

# ***Oversight Board* e sua Legitimidade: Gênese da Autorregulação a partir da Jurisdição Romana\***

## ***Oversight Board and its Legitimacy: Genesis of Self-Regulation from Roman Jurisdiction***

## ***Junta de Supervisión y su Legitimidad: Génesis de la Autorregulación desde la Jurisdicción Romana***

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### **Resumo**

O objetivo geral é o de pesquisar quais contribuições o paradigma da jurisdição romana, em um período pré-estatal – momento histórico em que julgamentos por meio de julgadores leigos, sem qualquer formação jurídica, que eram nomeados a partir dos cidadãos romanos –, pode fornecer ao *Oversight Board* (Conselho de Supervisão), que realiza revisões sobre decisões de conteúdo suspenso ou removido das plataformas digitais Facebook, Instagram e Thread. Como a própria concepção de Estado Nacional somente surgiu em fins da Idade Média, a organização republicana dos romanos foi fundada com base na sociedade, e não por meio de uma pessoa jurídica. Assim, buscou-se entender como os conflitos eram resolvidos por uma jurisdição da antiga cidade romana, de forma pragmática, criativa e com todo o rigor jurídico. Partindo dessas constatações, o problema de pesquisa encontra-se na seguinte pergunta: quais contribuições o paradigma da jurisdição romana pode fornecer para o aprimoramento do *Oversight Board*? A ausência de experiências anteriores sobre um órgão empresarial que foge do binômio público-privado, enquanto base dogmática do Direito Moderno, abre espaço para que a questão seja realizada por meio de um paradigma jurídico que legitime sua autorregulação. Tendo isso em vista, adotou-se como marco teórico a concepção de jurisdição da republicana romana, construída sobre a *sociedade* e não sobre a *pessoa jurídica estatal*. O desenvolvimento do trabalho é realizado por meio de um método de abordagem dedutivo, um método de procedimento monográfico, e a técnica de pesquisa bibliográfica documental, por meio de revisão da literatura especializada. Realizou-se um confronto entre os paradigmas jurídicos antigo e contemporâneo, por meio do método de contraponto. Em razão do ineditismo do tema, ao final, são apresentados, como resultados, 12 contribuições para o melhor funcionamento do *Oversight Board*. Por fim, conclui-se que o paradigma da jurisdição romana – gênese do Direito moderno – legitima a atuação do *Oversight Board* como forma de resolução de conflitos por meio da autorregulação.

**Palavras-chave:** acesso à justiça; *Oversight Board*; jurisdição; direitos humanos; liberdade de expressão.

### **Abstract**

*The general objective is to investigate what contributions the Roman jurisdictional paradigm, in a pre-state period - a historical moment in which judgments were made by lay judges, without any legal training, whom Roman citizens appointed - can provide to the Oversight Board, which reviews decisions on content suspended or removed from the digital platforms Facebook, Instagram and Thread. As the very concept of a nation-state only emerged at the end of the Middle Ages, the republican organization of the Romans was founded based on society and not through a legal*

\* Artigo traduzido por Inteligência Artificial.

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*entity. Thus, we sought to understand how conflicts were resolved by a jurisdiction in the ancient Roman city in a pragmatic, creative way and with all legal rigor. Based on these findings, the research problem lies in the following question: What contributions can the Roman jurisdictional paradigm make to the Oversight Board? As the dogmatic basis of modern law, the lack of previous experience of a corporate body that escapes the public-private binomial opens up space for the issue to be addressed through a legal paradigm that legitimizes its self-regulation. With this in mind, the theoretical framework adopted was the Roman republican conception of jurisdiction, built on "society" and not the "state legal entity." The work was developed using a deductive approach, a monographic procedural method, and the technique of documentary bibliographical research through a review of specialized literature. A comparison was made between the old and contemporary legal paradigms using the counterpoint method. Due to the unprecedented nature of the topic, the results show 12 contributions to the better functioning of the Oversight Board. In the end, it is concluded that the paradigm of Roman jurisdiction - the genesis of modern law - legitimizes the work of the Oversight Board to resolve conflicts through self-regulation.*

**Keywords:** access to justice; Oversight Board; jurisdiction; human rights; freedom of expression.

## Resumen

*El objetivo de este artículo es analizar límites y posibilidades de la actuación del Oversight board (Comité de Supervisión) que realiza revisiones sobre decisiones de contenido del Facebook. La ausencia de experiencias anteriores sobre un órgano empresarial, que huye del binomio público-privado, mientras base dogmática del Derecho Moderno, abre espacio para que la cuestión sea realizada por medio de otros paradigmas. Teniendo esto en cuenta, se adoptó como paradigma de contrapunto la jurisdicción de la antigua ciudad romana, construido con base en la sociedad y no en la personalidad jurídica estatal. El desarrollo del trabajo es realizado por medio de un método de enfoque deductivo, un método de procedimiento monográfico y la técnica de investigación bibliográfica documental, por medio de revisión de la literatura especializada. En la conclusión, se realiza un confronto entre los paradigmas jurídicos antiguo y moderno, cuando se concluyó por la inoperancia de intentar resolver conflictos en sus redes sociales privadas utilizando el paradigma jurídico de la jurisdicción moderna. Debido a la característica inédita del tema, al final, son presentadas contribuciones para el funcionamiento del Oversight board del Facebook.*

**Palabras clave:** comité de supervisión; derechos humanos; Facebook; juzgamiento independiente; libertad de expresión.

## 1 Introduction

Modern society suffered numerous impacts resulting from the first Industrial Revolutions, when new technologies began to implement changes in cities and a new rhythm in production, work, commuting, politics and state planning (Morazé, 1965).

The increasingly accelerated pace of large urban centers has gradually and continuously extended to other cities around the world. However, what most affected global life was the 4th Industrial Revolution (Schwab, 2016), the revolution in information technologies, which generated the phenomenon known as *network society* (Castells, 1999).

The uses of new information technologies deserved attention and studies in order to verify their limits and possibilities (Schwab, 2019), and it has been proven that their good use can contribute to development, as long as the specificities of each location are respected (Santiago, 2018). However, the role played by Artificial Intelligence (AI) in the collection and sale of information about users of digital platforms cannot be ignored (Borges; Filó, 2020). Scientists believe that they are increasingly managing to understand how decision-making occurs by human beings, which generates the expectation of planning actions based on what the algorithms say (Harari, 2018, p. 36). All of this, being brought about by the dissemination of information technologies, is producing changes

in the very way law operates (Koener et al., 2019) and social mobilization for the claim and discussion of the right to the city and political issues (Cavalcanti; Ferreira, 2018). In this context, the risk that digital platforms will be used as a means of mass communication, to confuse the population and/or disseminate extremist ideas, exceeding the limits of the human right to freedom of expression, led Facebook<sup>1</sup> to take an unprecedented measure: to create an *Oversight Board*, in order to provide review of content published on its platform.

The present article, therefore, has the general objective of researching what contributions the paradigm of Roman jurisdiction, in a pre-state period, can provide to the *Oversight Board*, which reviews decisions on suspended or removed content from the digital platforms Facebook, Instagram and Thread.

Although this council was created by a private company, its contribution is intended to be essential for the improvement of democracy<sup>2</sup>, occupying a sphere that is public, through a hierarchical structure. However<sup>3</sup>, the absence of previous experiences about a private business body to control public information, which is beyond the space provided for by the public-private binomial of Modern Law, justifies the research in search of other paradigms<sup>4</sup>.

The improvement of jurisdiction can occur by incursion into discarded routes, rather than by proceeding on a linear path. Notwithstanding this, following new paths (or forgotten paths) does not mean that it is an escape, as it can be a rediscovery (Macedo; Facchini Neto, 2015), since in current Law, despite having its roots in the Republic of the Romans<sup>5</sup>, several ancient legal institutes were discarded. In this sense, the research problem lies in the following question: what contributions can the Roman jurisdiction paradigm provide for the improvement of the *Oversight Board*?

The development of the article will take place in three parts. First, it will be explained how jurisdiction was administered from the perspective of a legal paradigm that took into account society, and not the legal personality of the State. In the second part, the structure of the *Oversight Board* will be verified. In the third part, the functioning of the *Oversight Board will be analyzed*, which was constituted from an unprecedented corporate decision on the control of public information. In the conclusion, it is intended to present the counterpoint between the ancient paradigms and the practice of the *Oversight Board*, in order to present contributions from the

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<sup>1</sup> Cf. Harari (2018, p. 51): "California is used to earthquakes, but even so the political tremor of the 2016 U.S. elections came as a violent shock to Silicon Valley. Realizing that they could be part of the problem, computer wizards reacted by doing what engineers do best: they sought a technical solution. Nowhere has the reaction been more forceful than at Facebook's headquarters in Menlo Park. That's understandable. As Facebook's business is the social network, it is the one that is most attuned to social disturbances".

<sup>2</sup> On values and principles necessary for democracy, see Cunha's reflection (2022).

<sup>3</sup> Callejón (2022) warns about the tendency of large technology companies to monopolize the distribution of information and public opinion, through communicative mediation processes.

<sup>4</sup> The concept of paradigm adopted here is found in Kuhn (2013).

<sup>5</sup> Pilati (2017) prefers to use the expression Republic of the Romans rather than Roman Republic, in order to indicate that in that ancient time it was not there was a legal entity, being a conception of a republic based on individuals.

Roman republican jurisdiction.

The first sections will be carried out through a deductive approach method, a monographic procedure method and the technique of documentary bibliographic research, when legal articles, doctrine and legal journals will be verified. The analysis of the fourth section will occur through a method of counterpoint, whose theoretical basis is found in the productions of Giovanni Lobrano (1983; 2009) and José Isaac Pilati (2013), in order to raise propositions for the functioning of the *Oversight Board*.

## **2 The Birth of Roman Jurisdiction: The Appointment of Lay Judges and the Quest for Justice**

The theoretical basis for the term *paradigm* that is adopted in this article is found in Kuhn (2013), who was able to explain scientific development from the overcoming of matrices adopted by academia, when they can no longer solve problems proposed to scientists. In his explanation, he demonstrated that the conditioning of scientists to the rules of understanding adopted does not always work to solve new problems. However, this does not mean that mere disagreement among scholars indicates that a paradigm has lost its validity, but rather that the paradigms adopted discard the observation of certain phenomena and the consideration of various solutions.

Morin (1999) used the term paradigm to indicate that in complexity there are problems, but not answers. Therefore, the researcher must provide answers that are not found in the structures previously built and adopted:

[...] It is necessary to be aware of the problem of the paradigm. A paradigm reigns over minds because it institutes sovereign concepts and their logic (disjunction, conjunction, implication), which govern, occultly, the scientific conceptions and theories carried out under its empire. (Morin, 2006, p. 114)

When referring to the term paradigm in this article, the ideas of the term *normal or reigning paradigm* (Kuhn, 2013) and the *great paradigm of the West* (Morin, 1999) are returned to elaborate a definition of *legal paradigm*. As Pilati (2017) observes, there is harmony between these Kuhns and Morin, and these ideas, in turn, are in line with Burguière (1999), according to which there is a dogma of a unitary and linear evolution of Humanity, which induces us to believe that the mere passage of time leads humanity to a unitary and linear evolution, as if there were a consciously accomplished march.

The concept of the legal paradigm of Modernity (Pilati, 2017) arose from the proof that contemporary rules of understanding that dictate legal validity occurred through intentionally selected legal elements (Filó, 2018), which, despite being present in Antiquity (Grossi, 2007), do not fit into the best concept of republicanism. On the contrary, what

happened, in the noble eagerness to overcome the horrors of the Middle Ages (Deschner, 1990), was to establish the Law through a mixture of medieval practices, elements that could be rescued from Roman Law – which remained for centuries recorded in the Code of the Emperor Justinian – and from the practices of Canon Law (Paricio; Barreiro, 2014).

However, the great effort to overcome common practices in the Middle Ages was not able to harmonize the creation of the State with Society (Lobrano, 2009), and it is necessary to recognize the absence or inability of institutions to deal with complex legal issues, which must be researched beyond dogmatism (Delmas-Marty, 1999; Grossi, 2004).

It is necessary to clarify that in the Republic there was no figure of the modern judge: a jurist who was elected or is hired to exercise the office of judging conflicts. Secondly, there was no state figure, but public institutions that were exercised by magistrates elected for short periods, in order to exercise a certain function, in an unpaid manner. Political institutions, founded from society, lacking the fictitious representation of the State, emerged pragmatically to achieve the continuity and functioning of the city (Filó, 2018).

In view of this situation, the return to old legal sources, paradoxically, allows for new theoretical and technical rationalizations, in order to be able to find scientific truths ignored by several modern studies (Morin, 2010)<sup>6</sup>. But it is important to emphasize: it is not a matter of copying what the ancient Romans accomplished, but rather – through a legal counterpoint<sup>7</sup> – verifying new legal solutions. To this end, it must be taken into account that the legal roots of the West are deep, going beyond what occurred in the Middle Ages and in the Absolutist Period of the Roman Empire, reaching a republicanism driven by institutions that did not depend on the state legal entity<sup>8</sup> (Lobrano, 2006).

The longevity of **13 centuries of legal productions allows for a didactic division that is carried out in** three major phases: Royalty (754 B.C. to 510 B.C.); Republic (510 BC to 27 BC), and the Empire (27 BC to 565 AD). The imperial phase is subdivided into Principate (27 B.C. to 284 A.D.) and Dominate (284 A.D. to 565 A.D.), when growing absolutism ended up extinguishing the casuistic form of application of jurisdiction (Paricio; Barreiro, 2014).

As there is no monolithic structure, nor unilinear continuity, nor evolutionism in these centuries (Bretone, 1998), the criterion is adopted that Romanesque research requires the choice of the period to be studied (Ferraz, 1989), reducing its object and deepening the

<sup>6</sup> Cf. Morin (2010, p. 149/150): "I said that the truth of science was not in its theories, but in the game that allowed the confrontation of these theories, in the game of truth and error; science does not possess truth, but plays on a level of truth and error [...]".

<sup>7</sup> An example of the application of the method of counterpoint between paradigms can be seen in Borges and Filó (2020) when the *cartography contemporary of the common and its aspect in Roman Law*: <https://revistades.jur.puc-rio.br/index.php/revistades/article/view/1434>.

<sup>8</sup> On the subject of republic and society, it is essential to read the article by Lobrano (2009): "The theory of *Respublica* (founded on the "company" and not on the "legal entity") in the *Corpus Juris Civilis* of Justinian (Digest 1.2-4)".



legal experience, which in the case of this article will focus on aspects of the application of jurisdiction that occurred in the Republic of the Romans.

Another aspect is in the way of studying the Roman republican sources, since, as they are not cataloged in a legal manual, they are scattered, like a puzzle. They are often found in classic legal literature and in other productions that allow the identification of political clashes. In order to delve into specific issues and deepen the critique of historical fact, it is not uncommon to make use of epigraphic and papyrological, numismatic, iconographic, and archaeological sources<sup>9</sup> (Bretonne, 1998).

Having made these previous clarifications, it is possible to verify how the Romans managed, through legal institutions, to contemplate complex social phenomena in a casuistic way, that is, without using legal dogmatism.

Without the burden of summarizing centuries of developments to alternatives that occurred in that period and explaining the various historical developments, now not pertinent, jurisdiction will be rescued here as a matter of maximum relevance for Roman society, which – despite its various conflicts – understood pragmatically that "justice is the constant and perpetual will to give each one his right", as recorded by the jurist Ulpianus (Justiniano, 2013, p. 21), who completes by raising the precepts of Law: "to live honestly, not to harm others, to give to each one his own" (Justiniano, 2013, p. 21).

But how to make justice effective in periods of so many foreign wars and conflicts between the Order<sup>10</sup> Patricia and another order excluded from citizen guarantees?

Jurisdiction in that republic was initially exercised by the consuls who, due to wars, had to be absent from the city. As a result, a magistrate was elected to exercise jurisdiction, and a *magistrate of lesser political stature was created*: the *praetor*. Following the formula already adopted, he began to distribute the Law in each concrete case (Paricio; Barreiro, 2014).

And how did he accomplish this office of ministering jurisdiction?

The praetor, as a great magistrate who, hierarchically, would be second only to the consuls, had the mission of organizing the controversy based on the conflict generated between those involved. From then on, it began to appoint one or more arbitrators or judges for each specific case (Justiniano, 2013).

When one mentions the judge of the case (*iudex*), one must put away from one's mind any mention of the judges of modern democracies. The judge of the case, as he was not a jurist (Justiniano, 2013), judged the case essentially through criteria of equity, based on the

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<sup>9</sup> Frequent archaeological research, for example, allows the verification of conclusions and hypotheses, to be confirmed, expanded, modified or even excluded (Alföldy, 1989, p. 18; Grandazzi, 2010, p. 12-13).

<sup>10</sup> According to Rostovtzeff (1983) and Durant (1971), the democratization of Rome did not occur due to typical bloody conflicts of social classes, but the from political clashes, such as the plebeian strike).

concrete case, functioning as a kind of arbitrator. And, in fact, this is how he should be understood in the phase under analysis, as he did not have any legal or technical training, being appointed among the Roman citizens, for the resolution of a conflict, in a true arbitration system. But how was this possible? How could lay people judge concrete cases as if they were judges? Moreover, how is this period of trials by lay arbitrators considered the most legally rich period in Rome, when ideas and conceptions that are still adopted by modernity emerged?

The answer seems to lie in Roman pragmatism.

Although the judge in the case does not follow any theoretical indication and position on what position should be taken, the praetor should inform the legal principle to be applied in the case under analysis (Valditara, 2008). After the outcome of the trial, the praetor (usually) ratified the trial. After the judge of the case judged the controversy, it was up to the praetor to ratify the judgment.

According to Pilati (2013, p. 27), Roman jurisdiction itself was summarized in three solemn verbs (*tria verba solemnia*):

- [1] *dico* (to publish a general rule in an edict, or to regulate a contention by an interdict);
- [2] *do* (give a judge to the parties), *addico* (recognize a right in favor of a party; also, ratify what the parties agree; exercise voluntary jurisdiction). *To say*, in legal and religious language, is to say with a solemn, technical character.
- [3] *Addicere* is to approve, to agree. Hence: adjudicate, confirm the will of the parties (by act jurisdictional).

The edicts of the praetors, which came from the *ius edicendi*, dealt with the right to issue normative orders. This means that that magistrate had the power to address the people by edicts, in order to clarify some question that was common to all. Edicts were usually held at the beginning and end of each praetor's term, especially to indicate how jurisdiction would be carried out, which was very important for those under jurisdiction. The edicts – it is important to emphasize – could not bind the citizens, but they clarified the way praetors acted in their actions (Del Giudice, 2006). The objective of the edicts was not to create a norm in the abstract, as the laws, therefore, could be – for justified reasons – disregarded, due to the complex nature of some demand.

Although the judge in the case did not follow theoretical positions, the praetor informed the legal principle to be applied in the case under analysis (Valditara, 2008).

There were two phases of trial. In the first phase (*in iure*) the praetor was present to deal with preliminary issues, setting the limits of the dispute. In the second phase (*apud iudicem*), the production of evidence and the controversy was handled by the judge of the case (a citizen who was a layman in law) who could be appointed by the magistrate or chosen by mutual agreement by those involved in the litigation (Paricio; Barreiro, 2014).

In the formal process – adopted here as a paradigm – the praetor carried out the first

phase in a contractual manner, appointing an arbitrator for the case. These judges of the case were elected by the parties or appointed from names that appeared in a previously prepared album. When the matter involved public issues, more judges could be appointed for the cause. When the praetor gave the judge the cause, it was not just a matter of a mere appointment, but of giving him jurisdiction (power) to judge it. After the judge of the case judged the controversy, it was up to the praetor to ratify the judgment. It is verified that the praetor, despite delegating the power to judge, kept for himself the power to ratify the judgment, in order to produce the due legal effects (Pilati, 2017).

With regard to public and private issues, the following was adopted: *a) if a conflict affected individuals more than the collectivity, it was private law; b) if a conflict affected the community more than private individuals, it was a matter of public law* (Meira, 1972, p. 184).

Due to the need to provide conditions for the jurisdiction to be exercised, a magistracy was created to assist the praetor, which was called *the curul council*. His mission was to take care of and watch over the city, with a kind of police power (Paricio; Barreiro, 2014, p. 66-67). Something quite logical, because the praetor's activity would be affected without this inspection in the busiest spaces.

Finally, it should be noted that the development of the *sense of justice* occurred thanks to the performance of a body of technical experts who assisted the one who exercised jurisdiction, noting and recording various jurisprudences and procedural formulas. In the Republic, these (*prudent*) experts recorded the results of the trials and clarified doubts formulated by the arbitrators of the cases (Valditara, 2008).

### 3 Oversight Board *Structure and Governance*

Currently, the retreat of centralized state power located within fixed territorial limits is observed. With the rapid technological evolution, digital platforms such as Facebook, Twitter, Google, Instagram, and others, have emerged as new economically and socially powerful authorities. In this scenario, a new distribution of power occurs, which is characterized by decentralization and the absence of geographical limits. Platforms start to accumulate a large amount of legitimacy and power to the detriment of national governments; what is then called self-regulatory practices emerge (Supiot, 2007, p. 187-188).

The creation of an independent body comes, precisely, to balance the disproportionate accumulation of authority and avoid authoritarian practices. Thus, it is in this attempt to establish a new independent governance system that the *Oversight Board* was designed and outlined; its main objective is to distribute the responsibility accumulated by Facebook in making important decisions on various matters (Clegg, 2020).

The *Oversight Board* was created on September 17, 2019 through the official



publication of its Bylaws, after eight months under public review<sup>11</sup> and several global consultations in more than 88 countries (Clegg, 2020). The consultation process was part of Facebook's attempt to reflect the cultural diversities that make up the social network, proposing to embrace new non-Western perspectives. Precisely for this reason, the Committee's first global consultation took place in Singapore, Asia (Klonick, 2019).

The *Oversight Board* can be defined simply as a panel or an independent control body. Facebook founder Mark Zuckerberg created the *Oversight Board* to function as a kind of U.S. Supreme Court, in order to act as the last instance for review of certain decisions made by Facebook in the removal or suspension of content that violates the terms of the privacy policy or the general community guidelines (Kang, 2021).

It is understandable, then, that violation of the community guidelines is a very common expression for Facebook users. It is known that sometimes online content posts cross the boundaries of free speech and violate community guidelines. The removal of content or deactivation of the account are some internal punishments provided for in Facebook's Terms of Service. The service itself already has a reporting mechanism integrated into the application, in which a global team is responsible for the investigation (Facebook, 2022). The community standards were developed without the participation of the user in all its stages and a growing demand from experts, press, users and students began to emerge in 2018, requiring changes in the platform's internal policies that would ensure, among others, greater transparency (Klonick, 2019, p. 2425).

Also, some problematic situations involving Facebook's general guidelines and internal moderation policy gained media prominence. In 2016, Facebook removed the publication by writer Tom Egeland, which contained the image photographed by Nick Ut, titled "*The Terror of War*" and popularly known as "*Napalm Girl*"; the black-and-white image showed a naked girl in the Vietnam war in Trang Bang shortly after an attack. In addition, the damage done to democracy during the US presidential election and during the *Brexit* campaign in the UK demonstrated the interfering power of disinformation<sup>12</sup> on Facebook. Finally, the platform has also caused controversy in Myanmar, an extremely critical and conflictual region, where military groups have appropriated the social network to incite hatred and organize violence<sup>13</sup>

<sup>11</sup> In June 2019, Facebook published a report summarizing the results obtained from the public consultations on the *Oversight Board*. The main demands were: Independent judgments, transparency in the elaboration of the Committee's rules and cultural diversity in its composition (Harris, 2019).

<sup>12</sup> Disinformation is the concept adopted by the European Commission to define the term popularly known as *Fake News*; European experts understand that disinformation is capable of encompassing a broader context, adopting as a concept for disinformation: "All forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit. It does not deal with issues arising from the creation and dissemination online of illegal content, which are subject to regulatory remedies under EU or national laws, nor with other forms of deliberate but not misleading distortions of facts such as satire and parody" (European Commission, 2018, p. 11).

<sup>13</sup> Myanmar is located on the Asian continent and is the scene of perpetuated violations of the human rights of its citizens; the country has almost no means of mass communication and those that did were controlled and

(Klonick, 2019, p. 2018-2020). In response to public pressure, the founder of Facebook began releasing the initial drafts of the *Oversight Board*, which was ultimately an economic pressure, seen as "an investment initiative in building user trust, which is a long-term strategy for continued economic growth" (Klonick, 2019, p. 2426).

To analyze the structure of the *Oversight Board*, one must pay attention to its fundamental document. Its Charter presents the structural essence of the *Oversight Board*, in addition to instituting accountability for digital platforms and encouraging impartial, independent and transparent decision-making (*Oversight Board*, 2024c).

"Freedom of expression is a fundamental human right," the Statute states. Its elaboration arises from two premises: First, the recognition of Facebook as a tool for human connection and, second, that some online manifestations imply violations of "authenticity, security, privacy, and dignity" (*Oversight Board*, 2024c, p. 3). It has been organized into eight sessions that address specific subjects: membership, jurisdiction, procedures, implementation, governance, internal amendments and regulations, and compliance with the law (Klonick, 2019).

The negative impacts on human rights, especially on freedom of expression and the influence on the independence of digital platforms, are two of the biggest concerns when it comes to the regulation of digital platforms (Zankova; Dimitrov, 2020). In this sense, the *Oversight Board* seeks to achieve a balance or harmonious coexistence between the exercise of freedom of expression by users and the limitations on the independence of the social network. In the introduction, the Committee already takes a position in the sense that its objective is to protect freedom of expression, but, despite this, it also states that the internet service should have the responsibility to define certain limits of what should or should not be acceptable to share on the platforms. In defining these limits, standards based on principles and values should be used to ensure impartial and independent decision-making (*Oversight Board*, 2024c, p. 3). Mark Zuckerberg, in an interview with Vox, presented the definition as:

Some kind of structure, almost like a Supreme Court, which is made up of independent people who don't work for Facebook, that ultimately makes the final judgment on what should be acceptable in a community that reflects the social norms and values of people around the world (Klein, 2018).

The Bylaws present the composition of the *Oversight Board* in its first article. It will have a group of members from different backgrounds, whose names will be public. Brazil, Kenya, Indonesia, the United States, France, Australia, Pakistan, and Yemen are just some of the countries that symbolize the cultural diversity of their composition (*Oversight Board*, 2024c,

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surrounded by censorship. Facebook was implemented during episodes of genocide and extreme violence between social groups and the military and ended up being used to spread hatred and organize violent movements (Arun, 2019, p. 6-7).

p. 4). The intention is to be in harmony with the multiplicity of the Facebook community itself and to promote a neutral judgment, without cultural interference. This multiculturalism encompasses not only the origin/nationality of its members, but also their gender, age, education, political opinions, and others (Klonick, 2019).

From professors to Nobel Peace Prize winners, its members are selected from among figures with knowledge and experience in issues of freedom of expression, Information and Communication Technologies (ICTs), online privacy and digital governance. Diplomacy and thoughtfulness are essential attributes in the selection of its members (*Oversight Board*, 2024a). The process of choosing professionals and future members of the Committee chose to include the need to have a large amount of knowledge, skills and specializations, in addition to demonstrating experience and decision-making skills (Klonick, 2019, p. 2459). The platform faced a major problem in deciding on the process of selecting members, direct selection by Facebook itself, the selection of an initial board for selection and even direct voting was considered; at the end of the discussions, the platform decided to carry out the initial selection of some members for the formation of the Initial Council, and these members would work on the selection of the rest, in an attempt to minimize Facebook's interference in the supposed independence of the Committee (Klonick, 2019, p. 2461).

Members can also be recommended by citizens around the world through the *Oversight Board's* recommendation portal; as well as from self-nomination, and must contain biographical information and personal experiences, requiring the answer of four essay questions (*Oversight Board*, [n.d.]

Flexibility permeates the entire *Oversight Board*. First, in terms of the number of members, which today has 22 members. However, the Statute establishes a minimum of 11 and a probable maximum of 40 members, as necessary for its effective functioning. Second, regarding the duration of the term of office of its members, each member will exercise their functions for a period of three years, admitting up to three terms, consecutive or not (Klonick, 2019).

This stipulation of flexible rules is essential to the functioning of any institute in its first years of empirical experience, as it allows an operation adaptable to the circumstances arising in its driving.

#### **4 Limits of Free Speech and the *Oversight Board's* Content Assessment**

The *Oversight Board* functions as a superior framework for analyzing relevant content. To act on a case, it is necessary to request it after exhausting the previous ways: The user needs to resort at first to the internal appeal process of Facebook, Instagram and Threads;

if the user does not obtain satisfaction of his claim, he may request the platform itself to request an appeal to the *Oversight Board*, which will generate an individual identification number that must be copied by the user and sent to the official website of the *Oversight Board*. The process automates the submission and facilitates communication between the user and the Committee; In addition, it will be possible to describe additional information and personal comments relevant to the decision. After submitting the case, the selection committee, composed of five members, will analyze and decide to send it to the panel, requiring the vote of the majority of the members. With the submission to the panel, both Facebook and the user are immediately notified and a panel with five members will request the information, documents or experts necessary for the specific case. It is important to note that the entire process of communication and presentation of Facebook and user points is carried out in writing. After all these steps, the panel members will meet to vote. The decision is sent to Facebook, which must take action within seven days (Klonick, 2019, p. 2472-2473).

Therefore, the Committee can be activated only after the action. The request may be made by the creator of the content under analysis, in case of disagreement with the decision made; or even through Facebook, in case of doubts in decision-making<sup>14</sup>14 (*Oversight Board*, 2020).

Sending cases through Facebook, Instagram and Threads can be done in three ways; First, the platform will be able to select a specific case and request a review, similar to the user's appeals process; in a different way, Facebook may also demand urgency from the Committee in exceptional situations that will have serious consequences in the real world, in these situations the Committee loses its power of choice, and must mandatorily analyze the content in less than 30 days; and, finally, the platform can request advisory guidance without the need to submit specific cases (Klonick, 2019, p. 2473).

In addition, there are some requirements that must be in place to be in place to be able to appeal to the *Oversight Board*; the appellant must: 1) have an active account on Facebook, Instagram and Threads, this means that accounts deactivated during the review process imply the immediate interruption of activities and the absence of a future decision on the case; 2) have a reference ID and, to obtain the identification, the user must go to the Facebook support inbox or to the platform's support requests and open the message about the decision previously analyzed by Facebook, Instagram and Threads; 3) qualification of the decision, this means that the analysis by the Committee must be in accordance with the national legislation of the country of the content, this will be visible by the user on the platform itself; and, finally, 4) the period of 15 days from the moment Meta responds to the user's

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<sup>14</sup> This feature was implemented in October 2020. Between October and December, about 20 thousand cases were proposed to the Committee (*Oversight Board*, 2020).

internal appeal must be observed (*Oversight Board*, 2024b). It is important to note that the *Oversight Board* acts on Meta, considered as the set that encompasses Facebook, Instagram and Threads.

Among the selected cases, there are notorious situations, usually involving hate speech, incitement to violence, disinformation, nudity and others. In June 2021, the Committee announced that it will review a case referred by Facebook of notorious potential and public importance; the case is a publication posted in March 2021 by a Facebook page of a Brazilian medical council. The publication contained an illustration with a warning about the inefficiency of the *lockdown* in containing Covid-19; it also stated that the measure was repudiated by the World Health Organization (WHO) itself for violating fundamental rights and causing psychological and economic damage. In addition, he was referring to a quote by David Nabarro, a medical diplomat who worked at the WHO, in which he supposedly stated that "*lockdown* does not save lives and makes the poor poorer" (*Oversight Board*, 2021c).

According to Facebook, the case in question does not expressly violate the platform's policies, which makes it difficult to resolve; it also states that although the WHO and other experts recommend that the platform remove specific content about health: "they have not directed Facebook to remove actions that criticize *lockdowns*." (*Oversight Board*, 2021c).

Another important case under review was Facebook's decision to remove two posts by former President Donald Trump and suspend his account indefinitely; the Committee concluded that the posts violated the community standards and guidelines, in addition to the user having great online influence – about 35 million followers on Facebook – and considered the suspension of said account for 24 hours correct; however, concluded that the suspension for an indefinite period was inadmissible because it was not one of the usual penalties provided for in the platform's rules (*Oversight Board*, 2021b).

In summary, it is clear that the existence of three elements is necessary for the authorization of the *Oversight Board's* action: the exhaustion of the previous channels, the express request – contains reservations – and the existence of relevant content. In the absence of these requirements, there will be no room for the Committee's action.

That said, the definition of "relevant content" for the purposes of the Committee's work is questioned. Its statute defines the selection of cases according to their potential for future repercussions. Thus, those matters with the capacity to clarify and facilitate decision-making in future cases would fit the definition of relevance<sup>15</sup>. In addition, the Committee is allowed to establish its own procedure for case selection. The choice of relevant content is

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<sup>15</sup> As of March 2021, the Committee has received more than 220 thousand appeals. Of these, 10 cases were selected that are considered to be "of crucial importance to public discourse or that raise important issues in relation to Facebook's policies" (*Oversight Board*, 2021a). In the first quarter of 2023 alone, more than 158 thousand appeals were submitted to the Committee (*Oversight Board*, 2023).



extremely important to the Committee's structure, as "any prior decision by the committee will have precedent value and should be viewed as highly persuasive when the facts, applicable policies, or other factors are substantially similar" (*Oversight Board*, 2024c, p. 7).

Having made this analysis, it is noted that there is a detailed description in the bylaws regarding the process of appealing to the Committee, with no room for doubt as to the timing of its action. However, the same is not said about the selection of cases. The use of generic terms is noticeable, which allows for a broad action of the Committee. Thus, the Statute focuses on *who* and *how* to appeal to the Committee, with few provisions on *what* content is analyzed. This happened precisely because "the role of the Statute was to demarcate the basic principles, with the rest to be defined later" (Klonick, 2019, p. 2425).

It is also interesting to note that the Committee will not be able to analyze cases that may give rise to criminal or regulatory sanctions. The rule is in line with the understanding of the Committee as an advisory body.

For the decision-making process, Facebook's content policies will be used, in addition to the values contained in its Terms of Use, such as the promotion of safety, inclusion, promotion of research and innovation and the strengthening of personal relationships (Facebook, 2022). In addition, the Committee should use the human rights rules on freedom of expression as a guiding principle (*Oversight Board*, 2024b, p. 1).

In order to analyze the cases and make a decision, a multifaceted effort will be adopted through the participation of several actors: Facebook, the Committee, the whistleblower, and also third parties external to the relationship, such as experts, researchers, and translators. For analysis, information will be provided by Facebook to the Committee, always in accordance with the privacy moderations and legal limits applicable to the case. In addition, the person responsible for publishing the content or the complainant may submit, in writing, relevant personal statements with informative content to the Committee. It is also possible to request other information from experts, researchers, translators, and subjects indirectly affected by the content under analysis (*Oversight Board*, 2024c, p. 7 and 8).

At the end of the procedure, a final decision will be made. The decision is as follows: an explanatory provision based on plain language (*Oversight Board*, 2024c, p. 8). The ideal scenario envisaged will always be a unanimous decision, however, when impossible, the determination of the majority of the members will be accepted, with divergent opinions being expressly included in the provision, in order to provide the view of diversified understandings (Ghosh, 2021).

In this sense, the provision will contain the Committee's decision, which may be for the removal or permission of the content, or even the recognition of some designation on the content, such as defining the existence of explicit violence (recommendations). The Committee

may also review Meta's original decisions that were subsequently amended after the Committee's recommendation. All decisions will be made available to the public online on the *Oversight Board website* (Ghosh, 2021).

The Statute provides, exceptionally, for the use of special procedures for certain cases requiring urgency. It is an environment (the virtual one) in which the rhythm of time passes at a higher speed than the real environment. The changes and consequences of what happens online are "naturally" faster. Therefore, when it is noticeable that the real consequences will be unrestrained, the process of selection and analysis will be received quickly<sup>16</sup>.

The Committee's duties are not limited to the preparation of decisions. Its Statute provides, among other competencies:

1. Request that Facebook provide information reasonably necessary for the committee's deliberations in a timely and transparent manner;
2. Interpret Facebook's Community Standards and other relevant policies (collectively, "content policies") in light of Facebook's articulated values;
3. Instruct Facebook to allow or remove content;
4. Instruct Facebook to maintain or revert a referral that led to an application result;
5. Issue adequate written explanations of the committee's decisions (*Oversight Board*, 2024c, p. 4 and 5).

The Committee's decisions will be binding and must be executed immediately by Facebook, Instagram and Threads, with the exception of those that violate the law. At this point, it is necessary to clarify that the binding of decisions is exceptional, applicable only to cases related to appeals. Thus, as a general rule, the Committee's duties are of an advisory nature (Klonick, 2019).

As for the Committee, its objective is to analyze content and issue public and reasoned decisions within the framework of the statute, in addition to issuing advisory opinions on Facebook's content policies. The committee will have its services contracted by Facebook, being financed by the *Trust* that will pay for its operations and expenses. The *Trust* serves as a guarantor of the essential functions provided for in the Oversight Board Bylaws.

This is accomplished through activities such as approving the Committee's budget or removing members for conduct violations. The operation of the *Trust* is funded by Facebook, and, at this point, some authors pay attention to the dubiousness that exists in the statement

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<sup>16</sup> The deadline established for the publication of the decision by the Committee is 90 days from the assignment of a case to the panel; cases considered exceptional, on the other hand, use a quick procedure lasting thirty days (*Oversight Board*, 2024b).

that the *Oversight Board* would be an independent body, since Facebook would finance the *Trust* with a fund of about US\$ 130 million (Kang, 2021).

The *Oversight Board* is a relatively new structure, implemented a few years ago, in such a way that research on its functioning is still recent and its implications/consequences do not have defined contours. In any case, it is known that it is an ambitious attempt and different from any self-regulatory mechanism that has existed so far. More recent research even equates it to an example of social constitutionalism (Golia, 2021).

The Oversight Board implementation initiative is a first-of-its-kind solution in terms of corporate management. His training is consistent with the understanding of the complexity of digital platforms. The Committee is an innovative idea designed to work effectively in an environment that requires adaptable responses to the disruptive nature of new social challenges. It also plays an essential role in the responsible decentralization of decisions previously left to a single structure: Facebook (Zankova; Dimitrov, 2020).

In the next section, a counterpoint will be made, presenting the conclusions of the contributions of the paradigm of Roman jurisdiction to the *Oversight Board*.

## 5 Counterpoint and conclusions

The counterpoint method (Pilati, 2017), which is carried out in this work, tried to confront two jurisdictional paradigms, in order to contribute to the improvement of the procedures adopted by the *Oversight Board* for content analysis.

The present paradigm of antiquity is, in fact, the genesis of jurisdiction, of that moment recorded by the History of Western Law, as the birth of the way of making judgments through lay judges, without any legal training, who were appointed from Roman citizens.

The very concept of the National State would only emerge at the end of the Middle Ages, and it was not necessary in the republican organization of the Romans, which was founded on the basis of society.

Through the procedure of knowing the ancient, with a view to restudying contemporary problems (Lobrano, 1983), a contextualization of how conflicts were resolved by a jurisdiction of the ancient Roman city was carried out, in a pragmatic, creative way and with all the legal rigor.

It should be noted that, despite the absence of the state legal entity, the Roman Republican period – chosen as a paradigm of antiquity – was the richest in legal productions and unsurpassed by original creations of political institutions.

With the conviction that the study of Roman Law finds its meaning in the practical resolution of contemporary problems – after all, Roman pragmatism was averse to philosophical

digressions – the unprecedented research problem was contextualized: what contributions can the paradigm of Roman jurisdiction provide for the improvement of the *Oversight Board*?

Two paths were verified: (1) to repeat the modern state structure within the structure of a company toilet; or, (2) go in search of a non-state paradigm.

It does not seem logical for the *Oversight Board* to replicate the regulatory state structure, notably for the resolution of conflicts, since the issues dealt with there are not restricted to the territorial limits or interests of a given national state.

First, it is understood that Meta cannot absorb state structures or even replace them, not least because that does not seem to be its objective.

Secondly, the National States have constructed their jurisdiction as an expression of their function-activity-power, which must be exercised within a structure that requires the presence of the elements: people, territory, and sovereign government. Meta does not have any of these elements.

So, the path that is envisioned is to go in search of a non-state paradigm. Therefore: why not implement a self-regulatory jurisdictional paradigm that emerges from the societal context itself, independent of state structures and constraints?

Furthermore, it does not seem to be reasonable to believe that Meta – or even other private business companies – can resolve and prevent conflicts involving freedom of expression on their digital platforms using paradigms of modern jurisdiction. The paradigm of modern jurisdiction is based on waiting for the conflict to occur and – later – applying the corresponding sanction, provided for in some rule. The paradigm of the old jurisdiction allows – in addition to punishment – a closer look at those involved, with solutions that come from of the concrete case, and not of the mere application of the sanction. In other words: the solution is found from the conflict and not in a general and abstract norm, through a reverse and purposely casuist movement.

It is understood that Meta, therefore, should be seen as a kind of *digital republic*, consolidated based on society and not on a proven or pseudo-state legal entity.

It can be said that, in a way, Meta carries out activities quite similar to what occurred within the paradigm of Roman jurisdiction, as an example of the appointment of its members to the *Oversight Board*.

After these conclusions, here are some contributions that were extracted by the use of the counterpoint method.

1. Candidates for members of the *Oversight Board* should be nominated by Meta, among those qualified registered, to fulfill their duties in short terms. Short terms allow for greater oxygenation and updating of ideas, in addition to preventing the manipulation of board structures for personal interests.

2. It is suggested that the members of the *Oversight Board* vote by the users of Meta's platforms themselves. As it is a digital coexistence, it is fair that there is this prior vote and that the choice of members occurs in a wide, accessible and widely publicized way. All users should have the right to vote for the candidates presented and to present themselves as candidates. However, the acts of appointment and registration must always be from Meta.
3. The members of the committee must inform, at the beginning of their terms, how jurisdiction will be exercised on the *Oversight Board*, that is, how they will carry out their work and what will be the main guidelines to be followed by the arbitrators. When there is a succession of mandates – the new members must inform whether the previously established rules will be maintained or modified.
4. Before the trials, in which there may even be forms of mediation and conciliation, the members of the *Oversight Board* must meet with the interested parties and clarify the limits of the demand: what its consequences will be, how the procedure will be and who will judge the case as arbitrator. If possible, the ideal is that everything arises by mutual agreement. Otherwise, the members of the *Oversight Board* must make the necessary choices and inform how the procedure will be.
5. Referees must be included in a public register of volunteers, accessible to all users of the network. If extremists (left or right) are identified, it will be up to the *Oversight Board* not to appoint them as members, on this very grounds.
6. It is necessary to create a permanent body of jurists, who are not members of the *Oversight Board*, which should be made up of life members, to record all conflicts and judgments that occur, in order to – in this way – assist the arbitrators when doubts are raised, through decisions and information on past cases, a policy adopted by Meta, and indication of principles already established in the appropriate form of conflict resolution.
7. The permanent body of jurists may under no circumstances be directly involved in the conflicts and judgments, as they will also dedicate themselves to research for the functioning of the *Digital Republic*.
8. An autonomous inspection of the platform is necessary, which will be carried out by a kind of *digital administrative police*, in order to enhance the reach of the *Oversight Board*, assisting in the early survey of problems for Meta.
9. The *Oversight Board* may issue binding decisions and guidelines to be complied with by users, with broad rules to guide the best use of the platforms; from the outset, it



being understood that these rules must arise from the analysis of previous cases and with well-clarified and delimited purposes. Such decisions may be reviewed at any time, provided that the interested party presents solid grounds and necessity.

10. The decision of the arbitrators is only effective after the approval of the *Oversight Board*; therefore, the right of automatic appeal should not be granted to the judge, after the judgment of the dispute, as occurs in modern judgments. The *Oversight Board*, when analyzing the ratification of the arbitrators' decisions, will already perform the function of 2nd instance and will reanalyze the entire judgment. In the event of non-approval, the *Oversight Board* shall make a duly reasoned decision and appoint a new arbitrator for the claim.
11. In the event of a request for review of decisions, the *Oversight Board* will meet beforehand to determine the need to re-give jurisdiction to that case already resolved. This procedure can simplify issues already resolved and give legal certainty to users of Meta's platforms, without the need to use the institute of "res judicata", under penalty of going against the digital dynamics.
12. It is convenient and opportune to create, from the counterpoint of the Republic of the Romans, the bases for a digital republic, in order to structure its conception on solid legal bases and promote its healthy development.

For all the above, it is concluded that the self-regulation practices exercised in the *Oversight Board* are perfectly legitimized by the legal paradigm of the Republic of the Romans: genesis of all Western Law.

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**How to cite:**

FILÓ, Maurício da Cunha Savino; BORGES, Gustavo Silveira. Oversight Board and its Legitimacy: Genesis of Self-Regulation from Roman Jurisdiction. **Pensar – Revista de Ciências Jurídicas**, Fortaleza, v. 29, n. 3, p. 1-17, jul./set. 2024. DOI: <https://doi.org/10.5020/2317-2150.2024.14040>

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**Received:** 02/08/2023  
**Accepted on:** 04/26/2024