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National Laws and the Internet: The Making and Implications of Brazil's Marco Civil

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The Internet today serves a global population and is central to economic development worldwide. It began, in the seventies, as a tool for collaboration amongst university researchers in the U.S and has since evolved beyond the wildest imagination of its early pioneers. By 1998, every single populated country on the planet had an Internet connection¹. The Internet's user base is now shifting south and east and is drastically different from when it started to grow in the U.S. and Europe in the early nineties. This has implications for the future of global Internet governance because the ideas of the early Internet community are no longer left unchallenged by new actors who demand a role in deciding how the Internet is run. During its early years, Internet governance was decentralised and governance policies and practices were developed in an organic and ad hoc manner; non-state actors enjoyed a prominent role and there was limited government involvement. However, the old model no longer holds for a global Internet that serves populations with different cultural values, norms, and expectations.

The term 'Internet governance' is applied to activities as diverse as coordination of technical standards, operation of critical infrastructure, development, regulation, and legislation, amongst others². In 2005, at the United Nations' World Summit on the Information Society (WSIS), heads of state agreed on the following definition: Internet Governance is the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet³.

The nub of the current debate on global Internet governance is mainly about the nature of cooperation and participation of actors, with blocs of nations preferring either the multistakeholder or the multilateral approach. The multistakeholder decision-making model includes the participation of civil society, the technical community and the private sector along with state actors. A purely multilateral model would be akin to the United Nations system where decision-making is solely the domain of state actors.

The current global Internet governance arrangement is decentralised, with a mix of fora ranging from multistakeholder to multilateral. The Internet Corporation for Assigned Names and Numbers (ICANN) is a multistakeholder platform to regulate the technical maintenance of the Internet's address pool. The Internet Governance Forum (IGF) is another multistakeholder platform for policy dialogue on Internet governance issues that seeks to establish consensus based global norms. The Group of Governmental Experts constituted under the United Nations is an example of a forum exclusively open to government officials to discuss potential threats, such as cyberspace attacks and related countermeasures. This indicates that the range of policy issues that arise out of a global Internet require different fora and participation of all stakeholders.

National Laws shape global Internet Governance

The IGF and many international civil society groups seek to establish core Internet values and norms but the meeting outcomes and reports they generate are non-binding. This opens the question of the implications that Internet-related policy making at the national level can have on global Internet governance. National laws governing Internet use can have profound implications for its global structure and governance. Governments have realised the importance of the Internet for their economies and want to assert sovereignty over their national networks to ensure digital security and stability. Despite the global nature of the Internet, local norms play a pivotal role in determining national laws and regulation governing Internet usage. Authoritarian countries limit freedom of speech on the Internet so as to reduce the political risk that free information can bring. Even countries that are democratic and share political values can end up with incompatible rules for privacy, data protection, and data localisation.

Consequently, the international Internet community must pay close attention to national laws and public policy because they are essential for keeping the Internet open and free. For instance, directives issued by the European Union (EU) for Internet users under its jurisdiction have far-reaching effects on commerce and data flows on the Internet. In the last decade, open web activists have convened around core principles that guarantee basic rights of freedom of expression, protection of personal information, and a neutral network, amongst others. The terms in which the rights are expressed are crucial since they determine the obligations of the private sector and of government towards the Internet user. Creating such a bill of rights for the Internet should be a participative and transparent process, and – similar to the dialogue at the international level – should include the voices of all stakeholders.

In April 2014, Brazil became the first country to create a digital bill of rights. Called the ‘Marco Civil’, the enacting of such a ‘constitution for the Internet’ was praised by open web activists around the world. The inventor of the World Wide Web, Sir Tim Berners-Lee, who advocates for an open and participative Internet, endorsed the Marco Civil throughout its making. The law was particularly exceptional because of the participative nature in which it was drafted and the fact that the core principles in the draft bill were intact when the law finally emerged after years of legislative debate and political give-and-take, common in a democratic setup.

This paper will take an in-depth look at the civil society advocacy, debates, politics, and controversy that went into the creation of the Marco Civil. Policy making for the Internet often brings up issues that are common across countries. For instance, the telecommunications industry that operates the physical infrastructure underlying the Internet almost always clashes with digital rights activists over the principle of net neutrality. A close look at the enactment of such a foundational piece of Internet law by a large democratic country that will be responsible for a significant chunk of the ‘next billion’ Internet users offers an instructive example of how these debates can play out for policymakers and activists. The Brazilian Marco Civil model has become an inspiration to countries around the world and the key actors behind the effort now share the lessons learnt while drafting the bill with those currently attempting the enactment of a similar law. The final part of the paper will discuss the effect of the passage of the Marco Civil in Brazil and beyond.

The Build-up to a Civil Law for the Internet in Brazil

In many developing countries where rapid expansion of the Internet happened relatively late, such as in much of Africa, the Internet is considered a telecommunications service subject to government regulatory agencies. In Brazil, the Internet was considered a “value added service” and therefore did not fall under the umbrella of the national telecommunications regulatory authority, Anatel, which enforces bureaucratic processes, such as, for instance, license requirements. This helpful lack of regulatory red-tape facilitated the expansion of the Internet in Brazil.

In 1995, the Brazilian Internet Steering Committee, CGI.br (Comitê Gestor da Internet no Brasil), was created to manage Internet governance within Brazil. It was created as a public-private partnership and became the registrar for Brazil’s top-level domain, .br. In addition to the government and private sector, CGI.br also included voices from academia, the technical community, and civil society. Many of Brazil’s Internet pioneers formed part of the initial staff of CGI.br, which had an open decision-making structure that operated by near-consensus. CGI.br did not write laws or make regulations, publishing only guiding principles and serving as a model of multistakeholder management of the Internet’s technical operations.

In the 1990s the term “Internet” began popping up in Brazil’s Congress and was mentioned in a few bills. But it was not until the 2000s that the legislature and society at large clashed over the role of the state, responsibilities of Internet service providers,

and principles of privacy, security, and freedom of expression⁴. In April 2007, Senator Eduardo Azeredo submitted a controversial legislative proposal that required user identification and registration so as to access the Internet. Companies that did not keep connection logs for a minimum period of five years could be penalised. This bill criminalised everyday practices of millions of people such as transferring songs from an iPod back to a personal computer or “jailbreaking” a cell phone. It even criminalised open Wi-Fi networks.

The new proposal was met with criticism from lawyers, the press and the general public and spurred digital activists across Brazil to organise themselves against it. In May 2007, Ronaldo Lemos, founder of the Centre for Technology and Society at Rio’s Fundação Getulio Vargas (FGV) University, criticised the bill in *Folha de São Paulo*, and advocated passing a civil law for the Internet instead of the proposed criminal law⁵. In June 2008, as the Azeredo bill continued to gain wider attention, Sergio Amadeu and André Lemos, both professors and members of the Brazilian Association of Researchers in Cyberculture (ABCiber), wrote an online manifesto in defence of freedom for the Brazilian Internet with the aim of gaining support of the academic community⁶. Within hours the manifesto went viral and in a matter of weeks, it received more than a hundred thousand signatures.

In January 2009, activists nicknamed the Azeredo bill ‘AI-5 Digital’ after a much hated law that limited civil liberties during Brazil’s military dictatorship. Later in May 2009, an activist blogger, João Carlos Caribé, started a blog called ‘Mega Não’, with the aim of providing a platform for collective action against the ‘AI-5 Digital’. The ‘Mega Não’ movement brought together volunteers from all over Brazil who organised protests in cities across Brazil: Porto Alegre, Belo Horizonte, São Paulo, Rio de Janeiro, Brasília, Vitória and Campo Grande.

Widespread public protest had the desired effect of slowing the progress of the Azeredo bill in Brazil’s Congress. The Ministry of Justice also expressed concern with the Azeredo bill and affirmed its support for dialogue with civil society. The final blow to the Azeredo bill fell in June 2009 when the tenth annual International Free Software Forum held in Porto Alegre welcomed a rather high-profile individual – Brazil’s then president Lula da Silva. The organisers of the forum were unequivocal in their criticism of the Azeredo bill and the danger it presented to the Brazilian Internet. The president was sympathetic to the concerns of the participants of the conference and acknowledged the need for a civil law for the Internet. On the following week, the Ministry of Justice called the activists to Brasília to initiate discussions on what would become the collaborative platform of the Marco Civil.

Drafting and legislative debates

Two main groups worked together on developing the idea of a Marco Civil: the Centre for Technology and Society at Rio’s Fundação Getulio Vargas (FGV) University and the Office of Legislative Affairs of the Ministry of Justice. They intended to draft the text of the bill from scratch via online public consultations. The Ministry of Culture

stepped in to help the Marco Civil project by providing its WordPress-based platform 'culturadigital.br' to invite public comments. In October 2009, representatives of the FGV, Ministries of Justice and Culture, and CGI.br announced the launch of the on-line public consultation phase of the Marco Civil.

A foundational document that established basic principles for a new Internet constitution based on universal human and digital rights was posted on the platform. The document was based on studies and debates conducted by Brazil's multistakeholder Internet steering committee, CGI.br. Brazilian Internet users were encouraged to comment on discussions that were categorised into sections. The team managing the platform travelled to various cities across Brazil to publicise the availability of an online platform open for comments and to encourage participation in the discussion. The majority of comments received were from people associated with cyberspace: programmers, digital activists, professors and researchers of cyberculture, and IT professionals. The online discussion was self-moderated, civil, clear, and objective.

This first phase of public consultation, which closed in December 2009, formed the basis for creating a draft Marco Civil bill. The draft bill was circulated among various ministries within Brazil's government, was subject to discussions in the lower and upper houses of the Brazilian Congress, and posted on the public platform once again for comments. The second phase of public consultation received comments that included intense debates between stakeholders with different policy positions. This phase of public consultation closed in May 2010, with 1,168 contributions⁷. Given that Internet policy was still a niche subject in Brazil in 2010, the contributions represented an impressive figure.

The members of the Marco Civil committee at FGV and the ministries divided up the job of reading the public comments. By June 2010, a draft of the Marco Civil bill was ready for submission to Brazil's Congress. The bill had to wait for the transition from Lula da Silva's presidency to the new government of president Dilma Rousseff. The bill was then sent to Brazil's lower house of Congress on August 2011 where it awaited a rapporteur. In March 2012, house representative Alessandro Molon was appointed the rapporteur for the bill in the lower house.

The bill died and came to life many times over during the course of more than two years of debate before it finally became law. There were frequent phases in which it was ignored and languished in wait for debate to restart. Voting on the bill was postponed several times⁸ due to lack of quorum or consensus until some agreement over a change in the wording brought it back into the game and revived expectations of its approval. The fact was that the bill was ambitious and touched upon various diverging interests of many influential lobbies and associations. As the bill was put to debate in Congress, actors with significant influence emerged defending corporate interests, especially those of the telecommunication and entertainment industries. Lack of agreement on issues such as data retention, net neutrality, third party liabilities, and copyright delayed voting for months.

The rapporteur and supporters of the bill realised that they needed to make alliances and find commonalities to keep the Marco Civil project alive. In order to build political capital they had to pick their battles carefully and compromise in some cases. For instance, to decrease the strength of the alliance opposing the bill, its supporters compromised on the issue of taking down content in case of an alleged copyright violation. Instead of insisting on a judicial order to take down content, the draft text was amended to defer this issue to a separate bill that was already under consideration by the Ministry of Culture⁹. This move was met with protests by some supporters of the Marco Civil but it was necessary to gain the support of the entertainment industry so as to keep the project alive in Congress. In contrast, the rapporteur and authors of the bill considered net neutrality to be a principle worth fighting for. Thus, they entered into a prolonged negotiation with the telecommunication industry to ensure that exceptions to net neutrality would be regulated by the President in consultation with the multistakeholder Internet steering committee CGI.br, in addition to the regulatory authority for telecommunications, Anatel.

The final Push thanks to Revelations by Edward Snowden

While the Marco Civil was struggling with the legislative impasse, the news of a hacker stealing nude photos of a popular Brazilian actress, Carolina Dieckmann, and leaking them on the Internet caught public attention. The case received extensive media coverage and the government came under pressure to take concrete measures for punishing such violations. Consequently, a law that would criminalise hacking was proposed in Congress. The bill was passed in record time by both houses, surprising even its creators¹⁰, and in a matter of days the bill was sanctioned into law by Brazilian President Dilma Rousseff. After the lightning enactment of the Dieckmann Law interest in the Marco Civil was rekindled. However, despite endorsement for the Marco Civil by Tim Berners-Lee at the World Wide Web Conference that was held in Brazil on May 2013, the legislative hurdles continued. The passage of the Marco Civil would have taken many more months were it not for the revelations by Edward Snowden about U.S. spy programs in June 2013.

Documents leaked by Edward Snowden showed that Brazil was by far the most spied upon country in Latin America, and its communications were intercepted by at least three different spy programmes of the U.S. National Security Agency (NSA). On September 1, Brazilian newspaper O Globo revealed that President Dilma Rousseff and her advisors had had their personal communications intercepted by the NSA¹¹. The following week, the newspaper released documents indicating invasion of the private network of Brazil's national oil company, Petrobras. The Snowden revelations affected President Rousseff personally and she made passing the Marco Civil a matter of constitutional urgency. Snowden had awakened the bill again after months of parliamentary lethargy.

With a deadline for voting on the Marco Civil set by Presidential decree, the lobbying by both supporters and detractors of the bill intensified. Even after more than two years of debate, the tangle of conflicting interests still blocked any attempt at

consensus on wording¹². Despite the declaration of constitutional urgency, Rapporteur Molon still received thirty-four different amendments to the text. More worrying still was the demand from the office of the President to insert a new provision to require Internet companies to store Brazilian user data in servers located within the country; this was a direct response to the U.S. spying on Brazilians. The provision was extremely unpopular with civil society and with Internet companies such as Google, Twitter and Facebook. It was even met with resistance in Congress: representatives viewed the measure as having no practical effect to ensure privacy and generating additional cost to Internet companies¹³. The combined efforts of civil society and Internet companies convinced the President's office to drop its provision.

The last burst of effort required to vote the bill into law happened in the few weeks before a major international conference, called NETmundial, which Brazil was to host in São Paulo on April 23 and 24, 2014. The organisation of the conference was to be led by CGI.br on multistakeholder lines, along with partners ICANN (Internet Corporation for Assigned Names and Numbers) and the World Economic Forum. On March 25, 2014, the Marco Civil was finally put to vote and approved by the lower house. On the eve of NETmundial, the Senate approved the bill and President Rousseff signed sanctioned it into law on April 23, 2014.

The creation of the Marco Civil, the first such digital rights law in the world, was announced by President Rousseff in her opening speech at the NETmundial conference. Despite some areas of concern in the law, such as the mandatory data retention requirement, Brazilians are justified in taking intense pride in this achievement. The Marco Civil represents a pioneering experience of establishing a constitution for the Internet that protects the principles of freedom of expression, net neutrality, and privacy. Its key strength lies in the participatory and democratic on-and-offline consultation process behind the bill's drafting. Implementation of the principles guaranteed in the law will be decided by secondary legislation that is going through a public consultation process similar to that of the Marco Civil and which will travel the long and winding road towards consensus that the Internet community in Brazil already knows well.

Implications of the Marco Civil for the Rest of the World

The main lesson from the making of the Marco Civil is the importance of collective action, participation, and persistence in and by civil society. The creation of a complicated piece of public policy or law in a democratic setup needs a window of opportunity when political interests are aligned in its favour. The Marco Civil waited for a long time for such an opportunity. Snowden's revelations and the constitutional urgency provided the right moment for the bill, but the fact that it was able to make use of such a moment was due to years of advocacy and persistence by supporters of the bill.

Brazil's experience creating the Marco Civil is a useful roadmap for other countries attempting similar legislation. In October 2014, six months after the Marco Civil was sanctioned, the Italian Congress' first draft of an Internet Bill of Rights was opened to online public consultations. Similar to the Marco Civil, the period of public

consultation lasted for four months. The participative nature of the online platform open to all stakeholders was influenced by the Brazilian model of Internet governance. In fact, officials from Brazil were directly involved in the debates and dialogues in Italy that led to the formulation and adoption of the Bill of Rights. In February 2014, CGI.br directors attended an event on Internet governance in Italy where they presented a detailed account of the institutional development of Internet governance in Brazil. In June 2014, the Marco Civil rapporteur, Alessandro Molon, accompanied by a delegation of Brazilian officials involved in the creation of the Marco Civil, attended a public hearing in the lower house of the Italian legislature and gave a presentation on the collaborative process of creating the law¹⁴. The Italian bill shares several principles with the Marco Civil – from net neutrality to the focus on privacy and freedom of expression. In July 2015, Italy became the first European country to introduce an Internet Bill of Rights, which was open to comment by the country's citizens¹⁵.

The content of the Italian Bill of Rights also draws inspiration from European Internet legislation and ongoing dialogue within Italy and internationally. The Council of Europe set up a multistakeholder Committee of Experts on Rights of Internet Users on April 2012 composed of Council of Europe member states and independent experts from civil society and academia¹⁶. The committee held a public consultation with participants from Internet governance fora held in Lisbon, Portugal in June 2013 and in Bali, Indonesia in October 2013. The committee also received contributions from representatives of the private sector, key civil society organisations, the technical community, and academia from across the world. On 16 April 2014, a few days before the Marco Civil bill became law, the Council of Europe adopted the recommendation of the committee and delineated core rights for the Internet age based upon the European Convention of Human Rights¹⁷.

France and Germany have created legislative committees specifically to consider the issue of rights and freedoms in the Internet age. Both countries have published reports and guidelines, which, besides the Brazilian Marco Civil, were also used as inspiration in the drafting of the Italian Digital Bill of Rights. The Italian bill inherits the principle of 'informative self-determination' from the 'Digital and fundamental rights' report written by the French Council of State¹⁸. The Italian committee responsible for the bill also considered as inputs judgements by the Court of Justice of the European Union in the case of Google vs. the Spanish Data Protection Agency and the case brought by Digital Rights Ireland against the EU Data Retention Directive¹⁹ in April and May 2014 respectively.

Sir Tim Berners-Lee created the World Wide Web foundation in 2009 to promote global human rights protection online and the decentralisation of Internet governance. He called for crowdsourcing a 'Magna Carta' for the web²⁰ and praised efforts such as those in Brazil and the EU as the best path to a stronger and freer web²¹. The foundation launched the Web We Want project to empower citizens to make, claim and shape the Web they want both nationally and globally. The initiative is rooted in the UN Declaration of Human Rights and the goals of social justice.

In effect, the Web We Want initiative is an effort to transform the groundswell of civil society awareness about digital rights into concrete legislation so the future of the Internet can be decided in a truly participative manner. The Marco Civil itself benefited from this transfer of ideas across borders through a coalition of civil society activists. Ronaldo Lemos, one of the authors of the Marco Civil, had just returned to FGV after completing his Master's in the United States, where he had studied with digital rights pioneers, such as Lawrence Lessig and William Fischer²². International Internet companies too made sure that their representatives participated in the creation of the bill.

Brazil benefited from the early adoption and spread of the Internet unencumbered by red tape or regulations due to its classification as a 'value added service'. Brazil's Internet pioneers shared the decentralised and participative decision-making ethos of the early Internet community. These factors played a role in laying a fertile ground for the creation of a law like the Marco Civil. Brazil is a relatively young democracy; its modern constitution was written in 1988 after a period of military dictatorship and consequently, the judicial decision-making process for the balancing of rights and obligations is a space which allows for dynamic and lively debate. Creating a constitution for the Internet brings this ongoing discussion into the digital age, which is a new domain for judicial systems everywhere. The active civil society that coalesced to bring about the Marco Civil will be a valuable voice as these debates continue within Brazil.

Historically, Brazil has been an active participant in international fora of Internet governance. The domestic multistakeholder governance model within Brazil anchored around the general principles of CGI.br has informed the country's official diplomacy at such fora. A push towards multilateralism and data storage within Brazil post the Snowden revelations was gradually defeated by a coalition of actors, including CGI.br. In her speech at the NETmundial, President Rousseff reaffirmed Brazil's commitment to the multistakeholder model of Internet Governance²³, also stating that state participation in global Internet governance should occur on an equal footing, with every country bearing equal weight.

Brazil's domestic Internet governance model and participative process that led to the creation of the Marco Civil offer insights into the domestic debates that shape national Internet laws. The Marco Civil – an illustration of positive domestic Internet legislation – has made Brazil a trendsetter for other nations because it managed to disentangle the conflicting interests that usually block such legislation. Sovereign nations have the right to create national laws governing Internet usage; ensuring universal values such as transparency and freedom form the basis of such laws leading, thus, to an open and free web, need not necessarily exclude the influence of national norms and culture. Brazil's Marco Civil provides an example to the global Internet community on how national laws can be built in a democratic and participative manner creating laws that do not balkanize the Internet but strengthen it.

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