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Notes on the creation and impacts of Brazil's Internet Bill of Rights

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ABSTRACT


The process that led to the approval of Brazil's Internet Bill of Rights ('Marco Civil da Internet') was the first initiative from the Federal Government to crowdsource the making of a Draft Bill of Law, using the internet to diversify the debate and invite participation from different stakeholders. This article provides an overview of the process behind the creation of such a law, emphasising the participatory process that resulted in the final wording of the law. Additionally, the article reflects upon some of the most relevant challenges for the enforcement of Brazil's Internet Bill of Rights, as well as its international impact on future case law and in the legislative process.

KEYWORDS Internet Bill of Rights; regulation; legislative process; internet – privacy; crowdsourcing legislation

1. Introduction: the invisible city of Isaura

Isaura, the city of a thousand wells, was supposedly built right above an underground lake. The boundaries of the city mirrored its imagined limits on the lake below. In order to have access to water, villagers ended up digging deep vertical holes on the ground. Over time, two religions emerged in the city: one believed that the gods lived in the darkness of the underground lake, while the other believed that they lived in the buckets, in the pulleys and in all manners of gadgetry that brought the precious water to the surface.

This is one of the many imaginary cities that Italo Calvino describes in his 'Invisible Cities'.¹ It is also an inexhaustible source of images that fosters a better understanding of human relationships through the accounts of fantastic cities that Marco Polo tells to Kublai Khan. In the case of the city of Isaura, a series of questions might help understanding the complex subject of this article.

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¹Italo Calvino, *Invisible Cities* (Random House, 2010).

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The uncertainties over the existence of gods in an underground lake, forever trapped ‘beneath the rock’s calcareous sky’, are not very different from those related to the usual lack of knowledge about who the stakeholders involved in the creation of a given law are. Who benefits from the passing of such law? Who has worked hard for its introduction? The answers usually offered by the analysis of the legislative process provide little satisfaction. Even if the stakeholders engaged in the drafting of the law could be identified, how can we map their contributions? Usually, the only materials available, beyond the resulting piece of legislation itself, are the opinions, parliamentary hearings and official documents that might record the speeches and arguments of senators, representatives and occasional experts. However, this set of materials is not sufficient for us to understand how a law was created.

If resorting to the idea that unknown forces drive the legislative process – such as gods from an underground lake – is not satisfactory, the opposing view that focuses in the approved wording of the law, seems to provide no deeper understanding of how the law came to be. This would be similar to the belief of those Isaura citizens who claim that the gods are not in the underground lake, but in the buckets and in the gadgetry that they could see. The literal interpretation of a law tells us very little about its driving forces, the agents interested in its enactment and their deeper motivations. Therefore, several questions remain regarding the legislative process conducive to a specific law: How do the relevant stakeholders engage in the legislative process? What are their contributions? Were they considered in order to draft the wording of the law? Or have they been rejected? Is there any sort of feedback about the acceptance or rejection of a given contribution?

Taking the example of how a given piece of legislation is analysed in Law schools’ classrooms, it is easy to see how the focus relies almost exclusively on the wording of the law as approved. Earlier drafts and defeated dissenting views presented by legislators are usually given little attention. In many cases, this might be a lost opportunity to foster a better understanding of how the final text was actually built.

It would be fair to put the blame on the one who is teaching if the tools for understanding the law-making process were widely available. Most of the time, however, that is not the case. The less transparent the law-making process is, the more reduced the interest in the process that led to its approval. However, there is an alternative to this opacity: to engage more actively with citizens and stakeholders who should be involved in the law-making process, who should understand what they want, and promote the transparency of the law-making process. This is precisely what was at stake in the Brazilian Internet Bill of Rights (Federal Law No. 12,965/2014, also known as ‘Marco Civil da Internet’). This law is the result of the first large-scale initiative spearheaded by the national government to use the internet as a way to expand and diversify the voices in the law-making process. By using the internet to promote the

democratic component of the legislative process, the Brazilian Internet Bill of Rights provides several opportunities to better understand how a law is created, who the relevant stakeholders interested in its approval are, and how they contribute throughout the process.

The Brazilian Internet Bill of Rights provides an overarching set of principles to guide future regulation on digital rights in Brazil. Covering a broad range of topics such as privacy, freedom of expression, liability of internet intermediaries and network neutrality, this is a law that can be directly enforced by judges. This was a very challenging move by the Brazilian federal government as this was not only a very relevant piece of legislation but it was also the first one resulting from a crowdsourcing effort.²

By providing an open platform for all interested parties to share their views and expertise on the topics under discussion, the Marco Civil opened a new chapter of transparency in the legislative process at the national level. It is important to understand how this initiative came to be and its undisputed achievements, but also to pay attention to its limitations, especially when considering how the National Congress reacted to the Draft Bill of Law, how its passing in both parliamentary houses came to be and how eagerly a new legislature is attempting to change the law.

The people of Isaura always knew that the water came from wells dug deep in the ground. Now it seems possible to shed some light on the vertical hole and see the way the bucket is pulled from down below. There is no reason to be satisfied only with buckets and pulleys when there is a full itinerary to be discovered, uncovering how a Law can be crowdsourced, who participated in this process, what challenges have been faced and what others might lie ahead.

2. Brazil's Internet Bill of Rights in the making

Brazil's Internet Bill of Rights is the result of an initiative that started with a public online consultation that lasted from 2009 to 2010. The Bill of Law was then sent to the National Congress in 2011 and for three more years and it was fiercely debated until its approval in 2014. The Bill of Law came under the scrutiny of a wide range of actors, from civil society organisations to the private sector, from the technical community and individual users to other relevant governmental entities.

The text of the Draft Bill of Law was built around the comments and inputs made by any interested stakeholder in an online and open platform. No registration in the platform was required in order to see the proposed text and the

²C.A. Souza, R. Lemos and M. Viola (eds.), *Understanding Brazil's Internet Bill of Rights* (ITS Rio, 2015) <<http://itsrio.org/projects/english-understanding-brazils-internet-bill-of-rights/>> accessed September 15 2016. Daniel O'Maley, 'Networking Democracy: Brazilian Internet Freedom Activism and the Influence of Participatory Democracy' (SSRN, December 1 2015) <<http://ssrn.com/abstract=2757853>> accessed September 15 2016.

comments. Registration of a username was only required in order to post a comment.

Since it was the first time that such an experiment was conducted, bringing together a wide range of actors, several of the features of the initiative were developed along the way. Since the very early debate back in 2007 until the passing of the law in 2014, the Marco Civil has proven to be a very educational process for all parties that engaged in the discussion and cemented the path for future (and improved) experiences in online consultations in Brazil.

The following section offers a brief account of the more relevant facts regarding the consultation and the debate held in the National Congress that has led to the passing of the Law. It is important to go beyond the facts to really understand the merits and the shortcomings of such an initiative, highlighting all the relevant interests and how they have been articulated throughout the process.

2.1. A preliminary question: to regulate or not to regulate?

A preliminary and fundamental question that one might raise when approaching the Marco Civil initiative is the need for a law to articulate the principles related to the protection of fundamental rights online. In an ever-changing landscape of increasingly fast technological development, would a statutory approach be the best way to protect the rights and liberties enjoyed on the Internet?

Back in 1996, the well-known ‘Declaration of the Independence of Cyberspace’,³ by John Perry Barlow, drew a line between the States as ‘weary giants of flesh and steel’ and the cyberspace as ‘the new home of Mind’. By stating the virtues arising out from the existence of a virtual space for the free flow of information, Barlow urged States not to interfere with the development of the network through regulations of any kind.

Regulation comes in many different forms and, certainly, a state-imposed law is not the only way in which behaviours might be stimulated or hindered. Lawrence Lessig, in 1999, suggested that this regulatory tug of war could be more complex when it comes to addressing how technology impacts human behaviour. Legal rules were not to be the sole source of regulation, but they must contest with other competing forces such as the market and its economic logic, social constrictions and, finally, technology itself, which could either allow or prohibit a behaviour by means of architecture.⁴

The scenario drawn by Lessig reveals that a computer code regulates conduct as much as a legal code. Sometimes a change in architecture could

³John Perry Barlow, ‘A Declaration of the Independence of Cyberspace’ (Electronic Frontier Foundation, February 8, 1996) <www.eff.org/pt-br/cyberspace-independence> accessed 15 September 2016.

⁴Lawrence Lessig, ‘The Law of Horse: what CyberLaw might teach’ (1999) 113 HLR 501.

be even more effective than a change in the legislation when it comes to shaping human relations and behaviour. ‘Code is Law’ thus became a repeated mantra in the debates over the future of internet regulation. Coding might be a more reliable way to achieve the goals of a given regulation than going through the formalistic and usually opaque process of law making. Not that algorithms themselves could be any less opaque, but the idea that the aspirational enforceability of the law could be less strong than a change in the code that runs a given internet application is a powerful one. We are increasingly bound and transformed by the ways in which technology allows us to access and communicate knowledge.

How do we ensure that freedom enjoyed precisely by the development of the internet would not be eroded by the outcomes of the regulatory tug of war? This is where the debate over the creation of a human rights-based legislation fits in. A focus of resistance to the Marco Civil (and to the whole idea of having States regulating the internet) comes from a feeling of discomfort experienced especially by the technical community. This distrust in the benefits that might arise out from a hard law approach is not entirely unjustified.

An entire new set of legal rules is not the best answer every time a new technology comes along. Most of the time, the desire to pass a law that addresses a very specific issue (as popular as it might seem) will rapidly lead to an obsolete piece of law. As soon as technology changes, the same law will have little application or might even restrict the framework for innovation. Regulation that addresses technological shifts should follow a principles-based approach to avoid imminent obsolescence.

On the other hand, there is a need for regulatory action to preserve fundamental rights and ensure that technology serves as an instrument to enhance the development of personality, the improvement of economic and social conditions – and not the opposite.⁵

When ‘internet freedom’ is addressed in any single debate over internet governance and regulation, there is always the risk of having the ‘free’ in freedom being understood as the absence of any sort of legal regulation. To be free would mean having no laws binding one’s conduct.⁶ A free internet then would be a network in which behaviours are not restricted by any legal constraints.

⁵Stefano Rodotà, *La Démocratie Électronique: de nouveaux concepts et expériences politiques* (Apogée, 1999) 185.

⁶The opposition between law and liberty goes a long way. It is common sense to say that if on one hand the law might be portrayed as a sanction or restriction to one’s free will, on the other it is the very set of rules that one resorts to when one feels threatened or harmed in any way. According to Pérez Luño, ‘the Romans knew how to express this ambivalence in two aphorisms: *ubi lex, ibi poena; ubi periculum, ibi lex*; which means that where there is law there is punishment, but at the same time, where there is danger, there is law as well.’ Antonio-Enrique Pérez Luño, *Teoría del Derecho* (Tecnos, 2002) p. 24.

Brazil's Internet Bill of Rights was conceived under a different banner. Advocating for internet freedom in this sense means not encouraging the absence of law, but quite the opposite. Such law exists exactly to protect the rights and liberties enjoyed and strengthened by the internet.

The reasoning behind the creation of the Marco Civil is directly connected to the reaction to a cybercrime Bill of Law that, if approved as originally conceived, would have reinforced the idea of regulation as a restriction to behaviours that are acceptable or even usual in the internet. Offering a quite different option, Brazil's Internet Bill of Rights came as a crowdsourcing process to create a legislation that would preserve fundamental rights in a principles-based language so that it could last as a framework for future regulation and case law.

2.2. The online consultation process

The Marco Civil drafting came as a strong public reaction against a Bill of Law on cybercrimes. The Bill of Law No. 84/99, originally introduced by Representative Luiz Piauhyllino, received an amendment by Senator Eduardo Azeredo that led to the association of the Senator's name to the Cybercrime Bill of Law. As of 2007, the Bill was even dubbed as being the 'Azeredo Bill'. If approved, it would have created sanctions of up to four years in prison for those who violated cell phone protection mechanisms ('jailbreaking') or for those who decided to transfer songs from a CD to other devices.

With such a broad spectrum, closely connected to the discussions that ended up leading to the debate over the SOPA and PIPA bills in the United States later on, the Azeredo Bill would have turned millions of internet users in Brazil into criminals. Moreover, it would have restricted opportunities for innovation, turning regularly needed activities of research and development into crime.

A very broad coalition arose against the Azeredo Bill. One of the first groups to raise their voice was the academic sector, followed by a strong civil society mobilisation, which included several campaigns and an online petition that, in a short time frame, received 150,000 signatures.⁷ Given the fact that the Azeredo Bill would strongly restrict the enjoyment of rights online, civil society nicknamed the Bill 'Digital AI-5'. 'AI-5' was the name of a Decree ('Ato Institucional') issued during the military dictatorship period in Brazil that restricted a number of fundamental rights. Congressmen noted the reaction and, thanks to such mobilisation, initiated a broader discussion on internet regulation in the legislative branch.

⁷The original petition against the Azeredo Bill used to be hosted at <www.petitiononline.com/veto2008/petition.html> accessed 15 September 2016. Its content is still available at Carta Maior <www.cartamaior.com.br/?/Editoria/Politica/Em-defesa-da-liberdade-e-do-conhecimento-na-internet-brasileira/4/14135> accessed 15 September 2016.

There were many voices against the ‘Azeredo Bill’. However, there was no clear consensus on which alternative should be presented. If a Criminal Law bill was not the best way to regulate the internet in Brazil, then what could be the alternative? In May 2007, an article from Ronaldo Lemos in the *Folha de São Paulo* newspaper presented the proposal that, instead of approaching criminal law, Brazil could have a ‘Civil regulatory framework’ for the internet: a ‘Marco Civil’. This was the first time the term ‘Marco Civil da Internet’ was made public.⁸

The Federal Government’s support for the notion that a ‘Marco Civil’ could oppose the Azeredo Bill only came in 2009. Speaking at the 2009’s International Free Software Forum held in Porto Alegre, President Luis Inacio Lula da Silva asserted that Brazil did not need a ‘criminal law for the internet’ and that the best solution would be to amend the Civil Code to protect digital rights.⁹

Although initially formulated as an ‘amendment of the Civil Code’, the presidential message was clear: Civil rights should come first before passing a cybercrime bill in Brazil.¹⁰ The Ministry of Justice then invited a group of experts, including some of the authors of this article, to create an open and multi-stakeholder process in order to develop a mechanism to gather diverse expertise on internet regulation. It was clear from the beginning that this regulation could not be made without using the internet itself to improve the debate around the relevant topics.

Given the potential of the Internet to converge different views, the online platform ‘Digital Culture’ developed at the time by the Ministry of Culture was customised to receive the first consultation on a Draft Bill of Law ever to be deployed in Brazil. It was the first experience of the Brazilian Government with the use of online platforms to enhance the law-making process. Many of the lessons learned from this initiative were then implemented in several consultations launched in the following years.

Despite the technological topic of the bill, this first online consultation was almost a ‘handmade one’. Back in 2009, there were significantly fewer methodologies, software, best practices and previous experiences that aimed at crowdsourcing a Bill of Law.¹¹

⁸Ronaldo Lemos, ‘Internet Brasileira Precisa de Marco Regulatório Civil’ *Folha de São Paulo* (São Paulo, 22 May 2007) <<http://tecnologia.uol.com.br/ultnot/2007/05/22/ult4213u98.jhtm>> accessed 15 September 2016.

⁹A video recording of the speech can be found at <www.youtube.com/watch?v=g9YKmaXvhQM> accessed 15 September 2016.

¹⁰Ronaldo Lemos, ‘Uma breve história da criação do Marco Civil’ in N. De Lucca and others (eds.), *Direito & Internet III: Marco Civil da Internet* (Lei n. 12.965/2014), tomo I (Quartier Latin, 2015) 83.

¹¹However, a great number of countries (especially developed ones) had by 2009 already approved a diverse range of laws concerning the internet. Laws and regulations on issues such as privacy, data protection, intermediaries’ liability and copyright were already in force. In this sense, if the collaborative construction of an Internet Bill of Rights at the national level was something unique by 2009, the topics covered by this draft Bill of Law had been discussed and introduced as legislation for more

The initial concept behind the consultation was to provide the future Draft Bill of Law with a pool of expertise that could be as diverse as possible. For such a purpose, the public consultation was divided into two phases. In the first, which began in October 2009 and lasted just over 45 days, all interested parties could submit their contributions on pre-defined topics. A small set of principles was initially provided so that participants could adhere to them, suggest different ones or even propose a new approach to an already suggested principle.

It was also in 2009 that the Brazilian Internet Steering Committee (CGI.br) approved its Ten Principles for the Governance and Use of the Internet. This resolution contemplates a number of principles that ended up serving as an inspiration for the Marco Civil, such as the protection of ‘freedom, privacy and human rights’, the fostering of a ‘democratic and collaborative governance’ and network neutrality.¹²

During this first phase, the public consultation received over 800 comments by individual users, academics, civil society organisations and representatives from the private sector (as business associations or directly by the companies themselves). The group of experts and the staff of the Ministry of Justice’s Secretary of Legislative Matters analysed each contribution individually and identified the major trends that would guide the wording of the Draft Bill of Law. Once the draft text was ready, a second phase of consultation began with another 45 days for participants to present their contributions. Given the number of applications submitted and several requests for a deadline extension, this second phase was extended for a week and ended on 30 May 2010.

Two very practical moments might serve to highlight the level of experimentalism of the initiative. At first, a great part of the team behind the consultation thought that 30 days would be enough to receive relevant input from the community. It was then clear that only in the very last days of the consultation, almost approaching the deadline, that the more formal and lengthy contributions were submitted. The consultation was then extended in order to provide more time for discussion of these last-minute contributions.¹³

than ten years in other countries. If one could then say that, on the one hand, Brazil delayed the approval of a legislation concerning the internet, on the other hand it seems that this delay was quite positive for the Marco Civil because it could resort to the lessons learned in other countries, acknowledging what went wrong and trying to replicate the successful experiences. Ronaldo Lemos, ‘O Marco Civil como símbolo do desejo por inovação no Brasil’ in G.S. Leite and R. Lemos (eds.) *Marco Civil da Internet* (Atlas, 2014) 5.

¹²CGI’s Ten Principles are available at: <www.cgi.br/resolucoes-2009-003-en/> accessed 15 September 2016. See also Rebeca Garcia ‘Marco Civil da Internet no Brasil: Repercussões e Perspectivas’ (2016) 964 RT 167.

¹³In 2015, the very same process happened in the consultation of the Decree that regulates the Marco Civil <www.brasil.gov.br/cidadania-e-justica/2015/02/marco-civil-debate-e-prorrogado-para-31-de-marco> accessed 15 September 2016.

Another circumstance that highlights the degree of experimentalism was the adoption of a thumbs up/thumbs down feature in the platform in order to rank the comments. The coordination team realised that comments posted earlier on ended up naturally receiving more votes, so this feature could not be regarded as a trusted method to evaluate and compare comments.¹⁴

The second phase of the online consultation provided the public with a draft text that could be commented upon article by article. Participants could agree or disagree with the proposed wording or suggest amendments. Every participant could see each other's comments so that a real conversation could be established among them.

In this second phase there were about 1200 comments on the text of the Draft Bill of Law. In addition to individuals, academics and civil society organisations, a number of technology and media companies also engaged in the consultation, increasing the diversity of stakeholders involved in the process.

Since all comments were made publicly available, the consultation has shed an unprecedented amount of light on the demands of the interested parties concerning changes in the proposed text. Opinions, criticisms and suggested amendments to the text of the future law were no longer restricted to technical pieces distributed directly to the congressmen's offices. Such contributions could then be reviewed and commented upon by all stakeholders, as in a typical discussion forum on the internet.

But how could we make sure that the interested community would effectively participate in such a consultation? What type of feedback is due to make participants know that their contributions have been properly analysed? How could the government guarantee that different voices were heard during the consultation? How could the results be presented in order to include the contributions that were instrumental to the crafting of the final text?

Those were the issues that motivated a careful look not only at the content of contributions, but also the way in which the different stakeholders end up engaging with the process. The Ministry of Justice formed a review team to this end. The team behind the consultation attended a number of conferences, meetings and workshops in an outreach effort to bring together the largest and the most diverse group of stakeholders to comment on the platform. Media coverage also proved to be very important to raise awareness of the consultation process.

A very important moment for the second phase of the online consultation was a partial balance made by the review team. Until that moment, one of the most discussed topics was the one concerning the liability exemption of

¹⁴Fabro Steibel, 'O Portal da Consulta Pública do Marco Civil da Internet' in G. Leite and R. Lemos (eds.), *Marco Civil da Internet (Atlas, 2014)* 18-28.

internet intermediaries for third parties' content. According to the text of Article 20 of Draft Bill of Law,¹⁵ providers could not be held liable for their user's content provided they had complied with a private notification sent by the victim claiming that the content was illicit. It was only if the provider failed to remove the content that it would be held jointly liable for the claimed violation of individual rights.

The solution to the topic of intermediary's liability was drawn mostly from the United States' experience with the Digital Millennium Copyright Act, provided that the wording at the time had gone beyond the usual 'notice and takedown' regime in order to give the user who had the content notified some additional protection.

In any case, the topic was fiercely debated on the platform and on all major newspapers in Brazil. A number of opinion editorials focusing on the topic mentioned that the regime established in the draft Bill of Law would diminish the scrutiny of the Judiciary Power over content posted online.¹⁶ By the end of the day, a whole industry of extra-judicial notifications could lead to the removal of content that could be rendered licit if a judge were to analyse it.

As evidence that the debate was truly open and collaborative, a new wording was drawn from the various contributions received. The liability of internet providers for third parties' content was then conditioned to fail to comply with a judicial order. That is, only after the decision of a judge asserting that a given content is illicit could a provider be held liable if it failed to comply with the judge's decision.

Once an agreement over a final text was reached, a Bill of Law was sent to the National Congress in 2011. Then came three years of legislative process that resulted in the adoption of Law no. 12965, in 2014.

2.3. Debating internet regulation in the National Congress

The Marco Civil's path towards a final approval in National Congress was not an easy one. Many challenges were presented and in order to reach new agreements, some amendments to the text that originally came out of the public consultation were made. Topics such as privacy, data protection, net neutrality, liability and copyright demanded intense legislative work.

Even before entering the National Congress there has been some controversy over the text. More than one year passed between the end of the second phase of consultation and the introduction of the Bill of Law in the Congress.

¹⁵Now Article 19 of the approved Law.

¹⁶Folha de São Paulo <www1.folha.uol.com.br/tec/2010/05/730418-governo-recua-e-muda-projeto-de-lei-para-web.shtml> accessed 15 September 2016.

The reason for this delay in the preparation and submission of the text lies within the transition that was taking place in the Federal Government from 2010 to 2011. President Dilma Rousseff succeeded President Lula and, although they were from the same political party, the formation of a new cabinet, with significant changes in ministerial staff and their secretariats end up delaying the submission of the Marco Civil.

While this explanation has been received naturally at first by activists and civil society organisations, some new ministers appointed by President Rousseff began to take a quite different direction from their predecessors in the previous administration.

This initial stalemate in the early years of the Rousseff administration not only highlights the divisions within the Labor Party, but also reveals the fragility of popular participation mechanisms for the formulation of public policies. After a long online consultation, which sought to converge in an unprecedented way the most diverse interests, the decision to send a final text to the National Congress was again in the hands of government ministers.¹⁷

Finally, after just over one year of internal deadlocks in the government, the text was sent to the Congress as a Bill introduced by the Executive Branch (Bill of Law No. 2126/2011). The selected rapporteur in the House of Representatives was Alessandro Molon, at that time a deputy of the Labor Party. The Bill of Law went through regular discussions in various commissions. Not surprisingly, net neutrality and copyright were two of the most debated issues and they were usually identified as disagreement points that prevented the approval of the text.

This first moment of stalemate lasted from 2011 to 2013. The year of 2013 was an especially turbulent one for Brazilian politics given the unprecedented public demonstrations of discontent with both national and local governments that took place throughout the country. Although little coordinated and targeting multiple objectives, these demonstrations gathered large crowds in June 2013. One of the demands was the lack of channels to improve participation in public policy formulation.¹⁸

Beyond the demonstrations of 2013, another factor was crucial to advance the discussion over the Marco Civil in the National Congress. When Edward Snowden revealed the deployment of several Governmental-led espionage

¹⁷According to Dan O'Malley: 'Activists expressed frustration at this point when their participation in shaping government policy was no longer wanted and progress on the bill seemed to be stalled. They rightfully considered this delay as evidence that the Marco Civil da Internet was not a priority for the Rousseff administration. This delay evidenced the fact that even though the experiment in participatory democracy online opened up new avenues of engagement for a small number of activists, it did not fundamentally alter the decision-making power structure of government' (ibid., 64).

¹⁸One of the reactions of the Government to the demonstrations was the launch of the portal [Participa.br](http://www.participa.br), which sought to improve communication with civil society and foster popular participation. [Participa.br](http://www.participa.br) <www.participa.br> accessed 15 September 2016.

programmes, with some of them ending up focusing on Brazil, a rapid reaction by the Brazilian Government was expected. Surprisingly, the Marco Civil was chosen as part of the national response to the scandals involving the indiscriminate rise in surveillance and espionage.¹⁹

It is worth pointing out that there was actually little wording in the Marco Civil that could directly be a response to the scandal of the spy programmes. However, once selected as part of the strategy of the governmental response to the spying case, the Bill of Law underwent some changes.

There were two significant changes to the text. The first is concerned with the current Article 7, which deals with the protection of privacy and personal data. Understandably, the Marco Civil received some provisions involving the collection and treatment of personal data. To date, Brazil still does not have a general data protection law, so the provisions inserted into the Marco Civil were the first ones to apply to the collection and treatment of personal data online. Until then, 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).

A number of Bills have been introduced in the National Congress in order to establish a proper general data protection law in Brazil. More specifically, the Ministry of Justice had conducted an online consultation on similar terms to the one used for the Marco Civil in order to create a collaborative draft bill of law.²⁰ Given that the Marco Civil seemed to be an alternative that could be quickly converted into law, some provisions of this draft bill on data protection ended up migrating into the text of the Marco Civil.

Although the insertion of very relevant provisions on data protection had strengthened the Marco Civil as a whole, expanding the protection of fundamental rights online, some provisions were simply moved from the Draft Bill of Law to the Marco Civil, losing the necessary links that could facilitate their interpretation and enforcement. This is the case, for example, of article 7, IX, which requires express consent for the collection of personal data. In the Data Protection Draft Bill of Law there was a number of exemptions to the requirement of express consent that were not sent altogether to the Marco Civil.

In addition to the new provisions on data privacy, a second topic that emerged right after the Snowden revelations was the proposal of inserting in the Marco Civil a provision that demanded a forced localisation in the country of all data of Brazilian users that are collected by foreign companies.

¹⁹Senado Federal 'Marco Civil da Internet foi reação a denúncias de Snowden' <www12.senado.leg.br/emdiscussao/edicoes/espionagem-cibernetica/propostas-senadores-querem-inteligencia-forte/marco-civil-da-internet-foi-reacao-brasileira-a-denuncias-de-snowden> accessed 15 September 2016.

²⁰A first consultation on a Data Protection Draft Bill of Law was made in 2011 under the same Cultura Digital <<http://culturadigital.br/dadospeoais/>> accessed 15 September 2016). A second one was conducted in 2015 using the website of 'Pensando Direito' (a project of the Ministry of Justice) <<http://pensando.mj.gov.br/dadospeoais/>> accessed 15 September 2016.

Much criticism has been raised against this provision, warning of the risk of network fragmentation and isolationism.²¹ In the end, the government acknowledged that this was not the best way to deal with the concerns that have arisen from the spy scandals and decided not to move forward with that. Thus, out of the two most significant changes that came in 2013, only the inclusion of data protection provisions effectively moved on.

With the momentum generated by the spy scandals, the two most controversial issues in the debates in the House of Representatives (copyright and net neutrality) also ended up reaching an agreement between all stakeholders that could lead to a vote for approval in the plenary.

With regard to copyright, an additional paragraph was inserted into Article 20 (now Article 19 on the approved Law), which deals with the liability of internet intermediaries for third parties' content, in order to clarify that copyright infringements would be treated separately. There was some degree of discontentment among copyright holders with the solution presented (stating that providers could only be held liable for their users' content if they fail to comply with a judicial order). As there was an ongoing effort to reform the copyright law, eventually triggering a debate over the best regime to deal with liability for online copyright infringement, it was decided that it would be not only technically but also politically advisable to leave copyright infringements out of Article 20 of the Marco Civil.

As the current Copyright Act in Brazil (Law No. 9610/98) does not address the liability of providers for online infringements, and the Marco Civil remits the issue to a forthcoming law reform (or the enactment of a new one), it is up to the Judiciary to set the precedents on the regime governing the liability for online copyright infringements.

Before the Marco Civil came into force, the courts usually enforced a 'notice and take down' regime. If the provider received a notification and failed to remove the content posted by its user it would be jointly liable for the corresponding violation of rights. More recently, the Superior Court of Justice decided not to apply this regime in favour of an analysis focused on the existence of contributory or vicarious liability.²²

With regard to net neutrality, the general provision of what is currently Article 9 of the Marco Civil was preserved. In order to reach an agreement with some segments of the private sector, an additional item was inserted into Article 2, protecting 'the freedom to develop new business models on the Internet, as long as they comply with the principles of this Law.'

²¹Bruce Douglas, 'Brazil's plan to isolate its Internet is a terrible idea' (Motherboard, November 14 2013) <<http://motherboard.vice.com/blog/why-brazils-new-internet-law-is-stupid>> accessed 15 September 2016.

²²Felipe Busnello and Giancarlo Frosio, 'Brazilian Supreme Court adopts common law tests in intermediary liability copyright case' (Center for Internet and Society, June 24 2015) <<https://cyberlaw.stanford.edu/blog/2015/06/brazilian-supreme-court-adopts-common-law-tests-intermediary-liability-copyright-case>> accessed 15 September 2016.

So the two relevant issues raised right after the spy scandals have been settled (data protection and data localisation) and the two more controversial issues have reached some agreement (copyright and net neutrality). That set the scene for the approval of the Bill of Law in the House of Representatives.

Among the international support received by the proposal, it is worth noting the statement issued by Tim Berners-Lee, one of the founding fathers of the internet. According to the statement delivered right before a voting session in the House of Representatives, the author emphasised that ‘the Bill reflects the Internet as it should be: An open, neutral and decentralized network, in which users are the engine for collaboration and innovation.’²³

The Marco Civil was finally approved in the House of Representatives and sent to the Senate. The approval in the Senate came quite quickly. Symbolically, the President sanctioned the law at the opening ceremony of the Net-Mundial Conference of 2104, which brought to Brazil several international delegations to discuss the future of internet governance. The law entered into force on 23 June 2014.

3. Questions about impacts and future regulation

Brazil’s Internet Bill of Law is a Federal Law and, hence, it serves both as grounds for judges in deciding cases, but also as a framework for future legislative work. After two years of passing in the National Congress, the Law has already served as an inspiration for a number of other initiatives nationally and abroad.

Most of the provisions of the Marco Civil were automatically enforceable, but a few required additional regulation, especially those dealing with exceptions for net neutrality, as well as the data retention clause. In order to provide the Law with full enforceability, the Decree no. 8,711/2016 was enacted. Due to the authorisation given by the Congress to initiate an impeachment process against President Rousseff, the Decree was published in the very last week of her Presidency.

Still at the national level, one of the most challenging outcomes of the Marco Civil is to serve as a magnet for future legislative work concerning the internet. New provisions on data protection, right to be forgotten, access to a user’s data, blocking of apps and internet filtering: all of those topics are currently featured in Bills of Law that aim at changing the Marco Civil. More recently, an Inquiry Parliamentary Commission was established to improve Brazilian legislation on Cybercrime. Not surprisingly, several proposals that came out of the Commission also affect the Marco Civil.

²³Tim Berners-Lee, ‘Marco Civil: Statement of Support’ (World Wide Web Foundation, 24 March 2014) <<http://webfoundation.org/2014/03/marco-civil-statement-of-support-from-sir-tim-berners-lee/>> accessed 15 September 2016.

Internationally, the Marco Civil has inspired some initiatives such as the creation of a Declaration on Internet Rights in Italy. Brazil and Italy share a long record of debates around the idea of an Internet Bill of Rights, with roots that can be traced back to the very beginning of the United Nation's Internet Governance Forum process.

3.1. Further regulation by the Decree 8711/2016

The wording of the Marco Civil kept a broader and principle-based tone in most of its provisions. Working with principles rather than detailing the use of a certain technology was a strategy to guarantee that the provisions could stay relevant for a significant period of time. (Where further details are required for legal enforcement, the law delegates such a detailing process to secondary legislation, such as Presidential Decrees.)

As mentioned before, some provisions concerning mostly the exceptions to net neutrality and conditions for data retention were subjected to the enactment of a Decree. After four online consultations (two conducted by the Ministry of Justice,²⁴ one by the Internet Steering Committee – CGI.br and another by the National Telecommunications Agency – ANATEL) the Decree was published in 2016.

The largest chapter of the Decree focuses on the exceptions to net neutrality. The Decree forbids the practice of ‘unilateral conducts or agreements’ that ‘jeopardize the public and unrestricted nature of the Internet and the fundamentals, principles and goals of Internet usage in the country’ (Art. 9). The Decree also states that any network management practices should be transparent to Internet users and presented in language that is easy to understand.

With regard to safety standards and confidentiality of records, personal data and private communications, the Decree imported some issues discussed in the Data Protection Draft Bill of Law (currently Bill of Law no. 5276/2016), which was also built after public consultations. The Decree states that the collection of personal data shall be restricted to the least amount of personal data needed for the purposes of the service and that the records should be deleted as soon as they cease to serve their purpose or by the end of any retention term established by law.

The Marco Civil has explicitly mentioned the attributions of the CGI.br in proposing technical guidelines for the use and development of the internet. The Decree details how this expanded regulatory dialogue between governmental and non-governmental entities should be, stating the attributions of

²⁴For an overview of the consultations made by the Ministry of Justice, see F.C.D.B. Cruz, J.C. Marchezan and J.C. Santos, ‘O que está em jogo na regulamentação do Marco Civil da Internet? Relatório final sobre o debate público promovido pelo Ministério da Justiça para a regulamentação da Lei 12.965/2014’ (InternetLab, 2015) <www.internetlab.org.br> accessed 15 September 2016.

the Administrative Council for Economic Defense (CADE), the National Secretary of Consumer Protection (SENACON) and ANATEL.

The Decree was issued in the very last week before the National Congress had decided to move forward with the impeachment of President Dilma Rousseff. Some criticism has then been made of the fact that the President ended up releasing a large number of Decrees before stepping down. In what concerns Decree 8711/2016, the criticism seems unfair since the Decree was subjected to four online consultations by three different entities before being issued. Most of its wording had already been revealed during the consultation process by the Minister of Justice.

3.2. The Marco Civil and future legislative work

One of the most notorious issues related to the second year of enforcement of the Marco Civil is the work of the Inquiry Parliamentary Commission on Cybercrime (known as CPICIBER). Although the focus of the Commission has been the improvement of the legal framework regarding the fight against cybercrime, the Marco Civil ended up being affected by the outcomes of the CPICIBER.

Apart from the technical debate over the proposals that ended up being suggested by the Commission, it is important to highlight how politics affected the debate over the Marco Civil in the CPICIBER and in the National Congress as a whole in 2016. Once President Rousseff was suspended for her impeachment trial, a new coalition of political forces emerged in the Congress. For such Representatives and Senators, the Marco Civil might be seen as the product of the previous government and as such it needs to be revised.

As it was approved during the Rousseff administration, which relied heavily on the government's support in Congress, it would be natural to link the Marco Civil with a particular political moment. On the other hand, it is very important to mention that the final wording of the text was created out of a very diverse consultation process. The Law was not the product of a specific government or political party, but a collaborative effort coordinated by the government.

The final report of the Commission suggests a number of Bills to be further analysed by the Congress, some of which directly alter or insert new provisions in the Marco Civil.²⁵ Recognising that the Marco Civil has three pillars, namely privacy, freedom of expression and net neutrality, it is possible to identify three results of CPICIBER that affects each of them.

²⁵The final report of CPICIBER can be found at <www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-temporarias/parlamentar-de-inquerito/55a-legislatura/cpi-crimes-ciberneticos> accessed 15 September 2016.

Initially, the CPICIBER sought to introduce a Bill that would facilitate access to IP numbers by the investigative authorities. In this sense, a judicial review of the law enforcement or investigative authority request would no longer be necessary. This measure could produce a disturbing result that demands a better balance. By allowing the IP to be obtained directly by the investigative authority, without going through the control of a judge, the measure mixes the role of who investigates with the role of those who analyse whether the production of this evidence is really necessary. By mixing the roles of investigation and decision, the proposal would weaken the privacy of all internet users as the IP used in their devices could be revealed by the provider without going through judicial scrutiny.²⁶

As there was no consensus by the end of the mandate of the CPICIBER on the issue, and there is already a Bill of Law suggesting this very same measure being discussed in the National Congress, the final report only recommended further study on the issue of obtaining IP without a judicial order.

Another outcome of the CPICIBER affects freedom of expression and the intermediaries' liability regime as stated in the Marco Civil. Article 19 of the Marco Civil makes clear that the user is responsible for the content he or she publishes online, not the application providers that run the platforms in which content is published. The provider will only be held liable if it fails to comply with a judicial order.

This provision of the Marco Civil reaffirms that it is the Judiciary that shall have the final wording regarding whether content is illicit or not.²⁷ In a typical notice and takedown regime, if an individual notification for content removal is not fulfilled, the provider may be held liable. This could lead to a scenario in which providers would end up removing any content that is notified, being a restaurant review or photos that displease someone for any particular reason. Ultimately, providers would be the judges of what stays alive or is removed from the internet.

The suggestion made by CPICIBER restores the fundamental problem that the law has solved. In the proposal, providers are called again to act as 'judges', assessing the legality of certain content. According to the proposal of the CPICIBER, contents that are allegedly identical to any other content that has already been claimed as illicit by a court decision should be taken down within 48 hours, otherwise the provider is to be held liable for it. The problem that one can foresee is the debate over what is or is not identical is very likely to occur. In doubt, providers will eventually remove content.

²⁶Article 10, §3°, of the Marco Civil states that the data concerning the user's affiliation, address and personal qualifications could be requested by investigative authorities without going through a judicial review. The same logic does not apply to IPs. See Caio Lima, 'Garantia da privacidade e dados pessoais à luz do Marco Civil da Internet' in G. Leite and R. Lemos (eds.) *Marco Civil da Internet* (Atlas, 2014) 157.

²⁷Demi Getschko 'NETMundial e o Marco Civil: a necessidade de ambos' in N. De Lucca and others (eds.), *Direito & Internet III: Marco civil da Internet* (Lei n. 12.965/2014), tomo I (Quartier Latin, 2015) 104.

Finally, the CPICIBER also suggests the insertion of a provision in the Marco Civil that would allow courts to order the blocking of websites and applications when they are hosted abroad and engage in the dissemination of illicit material. A last minute addition, motivated by the WhatsApp blocking in Brazil, excludes the possibility of blocking ‘instant messaging applications’. As well as all the debate on net neutrality, this addition is an example of how a principles-based law might be turned into something else if for any new trendy technology or very popular app a new tweak on the Law is made.

The CPICIBER report prompted an international campaign that had the creator of Facebook, Mark Zuckerberg, promoting a petition in support of what he described as ‘a threat to free internet’ in Brazil. Tim Berners-Lee published an ‘Open Letter to Legislators in Brazil’²⁸ in which he states that the CPICIBER report is a setback to the achievements brought about by the creation of the Marco Civil.

3.2.1. Crowdsourced legislation and political impacts

Policymakers tend to have lower expectations in using the internet for policymaking, which is not at all surprising. As Lasswell argues, political practitioners are characterised by a very utilitarian view of policy making processes given that a policy orientation ‘calls for the most efficient use of the manpower, facilities and resources ... [which requires] utilising our intellectual resources with the wisest economy’.²⁹ Online consultations tend to attract only a relatively small share of the population, and to bias decisions according to stakeholders and participants that enrol when the consultation is open.³⁰ In fact, empirical research so far suggests that ‘if the quality of democracy is to be measured by the inclusiveness and deliberativeness of the interactions between government and citizen, the incremental effect of online consultations so far appears to be minimal’.³¹

From a policy-oriented perspective, online consultations would fail to replace the policymaking processes that happen offline, for example inside the Congress venues. Good policy is primarily based on good policy process standards, we could argue. This argument however ignores the

²⁸Tim Berners-Lee, ‘An Open Letter to Brazilian Lawmakers’ (World Wide Web Foundation, April 11, 2016) <<http://webfoundation.org/2016/04/uma-carta-aberta-aos-legisladores-brasileiros-an-open-letter-to-brazilian-lawmakers/>> accessed September 15, 2016.

²⁹H.D. Lasswell, ‘The Policy Orientation’ in S. Braman. *Communication Researchers and Policy-Making* (MIT Press, 2003) 84.

³⁰S. Coleman and P.M. Shane, *Connecting Democracy: Online Consultation and the Flow of Political Communication* (MIT Press, 2012).

³¹P.M. Shane, ‘Online Consultation and Political Communication in the Era of Obama: An Introduction’ in S. Coleman and P.M. Shane (eds.) *Connecting Democracy: Online Consultation and the Flow of Political Communication* (MIT Press, 2012) 4.

shortcomings of traditional venues of policymaking: low diversity of opinions, low inclusiveness of different stakeholders, high entry barriers to start debating with well-established policy makers outcomes.³² And it also ignores, as Coleman and Blumler argue, that bottom up experiences of internet use for policy making are more likely to produce meaningful political outcomes than top down experiences.³³

The Marco Civil was the first attempt to crowdsource a legislation that would set overarching principles for internet regulation and provide direct enforceability to digital rights. It was based on a conjoint and unorganised effort that involved civil society, individual users, government (executive and legislative branches), academics, technical community and the business sector. As such, Marco Civil was the product of an open and collaborative effort that can be described as a multi-stakeholder process, to crowdsource not only with individuals in general, but specifically with individuals based on a diversity of stakeholder backgrounds.

From the time it became clear that Brazil needed a bill of rights for the internet, it also became clear that the internet itself could and should be used to draft the legislation. From the time the first consultation took place, in 2007, to the time it passed Congress, in 2014, until today, we can also argue on the legacy a crowdsourced legislation such as the Marco Civil has on policymaking.

Back in 2007 the Marco Civil was based on a government-run online consultation designed to draft a bill of law on internet legislation with the aid of collaborative tools. In the original consultations, political practitioners designed a top down online platform to invite general citizens to engage in policy deliberation. As a result of the process, more than 2000 contributions were received from users on the platform alone.

It also had three primary targets: (a) to provide an overview of the legal landscape concerning internet regulation and design a Draft Bill of Law that could be sent to the National Congress; (b) to create policies capable of securing existing and future individual rights over the web; and to (c) be based on collaborative practices and public debate constructed with the aid of crowdsourcing tools.

Based on what we witnessed during the CPICIBER, in 2016, the tenets that guided the online consultation back in 2007 have shifted. The CPI report was aimed to produce a policy document that provided an overview of the legal landscape in Brazil (item (a) above) and based on future individual rights over the web (item (b) above). Nonetheless, the CPICIBER was no longer

³²A. Chadwick, *Internet Politics: States, Citizens, and New Communication Technologies*. (Oxford University Press, 2006).

³³S. Coleman and J.G. Blumler, *The Internet and Democratic Citizenship: Theory, Practice and Policy* (Cambridge University Press, 2009) ix.

guided by the rule to promote collaborative practices and public debate constructed with the aid of crowdsourcing tools (item (c) above).

Overall, the final report of the CPI seems to reflect a recurring image by politicians that identifies the internet more as a threat to reputation than an opportunity to expand access to knowledge and education. The spread of illicit content needs to be addressed, but the means by which this result is achieved must be proportionate and not interfere with the technical infrastructure or directly affect the principles enshrined in Brazilian law and long debated during the process of the Marco Civil.

However, the impact on important Marco Civil provisions shortly before its second year in force demonstrates how the engineering of public participation in the legislative process is a work in progress with lots of room for improvement.

Two circumstances indicate that the Brazilian experience with the Marco Civil can lead the way for improved initiatives of public participation. At first, it seems that congressmen were not exactly concerned with the fact that the text that reached the Congress was created through an open online consultation process. Although the final text ended up following much of the suggestions that came out of the consultation process, relevant changes were made without a proper articulation on why the result of the consultation should be replaced by new wording.

The second circumstance, derived directly from the results of the CPICIBER, is the acknowledgement that the participatory mechanisms in the legislative process do not eliminate the political component that governs the actions of congressmen and that might cause them to be allies or opponents for reasons that have little connection to the issues pertaining to the Bill of Law itself. Moments of high political tension, such as a change in the Government or Legislature or even something more disruptive such as an impeachment process might prove especially delicate and provide opportunity for revisionism.

3.3. International initiatives

Once approved in 2014, the Marco Civil has been one of the inspirations for the launching of a process of collaborative construction of a Declaration of Internet Rights by the Italian Parliament. Making an express reference to the Brazilian experience, the Parliament invited a number of actors involved with the Marco Civil to present their experience to the members of the Chamber of Representatives.

The Italian Parliament formed an expert commission to coordinate and analyse the contributions of an online consultation on the Declaration of Internet Rights. The members of the Commission were 10 members of the Parliament and 13 experts. A drafting committee was created as well. An

online consultation was then launched and lasted for five months. In parallel, to the online consultation a number of hearings were held as well.³⁴

On 25 July 2015, the final version of the Italian Declaration on Internet Rights was presented. Unlike Brazil, which opted for the approval of a federal law, the Declaration adopted by the Italian Parliament is not a law, but a charter of principles to guide future legislative work.³⁵

In France there has also been an online consultation to reform the existing laws in matters relating to the protection of rights on the internet. Under the umbrella of a concept of a 'Digital Republic', the French legislative proposals were discussed in a platform that is clearly a step forward in what the Brazilian Marco Civil could provide in 2009.³⁶

In addition to the visible influences at the procedural level, it is worth mentioning that the Brazilian Marco Civil was quoted in a decision of the Supreme Court of Argentina. The Court decided that a search provider is not liable for the results of its search mechanism. The ruling quotes how the issue is dealt in the Marco Civil, stating that a provider could only be held liable for the content of its users if it fails to comply with a judiciary decision ordering the removal of the content recognised as unlawful.³⁷

4. Conclusion

The Marco Civil has entered its third year of enforceability. Since then, courts have applied its provisions (mostly on privacy and intermediaries' liability) and Congressmen have discussed several issues that have a direct relation to the law. Since it is a centrepiece to the debate over the internet in Brazil, the Marco Civil is usually referred to as the 'Constitution of the Brazilian Internet'.

It is still too early to provide a more detailed analysis on the impacts of the law on a larger scale, especially because only recently are the Superior Courts deciding cases based on the Law.³⁸ However, the international repercussions might point to the very relevant role that the initiative plays in a moment that could be framed as a 'constitutional moment for the Internet'.³⁹

³⁴Juan Carlos de Martin 'The Experience of Italy's Declaration of Internet of Rights' <<http://demartin.polito.it/sites/demartin.polito.it/files/Slide-JoaoPessoa-CGI-DeMartin-9novembre2015.pdf>> accessed September 15, 2016.

³⁵Italian Declaration on Internet Rights <http://www.camera.it/application/xmanager/projects/leg17/commissione_internet/testo_definitivo_inglese.pdf> accessed September 15, 2016.

³⁶République Numérique <<https://www.republique-numerique.fr/project/projet-de-loi-numerique/consultation/consultation>> accessed September 15, 2016.

³⁷Darian Pavli, 'Case Watch: Top Argentine Court Blazes a Trail on Online Free Expression' (Open Society Foundations, October 30, 2014) <<http://www.opensocietyfoundations.org/voices/case-watch-top-argentine-court-blazes-trail-online-free-expression>> accessed September 15, 2016.

³⁸For an overview on the relevant case law leading to the Marco Civil and how Courts are enforcing the relevant provisions see Carlos Affonso Souza, 'Responsabilidade Civil dos provedores de acesso e de aplicações de internet: evolução jurisprudencial e os impactos da Lei no. 12.965/2014 (Marco Civil da Internet)' in G.S. Leite and R. Lemos (eds.) Marco Civil da Internet (Atlas, 2014) 791–816.

³⁹Stefano Rodotà, *Il Mondo nella Rete. Quali i diritti, quali i vincoli* (Laterza, 2014) 56.

The participatory consultation process initiated in 2009 provided the first opportunity to foster diversity and transparency in the law-making process in Brazil. The improvement of subsequent online consultations is evidence alone of the legacy of the Marco Civil. One of the challenges ahead will be to evaluate how laws built through broad consultation processes are treated by legislators, judges and policy makers.

The use of crowdsourcing technology was a key element in understanding the uniqueness of the Marco Civil consultation in 2009. This process helped lawmakers and users understand the role played by institutions that moderated the use of technology for policy-making objectives. As Blumler and Coleman stated: ‘for democratic participation to have a meaningful impact upon political outcomes there is a need for inclusive and accountable institutions that can provide a space for consequential interaction between citizens and their elected representatives’⁴⁰.

In 2009, crowdsourcing tools were led and supported by government-based institutions, as well as by the support given by sponsoring think tanks. Civil society and government secured an opportunity for collaborative, open policymaking, both because of the technology used and institutions involved in the project.

In 2016, crowdsourcing tools were not implemented by default, based on institutional decisions made by those running the CPICIBER mechanism of participation. As such, multistakeholder participation still existed, but it took place outside the policymaking venue, that is, on social media, in the newspapers, and along the Congress corridors. Several were the forums where the draft report was discussed. The difference from 2009 to 2016 however was a reduced level of transparency, and public accountability.

Returning to the opening metaphor, a more collaborative legislative process will be made by those who understand that the focus should not lie exclusively on the lake or in the bucket. That is, to understand the legislative process we should not only focus on the typical actors that move the law-making process or on the law that is its direct result. Rather, it is necessary to illuminate the path that takes the bucket out of the lake.

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⁴⁰Ibid., 3.