Internal Judicial Independence and Internet Application Blockings: The Brazilian WhatsApp Case

Rafael Bezerra Nunes

**Keywords:** Internal Judicial Independence – Blockings – Brazil – WhatsApp

Brazil had a low score in the Freedom of the Net 2017 Report from Freedom House[[1]](#footnote-1).One important element impacting in such score were the blockings of WhatsApp in 2015 and 2016. These are far from being the only blocks or take down judicial orders aimed at apps or websites in Brazil. However, they were the most impactful and covered cases[[2]](#footnote-2).

All the blockages came from judicial orders issued in ordinary criminal processes, without any intervention or support from the Federal or local governments. Judges issued such others to pressure Internet infrastructure owners to comply with private data requests. The judges were treating WhatsApp as if it was any other form telematic interception. Some of them requested interception of messages in real time as if they were ordering telephone calls wiretap. Interception was ordered partially by ignorance of technological differences between the medias, which prevent those who control WhatsApp having access to users’ messages without transforming the whole way under which they operate in general concerning other users (finishing end-to-end encryption, which would amount to a different app).

Their actions were also partially explained by a sincere belief that these corporations should be treated equally to those which run traditional telecommunication mediums given the need to have access to communication of law breaching individuals. Why should WhatsApp be treated differently from telecommunication service providers which have to comply to legislation which empowers courts to request communication interception?

The Brazilian WhatsApp case shows how different State actors may be involved in speech regulation, each of them with different capacities and interests for restricting speech.

All cases involved State action targeting part of the Internet infrastructure in other to exert pressure on another Internet infrastructure owner that refused to surveil an end-user. The judicial decisions aimed at acquiring private data, not restricting speech, but the latter was certainly one of their consequences.

Judicial institutions are limited in the type of actions they can legitimately claim to be allowed to engage in order to pressure Internet infrastructure to comply with its decisions. These limitations create opportunities for corporate disobedience. Facebook was utterly aware of it. It adopted the general strategy of claiming to not be subjected to Brazilian jurisdiction, because its headquarters are located outside the country. In the first case, this response was described as one of the reasons for issuing the general blocking order: it would be only effective way of pressuring the company to comply. The ISPs, the targeted internet infrastructure owners, at the beginning, largely fought the judicial orders in appellate courts. They cooperated with courts, performing collateral censorship, while still resisting by legal means. In the last cases, the number of ISPs who filled appeals went considerably down.

In these cases, it is not accurate to say that the judiciary was only acting based on governmental regulation concerning State power to demand private data from internet infrastructure owners during criminal proceedings. It was, at best, highly disputable that judges would have these overreaching powers. The best explanations is that the blockages were an unintended consequence of a fragmented, highly independent and active judiciary that broadly interpreted its powers[[3]](#footnote-3).

The Brazilian case is particularly interesting because it differs from the more common situation in which these country-wide blocks seem to happen. Authoritarian and semi- authoritarian regimes may also use courts as a way of targeting infrastructure owners and block disfavored services. However, the bigger alignment between government and courts in these cases is likely to generate more stability for the blocking.

In the Brazilian case, disaggregating government may help us to understand the likely forms of speech regulation and private enterprises options to respond to “state” action. Lower court judges without the support of the elected branches of government and subjected to judicial hierarchy may have enough power to interrupt the app regular function, but hardly to sustain it through long time. WhatsApp could expect the decisions to be soon reversed, but also that similar cases would arise in the future. This most likely shaped the short and long-term responses by Facebook, WhatsApp owner, to “State” speech control.

1. https://freedomhouse.org/report/freedom-net/2017/brazil [↑](#footnote-ref-1)
2. For a timeline of some important cases in which blocking was attempted, *see* http://bloqueios.info/pt/#home-content [↑](#footnote-ref-2)
3. The blockings were based on the art. 12, III, of the Law 12.965/2014, The “Internet Civil Mark”. In 2017, the Brazilian Supreme Court realized a public hearing on the constitutionality of judicial blocking order. The case was not decided yet. *See* http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?numero=403&classe=ADPF&origem= AP&recurso=0&tipoJulgamento=M [↑](#footnote-ref-3)