Internet Regulation In Brazil: the importance of the Civil Rights Framework for the Internet in safeguarding digital rights.

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ABSTRACT: The present exposition addresses the subject of Internet Regulation in Brazil, more specifically the Civil Rights Framework for the Internet and its impacts on the Internet Governance related discussions in the country. In this sense, from a bibliographic review approach, we aim to analyse the legislative scenario that later resulted in the Marco Civil da Internet, as well as the crowdsourced lawmaking process adopted by the Ministry of Justice and the questions that have arised from the debate.

KEY WORDS: Internet Governance. Regulation. Crowdsourcing Legislation. Digital Rights. Marco Civil da Internet.

Internet access in Brazil and the regulatory scenario before 2014

Brazilians are estimated to spend over nine daily hours on the Internet of which three are dedicated exclusively to social media[3]. From the statistics you can conclude that the country shows very ample use of internet and social networks as we are the fourth country in absolute number of Internet users, behind the United States, India and China[4].

Our country is also known as a progressive one when it comes to Internet regulation in light of being one of the main advocates of the Multistakeholder participation model and als for having a so called “Internet Constitution”, or the Civil Rights Framework for the Internet, in portuguese “Marco Civil da Internet”, established into law in 2014. The law, one of the first great examples of crowdsourcing applied to the legislative process, establishes principles, guarantees, rights and duties for the use of the Internet in Brazil.

Until 2014 there was no specific legal framework dedicated to the Internet in Brazil. With regards to rights such as the protection of privacy and private life, the Brazilian 1988 Constitution defines it as a fundamental Human Right (art 5 (X)) extendable to all individuals who reside in the country and that the secrecy of data is inviolable except for purposes of criminal investigations by means of judicial orders. Other than the Constitution, its is possible to list a set of thematic laws which contain provisions with regards to the protection of Health, Financial, Telecommunications and Consumer personal data, or with regards to conducts that could be offensive to one's honour.

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[3] https://wearesocial.com/blog/2018/01/global-digital-report-2018

[4] http://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=432

Another fundamental right acknowledged by the brazilian constitution is the Access to Information. In that sense, the Law no 12.527 of 2011 (Access to Information Act) regulates the access to information and prescribed procedures to be observed by the Federal, State, Federal District and Municipalities. With the approval of the Law - applicable to all levels of the government (city, state, and national) and the three powers (legislative, executive, and judicial) -, access to governmental information like financial expenditures and contracts, as well as general data on programs, actions, projects and other public works were guaranteed to Brazilians.

On the Personal information subject, it is important to note that the legal text of "Marco Civil" contains a definition of the term and some provisions on the treatment of this information both on articles 4th and 31st[5]. According to the law, all personal information related to private life, honor and image of individuals must not be disclosed without the consent of the information owner and is also restricted exclusively with legal authorization of access[6]. Unauthorized agents can only have access to personal information in the following cases: (1) disease prevention or medical diagnostic purposes; (2) statistics and research of public interest when predicted by law; (3) enforcement of a court order; (4) protection of human rights; or (5) protection of the public interest. In addition, third parties are allowed to request and have access to personal information once a statement of responsibility that clarifies the objectives of the applicant, as well as their obligations under the law, is signed.

Unfortunately the Internet Regulation debate in Brazil did not start with legislative proposals such as the "Marco Civil". Before 2014, the discussion was mostly criminal law oriented, meaning that most of the legislative proposals concerned the criminalization of online conducts such as unauthorized access to devices, mechanisms to prevent fraud in

[5] Article 31. The processing of personal information must be done in a transparent manner and with respect to privacy, private life, honor and image of people, as well as individual freedoms and guarantees.
§ 1. The personal information referred to in this article relating to privacy, private life, honor and image:
I - shall have restricted access, regardless of classification of secrecy and for a maximum period of 100 (one hundred) years from the date of production, to legally authorized public agents and the person to whom they refer; and
II - may have authorized their disclosure or access by third parties with the legal provision or express consent of the person to whom they refer.
§ 2. Anyone who gains access to the information referred to in this article will be held liable for its misuse.
§ 3. The consent referred to in item II of § 1o shall not be required when the information is required:
I - prevention and medical diagnosis, when the person is physically or legally incapacitated, and for use solely and exclusively for medical treatment;
II - the accomplishment of statistics and scientific researches of evident public or general interest, provided for by law, being forbidden the identification of the person to whom the information refers;
III - compliance with a judicial order;
IV - the defense of human rights; or
V - protection of the prevailing public and general interest.
§ 4. The restriction of access to information concerning the private life, honor and image of person can not be invoked with the intention of harming the process of investigation of irregularities in which the holder of the information is involved, as well as in actions aimed at the recovery of historical facts of major relevance.
§ 5 The Regulation shall provide for procedures for handling personal information.

[6] Antoniutti, Cleide Luciane. Usos do Big Data em Campanhas eleitorais. PhD Thesis oriented by Sarita Albagli. Federal University of Rio de Janeiro. Available at: http://ridi.ibict.br/handle/123456789/849

e-commerce, and what later would be defined as revenge porn related conducts, usually on the track of high profile situations and scandals portrayed by mainstream media.

The Azeredo Bill, then one of the most important draft bills on the subject, proposed to amend the brazilian Penal Code with the creation of new criminal conducts for the digital world. Therefore, the Bill and the internet regulation discussion at the time were more focused on the large criminalization of conducts without acknowledging the actors, practices and the structure of the Internet as we know it.

The discussions originated with the Azeredo Bill later resulted in what was called the "Carolina Dieckmann Law[7]", approved after the leaking of private photos from a well known actress in Brazil. At the time, the incident raised a lot of questions with regards to the possible remedies to the crimes committed through electronic and internet means. Although this specific case was more similar to a sextortion or even revenge porn, the law opted for defining this digital crime as the *invasion of any computer or digital equipment, connected or not to the internet, not depending of which security barrier that invasion has exceeded, with the objective to obtain, adulterate or destroy data and information without authorization.*

Any Internet regulatory initiative should observe principles such as freedom of expression, privacy, respect for human rights and preservation of the dynamics of the Internet as a space for collaboration and innovation. In this way, the process of normative elaboration on the subject must, however, be careful to stick to the essential. That was the purpose of “Marco Civil da Internet”: to set a wide, broad framework of basic rights and principles to preserve those characteristics, while also establishing that the online world is not exempt from the legal framework. It is my understanding and it was the understanding of Dilma Rousseff’s Administration that the open and transnational nature of the Internet, as well as the rapid pace of its technological evolution, can be severely hampered by restrictive legislation.

Brazil had other legal frameworks applicable to the Internet but until 2014 we did not have any law exclusively dedicated to the Internet, let alone any draft bill dedicated to the safeguard of Internet users rights. It was under those principles and goals that “Marco Civil da Internet” came to be, setting a civil rights approach for internet regulation in Brazil, hence the nickname “Civil Rights Framework for the Internet” or “Internet Constitution”.

During this exposition, I expect to bring some light to this innovative lawmaking process and also to set the challenges faced and to be faced on the theme of Internet Governance and Regulation.

A Crowdsourced legislation: Public Consultations, the debates on the Brazilian Congress and the Snowden Effect

[7] BRASIL, Presidência da República. Law no 12.737 from 30th november 2012. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2012/Lei/L12737.htm

The Law n. 12.965 from April 23rd 2014, or the Marco Civil da Internet, is the first comprehensive law in brazil dedicated exclusively to the Internet. The drafting process of the law also represented an innovation in lawmaking process in the country due to the high level of participation that was granted during the making of the law.

Differently from other bills discussed by the brazilian legislative in which the stakeholders participation happens mostly in the shape of public hearings or old fashioned, shady, lobbying, Marco Civil was constructed through the Internet from its very beginning. It is safe to say that the Bill and its many versions along the process were written taking into consideration the input from the brazilian society, with an online, participative debate tool hosted by a joint venture of the Ministry of Justice and the Ministry of Culture of Brazil.

The law introduced the concept of crowdsourced legislation in the country as it was not only an initiative of collaborative construction within the institutional spaces of power or democratic institutions such as the Presidency of the Republic, Ministry of Justice and Legislative branch, but also with the brazilian society. In a global context in which the models of representative democracy are put in check by new technologies, the construction of the Internet regulation of Brazil was able to combine the diffuse online participation with the traditional processes of decision making in the spheres of political power. The result, I must say, was better than expected for such an open environment. We've had almost no trolls, no hate comments, no spamming, but a real, productive debate that led to the bill and lather to the law.

Crowdlaw - or crowdsourced laws - poses as an alternative to the traditional method of lawmaking, typically done by professional staff and politicians working behind closed doors and with little direct input from the people legislation affects. As defined by the New York University's GOVLAB, it is known as the practice of using technology to tap the intelligence and expertise of the public in order to improve the quality of lawmaking[8]. And, if designed with the aim of improving the quality of outputs, there shall be opportunities at each stage of the process to introduce greater expertise into the legislative process efficiently - including in moments such as problem definition, solution identification, research and drafting[9].

As mentioned before, the idea of the legislation was brought up as an alternative to the brazilian Congress attempts of regulating Internet in Brazil through the criminalization of online conducts. By the year of 2008, the Ministry of Justice of Brazil and the Center for Technology and Society, a brazilian think thank on the subject, decided to issue the first of the phases of public consultations that later resulted in the Law 12.965/2014 (Marco Civil) bearing in mind the importance of direct democracy and enhancing participation in the legislative processes.

[8] New York University, The GOVLAB. CrowdLaw: Online Public Participation in Lawmaking. Available at: https://crowd.law/

[9] New York University, The GOVLAB. CrowdLaw. Available at: http://www.thegovlab.org/project-crowdlaw.html

According to the report presented right after the conclusion of the first phase of debate, the urgency of the discussion was due to the need for a comprehensive legislation capable of updating legal approach to the digital culture, respecting the rights of individuals, the right to the nature of the global network, clearly defining the responsibilities of various actors involved and establishing guidelines for government action with a view to achieving the objectives of full access, integration and interoperability[10]. Therefore a platform for the discussion of subjects such as freedom of expression, privacy, right to access and Intermediary liability and others was assembled.

The construction of the proposed regulatory framework aimed to bring innovation in the lawmaking process: the intention was to encourage, through the Internet itself, the active and rightful participation of the numerous social actors involved in the theme (users, academia, representatives of private initiative, besides parliamentarians and representatives of the government). To this end, the process was conducted primarily by the Internet itself, highlighting the impartiality of this space to be a decision arena as well as its diversity of actors or stakeholders.

The *first* phase of the discussion was able to to gather input from the brazilian society at large on individual and collective rights related to the use of the Internet that were not explicitly foreseen in the national legal order, Internet actors liability and governmental guidelines[11] regarding policies for and on the Internet. Despite of the fact that some of those individual and collective rights might have been already protected before the Marco Civil enactment due to the fact that they derive from constitutional principles, at that time, the absence of specific legal provisions for their protection was considered a risk to their guardianship and exercise.

The coordination of the debate, led by the Ministry of Justice, created specific discussion *forums* for some topics and the debate was hosted in specific communities within the portal *culturadigital.br.* In this way, it was believed that the discussion would take place more comprehensively, allowing an openness that would lead to the maturation of the ideas proposed among the participants. In addition, other participants could view the other comments of the query, allowing an effective discussion of ideas, both in the comments and in the discussion forums[12].

Another interesting point in this first phase was that all participants were given the possibility of ranking, positively or negatively, the contributions of others. In this way, the reception of the comments would serve as a guideline to the drafting team regarding the preferences, opinions and interests of the participants, contributing to the formulation of the proposal.

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[10] Secretaria de Assuntos Legislativos do Ministério da Justiça e Centro de Tecnologia e Sociedade da Fundação Getúlio Vargas. RELATÓRIO – COMPILAÇÃO DE COMENTÁRIOS APRESENTADOS NA PRIMEIRA ETAPA. Available at: http://culturadigital.br/marcocivil/category/consulta/1-direitos-individuais-e-coletivos-eixo-1/

[11] CULTURA DIGITAL. Marco Civil da Internet. Available at: http://culturadigital.br/marcocivil/sobre/.

[12] CULTURA DIGITAL. Marco Civil da Internet. Available at: http://culturadigital.br/marcocivil/sobre/.

During this first period of discussions, between 29 October and 17 December 2009, the platform received more than 800 contributions, including comments, emails and references propositions on websites. By the end of the first stage, the results of the participation were compiled and a draft of draft law was elaborated.

The second phase of the discussion followed basically the same format and duration of the first, 45 days. However, at this stage the document under discussion was the preliminary draft bill resulting from input received during the first phase. In that sense, each article, paragraph and subheading were open for comment by any interested party. Other than that, discussion forums were also maintained for the maturing of ideas and for an unrestricted discussion. Apart from the discussion on the draft text and the online forum, citizens could also follow the process on twitter through the handle @marcocivil and the hashtag #marcocivil.

Therefore, during 45 days, a draft text composed of 34 articles, divided into chapters: (1) Preliminary Provisions; (2) Users Rights and safeguards; (3) Internet Connection and Services provision, (4) Role of Public sector; and (5) Final Provisions, was discussed with the brazilian society. By the end of the second phase of the public consultation, the draft bill received approximately 160 thousand visits that resulted in more than two thousand and three hundred contributions of individual users, governmental and nongovernmental entities - many of them adopted by the final text.

Finally, in October 2011, the final text of the bill was presented to the Brazilian Congress, closing up the three years of a bottom-up drafting process. Upon its arrival at the House of Representatives, a special commission was instituted for its appreciation. The processing of the bill in the brazilian legislative branch was also important in enhancing the text and allowing more voices to be heard in the process.

There were at least two interesting phenomena that derived from this process: First, traditional lobbying organizations would still try to hold meetings with public agents and present their contributions through paper letters addressed only to the Ministry of Justice. To halt those attempts, our resolution was to answer those requests by saying that minutes of all meetings and scanned copies of those letters would be uploaded to the public debate website. Needless to say, some of those cancelled the meeting requests and others asked to take back their letters, presenting new ones, more suitable to the public debate. The second is that, although the Administration was not binded to the outcome of the public debate, every stand or decision that was taken was thoroughly explained, setting the foundations and motives that led to such decision. It is important to say that the resulting bill was not a result of the most “liked” our “popular” proposals, but the detailed explanation of every governmental choice, accepting or rejecting those proposals set a ground of legitimacy that was later essential to its approval at the Legislative branch.

Alessandro Molon, one of the Draft Bill rapporteurs at the House of Representatives and the other members of the special commission on the subject held by the Brazilian Congress opted on holding public hearings in 7 cities around the country that, in the end,

welcomed 62 specialists on the subject. In addition to the public hearings, a new version of the draft bill, with amendments from the congressmen, was made available on the Internet through a public consultation on the [edemocracia.camara.gov.br] portal, in order to gather more opinions from society and other sectors interested in the process.

In the final report[13], more than 45 thousand visits were counted and forums that discussed topics related to the civil milestone received more than 200 posts. In addition, 140 proposed amendments to the text of the Bill were submitted by Internet users in Wikilegis, a session of the e-Democracy portal where it was possible for interested parties to submit suggestions for changes to the draft law in question.

The second public consultation only demonstrates how complex the process of elaboration of Draft Law n. 2.126/2011[14] was. During its appreciation by the legislative branch some important subjects such as Net Neutrality, ISPs liability and some congressmen attempt to include copyright dispositions on the bill posed as a challenge to its approval.

At this point, the strength of the outsourcing revealed itself. Civil society, academia and important sectors of Internet actors took a stand to defend the Bill, facing ISP and copyright lobbyists and holding meetings with all sort of congressmen, including those that opposed Dilma Rousseff's Administration. This led to the bill passing both the House of Representatives and the Senate by unanimous vote.

It is also safe to say that the Snowden revelations had a direct impact towards speeding the approval process of the Marco Civilat the Brazilian Congress. Once the Internet users privacy violations performed by governments was brought to attention by Mr.Snowden the Brazilian congress finally understood the urgency of approving the draft bill in order to guarantee rights and instate a new legal framework dedicated to the protection of Internet users.

Still on the Snowden revelations, the scandal that exposed the US National Security Agency (NSA) was collecting the telephone records of tens of millions of people around the world had a direct influence on the brazilian position with regards to mass surveillance. At the time President Rousseff delivered a speech at the UN General Assembly, accusing the NSA of violating international law by its indiscriminate collection of personal information of Brazilian citizens and economic espionage targeted on the country's strategic industries[15].

At the opportunity, the speech was also used to send a message to the Brazilian National Congress on the importance of adopting legislation and technology to protect its citizens

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[13] MOLON, Alessandro. **Relatório da Comissão especial destinada a proferir parecer ao projeto de Lei nº 5.403, de 2001, do Senado Federal, que "Dispõe sobre o acesso a informações da Internet e dá outras providências".** Câmara dos Deputados, 2012. Available at: [edemocracia.camara.gov.br].

[14] BRASIL, Câmara dos Deputados. **Projeto de Lei 2.126 de 2011**. Available at: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=517255>.

[15] Borger, Julian. Brazilian president: US surveillance a 'breach of international law'. Available at: https://www.theguardian.com/world/2013/sep/24/brazil-president-un-speech-nsa-surveillance

from illegal interception of communications. Adding to that, alongside with Germany, Brazil is one of the co-sponsors of the Privacy In the Digital Age resolution[16], two of the countries where public debate over surveillance has been most intense as a consequence of the Snowden disclosures. The move can be seen as a direct response to the Edward Snowden's revelations about the scale of electronic monitoring by the US National Security Agency (NSA) and Britain's GCHQ.

Finally, in april 23rd 2014, the Bill was enacted by President Dilma Rousseff during the Global Multistakeholder Meeting on the Future of Internet Governance (NETmundial) in São Paulo. NetMundial was an event co-organized, among others, by the brazilian government that allowed governments, civil society organizations, private actors, and local Internet communities to elaborate a human rights declaration and set common grounds on global Internet governance[17].

Being the host country of the NetMundial was one of the forces that helped the National Congress approve the bill after postponing its appreciation over and over again. The global Multi-stakeholder meeting held in São Paulo in April 2014 was dedicated to the discussion of digital rights and Internet Governance and Brazil had to demonstrate its commitment with the subject. Therefore, the approval of the Law had a very positive influence on the meeting as it was the first legislation in the world that acknowledged a multistakeholder participation on Internet Governance.

At the occasion, President Rousseff highlighted that the law was a result of a vast debate process with the brazilian society. She also portrayed the Law as a good example of the feasibility and the success of an open and multi-stakeholder discussions as well as the use of the Internet in the discussion by convening an interactive platform for debate that granted brazilians a space to have their voices heard. Last but not least, the law was also important in consecrating the Net Neutrality discussion in Brazil as well as the consensus around its importance.

Later in 2015, the Ministry of Justice held another public consultation process but this time it was dedicated to the regulatory decree of the Law. In order to enrich some of the discussions summoned by the enactment of the law, the regulatory decree addresses exceptions to network neutrality and indicates procedures for data storage by connection and application providers.

Here the draft was once again submitted to the communities inputs in two phases: one around 4 main axes - net neutrality, log storage, privacy online and other themes; and a second one that debated the actual draft of the decree constructed based on the input

[16] United Nations General Assembly. Resolution A/RES/68/167: The right to privacy in the digital age. Available at: http://undocs.org/A/RES/68/167

[17] Markus Fraundorfer (*2017*) Brazil's Organization of the NETmundial Meeting: Moving Forward in Global Internet Governance. Global Governance: A Review of Multilateralism and International Organizations: July-September 2017, Vol. 23, No. 3, pp. 503-521.

provided in the first phase. Over this period, the page that hosted the public consultation received over 192,706 pageviews and over two thousand comments during both phases[18].

Therefore, the Marco Civil da Internet was the brazilian contribution to the Internet Governance debate with regards to the importance of bottom-up policy making processes, with the participation of the broader Internet Governance community, dedicated to the fulfillment of fundamental rights online.

In that sense, the construction process of both the Law and its regulatory decree through public online consultations developed by the Ministry of Justice ended up being a benchmark comparing to the usual means of direct democracy. Such processes are important in the Internet Regulation scenario based on the premise that now the public is not only a collaborators but a co-creator in the legislative process, and that also contributes to the effectiveness of governing.

By approving the law, Brazil attempted, within its sovereignty space, to establish the minimum parameters of a law that would guarantee the free, open and plurality of the Internet. The law served as an inspiration for many legislations around the world due to its Human Rights based approach to the Internet.

What is the Civil Rights Framework for the Internet ?

The law, known as the Constitution of the Internet, is a declaration of principles for Internet use in Brazil, other than being one of the first concrete steps towards ensuring privacy, human rights and citizenship in digital media. Apart from that, the legal text sets obligations for the commercial and governmental exploitation of this large network as it sets rules for content removal by Internet applications, introduced the subject of Net Neutrality later regulated by its specific decree and addresses the storage of connection logs as it also states mandatory data retention for both connection providers and internet service commercial providers.

As mentioned above, principles such as transparency, freedom of expression and privacy were already enshrined in the Brazilian Constitution, but the Marco Civil da Internet can also be seen as the law that adapted existing fundamental rights to the digital context.

Another important text for the drafting of the law was the Brazilian Internet Steering Committee decalogue of principles for the Governance and Use of the Internet[19]. This set of principles encompassed values such as the acknowledgement of the importance of freedom of expression, individual privacy and the respect for human rights in the use of the internet and also the exercise of Internet governance in a *transparent, multilateral and*

[18] Pensando o Direito. Marco Civil: O debate em números. Available at: http://pensando.mj.gov.br/marcocivil/debate-em-numeros/

[19] CGI.br, Brazilian Internet Steering Committee. PRINCIPLES FOR THE GOVERNANCE AND USE OF THE INTERNET. Available at: https://www.cgi.br/principles/

democratic manner, with the participation of the various sectors of society, thereby preserving and encouraging its character as a collective creation.

Moving on to a more in depth analysis of the Law, the Civil Rights Framework for the Internet is mainly a principologic legal framework. Laws based in underlying principles tend to be more flexible and able to endure the challenges imposed by the innovations inherent to the evolution of technologies, and thats the goal Brazil reached for with Marco Civil. It would also set a framework for future legislation on more specific issues, such as online data protection and copyright.

The law was built around 3 main axes - (a) fundamental rights of users; (b) Internet service providers liability and (c) Governmental attributions in safeguarding the users and the development of the Internet as a social tool.

(a) Freedom of Expression

During the drafting process one of the main challenges was sewing these three axes in light of the inputs brought by the debate with civil society, internet corporations and congressmen. At the time, the legislative debate was still very inclined in holding people accountable for their conducts online - both in the civil and criminal spheres. Thus, the debate suffered some influence from the Azeredo bill and sectors of society, specially law enforcement entities and media producers sought the possibility of installing harder rules for content removal by content providers that could have possibly resulted in online censorship. The challenge was to set a dialogue to those demands, some of them legitimate, and try to balance that with the fundamental right of free speech.

Freedom of Expression is a transversal subject that can be identified in different sectors of the law. Apart from being a right safeguarded by the Brazilian Constitution, Marco Civil took on the special mission of adapting its intricacies to the Internet. Discussions around the ideal content removal mechanism and Internet service providers liability took a huge part in the debate. One of the main concerns was to establish a model of content removal that would not result in online censorship and also that did not directly held the intermediaries accountable for the content, while still allowing for criminal investigation when needed.

Therefore, the mechanism adopted was the removal of content only through judicial order, meaning that only a judge should be able to compel whether or not a content should be removed from the Internet. Article 19 of the law, as an exception, makes service providers subsidiarily responsible for third-party content only in specific cases. It is important to say that this provision does not apply directly to copyright, since that debate was - and still is - being made on a specific bill, still under scrutiny of the Brazilian Congress.

The letter of the law on this issue states that: "In order to ensure freedom of expression and prevent censorship, the provider of Internet Applications who does not comply (take any steps further the removal of the content) with a judicial order requesting the removal of

the content should be subjected to civil liability for damages resulting from content generated by third parties." As said before, the exceptions to this rule are (a) copyright (article 19, § 2º), which according to the law is to be subject of a specific legal provision and (b) Porn revenge distribution (article 21) due to the fact that cases that bear the disclosure of images, videos and other materials containing nudity or sexual activities of a private nature, without consent for its disclosure can be severely damaging to the people depicted in the content and are not, as the law provides, a subject of public interest.

(b) Net Neutrality

Moving on to another important subject, Marco Civil da Internet introduces the legal concept of Net Neutrality as well as sets the equal treatment of data packets, ensuring that there is no discrimination based on content, origin and destination, service, terminal or application by ISPs. This specific subject was one of the main topics of discussion during the drafting of the law and its regulatory decree.

Imperative to note that it was not easy to come to a consensus within the brazilian society about the ideal language for addressing the issue. As MCI was introducing a new regulation for the Internet market both in the provision of access and services online, the attempt to guarantee net neutrality as an absolute principle has suffered a few distractions during the MCI approval process.

In its article 9, the Law instituted that the discrimination or degradation of data traffic could only result from technical requirements essential to the adequate provision of services and applications or prioritization of emergency services. Later in 2016, the regulatory decree[20] dealt with detailing the exceptions in which data package discrimination and traffic degradation were to be allowed.

According to the decree[21], the "technical requirements indispensable for the provision of Internet services" are basically two: (i) handling of network security issues, such as the restriction on bulk messaging (spam) and denial of service attacks; and (ii) administer exceptional situations of network congestion, such as alternative routing in cases of interruption of the main route and emergency situations.

Nevertheless, the decree expressly prohibits agreements between Internet service providers and application service providers when they (i) compromise the public and unrestricted character of internet access and the fundamentals, principles and goals of internet usage in the country; (ii) prioritize data packages due to commercial arrangements; or (iii) favor applications offered by those responsible for transmitting, switching or routing or by companies in the same economic group.

[20] Brasil, Presidência da República. Decreto nº 8.771, de 11 de maio de 2016. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Decreto/D8771.htm
[21] Article 5 of the Decree nº 8.771/2016.

While practices such as fast laning are expressly banned by the Net Neutrality rule, neither the law nor the Decree puts in place any prohibitions to zero-rating or sponsored access to Internet applications in the country. Although net neutrality is being respected in fixed internet plans, it is very common to see 3G and 4G band services in Brazil offering services with zero-rating or sponsored access to a certain application in order to facilitate the access to popular services such as WhatsApp, Facebook and Twitter[22].

In an attempt to protect the users interests, the Decree also states that *commercial offerings and billing models for internet access must preserve a single internet that is open, plural and diverse in nature and understood as a means for the promotion of human, economic, social and cultural development as well as contributing to the building of an inclusive and non-discriminatory society[23].*

Throughout the whole process, main players of civil society saw the discussion of Net Neutrality as the cornerstone for guaranteeing rights on the internet. Due to their resiliency the subject was kept on the law which was the first legal framework in the world to codify that in the traffic of data there should be no distinction or discrimination between the packets.

Although net neutrality was mostly guaranteed to all internet services, zero rating, which may in some cases be seen as a violation of a pure net neutrality rule, proved itself to be a hard case for policy-making, since such services were already in place by some ISPs in 2014 and consumers usually are supportive of them. Therefore, legislation was not able to tackle those practices directly, which nowadays reveal themselves as an important issue, as we see the impact of fake news, delivered through closed social media, which are usually the ones that usually set the zero rating agreements with ISPs. That`s a theme Brazil will most likely have to face again.

(c) Right to Privacy

Right to Privacy is another core subject for the Civil Rights Framework for the Internet. As mentioned previously, the revelations surrounding the deployment of governmental-led espionage programs by the Us Government, expedited a fast reaction from both the National Congress, Government and Civil Society. Prior to the revelation, there was not much working in the draft bill text that could address the rise in surveillance and espionage[24].

Initially the law mentioned in its article 3 that the discipline of internet use in Brazil should follow principles such as the protection of Privacy (Article 3 (II)) and the protection of Personal data, pursuant to law (Article 3 (III)). But only after the Snowden scandal that

[22] Article 19. Country Report: Brazil's Marco Civil da Internet. Available at: https://www.article19.org/resources/country-report-brazils-marco-civil-da-internet/

[23] Article 10 of the Decree nº 8.771/2016.

[24] Senado Federal 'Marco Civil da Internet foi reação a denúncias de Snowden' <.www12.senado.leg.br/emdiscussao/edicoes/espionagem-cibernetica/propostas-senadores-querem-inteligencia-forte/marcocivil-da-internet-foi-reacao-brasileira-a-denuncias-de-snowden>

provisions regarding the collection and treatment of personal data were included on the bill.

Despite of a vast number of bills being presented to the National Congress to establish a General Data Protection Law in the country, Brazil did not have a comprehensive data protection law until as late as 2018. Before the Marco Civil and its few provisions on privacy came into force brazilian legislation had dealt with the topic of data protection either in a very broad fashion, such as in the Federal Constitution (art. 5, X, XI, XII and LXXII) and in the Civil Code (art. 21) or in a very specialised manner, such as the Consumer Protection Code (art. 43).

Therefore, with regards to the collection of data through internet services, some core principles were set by the Marco Civil, such as the (i) inviolability of intimacy and private life, safeguarded the right for protection and compensation for material or moral damages resulting from their breach; (ii) inviolability and secrecy of the flow of users's communications through the Internet, except by court order, as provided by law; (iii) inviolability and secrecy of user's stored private communications, except upon a court order; (iv) clear and full information entailed in the agreements of services, setting forth the details concerning the protection to connection records and records of access to internet applications, as well as on traffic management practices that may affect the quality of the service provided; (v) non-disclosure to third parties of users' personal data, including connection records and records of access to internet applications, unless with express, free and informed consent or in accordance with the cases provided by law; and (vi)the need for expressed consent for the collection, use, storage and processing of personal data, which shall be specified in a separate contractual clause;

The law also has provisions that refer to the consumer law obligation of information by stating that all information provided in terms of use or any other Internet service provider agreements applicable to personal data must be clear and comprehensive (art.7, VI), reinstates that personal data, including connection logs and access to Internet applications records will not be shared with third parties, except upon the users free and explicit consent (art. 7, VII) and reinforces the importance of clear and complete information on the collection, use, storage, processing and protection of users' personal data to be specified in terms of service of Internet applications (art. 7, VIII)[25]. There are issues here that lack enforcement, as it is still standard to have those User Agreements terms with multiple small letter pages written in what seems to be the secret language of lawyers, to which most of us simply click "ok" to move on.

Other than the underlying principles of Data Protection, the law also addresses the guard of connection and access to application logs. On that note, article 10 states that *the retention and the making available of connection logs and access to internet applications logs, as well as, of personal data and of the content of private communications, must*

[25] Coding Rights. Data and Elections in Brazil 2018. Available at: https://www.codingrights.org/wp-content/uploads/2018/11/Report_DataElections_PT_EN.pdf

comply with the protection of privacy, of the private life, of the honor and of the image of the parties that are directly or indirectly involved.

Trying to bring that to a more understandable ground, it is fair to say that the framework of this rule was to establish that "whoever knows who you really are (ISPs) must not store or collect information on what you do online. Whoever knows what you do online (application and content providers) must not know who you really are." In order to enforce the law, only a judge may compel both sides to provide information that, when put together, may be useful to a judicial persecution.

With regards to the inviolability of communications, the law also reinforces the constitutional provision of communications secrecy by only allowing the possibility of access to the content of communications under a specific and limited court order. On that note, the article 11, which sets out the obligations for Internet service and application providers and Internet applications must have, reinforces the need to comply with the right to privacy, protection of personal data and confidentiality of private communications and their records.

Last but not least, the law also sets rules for the retention of access and application logs by ISPs in an confidential, safe and controlled environment (articles 13 until 15)[26]. According to the MCI every admin of an autonomous system should store the data from connection logs for one year. When it comes to application logs, the law dictates that these should be stored for six months, but only by profit-seeking corporations (non-profits and natural persons are exempt from this rule). In both cases a judicial order can mandate a longer period of storage. It is important to note that the data stored under the provision of the law can only be accessed under the existence of a court order and, therefore proof of usability and pertinence of the required data for specific investigations.

Earlier in 2016, a misinterpretation of such provisions resulted in a 72h nationwide whatsapp shutdown in the country. The ruling was based in the lack of facebook's compliance with a state judge's request for data from whatsapp to aid in a investigation involving organized crime and drug trafficking. The law has no such express authorization for a single judge to shutdown an Internet service, but the order was set under a broad interpretation of a provision that was set to protect user privacy.

Unfortunately this shutdown was not the only incident in the country as another shutdown was ordered nationwide also due to the lack of compliance with police eavesdropping requests in a separate criminal drug case[27]. It is still not clear the reason of the failure to comply, as such cases are usually under judicial secrecy, but it has been said by tech experts that some of those court orders were either too broad or impossible to comply, as they requested data that was not stored by the providers. Ever since whatsapp switched to a full end-to-end encryption, there has been at least four court orders requesting the

[26] Article 19. Country Report: Brazil's Marco Civil da Internet. Available at: https://www.article19.org/resources/country-report-brazils-marco-civil-da-internet/
[27] The New York Times. WhatsApp Blocked in Brazil as Judge Seeks Data. Available at: https://www.nytimes.com/2016/05/03/technology/judge-seeking-data-shuts-down-whatsapp-in-brazil.html

periodically blockage of the service in an attempt to make the company comply with demands for information.

Such rulings were seen as reckless and also as a long-term threat to the freedoms of brazilians[28]. Also the insistence from brazilian authorities that the company assist with criminal investigations says a lot about about what seems to be a limited understanding of Whatsapp's architecture and end-to-end encryption.

Today both court orders have been overruled by higher courts and the interpretation of the law on this subject is under scrutiny by the Brazilian Supreme Court.

The regulatory scenario nowadays

Past the approval of the Marco Civil da Internet, the political turmoils that Brazil has been facing in the past years and the ever growing conservative setup of the legislative resulted in the proposition of several draft bills aimed at changing the status of the safeguards from the Marco Civil or compromise several human rights in the digital environment.

According to "Radar Legislativo", a transparency tool that maps draft bills on digital rights proposed by the National Congress, by December 2018 there were over 400 propositions related to topics such as privacy, freedom of expression, gender, innovation and consumer rights in the digital helm being discussed.

One of the main topics of such propositions is the Right to Privacy and Data Protection[29]. In August 2018 the National Congress finally approved the Brazilian General Data Protection Law, a comprehensive legislation that incorporates the minimum standards needed to ensure that the citizen's right to privacy is protected. This law was also subject to a public debate held by the Ministry of Justice, under the coordination of its National Consumer Defense Secretariat.

Prior to the enactment of this law, personal data processing was regulated through a variety of sectoral laws, including the Marco Civil, the Consumer Protection Code, the Compliant Debtors List Act, and the Bank Secrecy Act, generating a scenario of legal uncertainty.

The discussions around the Brazilian Data Protection Law started back in 2010, when the Ministry of Justice started to work on a draft data protection bill, and carried out until 2016 when the draft bill that resulted from the public consultation[30] was sent to the National Congress in the late days of Dilma Rousseff`s administration. Two years later, the bill was sent for presidential assent in July 2018.

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[28] Robert Muggah and Nathan B. Thompson. Brazil's Digital Backlash. Available at: https://www.nytimes.com/2016/01/12/opinion/brazils-digital-backlash.html?_r=1

[29] Law No. 13,709, of August 14, 2018.

[30] Ministério da Justiça. Proteção de Dados Pessoais. Available at: http://pensando.mj.gov.br/dadospessoais/

What is curious about this process is that the rapporteurs of the different draft bills around the subject in both houses of the National Congress acknowledged the importance of a participatory lawmaking process, for which Marco Civil was set as the standard. By doing so they invited specialists from all backgrounds to discuss not only in public hearings but also for actually writing the final draft of the bill. This process resulted in a final proposal with 65 articles related to the processing of personal data with the purpose of protecting the fundamental rights of freedom and privacy and the free development of the personality of the natural person.

Inspired in many of the GDPRs provisions, the Brazilian General Data Protection Law (LGPD) creates a new legal framework for the use of personal data in Brazil, both online and offline, in the private and public sectors. Applicable to both the online and offline spheres, the law can be defined as transversal and multi-sectoral, and sets the definition of personal data as well as the legal basis that authorize its use[31]. I am proud to have contributed to such legislation as the Minister of Justice responsible for hosting the first public debates on the issue and that presented the Executive`s draft to the Brazilian Congress.

However, it is Important to highlight that some provisions initially included in the legislation were vetoed by the Michel Temer, the acting president of Brazil until 2018. Such provisions dealt with (a) the creation of an independent Brazilian Data Protection Authority - the independent body responsible for the enforcement of the Law - and its multi-stakeholder national council for the protection of personal data; (b) Protection of the personal data of access to information petitioners (article 23, II); (c) the transfer of personal data between public authorities and private entities — such transfer will not be prohibited, but they will be based on other legal basis, and transparency on the use of data shared between public entities (article 26, II); (d) prohibitions to the communication or the shared use of personal data between organs and entities governed by public law will be object of publicity (article 28); and the (e) provision for companies found collecting data illegally to be suspended (see Section I, Administrative Sanctions, Art. 52, VII- VIII in the text that went for presidential assent);

By the very end of 2018, an executive order reinstating the creation of a Data Protection Authority, but under the Administrative authority of the Executive Office of the President, was issued. Although the measure is a remedy to the presidential veto to the brazilian DPA, the model in which it was proposed does raise some concerns due to the fact that the body is set as a direct branch of the federal administration and under subordination of the President of and, therefore, it is very unlikely that it will have the adequate level of independency.

With those concerns noted, this new law is still very welcome due to the fact that it harmonises the wide range of sector-specific legal frameworks that existed in Brazil which directly and indirectly dealt with the protection of privacy and personal data. Europe has

[31] Renato Leite Monteiro. The new Brazilian General Data Protection Law — a detailed analysis Available at: https://iapp.org/news/a/the-new-brazilian-general-data-protection-law-a-detailed-analysis/

been dealing with data protection law for decades and we were still very behind on this issue. Although, the uncertainties around the brazilian DPA and whether or not it will be endowed with autonomy and independency in order to fully exercise its oversight power in the law's enforcement, might suggest that it may still lack the tools to enforce its provisions[32].

Further concerns

Walking hand in hand with the privacy discussion, there`s an underlying discussion about the broad use of encryption in Brazil. The multiple rulings mentioned above requesting the shutdown of the communication platforms in the country ignited some important debates around the importance of encryption for safeguarding the users right to uninhibited communications and Freedom of Expression. It is common ground, even amongst lawyers, who have a special right to the secrecy of their communication, that there are no means of electronic communication that can grant any conversation from eavesdropping. There will be a lot of public debate on this issue and it is not easy to set the outcome of this, as law enforcement agents push for more investigative power, arguing about the need of those eavesdropping tools to fight terrorism and organized crime. The right balance on communication privacy and law enforcement efficiency is still to be set.

Brazilian Elections were vastly influenced by the use of Whatsapp for the dissemination of fake news and both the electoral scenario and the new provision of the electoral law that allowed sponsored posts by candidates, political parties and coalitions have, indirectly, encouraged activities of data collection for profiling. This took place while the General Data Protection Law was still not enforceable. If we had in place a framework regarding the consent and purpose of the use of citizens' data, punishments for possible data leaks, unlawful sharing and unconsented use of personal data, as well as an independent DPA, there was a chance that this would not have happened, or at least the effects of such damaging practices would be less severe. I do believe that tackling indiscriminate data collection and abuse by social media and other Internet providers on the handling of personal data may be crucial not only to address privacy concerns but to the preservation of democracy.

Almost a year after the revelations surrounding Facebook, Cambridge Analytica and the massive collection of personal data from almost 87 millions of people around the world, users are growing distrustful around social media platforms. In that sense, the possibility of having companies meddling in elections around the world, the strategic usage of social media platforms to share electoral content and misinformation and the growing presence of tech savvy and military influenced far-right groups, are new issues of concern that regulation should eventually address in the upcoming future.

Misinformation also seems to be another global concern that will eventually affect Internet Regulation. With the intensification of political polarization in social media platforms,

[32] Global Partners Digital. DATA PROTECTION ON THE GROUND (#3): BRAZIL'S LAW. Available at: https://www.gp-digital.org/data-protection-on-the-ground-3-brazils-data-protection-law/

citizens tend to be encapsulated within their own echo chambers, or filter bubbles, composed by people with similar opinions and political orientation. In a world of diffuse communication sources, that's an issue we still don't quite know how to deal.

Still on the Misinformation subject, Whatsapp was already rumoured to be responsible for causing a serious fake news problem in Brazil which was worsened by the 2018's electoral process. In that sense, the concerns are around the (a) substantial amounts of information are shared by its users in group messages in search of validation from their peers; and (b)the opportunity for anonymous sharing, meaning that possible backlash remains private rather than attracting the public shaming that appears on platforms like Facebook and Twitter[33].

The logic in which platforms such as Whatsapp are built tends to hinder any attempt of integration as the replication of content without any fact checking became common practice. The messaging platform is undoubtedly a dominant one in the brazilian scenario - with 120 million users in in Brazil. Factors such as the limited Internet Connectivity in rural areas due to the lack of proper infrastructure and the "free" offerings of Whatsapp's services through zero rating packages, mentioned earlier have helped increasing the penetration rates of the platform in the country. However, if it is still not possible to blame only the design of communication app for the sharing of misinformation, we can certainly state that they have contributed to such state of things. That said, is it possible - or desirable to set rules regarding the design of such platforms to halt this wave of fake content? That's also a pressing issue we are still to handle.

While the fake news or the misinformation spread in the country are worrisome, it is very hard to tackle the problem on Whatsapp as its end-to-end encryption makes it is impossible to trace where information came from as well as the amount of people affected by it. The right to privacy remains as a fundamental right in Brazil, hence vital to democracy and the exercise of other rights such as freedom of expression. Therefore any quick or immediate solution dedicated to solving the spread of fake news in messaging apps could result in problems such as weakened encryption or other collateral effects.

We also watch with high concerns the debate around the EU Copyright Directive and the proposed rule for its article 13. As I noted before, an extreme overload on content overwatch by intermediaries, such as application and content providers may result in very serious effects for freedom of expression and the diversity of content production online. If the language on the article 13 is approved, platforms will be responsible for enforcement of copyright protection and this will require stronger content-moderation rules. We hope the European Directive can find a way to balance both copyright law and such fundamental rights which are at the core of the Internet as we know it, following the good example of a rights-based legislation that was the GDPR.

[33] Long, C. Why WhatsApp is Brazil's go-to political weapon. Available at: http://nic.br/noticia/na-midia/why-whatsapp-is-brazil-s-go-to-political-weapon/

In light of it all, the example set by the Marco Civil da Internet is once again important to this scenario as companies could use proper input from other stakeholders on their private decisions regarding content-moderation policies[34]. Here, as well as in other moments of Internet regulation, the application of the participative Multistakeholder model would suffice and result in better policies than the ones constructed through government or self-regulation. What I think is that this issue should be addressed not only by government agencies, but by all actors concerned, as a multi stakeholder agenda.

Conclusions

At the ceremony of enactment of the Marco Civil, when describing the construction process of the bill, President Dilma said that law *echoed the voices of the streets, networks and institutions*. And I believe this should continue to be the approach to legislations and policies concerning the Internet - companies want feedback, policy makers should be profiting from more insight into decision-making and people need and have the urge to be heard. By ensuring that all voices are heard and taken into account, we can hopefully avoid less arbitrary decision-making processes and policies that lack legitimacy and only enhance the mistrust on our representative democracies.

Until the General Data Protection Law get into its full force by 2020, Brazil faces the challenge of kickstarting the process of adequating both private sector and the public sector to the provisions of the law, apart from instituting its National Data Protection Authority. In this process we can certainly learn a lot from the european processes that preceded the enforcement of the law here.

While Brazil has been known as a progressive country in the Internet Governance field, the propagation of conservative voices within the Executive and the Legislative branches is more likely to bring new draft bills dedicated to content moderation, fake news and surveillance in the upcoming years. This new conservative approach to the government can represent a new take on regulation, more oriented with the punitive vibes discussed back in the days of the Azeredo Bill. In light of that, new draft regulations may carry the belief that internet companies need to fall in line or face regulation and that the government and law-enforcement authorities should set a main oversight over the web - a modus operandi that, even in the recent past, has already resulted in the shutdown of applications in the country.

Tendencies such as attempts to dismantle or circumvent human rights processes and commitments could result in the shrinking of civic spaces. Bearing that in mind, processes such as the society's oversight will be even more necessary considering any possible attack that the provisions of the Marco Civil da Internet and end-users rights might suffer. Today, I`m not a congressman or a Minister. My role is to set this issues at the academia, my law practice as an attorney and through participation in debates such as this. I hope

[34] Danielle Tomson and David Morar. A Better Way to Regulate Social Media
A multistakeholder ‘content congress’ could take account of everyone’s concerns. Available at:
https://www.wsj.com/articles/a-better-way-to-regulate-social-media-1534707906

this exposition was able to set some light on the past and current issues regarding Internet Governance in Brazil.

Cardozo (at the center), surrounded by relevant actors of the drafting of Marco Civil, celebrates the approval of the law by the Brazilian Congress during NetMundial.