the Centre for Socio-Legal Studies and Wolfson College, University of Oxford, 30 June 2020), 2.

³⁵ 'The fact that more than a dozen sets of regulations concerning platforms have been issued in such a short period demonstrates not only China's changing policies regarding its Internet regulatory framework, but also the concerns of the party-state about the increasing impact of platforms on its own control of information': Wang (n 35) 3.

³⁶ Mohammed Abdullateef, 'Regulating social media in Nigeria: A quantitative perception study' (2021) 2 Nile Journal of Political Science 52, 55-6.

³⁷ *ibid* 59.

³⁸ *ibid* 63.

³⁹ BBC, 'Viewpoint: Why Twitter got it wrong in Nigeria' (BBC, 14 August 2021) <<https://www.bbc.com/news/world-africa-58175708>> accessed 7 December 2021.

⁴⁰ Helen Nyambura, 'Nigeria Lifts Twitter Ban With Limits After Four-Month Sanction' (Bloomberg, 1 October 2021) <<https://www.bloomberg.com/news/articles/2021-10-01/nigerian-president-announces->

lasted for months, until the network reached an agreement with the Government.⁴⁰ After the episode, the expectation of regulation of the subject in the country remains.

Moving the lens to North America, the orientation in the United States, especially based on the First and Fourth Amendments, is around the almost absolute protection of freedom of expression, favouring self-regulation without broad parameters defined by the Administration.⁴¹ The jurisprudence in the country is in the sense that restrictions established by the public power can be valid, if they are not based on the content of the speech, are related to governmental interests, and leave open alternative paths for communication.⁴²

However, for restrictions from private entities, the First Amendment would not apply. Based on the case law precedent *Christopher Langdon v. Google Inc., et al.*,⁴³ decided in 2007, when interpreting the First Amendment, the understanding was established that its protection is limited to government restrictions, but it does not cover removal of content of the private sector, for example.⁴⁴ To intermediaries (search providers, social media and related digital services), jurisprudence has given wide deference to decision making in this regard.⁴⁵

The doctrine confirms the option of non-state intervention. Bringing a historical perspective, with reference to cases and understandings about internet regulation in a broader way, the US Government must respect the original perspective that grounded internet existence since its conception: the open network principle. This means that it should privilege freedom, transparency, and openness, with a sceptical posture regarding the presence of the State in this area.⁴⁶

In South America, the Colombian case is recent. The House of Representatives Bill 176 of 2019 has the purpose “to establish general parameters and procedures for the use of social networks on the internet that allow users to be protected from harmful or potentially dangerous behaviour resulting from the abusive or inappropriate use of virtual social media”. The Colombian regulation proposal aims to regulate the use of networks from the perspective of the user, whether an individual or a legal entity and

⁴⁰ Helen Nyambura, ‘Nigeria Lifts Twitter Ban With Limits After Four-Month Sanction’ (*Bloomberg*, 1 October 2021) <<https://www.bloomberg.com/news/articles/2021-10-01/nigerian-president-announces-conditional-lifting-of-twitter-ban>> accessed 7 December 2021.

⁴¹ Shirky (n 4) 41.

⁴² Paslawasky (n 30) 1495.

⁴³ *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631-2 (D. Del. 2007) (a search engine is neither a state actor nor a public forum). The case was about an individual who was denied advertising by Google because of its content.

⁴⁴ Paslawasky (n 30) 1495.

⁴⁵ *ibid* 1497.

⁴⁶ *ibid* 1539.

the regulatory focus is on user safety, with only partial State control, observing freedom of speech.⁴⁷

The main mechanism is the signing of agreements between the Government and technology companies. Article 13 of the proposal attributes to the Ministry of Technology and Information and the Superintendence of Industry and Commerce the duty to “sign up agreements or codes of conduct with *Facebook, Twitter, YouTube, Google* and other social media or digital platforms that arise”. Under the agreements, the companies assume a formal responsibility towards the State, in the adoption of control mechanisms for publications, comments and content spread.⁴⁸

For all the above mentioned cases, there was not a special and express concern with who is sharing the content. The focus of the regulatory scope is how providers of social media may or may not conduct content control as well as what are the limits for restricting content without harming free speech right. In all cases, formal rules and regulations, issued by the Congress or Parliament or the Executive Branch grounded or will ground its terms. As this first step of the research did not indicate a differentiation regarding the author, the research moved to a second stage, aiming for soft law and complimentary regulation.

2.2 The non-normative model

The second stage of this research concluded that, in the non-normative (soft law or alternative regulation) model, based on guidelines or rule interpretation documents, specific orientation for public agents or public institutions active in social media were found. However, this second model does not refer to providers, but to public agents (or public institutions), in a way of controlling their behaviour. Their content seems not to deal directly with the main aspects of regulating agents' or institutions' use of social media.

The research findings included guidelines for the performance of public functions, such codes of ethics, and includes orientation on the use of media by public agents themselves (individuals) or even institutionally (which encompasses profiles of bodies and entities, for example). More specifically, those documents bring light to the limitations that public agents may have in using social media while working in the public sector.

⁴⁷ Diana Camila Caro Martínez, ‘Análisis del proyecto de ley 176 del 2019: regulación de uso de redes sociales para evitar conductas lesivas que vulneren los derechos constitucionales de las personas’, [2020] *Iter ad Veritatem* 19.

⁴⁸ The Colombian Chamber of Informatics and Telecommunications signalled the risks of the project with regard to the possible mass surveillance and the inefficiency of content control.

As soft law, compliance with the recommendations is based on good faith and the idea of mutual consent, typical of international agreements.⁴⁹ Soft law models, in terms of justification of use by public law, are attached to the concept of public governance and the paradigm shift of Public Administration management. OECD recommends that member countries, for example, assess whether the choice of the regulatory model (normative or non-normative) is consistent with the objectives of the standard and that the effects be evaluated to design responsive implementation strategies.⁵⁰

In public law, there are three elements that are linked to the soft law use:⁵¹ (i) regulation via soft law it aims to create a standard of compliance, whose non-compliance would not imply a specific legal response; (ii) to soft law it must be adopted by the competent government, both in territorial and material terms; and (iii) there may be different levels of effects, depending on the way in which the preparation and incorporation of the soft law in the legal order.

For social media, the traditional conduct rules in the provision of public services proved to be insufficient to adapt agents to the reality. Several governments used experimental strategies to deal with the issue and started to adopt guidelines to alleviate uncertainty about how to use these new instruments.⁵²

Regarding the countries that were part of the research, it was identified that Australia (Australia Government Department of Social Services. Social Media Policy and guidance for making public comment online, January 2020), Colombia (*Republica de Colombia, Presidencia. Circular 01*, March 2019), United States (Hatch Act Guidance on Social Media of the U.S. Office of Special Counsel), Nigeria (Nigeria Communications Commission. Technical Framework for the Use of Social Media Network in Nigeria. June, 2019) and United Kingdom⁵³ have guidelines on the use of social media, applying laws and rules aimed at public agents. The nature of such documents is not uniform, both in terms of model and issuing authority, but none of them has a normative

⁴⁹ Fernando da Silva Gregório, 'Consequências sistêmicas da soft law para a evolução do Direito Internacional e o reforço da regulação global' [2016] *Revista de Direito Constitucional e Internacional* 299.

⁵⁰ OECD (n 6).

⁵¹ Daniel Sarmiento, 'La autoridad del derecho y la naturaleza del soft law' [2006] *Cuadernos de derecho público* 221.

⁵² Ines Mergel, 'A Framework for Interpreting Social Media Interactions in the Public Sector' (2013) 30 *Government Information Quarterly* 327, 329.

⁵³ In the UK, government bodies and entities have their own guidelines for their networks and profiles. By way of example, see HM Revenue and Custom, 'UK Social media use - Why and how HM Revenue and Customs uses social media, what we expect from you and what you can expect from us' (*Gov.uk*) <<https://www.gov.uk/government/organisations/hm-revenue-customs/about/social-media-use>> accessed 11 December 2021.

character. There was no indication that those documents went through a collegiate or similar deliberative or rulemaking procedure.⁵⁴

The research had no relevant results in China, possibly because the Chinese model is premised on state ownership of the platforms. There were also no results for the case of Germany,⁵⁵ although the use of social media is a reality within the Federal Government. For the European Union, regulation and/or guidance, in this area, is applicable to each member state.

3 The current scenario of social media regulation in Brazil

Brazil is a federal State, in which public service – broadly considered – is performed by career civil servants, approved in entrance examinations, or by temporary workers, politicians and hired appointed professionals for certain vacancies. There are specific rules applicable to each career and considering the federal state level, whether federal, regional, or local. According to the Brazilian Atlas of Public Administration, there are more than 9,5 million public agents (not including politicians) in the country,⁵⁶ which corresponds to 4,5% of Brazilian population (212 million, approx.).

A profile in social media is considered, in Brazil, as a digital property, by Ordinance 540/2020 of the Federal Government (Article 3, II). Social networks are digital social structures composed of natural or legal persons connected by one or more types of relationships (Article 3, XII). The Internet Bill of Rights (Law 12,965/2014) does not provide a specific definition for social networks, but only for the expression "internet applications", which would be the set of features that can be accessed through a terminal connected to the internet (Article 5, VII).

As will be shown in the following paragraphs, the Brazilian case is different from the other jurisdictions analysed in the research. Considering the numbers of the administrative structure of the country in addition to the intense use of social media by public agents and institutions, legislators and regulators are aware of the need of drafting specific rules considering this scenario. It will be presented that duties for both public agents and institutions and platforms are provided for in the Bill that is being analysed by the Congress. Also, soft law plays an important role to the issue.

⁵⁴ The research focused on regulations of a general nature referring to the performance of public agents and/or public servants, without entering into specific careers.

⁵⁵ Examples of use by public institutions were found in Mickoleit (n 13) and in the paper by Cigdem Akkaya, Jane Fedorowicz and Helmut Krcmar, 'Use of Social Media by the German police: The case of Munich' in Various Authors *dg.o '18: Proceedings of the 19th Annual International Conference on Digital Government Research: Governance in the Data Age* (Association for Computing Machinery 2018).

⁵⁶ Official Data from IPEA (*Instituto de Pesquisa Econômica Aplicada*), available at <<https://www.ipea.gov.br/atlasestado/>> accessed 25 July 2022.

3.1 The Brazilian particular case

The normative model

Referring to normative models, Brazil has specific legislation applicable to elections when dealing with social media regulation. Electoral Rule 23,610/2019 regulates campaign advertising and includes rules for its use over the internet, regulating the Elections Statute, which, since the amendment by Law 12,891/2013,⁵⁷ also deals with online content removal.

In the electoral rule, social media is the “social structure composed of people or organisations, connected by one or several types of relationships, which share common values and objectives” (Article 37, XV). These differ conceptually from instant messaging applications, defined as the “multiplatform instant messaging and voice calling application for smartphones” (Article 37, XVI).

Besides the specific rule for the electoral sphere, there was, in 2021, an unsuccessful attempt to regulate the use of social media in Brazil through Provisional Measure 1,068/2021. Six unconstitutionality challenges were proposed against the rule,⁵⁸ by different political parties, with arguments linked to the free market and undue intervention in social media platforms, as well as the inadequacy of the Presidential Provisional Measure as an appropriate way to regulate the matter.

The National Congress rejected the rule, supported by the Brazilian Bar Association and the State Attorney General's Office, understanding that it generated legal uncertainty. National Congress considered that the topic is highly complex, and is already being addressed in the Bill 2,630/2020,⁵⁹ that establishes the Brazilian Law on Freedom, Responsibility and Transparency on the Internet.

The Bill focuses on providers of social networks, search tools and instant messaging, in the form of a legal entity, “*that offer services to the Brazilian public and carry out activities in an organised, professional and economic manner, whose number of registered users in the country is greater than 10,000,000 (ten million), including providers whose activities are carried out by a legal entity headquartered abroad*” (Article 2). The proposal

⁵⁷ Article 57-D. The expression of thought is free, with anonymity prohibited during the electoral campaign, through the world wide web - internet, the right of reply is guaranteed, pursuant to sub-paragraphs a, b and c of item IV of Paragraph 3 of article 58 and 58-A, and by other means of interpersonal communication through electronic message. [...] Paragraph 3 Without prejudice to the civil and criminal sanctions applicable to the person responsible, the Electoral Court may determine, at the request of the victim, the removal of publications that contain attacks or attacks on candidates on websites, including social networks.

⁵⁸ Cases filed before the Brazilian Supreme Court by six different parties: PDT (ADI 6996), New Party (ADI 6995), PT (ADI 6994), PSDB (ADI 6993), Solidarity (ADI 6992) and PSB (ADI 6991).

⁵⁹ In Portuguese: *Projeto de Lei n° 2630, de 2020 (Projeto de Lei das Fake News)*.

addresses transparency duties for providers, differentiating the types of providers, as well as defining general content control parameters.

However, there are provisions in Brazil that differ from the analysed countries in paragraph 3 of this paper. The Bill 2630/2020 has a specific chapter for the use of social media, search tools and instant messaging by public agents. Article 22 confers public interest on the accounts and profiles of politicians that holds elective mandates in any sphere; occupants of Public Administration positions in the Executive Branch (such as State Ministers, for example); judges and members of the Judiciary Branch; members of the Prosecution Office and members of the Armed Forces.

Among the obligations arising from this framework are the equalisation of communication through the general communication network, subjecting the agent to the principles of administration. There is also an express prohibition for any public agent or public institution on restricting users on any social media - blocking or preventing the viewing of publications - due to access to information.

On the providers' and platforms side, it will be possible to file a lawsuit in Courts, in case of abuse of power or illegality in intervening in the public interest profile. This is provided for in Article 22, paragraph 2, that brings to the Bill the necessary observance of fundamental rights and with the principles of legality, impersonality, morality, transparency, and efficiency.

The proposed standard is concerned with ensuring transparency and the forbiddance to use of public interest accounts/profiles for purposes that are contrary to the democratic rule of law. For content control, the use of public resources for advertising purposes is prohibited in two cases: I – committing crimes against the democratic rule of law, and II - discrimination and incitement to violence against a person or group, especially on account of their race, colour, ethnicity, gender, genetic characteristics, philosophical or religious beliefs, among other (Article 25).

There is a more interventionist restriction in the sole paragraph of Article 25, which prohibits the maintenance of public interest accounts in providers “that are not constituted in accordance with Brazilian law and with representation in the country”.

The legislative option of Article 25 considers the events that took place in the years 2020 and 2021, in which social networks were used to incite the closing of the Supreme Court and Congress either by public agents or private persons.⁶⁰ The other provisions are aimed at guaranteeing transparency in the resources used in institutional advertising on the Internet, which is currently covered by the rules in force related to the subject.

⁶⁰ Erick Mota, ‘Bolsonaristas ameaçam invadir STF e Congresso com apoio de militares da reserva’ (*Congresso em Foco*, 7 May 2020) <<https://congressoemfoco.uol.com.br/area/governo/bolsonaristas-ameacam-invadir-stf-e-congresso-com-apoio-de-militares-da-reserva/>> accessed 25 July 2021.

For public institutions, the Bill has also provided for a duty that the State should promote campaigns for public servants on the importance of combating misinformation and transparency of sponsored content on the internet.⁶¹

The Bill 2630/2020 is in the House of Representatives. On December 7, 2021, the Working Group created to analyse and improve the current draft approved the replacement base text-draft for the Bill. The expectation, at this moment, is that this draft will be submitted to the plenary of the House of Representatives for voting.

The non-normative model

Regarding administrative planning and organisation, at the federal level, the Special Secretariat for Social Communication published the “Guidelines for Social Media Use”, presenting the main instructions for the assertive and ethical use of social media by federal public agents that are part of public institutions. The document does not establish straight rules on prohibitions and control parameters for the public agents’ performance.

Good practices are defined, of general content, which must be observed by public agents at the federal level, such as (i) to avoid the posting of content that could cause damage to the institution in which it works; (ii) to check, before publishing any information, that the user is not in the institution's profile, if the agent has access to it; and (iii) to avoid public discussions.

The Federal Office of the Inspector General issued Technical Note 1.556/2020, which deals with the scope and content of Article 116, II⁶² and of Article 117, V,⁶³ both the Federal Civil Servants Statute (Law 8,112/1990). It aims to promote the fair adaptation of these provisions to the cases of misuse of digital services by Federal Agents. As an example, the conduct of disclosing, on social media, posts of indignation with superiors or co-workers or opinions contrary to the understanding of the house by the server would violate the duties of loyalty.

Two unconstitutionality challenges were filed against the Note before the Brazilian Supreme Court (ADI 6.499 and ADI 6.530). In both, the Supreme Court understood that, as the Note is not a primary normative act, the abstract review of constitutionality would not be applicable. In the monocratic decision handed down by Reporting-Justice Lewandowski in ADI 6,530, despite denying the case to be followed up, the Justice confirmed the inadequacy of the document’s content in view of a potential offence to

⁶¹ In Portuguese: Art. 27: ‘A União, os Estados, o Distrito Federal e os Municípios devem promover campanhas para servidores públicos sobre a importância do combate à desinformação e transparência de conteúdos patrocinados na internet’.

⁶² Article 116: ‘The duties of the server are: II - be loyal to the institutions it serves.’

⁶³ Article 117: ‘To the public servant it is prohibited: V - promoting expressions of appreciation or disapproval within the office.’

freedom of speech.⁶⁴

As for the electoral scope, there are prohibitions and restrictions on the use of social media during election periods, as provided for in Law 9,507/1997 and Supreme Electoral Court Rule 23,610/2019. About the use of institutional profiles on social media, article 73, VI, "b" of Law 9,504/1997 provides that posting any institutional publication is a conduct prohibited to public agents in the three months prior to the elections. In the case of the institutions' accounts, Electoral Courts case law⁶⁵ determines the removal of all posts from the timeline, including those made before the three-month period prior to the election.

Regarding the personal profiles of candidates who occupy elective positions, the Court authorises content posting with their political positions, by virtue of freedom of speech. However, there are limitations arising from the fact that they hold public office. According to Supreme Electoral Court case law,⁶⁶ personal posts that in any way demonstrate the use of the public machine or are derived from public resources are not allowed.

3.2 Brazilian supreme court: president Bolsonaro “blocking” cases

By searching the Supreme Court case law in Brazil with the term “social network” or “social media” on the official search website, only one case was found directly involving the subject that is related to this Article. The case involved the determination of a formal warning to a State Prosecutor from the Prosecution Office for the misuse of the service application WhatsApp.

In the understanding of the Reporting-Justice, the dissemination of messages in groups, without any request for confidentiality, entails the inherent risk of leaks.⁶⁷ The conduct of the public agent in the case involved broadcasting offences to other prosecutors in an audio posted as a group, which would violate the functional duties established in Prosecutors' Ethical Statute. The ruling considered that the Federal Prosecutor's behaviour was incompatible with its public duties. In the case, the Supreme Court did not differentiate private messages applications from other types of “open” social media – such as Twitter or Facebook.

Even though there is only one case formally included in the Supreme Court case law,

⁶⁴ Brazilian Supreme Court, Justice Decision on Case ADI #6,530 [2021] Plaintiff Brazilian Socialist Party - PSB. Reporting-Justice Ricardo Lewandowski, decided on 8 March 2021.

⁶⁵ Electoral Superior Court [2014] RESPE 0001490-19.2014.6.16.0000, Reporting-Justice João Otávio de Noronha, decided on 24 September 2015.

⁶⁶ Electoral Superior Court [2016] Interlocutory Appeal in RESPE 0001519-92.2016.6.13.0029, Reporting-Justice Luis Roberto Barroso, date of judgement April 23, 2019.

⁶⁷ Brazilian Supreme Court [2020] Writ of Mandamus #37.325. Reporting-Justice Rosa Weber.

there are two relevant ongoing cases awaiting the Supreme Court ruling regarding the use of social media by public agents: Constitutional Writ of Mandamus 37,132⁶⁸ and Constitutional Writ of Mandamus 38,097.⁶⁹

The first case was filed by a citizen, an attorney at law, who had his personal profile blocked from the account of the President of Jair Bolsonaro, in 2020, after posting a critical comment to the President on *Instagram*. The challenged act pointed at the initial brief was the blocking act itself. The petitioner alleges a violation of his freedom of speech, the principle of publicity and access to information as a mechanism for exercising citizenship. A President's profile has public interest and, therefore, should not restrict the views of citizens.

In the President's defence, both the private legal firm acting on his behalf and the Federal Attorney General's Office ("AGU") understood that this is a personal profile of the President and, therefore, there would be no public act embedded with public authority to be challenged before the Supreme Court. The Federal Prosecutors Office (PGR) understood in the same way – however, PGR had recognised that the President broadcasts, in his personal profile, information of public interest as well as official information.

The second case was filed by the Brazilian Association of Investigative Journalism (ABRAJI) against the blocking of 65 (sixty-five) journalists' Twitter accounts by President Jair Bolsonaro's official account. The journalists reinforced, in the same sense of the first case, the public interest nature of a President's profile in social networks, the right of access to information, and the seriousness of the situation considering that those who were blocked are journalists. AGU and PGR held the same arguments.

In the case dockets of both writs, the United States episode regarding Donald Trump's accounts on *Twitter* was mentioned. The case was ruled by the United States Court of Appeals for the Second Circuit in which the Court understood that there would be no way to distinguish a personal account from an institutional one. The reason is that for a person who is the country's President, the content provided naturally conveys information of public interest.⁷⁰

For the first case, a virtual ruling session of the Supreme Court was previously scheduled, but it was withdrawn from the agenda since December 11, 2020. The Reporting-Justice Marco Aurelio had advanced release his written opinion, in the same understating of the US Court. As the President is a public figure, in the exercise of an elective term, transmitting information of general interest in his account, the public

⁶⁸ Brazilian Supreme Court [2020] Writ of Mandamus #37,132. Reporting-Justice: Justice Marco Aurélio.

⁶⁹ Brazilian Supreme Court [2021] Writ of Mandamus #38,097. Reporting-Justice: Justice Carmen Lucia.

⁷⁰ United States Court of Appeals for the Second Circuit, *Knight First Amendment Institute v Donald J. Trump*, No. 1:17-cv-5205 (S.D.N.Y.), No. 18-1691 (2d Cir.), No. 20-197 (S. Ct.). (9 July 2019) and United States Court of Appeals for the Fourth Circuit, *Davison v Randall*, 912 F.3d 666, 680 (7 January 2019).

interest is inherent to the social network account's nature. It is worth waiting for the next chapters of the deliberation at the Supreme Court on the subject. On the other hand, the second case did not have further developments yet.

4 Conclusion: a proposed roadmap for Brazilian regulators and legislators

Many controversial issues are part of the discussion on social media regulation. This article does not intend to present a general or final solution to the problem but seeks to clarify elements for the regulatory design. The focus was the definition of whether regulations should make a distinction considering who is the author of the posts and who is sharing content online. The concern relates to the progressive use of social media by public agents, public institutions, and politicians, in the exercise of public function and in the electoral context.

For the conclusion, it is presented as a proposal for a roadmap to be considered in any decision-making process regarding social media regulation in Brazil, regarding *who* should comply with the regulatory standards. Three basic elements should be considered by regulators or legislators in the rulemaking procedure: (i) whether the regulation will differentiate who is the author of the post/content, considered the role of public agents or institutions in social media and its differences from private users; (ii) whether the regulation will differentiate types of social media and consider the private or public ownership of providers/platforms; and (iii) the need to plan and elaborate a strategy for the use of networks by public agents and public institutions.

As for the first element (i), the establishment of different standards considering who is the author is relevant because of the public interest involved, when dealing with public agents or institutions as content sharing parties. Considering cases identified in different jurisdictions, it is common for public figures – especially politicians – to use their personal accounts to broadcast official content, even if merely informative. The current understanding is that it is not possible to differentiate the public figure from the private figure in such cases. Therefore, the private account and the official account of the government should be both considered of public interest.

It is also necessary to consider that public agents are subject to a complex of responsibility, duties and obligations, arising from the public law rules in force in the legal orders, which bind them. In this context, transparency is a fundamental principle and a duty inherent to the State and its agents, in which access to information must be respected. This aspect is often protected by the Constitutions - as is the case in Brazil, where it is a fundamental right and a Public Administration binding principle.

In the same sense, institutional profiles must be managed in view of this bounding paradigm. It is necessary that governments provide transparency in how official institutional profiles are managed in the networks, setting limits and possibilities for their use. For this purpose, the regulation itself should differentiate private profiles from profiles of public interest, including in the last both institutions and individual agents' profiles.

For example, it is necessary to understand to what extent a given network can be used for purposes of requesting information. Some institutional ombudsman profiles have already been created in *Twitter* in Brazil - like the one from ANVISA, that is the Brazilian FDA (@*OuvidoriaAnvisa*). Law 12,527/2011 (Freedom of Information Requests) provides a specific procedure for managing requests for information and complaints, along with the Public Services User Code (Law 13.460/2017). Would a complaint or request through *Twitter* be addressed in the same way as a request made on the official Government platforms? The response is not clear in Brazilian Law.

The second element (ii) of the road map is related to the Brazilian FDA example. The type of platform and social network is relevant to the regulatory definition. In general, when talking about the use of networks, especially social media, the immediate scenario is the public use of private networks. However, it is possible that government official platforms are used for the same purpose. The accountability model and the arrangement to be adopted must vary accordingly, considering that in private platforms the public authorities may have more restricted interference from third private parties.

There must be a distinction in the regulator's analysis regarding the platform provider⁷¹ - if it belongs to the Government itself or if it belongs to third parties (as would be the case with *Twitter*, *Facebook* and others). Understanding this difference is important, including due to the degree of engagement and interactivity and how the measurement and response to social interaction will be carried out.

When it comes to social media types, yet on item (ii) of the road map, it should be considered if the jurisdiction will differ message applications, regular social media, and search engines in the standards. In the case of the German Law, individual communication platforms are not in the scope of the in-force Act, which apparently excludes, for example, its applicability for *WhatsApp* and related message applications. In the same sense, the Chinese model does not aggregate all types of social media platforms into a single group, as it decomposes different rules according to the service model.

UE Digital Services Act does not carry on a differentiation, by dealing with digital services in a general manner, with some specificities provided for in the proposed

⁷¹ Mergel (n 52) 328.

regulation. In Brazil, Bill 2630/2020 is divided into several sections, in the same way of the Digital Services Act. However, both cases seem not to exclude any type of social network from its scope of protection regarding the regulation subject.

An alternative to regulation might be, within the same rule, to create separate chapters considering the function of each social network and each platform, with a principle-based general chapter applicable for all cases. Automatic message triggering tools should be considered by regulators in this definition, as even private application has this type of mechanism that spreads information without proper control. The particularities of the main existing platform should be considered in order to adapt the regulated subject, preserving freedom of speech and, at the same time, ensuring innovation in the form of digital government development.⁷² Also, there should be flexibility for the proposed regulation to evolve with the digital development of platforms.

The third (iii) and last element to be considered is that not all types of institutional content should be conveyed through social media in private platforms. Public engagement, its control and a need for a Public and formal response vary according to the matter. It is the role of the Public Administration to define the most adequate means to fulfil the access of information duty.⁷³

For this, social media and transparency strategic planning is necessary. The plan should include: (i) defining goals and limits for each type of social network used by the Government, which shall be aligned with each governmental institution duties; (ii) setting the role of the public entity responsible for the institutional communication, drafting use standards, and coordinating the use of the network to IT management to enable its proper functioning – also considering, for example, cybersecurity; and (iii) design of a media-use strategy that should address engagement rules for citizens, internal content moderation by public agents, content policies, among others.⁷⁴

⁷² Jack M. Balkin 'How to Regulate (and Not Regulate) Social Media' [2021] *Journal of Free Speech Law* 71.

⁷³ Mergel (n 52) 333.

⁷⁴ Gohar F. Khan, *Social Media for Government A Practical Guide to Understanding, Implementing, and Managing Social Media Tools in the Public Sphere* (Springer Nature Singapore 2017) 113.