

# Platform Councils: Solving or Creating Regulatory Vulnerabilities? A Brazilian Perspective.

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An old Soviet adage recommends that “If you do not want to solve a problem, then create a commission.” The hypothesis of this brief paper is that platform councils may not necessarily solve [digital platforms’](#) deficit of democratic values accountability, and they might contribute to creating further regulatory vulnerabilities, unless legislators design them to be meaningfully [accountable](#).

To this end, this essay provides a brief and non-exhaustive introduction to the types of platform councils developed so far. Subsequently, it explores the existing Brazilian platform regulation framework, and utilises the three main democratic values included in the title of the Brazilian Bill for Platform Regulation i.e., “freedom, responsibility and transparency”, to analyse how far platform councils might be useful to foster democratic values. Lastly, the conclusion highlights some relevant caveats, regarding the effectiveness – and, ultimately, advisability – of relying on [self-regulation](#) versus public [regulation](#) to establish platform councils.

## 1. Platform councils and their diverse rationales

As highlighted by the Platforms and Democracy position papers, several types of digital platforms, besides social media, have been experimenting with platform councils over the past five years. The most renowned example is [Facebook’s Oversight Board](#), which has established such a body to – supposedly – regulate the content moderation practice of the platform in a more participatory and accountable manner.

That is by no means the only existing example. Platform scholars are aware of gaming platforms experimenting with player councils, such as [EVE Online’s Council of Stellar Management](#), a group consisting of ten EVE Online players democratically elected by community of game players, to advise and assist the continuous development of the platform, provide analysis, share suggestions, and give feedback.

A less-known instance is the one created by [the Chinese data protection law](#), the Protection of Personal Information Law (PIPL), whose article 58 establishes an obligation for large platform providers – defined as those having “a huge number of users and complex business models” – to establish an “independent supervision board” composed by external members, responsible for monitoring the correct implementation of the law.

This normative provision represents a remarkably original feature among data protection frameworks that, together with the large platforms' obligation to periodically publish reports on their data processing activities, also foreseen by PIPL article 58 aims at increasing accountability through what is described as "society's supervision."

The increase of platform accountability, in truly meaningful ways, ideally embedding democratic values and oversight in these private entities, has indeed been a recurrent preoccupation of scholars and policymakers alike for the past decade. Such preoccupation has been repeatedly expressed, for instance, by Brazilian policymakers that, since 2020, have been [discussing policy efforts](#) aimed at regulating digital platforms, although without reaching a consensus on how to do so, at the time of this writing.

## 2. Contextualising Brazilian evolutions

An important element of context regarding Brazilian digital platforms regulation is that social media platforms are already regulated by the Brazilian Civil Rights Framework for the Internet, Law n. 12,965/2014, a.k.a. "[Marco Civil da Internet](#)" (MCI), which the Brazilian Congress wishes to supplement with [Draft Bill n. 2,630/2020, on Freedom, Responsibility and Transparency on the Internet](#), a.k.a. the "Fake News Bill."

The MCI is Brazil's primary law regulating the Internet and the first and only general law for Internet governance and Internet rights adopted in Latin America. MCI article 19 establishes a general regime of a judicial notice-and-takedown system where "application providers," i.e. platforms, are deemed liable for user-generated content only if failing to comply with court orders for the removal of specified content within 24 hours, granted they have the technical capacity to do so.

Hence, the Brazilian legislator has framed an approach to regulate digital platforms, although this initial approach has shown limits. The constitutionality of MCI article 19 is currently [challenged at the Brazilian Supreme Court level](#). Plus both the Brazilian Legislative and Executive powers are actively pursuing efforts to supplement the MCI provision with specific normative provisions aimed at improving "freedom, responsibility and transparency".

The Brazilian policymaking initiatives do not mention councils, but for our discussion the Brazilian experience is particularly relevant, as it allows us to understand the democratic values that the Brazilian nation, through its democratically elected Congress, considers as the most relevant and in need of protection, when it comes to regulating platforms.

Democratic values, which could be supposedly baked into platform governance architectures through platform councils, are a very large and heterogeneous set of values. The Brazilian Legislator deems "freedom, responsibility and transparency" as so relevant for platform regulation – and clearly missing from platforms private orderings – to include them in the very

name of the Bill that aimed at regulating them. This inclusion leads us to assume that such values are the most relevant ones from the Brazilian perspective.

It is not clear, however, how and to what extent the establishment of platform councils could strengthen the aforementioned values. To provide an initial answer to such query, the following section will briefly analyse how platform councils could be used and designed to positively contribute to improving Brazilian democratic values.

### **3. Platform councils: Regulatory trick or treat?**

For the sake of clarity and conciseness, this essay will only examine three specific elements of the entire spectrum of democratic values – i.e., freedom, responsibility, and transparency – based on the importance that they seem to play in the Brazilian context. This section provides some observations and recommendations on how each of these democratic dimensions could fit into platform governance through the action of a platform council.

#### **3.1. Freedom**

This first item evokes the full spectrum of fundamental freedoms granted to each and every individual at the domestic level by national constitutions and at the international level by binding international law frameworks.

From a pragmatic standpoint, it seems highly unlikely that a sound protection of fundamental freedoms can be granted by solely relying on global international law frameworks, such as the [ICCPR](#) or [ICSECR](#), as this type of international law framework inevitably relies on national systems to specify and implement normative provisions and, critically, their exceptions. Importantly, the subject of international law obligations are states (i.e., public bodies which must guarantee the full enjoyment of rights to physical persons). Thus, international jurisprudence, while offering important guidance, might be of limited use when trying to establish how corporations (i.e., legal persons) must respect individual rights.

Regional fundamental rights frameworks exist, and in some regions, might be more active than others, even regulating the behaviours of corporate actors, but they are typically renowned for their lethargic processes. In this perspective, the establishment of regional platform councils might be an interesting option to translate the existing regional approach from fundamental rights to guidelines for responsible platform behaviour, as I will discuss in the next point.

Lastly, national constitutional law and domestic jurisprudence are usually well suited to address the specificities of local culture, particularly as regards local juridical sensitivities and traditions. Therefore, if any national platform council must be established, I suggest they should be created at a national level, as convincingly [argued also by other authors](#). Such national bodies could

coordinate at the regional level if needed, considering that most international disputes may typically occur at the regional level.

### **3.2. Responsibility**

As suggested in the previous paragraph, one of the core elements of a [responsible behaviour](#) from private entities in general and digital platforms in particular is the respect of fundamental rights, but also the provision of [effective remedies](#), strongly recommended by the [UN Principles for Business and Human Rights](#).

In this respect, platform councils might serve as a useful additional mechanism for users to seek redress when any of their rights is unduly violated. Considering the existence and notable advancement in terms of sophistication of [Online Dispute Resolution](#) (ODR) mechanisms, it seems that national platform councils could be designed to be appellate bodies of the [existing ODR mechanism](#), so that ideally users are granted the most effective and just resolution of their potential controversies.

The ancillary benefit of establishing a system of a national platform council acting as an appeal body would be the decongestion of national juridical systems as regard platform disputes. This could simultaneously improve the full enjoyment of platform users' rights, increase the (corporate social) responsibility of platforms, and positively contribute to alleviating notoriously overburdened national judicial systems.

### **3.3. Transparency**

This point deserves special attention as transparency is frequently touted as a sort of silver bullet, able to solve – or at least contribute to solving – a wide range of issues. But de facto transparency may not be as effective as we might think, being usually very poorly defined and even more poorly implemented.

A telling example in this regard are platform [terms of service](#), which should supposedly be a tool of transparency – and indeed are considered so by data protection frameworks around the world. Yet, these end up as instruments cleverly engineered to mislead and confuse the user with lengthy and highly technical terms, without providing any meaningful information that could increase accountability for the provider and oversight for the user – and society.

In this respect also the establishment of platform councils may be helpful, should such organs be mandated to publish regularly reports on specific issues – e.g. content moderation, product defects, game features, etc – that enable an increased understanding, monitoring and, ultimately accountability of these private actors. Importantly, to achieve a situation of [meaningful transparency](#), such reporting should also adopt shared – ideally standardised – formatting

requirements so that data can be more easily compared and studied by regulators, researchers and users, and even be machine readable.

#### 4. Conclusion

While a good dose of scepticism regarding the potential benefits of platform councils must be of order, this brief analysis has demonstrated that platform councils might prove to be useful, largely depending on how they are designed. A system composed of national and regional platform councils might prove to be an interesting choice as they could usefully assist in guaranteeing users' rights and provision of effective remedies, as well as improving platform transparency and, consequently, accountability.

However, a very strong caveat is that such system – and whatever other platform council system – would have a cost. Such a cost might be easily borne by large platforms, as explained by the Chinese legislator's choice to only target large platform with its obligation to establish "independent supervision boards." Small players and, particularly, new entrants in the platform business would be very unlikely to have the resources to establish such a complex and costly system and, therefore, stakeholders' expectations as to the impact of platform councils should be lowered to a minimum, adopting the most pragmatic approach possible.

Lastly, stakeholders should be aware that should the design and implementation of platform council be delegated to self-regulation, with no specific indications from legislators on how they should be established, their roles, responsibilities, and accountability, platform might use such bodies as a strategy [to avoid or postpone important regulatory action](#).

Indeed, as long as national law does not mandate the establishment and regulation of such bodies, any large platform executive would have a fiduciary obligation towards shareholders – which exist in every country for every publicly traded company, such as most large platforms – to prioritise the maximisation of their profits rather than the full enjoyment of user rights. In this perspective, it seems reasonable to posit that national platform councils regulated by domestic law could play a useful role, improving platform governance, while it seems at best naïve to argue that global platform councils, purely based on self-regulation will be able to offer any meaningful solution.