

THE BESIEGED CONNECTED PUBLIC SPHERE IN BRAZIL

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The combination of digital technology and the Internet infrastructure resulted in a medium with huge democratic potential². Adding up new architectural features, the Internet enables multidirectional communication, instant response, expanded possibilities of discourse and debate. Nevertheless, such potential can considerably diminish, depending on how technology layers on top of the infrastructure are built, permitting more or less actions by users and depending on the criteria of accessing and filtering content and discourses by its algorithm³.

In the process of enhancing political engagement by citizens through new technologies, in the wake of what has been called "e-democracy" or "digital democracy"⁴, we must deepen the debate on how this potential is being affected by what Ugo Pagallo calls "techno-regulation".⁵

In the Brazilian context, only recently we can talk about a true widespread usage of the internet. The latest CETIC Households⁶ report refers to 49% or 81 million of Brazilian Internet users in 2012, a figure that rises to 74% among those aged from 16 to 24 years. Concerning internet usage for democratic purposes, we are witnessing a moment of several novelties in the country: the 2012 elections consummated the first time that the Internet was used intensively by citizens and candidates in an election campaign, while the protests of June 2013 were the first

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² Considering the characteristics raised by cyberskeptics like Castells and Benkler, we can say that the new information and communication technologies has been seen as the great democratic promise. With several channels of participation, deliberation, mobilization and transparency, they are considered capable of enabling deeper interactions between society and the system through more communicatively efficient public spheres and greater democratic potential. (BENKLER, 2006; CASTELLS, 1999).

³ With some differences varying according to their own conceptions of what would be the Internet and research focus, so-called cyber-skeptics share common concerns. Andrew Keen; Nick Carr; Cass Sunstein; Richard Wurman; Mark Bauerlein; Steve Talbott; Jaron Lanier; Matthew Hindman; Sherry Turkle; Evgeny Mozorov; Eli Pariser and Tim Wu are names that, at some point, have been or are associated with this current, each with a particular look with skepticism doses for specific aspects or reticent in general about the democratic potential of the Internet. Eli Pariser, for instance, analyses the democratic loss generated by the invisible filter that puts us in a bubble where everything pleases, everything makes sense, everything is in line with our views and realities. These mechanisms, increasingly sophisticated, imprisons us showing most of the time informations that we agree, depriving us of dissonant voices. (PARISER, 2011)

⁴ Scholars like Castells and Archon Fung have identified the impacts generated by the Internet on the mechanisms of (i) improvement of transparency in the political process, by monitoring the performance of government agents and public resources, (ii) facilitation of direct involvement and participation in political processes, and (iii) improvement of the quality of opinion formation by opening new spaces of information and deliberation. (FUNG, 2003; CASTELLS, 2007)

⁵ PAGALLO, Ugo. The laws of robots: crimes, contracts, and torts. 2013.

⁶ <http://cetic.br/media/docs/publicacoes/2/tic-domicilios-e-empresas-2012.pdf>.

great cycle of marches in which the use of the Internet played a significant role, demonstrating all of its potential.⁷

Along with this, the prioritization of Internet access and the necessity to improve its use for democratic purposes, claims that are being echoed in the Brazilian public sphere, have found representation in recent legislation. In its Article 7, the Brazilian Civil Rights Framework for the Internet⁸, a law that resulted of a public consultation through the Internet started in 2009 and approved by the Congress in 2014, determines that "Internet access is *essential* to the exercise of citizenship (...)"⁹. Moreover, in 2011, the so called Access to Information Act (Law no. 12.527)¹⁰ was approved. It established mechanisms for mandatory disclosure of open data mainly via Internet, as well as online requests for information by any citizen, aiming to promote maximum transparency in public administration. From the point of view of public policy, the National Broadband Plan¹¹, launched by the Ministry of Communications in 2010, establishes quantitative targets and guidelines to stimulate the expansion of access in Brazil for the next years.

It becomes apparent that Brazilian government and citizens perceive the potential of the connected public sphere in Brazil and how it is playing an important role in the digital age in terms of access to knowledge, access to information, liberty of expression and accountability.¹²

⁷ The experience of June 2013 riots in Brazil showed deep institutional problems of legitimacy in our political system, while demonstrating at the same time all the communicative and democratic potential of the new information and communication technologies and the network organizational culture. There was at this time the embryo of a truly connected active public sphere, representing a breakthrough because of the potential the Internet found in these spaces. The role of online alternative media, the advantage of speed in the communicative flow in digital platforms, the ability to quickly mobilize and organize on social networks are all unprecedented elements and mechanisms that were crucial in this period of social upheaval and illustrate the democratic potential of the Internet.

⁸ In Portuguese: Marco Civil da Internet. Officially Law No 12.965. http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/112965.htm.

⁹ The project bill of "Marco Civil da Internet" was set in a context in which Brazilian representatives, academics and civil society organizations have worked together to bring more legitimacy and participation in the process of creating laws through the use of Internet platforms. The draft represented a commendable state initiative to expand the debate and communication skills in the preparation of rules. The online public consultation promoted by the Government, incremented the debate in the public sphere opening channels for discussing the content and procedures of the rules aiming a greater acceptance of the law. However it is important also to see beyond the process' merits. This deliberative process, despite being commendable and novel in Brazil, also experienced limitations to its potential, for instance, not all expressions were contemplated due to challenges such as lack of Internet access, the effects of technicalization of debate and the strong lobby imposed by some private sectors. Nevertheless, considering that it was the first experience of legislative online consultation in Brazil, it has already been a good advancement. But it is important that in the next similar processes both civil society and government try to correct these flaws and make viable all possible resources for digital inclusion and capacitate citizens for the debate, expanding the capacity to absorb the expression of all possible affected by the rule.

¹⁰ http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/112527.htm.

¹¹ <http://www.mc.gov.br/programa-nacional-de-banda-larga-pnbl>.

¹² FARIA, Cristiano Ferri Soares de. O Parlamento aberto na era da internet: pode o povo colaborar com o legislativo na elaboração das leis?. Brasília: Ed Câmara, 2012. p. 97-108.

However, a new scenario starts to be built on another direction, fast and invisibly. Although Internet regulations like the Brazilian Civil Rights Framework for the Internet in Brazil try to value Internet's democratic potential and regulate practices aiming to protect constitutional rights, the auto-regulation based on design simply surpasses the regulation of law, subverting the traditional "should/should not" logic of the rule of law and establishing the logic of "can/cannot" of a new "rule of technology", leaving no alternative choices of action for citizens or governments.¹³

The Brazilian Civil Rights Framework for the Internet correctly states a safe harbor¹⁴ for Internet Service Providers and strongly declares the importance in ensuring the freedom of speech in the cyberspace. Nevertheless, in reality, regulation by algorithms does an automatic and invisible filtering, performing illegitimate censure, unmotivated and uninformed removal of content, constantly unnoticed and without penalty.¹⁵

For example, the mechanism of techno-regulation used by Youtube through the Content ID¹⁶ system severely jeopardizes the Brazilian remix culture coming from Funk¹⁷ and Tecnobrega¹⁸ expressions in the music scene. In another instance, Facebook's algorithm trying to filter pornography expressions, recently censored a post by the Ministry of Culture in Brazil (posted in its official Facebook profile) with a photography picturing two Brazilian natives. The photo in the public domain, was posted as a release to divulge a new website in partnership with the National Library Foundation and the Moreira Salles Institute containing in the collection over two thousand historical images of the nineteenth and twentieth centuries. Given the lack of transparency for the automatic filtering and the indifference demonstrated by the Facebook in this case, Brazilian Minister of Culture public declared that the algorithmic private censure was abusive, violating the rights to sovereignty and access to culture, demanding more explanations by the company and threatening them with a possible judicial prosecution.¹⁹

¹³ PAGALLO, Ugo and BAYAMLIOĞLU, Emre. On the legal implications of regulation by technology: of law and things. 2015.

¹⁴ Brazilian Civil Rights Framework for the Internet states, with some exception, that Internet Service Providers are only obligated to remove content by means of judicial decision.

¹⁵ "Where non-normative instruments dominate the regulatory environment, we seem to be subject to the rule of technology rather than the rule of law. It may be time to realise the fact that increase in efficiency do not always result with effective solutions. `To prevent becoming merely the cognitive resource for these environments we must figure out how they are anticipating us'. In a techno-regulatory setting, rules no longer embody the politics that they are based on, but they simply dictate it. Law and politics do not operate as two exclusive axioms namely, `politics is the field of power relations and contestations; and law is the sphere of truth and justice governed by *the rule of law*.' Techno-regulation signals the demise of our capacity to reason against and resist, and thus it may result with a further deviation from the values that make us "human". PAGALLO, Ugo and BAYAMLIOĞLU, Emre. On the legal implications of regulation by technology: of law and things. 2015.

¹⁶ <https://support.google.com/youtube/answer/2797370?hl=pt-BR>

¹⁷ https://en.wikipedia.org/wiki/Funk_carioca.

¹⁸ https://en.wikipedia.org/wiki/Tecno_brega.

¹⁹ [Http://www.cultura.gov.br/noticias-destaques/-/asset_publisher/OiKX3x1R9iTn/content/id/1248553](http://www.cultura.gov.br/noticias-destaques/-/asset_publisher/OiKX3x1R9iTn/content/id/1248553).

Both examples give us a clear perspective that the techno-regulation is already an established practice and is being used to attend exclusively to commercial purposes without any concern of observing constitutional rights or specific internet regulations such as the recently approved Brazilian Civil Rights Framework for the Internet.

Although Brazilian policy makers and citizens are aware of the democratic potential of the Internet, they are not sufficiently aware of the risks that are coming together in this scenario promoted by private companies. To avoid a techno-regulation scenario where the rule of law is overruled by algorithms, superimposing civil and constitutional rights, we must seek a more effective regulation of these technologies, from a meta-technology perspective of the law.

Considering the importance of the law as an effective system to regulate actions, and also considering that its criteria preserves rightly individual's freedom to choose among alternative courses of action preserving that way human autonomy, the rule of technology need to be guided by the rule of law, considering law as a meta-technology that orients the regulation by technology.

To optimize the positive effect and minimize the damage brought by the disruptive effect of technological advanced regulation, it is crucial to understand their impacts and consequences, considering the technical aspects and peculiarities of the new forms of communication and also regulation.

Private companies have a relevant role in the enforcement of constitutional rights in the connected public sphere. Without obligation to revise eventual abusive and non-informed algorithmic filtering and removal of content or their reasons to the public scrutiny, there is no public control over such practices. The challenge, as such, is to observe these practices and measure their importance in political and social communication and guide the technology by a more efficient law regulation in a way that it preserves user's autonomy. The law, as a meta-technology, must try to reverse this scenario aiming to superimpose the dominance of design by imposing more specific and severe duties concerning those democratic spaces.²⁰

²⁰ Hartmann, Ivar. A auto regulação pelo código: características, impacto e limites de um novo modelo. 2015.