Brazilian Civil Landmark of Internet: collective construction of a regulatory mechanism and democratic discussion

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I. Introduction

The need to think of regulatory instruments to guide cyberspace has been forcibly imposed in many countries of the world when technology advances in logic faster than bureaucratic regulatory instruments are able to respond. Alongside this, there has been a number of attempts at economic and political exploitation of a worldwide network that is born free and essentially identified with an informative decentralization potentially capable of strengthen alternative communication channels, enabling the coexistence of a plurality of previously unimaginable discourses. Quickly, speeches multiplied about the democratic potential of the internet as a tool, and ideas of a new public sphere as "virtual agora" could easily be found in parallel talks over skeptics in a similar configuration to traditional discussion between apocalyptic and integrated.

However, the practice that is watched over the years, after the first impacts of the assimilation of new technology, reveals a highly profitable and whose potential for economic exploitation, associated with the possibility of withholding information flows (such as the interception of content private) and the risk of civil rights violation has revealed the need for regulation. Civil society, in some countries of Latin America has exercised the role of required regulatory reformulations aiming prioritizing citizens' interests and strengthening the democratic character of the Internet.

In case of Brazil, the Civil Landmark of Internet discussion, that is ongoing since 2009, is emblematic of this problem. From the platform Cultura Digital[22] citizens could participate in discussions about three normative axes: individual rights, rights of actors, government guidelines. This initiative resulted in the drafting of a bill that was put on public debate again before entering in progress in institutional spheres.

This article presents a theoretical review of authors that deal with democratic theory and the Internet to build a brief overview of the process of constructive discussion civil landmark of internet in Brazil. It is intended, from this, observe the democratic validity of such initiative, unprecedented in a country with little tradition of social participation in policy communication, but that it still faces a lengthy process of effectiveness institutional.

II. Notions of deliberative democracy and the public sphere

The concept of deliberative democracy currently used, according to Gimmler (2001) covers, mostly, a variety of theoretical approaches, even differently, have something in common: the fact highlight the role of open discussion, participation citizen and the existence of an efficient public sphere.

Witschge (2002) also states that the understanding of deliberative democracy should not be uncoupled from the idea of a strong public sphere with intense public debate. The deliberative discussion here is seen as a key factor and should consist of a rational-critical and free speech. Hence prevails, therefore, the best argument from which are formed the opinion and public will.

The theory of deliberative democracy is not necessarily distinct from the ideas proposed by the traditional theory of participatory democracy. For Kim *et. al.* (1999), it is even seen to be the same. Häytiö Tapio (2003), in turn, states that deliberative democracy can be generally defined as an approach that turns to the construction of ideal standards of political deliberation, from which the political decisions should be made based on procedures public reasoning and rational among citizens committed to making collective choices. It is a prerequisite of the legitimacy of the decisions that they come from of judgments and public policy debates in environments consensus reached by majority rule (Häytiö, 2003).

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22 Social network maintained by the Brazilian Ministry of Culture and by the National Education and Research Network (RNP). The platform is used to build guidelines for policies digital culture broadly and collaboratively.

However, instead of considering the public consensus, Charles White (1997) notices a sensitive disenchantment of American citizens with respect to representative democracy that neglecting the interests of citizens on behalf of private interests. The desire for a more direct democracy in this scenario becomes evident and, according to him, would not be something new:

> The rejection of representative democracy in the name of a more direct democracy is not something new and reflects a persistent tension rooted in American political life since the Constitutional Convention [...] Citizens have become more skeptical about politics in general, and as a result, are abandoning the electoral process at national and local levels (White, 1997: 23-24).

White (1997) asserts that one of the most present discussions about the future of American democracy lies in the potential revolutionary impact that new information technologies would offer to civilian life.

And it is on this kind of hopes that currently "deliberative democracy" and "public sphere" concepts are widely used in academic discourses that are dedicated to the relationship between the emergence of the internet and the possibilities of expanding the forms of citizen participation. The network, increasingly integrated by a plurality, diversity and complexity of public, could be also a new promise of reinvigorating the citizen interest for political affairs, since it makes the worrying decline in political participation observed, example among Americans (White, 2003; Weber, Loumakis, Bergman, 2003).

III. Internet and the public sphere

One of the main arguments about the democratic potential of the Internet is related to their identification with the idea of the public sphere as a space, now set virtually, oriented deliberative free communication between its members. Following a more skeptical regarding the effectiveness of the web to improve democracy, one of the most cited visions in this regard is to Buchstein (1997). He understands that, although in principle provide all the features that are required by Habermas to characterize a public sphere - is potentially universal, accessible, allow freedom of expression and participation outside the traditional political institutions etc. - the internet does not fit the concept properly because fail to accomplish fully with these requirements. In addition, factors such as lack of knowledge of political issues by lay citizens, elite's restricted access to new technologies, and the nature's changing of the public sphere, doesn't occur face to face anymore, so that, these reasons reinforce his argument against the democratic potential of the internet.

Antje Gimmler (2001), in turn, criticizes this skeptical position that underestimates the use of the network. According to the author, Buchstein overestimates the degree of disparity in access to internet (which would not be effectively confirmed by official data) and also shows an exaggerated criticism of communicative interaction that is not based on face to face interaction. In his analysis about the public sphere in the virtual environment, Gimmler, proposes to analyze it in three critical approaches that are usually: the dissociation of the concept of the reality of domination and coercion present there, the statement of the public sphere as manipulative and harmful to the individual judgment and, finally, their structural exclusions.

The author refutes these criticisms arguing that they do not constitute reasons enough to discard the model of the public sphere. On the other hand, will be the proof of what can be considered as fundamental to strengthen the normative and the use of regulatory mechanisms as a basis for the protection communicative structure that ensures institutional dissemination of information, the provision of access and equality of opportunity for participants (Gimmler, 2001).

As opposed to what the most skeptical critics think, the Internet would then, be able to act in strengthening representative democracy, mainly as a complementary tool for citizen participation. However, to preserve this potential it is essential to regulating the environment, following the norm that constitutes the public sphere, so that the rules do not run the risk of being exclusively restricted to the commercial interests of trading.

When analyzing the online forums and public spheres, Lincoln Dahlberg (2001) performs a detailed systematic evaluation of each of the six requirements described by Habermas as parameters for the determination of the public sphere: autonomy, reflexivity, reciprocity, honesty, inclusion and equality. Failure to reach optimal parameters such points, according to Dahlberg (2001), demonstrates the importance of adopting mechanisms to maximize the potential of rational-critical discourse of the internet. And so, could somehow develop his deliberative promise.

The use of the public sphere concept as a parameter is, however, refuted by Jodi Dean (2003) who states that notion is not only inapplicable to the internet, but also detrimental to practice democracy under conditions of contemporary techno-culture. She said with the complexity that characterizes the communicative capitalism involves a power relationship that requires a refinement of the way of thinking about the internet as a public sphere. As her alternative view, the author considers the potential for a political architecture rooted in the notion of networks through which to center the democratic practice of conflict and contestation and within communicative capitalism (Dean, 2001).

> Access to information and communication technologies represent materialized in a flood of images and shows that far from reducing disparities in wealth distribution, allow the emergence of new forms of freedom, undermine opportunities policies, increasingly invading areas of everyday life under terms of market and consumption (Dean, 2003: 103).

In response to the failure of public sphere theory to encompass the complexities of transnational techno-culture in the information age, it then proposes a shutdown this idea on behalf of the adoption of a more complex notion of civil society. This proposal, in turn, seeks to recognize the existence of inequalities, exclusions and competitions rational characteristics of connected societies in the era of so-called globalization, assuming it as a space of social interaction, cultural and political distinct (although showing interconnections) of State economy, but including also institutions such as family, school, neighborhood, media, church, police and activist groups (Dean, 2001). Unlike the public sphere that limits rational political discussion among people who respect each other, the concept of civil society is part of a political theory able to recognize that policies are established on unequal exchange between people and actors who have fundamentally different reasons, thus a dynamically provoking reality.

The emergence of an intermediate understanding of the virtual public sphere as a complement to the civic comes to be presented by Marques (2006). According to him, the line of argument that fits between the two poles of theoretical disputes around the theme "Internet and the public sphere", sees this scenario "as a place for discussions of different natures (some more serious, some not so much), but no greater feasibility of combining the full deliberation, the decision regarding the effective implementation of public policies "(2006:172).

Thus, the formation of nuclei of spontaneous conversation non-institutionalized fits in which Habermas admitted as a public sphere of civil area where prevails not a decision making atmosphere, but essentially a tool to aid in the formation of opinions. "The Internet is more useful in terms of opinion formation than at the level of decision making" (Buchstein, 1997: 260).

We must consider, then, that the role of the public sphere should be directed to the amplification of social concerns through public communication since it alone would have a much more limited ability to solve social problems. Ie, its social importance is to "draw the attention of the parliamentary domain and guide their decision in this or that direction" (Gomes, 2008). Hence we can understand that:

> in the center of the discussion about the public sphere, are the processes by which they are formed collective opinion and will [...] The processes by which they are formed not only become democratically justified belief and common will, they are also a source of legitimacy for the production of policy-making in general, the law and public policy in particular (Gomes, 2008).

When not generate that kind of return, the trend is your greatest contribution is identified with the strengthening of citizenship, as it allows greater political integration among citizens, assisting in their critical maturation as voters, as they rarely their consensus reach to represent reflection on effective policy decisions. For better understanding of this problem we will observe the case of the discussion of the Brazilian Civil Landmark of Internet, held since 2009.

IV. The Civil Landmark of Internet discussion in Brazil

Known as the Civil Landmark of Internet in Brazil, the process of public mobilization began in 2009 and comes from an initiative of the Ministry of Justice and Law School of Getulio Vargas Foundation in Rio de Janeiro, and still goes on process of deliberation and vote in the Chamber of Deputies. Until that moment, were ongoing about 26 proposals for the regulation of the internet in Congress, and one in particular caught the attention of civil society: The PL84/99 of Senator Eduardo Azeredo, which became known as "digital gag".

Among the most controversial points, was the criminalization and mandatory identification of internet users with the custody of shipping records by providers. Since then the Ministry of Justice starts a public consultation process through the internet. The aim was to produce a bill with the participation of various segments of civil society to be an alternative to existing proposals in Congress.

The consultation stage on the internet takes place between October 2009 and May 2010, totaling 90 days, through the blog "Civil Landmark of Internet". Here, citizens could express their opinions openly and decentralized ways on blogs as much as on social networks. This step was divided into two phases.

The first phase lasted little more than 45 days, from October 29 to December 17, 2009, and aimed to discuss the general principles of law, which were inspired by a resolution of the Brazilian Internet Steering Committee (CGI).[23] The document called "Principles for Governance and use of the Internet in Brazil" has 10 topics covering issues about freedom, human rights and technical issues of the network, such as neutrality, non-imputability and functionality.

The order of the discussion was guaranteed through thematic axes, in which participants were organized according to topics: individual and collective rights, responsibilities of the actors; government guidelines. All actors involved in the process could comment on each point, and add new suggestions and vote on interventions already published. In this period were recorded about 800 comments that were systematically categorized and reflected in the first version of the bill, giving birth then, to the second phase which aimed to discuss the first draft of the bill.

In this second phase, a debate much more specific took place directly on the articles of the draft project. This resulted in over 1,200 comments from individuals, civil society organizations, companies, cultural associations and domestic and foreign technology as-

23 Available in Portuguese on the website of CGI: http://cgi.br/regulamentacao/resolucao2009-003.htm Accessed January 20, 2013.

sociations. This diversity of actors is one of the main arguments for the legitimacy of the bill and validity of the democratic process.

In the process of deliberations the organizing committee arranged the guidelines so that the comments were taken into consideration. The first criterion was the qualification of the comments. For this, the blog did not work on the logic of chats and not as conventional discussion forums, i.e., the relationship would not question, answer and replicas but based on fundamentals and positions in direct dialogue with the principles.

According to the Report of Internet Policies: Brazil 2011 (Vargas, January, 2012), the Civil Landmark was didactically divided and emphasizes that there are fundamentals, principles and objectives that would guide the law. The fundamentals are the recognition of the world perspective; human rights and citizenship in the digital media, the popularity and diversity, openness and collaboration, free enterprise, free competition and consumer protection.

Such foundations guiding the general principles that are related to the guarantee of freedom of expression, communication and manifestation of thought, under constitution; privacy protection, the protection of personal data, and ensuring the preservation of net neutrality, protection of stability, security and functionality of the network, through measures consistent with international standards and by encouraging the use of best practices; accountability of agents according to their activities in accordance with law, and finally, the preservation of the participatory nature of network.

From these foundations and principles, the law also establishes goals that are promoting the right Internet access to all citizens, the promotion of access to information, knowledge and participation in cultural life and the conduct of public affairs, the promotion innovation and fostering the widespread diffusion of new technologies and usage and access models, and promoting adherence to open standards technology that enable free communication, accessibility and interoperability between applications and databases.

The determinations of the Civil Landmark of internet can be divided into (Vargas, January, 2012):

User rights and guarantees: in many ways the Brazilian Landmark Civil of Internet is innovative and different from global trends, he seeks freedom and full citizenship in the network. An example of restrictive legislation and reduction of human rights is the Hadopi law (*Haut autorité pour La Diffusion des Oeuvres et la Protection des droits sur Internet*) of France, which provides for suspension of the connection in case of violation of copyright law. For the Brazilian suspensions access cases are completely vetted, except for lack of payment, which is completely different of the Hadopi law.

Responsibilities of providers: they are in a key position, because they are intermediates in the process of communication between the user and the Internet, giving them power over traffic and record all network users. This power puts them as cornerstones for vari-

ous cases of violation of the law, however it is necessary to restrict their power as well as protect them from undue accountabilities so that they do not have the power to withdraw any publication unless order court and well as are not penalized by any user action.

However, the Landmark Civil provides intermediaries' penalty if is not fulfilled the court order for removal of content. If content is considered inappropriate by law, the site must remove it from the air, otherwise will also be penalized. Archiving of records by providers who, according to Article 5 in section IV, is the "set of information regarding the date and time of beginning and end of an Internet connection, its duration and the IP address used by the terminal for sending and receiving packet data ", it is essential to guarantee the rights of citizens and is directly related to the liability of providers. As the law is passed, it is their duty to keep for a period of one year such data so they stay available for any request court.

Network Neutrality: This is undoubtedly one of the most controversial aspects of the law, because it involves the equal treatment of all data flowing on the network. Since the approval of the law, will not be allowed to distinguish the content and neither the users under any circumstance, ie, providers may even offer a diverse band, however cannot distinguish, in contract plan, site access, applications and neither block or limit the access speed.

Performance of the government: it his competence the power to establish transparent, democratic, collaborative mechanisms of governance, and encourage digital inclusion, reducing inequalities between the different realities of the country in access to and use of technologies.

At the end of the stage of deliberation directly with citizens, the Civil Landmark of Internet was brought into the Chamber of Deputies in August 2011 where the discussion goes on until nowadays.   The discussions are still ongoing due to obstacles arising mainly on topics that relate to neutrality network, because lies directly on the interests of telecommunications companies. Nowadays, in Brazil, mobile operators, for example, sell Internet access strictly according to the packages available for businesses. Each package entitles access to applications and different pages according to the amount of data needed for access, so that the operator can interrupt the user and restrict navigation in accordance with these packages.

Another controversial aspect of the project is related to the Brazilian Penal Code predicts as accountability as a third part. According to this code in specific situations people can legally take responsibility for others (such as children, for example) due to spe-

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24 Article finalized in September, 2013.

cific conditions that prevent them from self-represent and been represented in court by their parents or guardians at an offense.

This logic directly affects the functioning of large portals with Facebook, Youtube, Google and many others. According to the project the user is fully responsible for the content posted, however, if a publication is questioned in court, the portals have the obligation after official notification to withdraw content of the air, otherwise also become legally responsible for publishing responding the content.

Besides the controversial points of the project, there are some proposals that were put after the proceedings in the first stage. An example is the debate about a possible regulator of the Internet. On May 31, 1995, with the arrival of the Internet in Brazil, was created from a need to involve participation from the beginning of society with regard to the Internet, the Internet Steering Committee which is an initiative of the Ministry Communications and the Ministry of Science and Technology.

This committee, however, does not aim to regulate the use of the Internet. It was created to coordinate and integrate Internet services in Brazil, besides promoting the technical quality, innovation and dissemination of services, all of this is based on citizen participation. As there are no models of regulators, the National Telecommunications Agency (Anatel), who currently works as a telecommunications regulatory agency in Brazil, intends to act in the regulation the Internet as well.

Although they are few, the points of disagreement and controversy about landmark civil are very complex. This happens because it affects the core of issues involving economic power and the ways of information production and distribution. This bill is currently being processed as PL 2.126/2011 between the House of Representatives and Senate for nearly three years.

V. Final considerations

After a new online public consultation and holding three public hearings in person in 2012, initiated by the House of Representatives, in this moment the reporter has published its opinion and the final report was released, but the voting has not yet occurred, officially because of lack of quorum in the Special Commission (Sampaio *et. al.*, 2013).

Such sluggishness compromises the observance to the advancement of deliberative democracy that was present in the first stage of the process, when a legitimate discussion took place with the participation of various segments of civil society, a climate of respect and cordiality, perhaps near materialization rules of a public sphere.

Nevertheless, one should note that, as seen in the theoretical approach, seems to be slightly valid a public consultation, even if very well made, involving society in the end, if it does not generate effective results in approved policies. Though it may be framed as a

considerable advance, Brazilian Civil Landmark of Internet runs the risk of never becoming law and fall into the same limbo various legislative discussions on communication in Brazil.

Apart from strengthening critical citizens who participated in the online discussions, the Civil Landmark also serves as parameter to guide the actions of activists who advocate regulating the internet as a way of ensuring its democratic character. One example is the campaign "Broadband is your right" which proposes a different model of public concession to Internet companies and has as main objective to universalize broadband (speed up to 1.5 Mbps) and to establish goals for the diffusion of access (quality) internet throughout Brazil.

In this sense, it is understood that, although it faces difficulties in effecting policy, the Brazilian Civil Landmark of Internet reflects a democratic advance in character of dialogue with civil society over political communication. It is an interesting and worthwhile experience in the Brazilian context, but that point needs improvement, enhancements and reformulations of dialogue with institutional sphere so that others future experiences have more concrete democratic validity.

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