

DIREITO:

A PENSAR TECNOLOGICAMENTE

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Do we have one real perception of the true degree of technological intrusiveness into the lives of citizens?

At this «Cyberlaw by CIJIC», 2nd edition, we intend to bring to one legal and technological debate some of the most worrying questions related with the weakness of the traditional concepts of public law. Take, for example, old problems where, alleged, threats to state security compress ordinary individual freedoms. Cyberspace currently dominates daily life. Where can we find the protection of the legal-subjective positions of individuals in it?

Traditional juridical and legal programs will lose all effectiveness, sliding into nominal, if the rule of law gives up to respond to the daily problems of netizens.

We all face new legal dimensions. In face of the ineluctable conclusion that the Internet is a global resource, which we dare say, incompatible, par excellence, with the old concept of territorial sovereignty of State, which scientific criteria need to be included in the construction of a dogmatic approach to the regulation of cyberspace? Furthermore, can it be regulated? Which - if any - new international, worldwide, legal solutions we must strive for? »

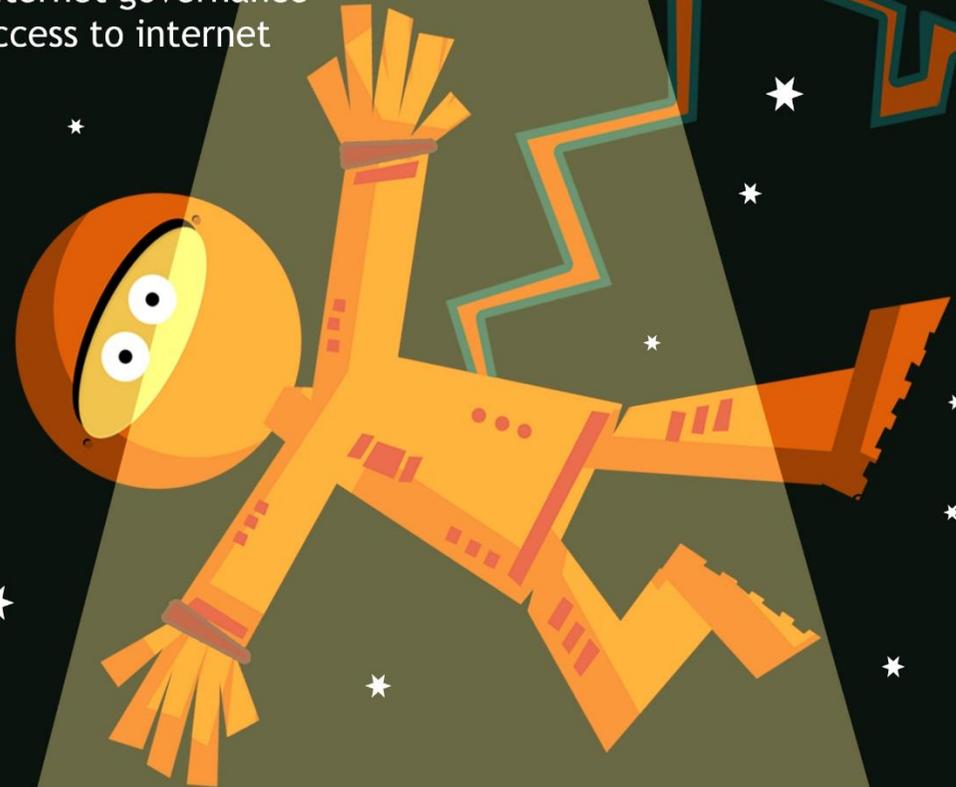


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internet:

- international tribunal for the internet
- open and free Internet
- internet governance
- access to internet

OUTROS: • international cooperation



CYBERLAW

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**REVISTA CIENTÍFICA SOBRE CYBERLAW DO CENTRO DE
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CYBERLAW

by CIJIC

IS MULTISTAKEHOLDER THE NEW BLACK? BRAZILIAN EXPERIENCES IN INTERNET GOVERNANCE AND DIGITAL RIGHTS POLICYMAKING

MULTISTAKEHOLDER É A NOVA ONDA? EXPERIÊNCIAS BRASILEIRAS DE GOVERNANÇA DE INTERNET E DE POLÍTICAS PÚBLICAS SOBRE DIREITOS DIGITAIS

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RESUMO

Arranjos de governança multistakeholder têm o propósito de envolver atores para além dos tradicionais e assim buscar ampliar o escopo de sua representação, de forma a trazer novos atores, como sociedade civil, indústria e academia, para as discussões gerais de gestão, elaboração de políticas, decisão e aplicação de normas, levando em consideração a necessidade de ampliar a legitimidade no ambiente em que operam. Este trabalho analisa de maneira crítica processos multistakeholder conduzidos no Brasil, como o Comitê Gestor da Internet (CGI.br), a elaboração do Marco Civil da Internet e a discussão de outros projetos que afetam o exercício da cidadania, de direitos e liberdades no ambiente digital com o objetivo de contribuir para ampliar a visão sobre as perspectivas, os aspectos positivos e as armadilhas que uma abordagem multistakeholder dirigida a tais iniciativas pode apresentar.

Palavras-Chave: modelos multistakeholder; governança de internet; políticas de tecnologia.

ABSTRACT

Multistakeholder arrangements are meant to involve players beyond traditional ones and search to widen the scope of their representation so as to bring new actors, such as civil society, industry and academia, to overall management, policy-making, decision and enforcement discussions, taking into consideration the need for improved legitimacy in the environment they operate. This work critically analyzes multistakeholder processes carried out in Brazil, such as the Internet Governance experience through the Brazilian Internet Steering Committee (CGI), the elaboration of Marco Civil and the discussion of other bills that affect the exercise of citizenship, online rights and freedoms with the objective of contributing to a broader view of the perspectives, strengths and pitfalls that a multistakeholder approach to such initiatives can bring.

Keywords: multistakeholder models; internet governance; technology policy.

1. INTRODUCTION

Unconventional governance arrangements commonly referred to as multistakeholder models, have evidently grown in importance and presence in the last decade. They are meant to involve players beyond traditional ones, and search to widen the scope of their representation so as to bring new actors, such as civil society, industry and academia, to overall management, policy-making, decision and enforcement discussions, taking into consideration the need for improved legitimacy in the environment they operate.

Multistakeholder structures, thus, are those in which parts with interests at stake recognize the importance of factors like equitable representation, accountability, communication, transparency and participation in structuring and taking decisions that affect each other, and the system itself⁽¹⁾. The general notion carries an underlying overall idea of enhancing participation in decision-making processes, and as such has been rapidly emerging and assuming significant importance in recent years, due to its adoption, in different layouts and degrees, by different entities throughout the world. Understanding how diverse governance groups which are structured in such a way and with different geographical and material scopes are formed, operate, how they measure success and feel internal and external sources of impact has been the object of recent studies⁽²⁾. They do not always behave in the same way, not every stakeholder exercises the same influence in the interaction, it is common for stakeholders without direct law enforcement or policy-making capabilities to play non-conventional roles that still need clarification, in summary, not all stakeholders interact in the same level for every step of every kind of process.

1 In fact, Hemmati describes multi-stakeholderism as “processes which aim to bring together all major stakeholders in a new form of communication, decision-finding (and possibly decision-making) on a particular issue. They are also based on recognition of the importance of achieving equity and accountability in communication between stakeholders, involving equitable representation of three or more stakeholder groups and their views. They are based on democratic principles of transparency and participation, and aim to develop partnerships and strengthened networks among stakeholders. MSPs cover a wide spectrum of structures and levels of engagement. They can comprise dialogues on policy or grow to include consensus-building, decision-making and implementation of practical solutions. The exact nature of any such process will depend on the issues, its objectives, participants, scope and time lines, among other factors.” Hemmati, Minu. *Multistakeholder Processes for Governance and Sustainability: Beyond Deadlock and Conflict*, Earthscan, 2002.

2 Gasser, Urs, Budish, Ryan, West, Sarah Myers. *Multistakeholder as Governance Groups: Observations from Case Studies*. The Berkman Center for Internet & Society Research Publication Series: Cambridge, 2015. http://cyber.law.harvard.edu/publications/2014/internet_governance

Multistakeholder governance evidently does not occur only in the internet environment, though it is interesting to notice that Internet processes have always been governed like this and that the universe of the Internet was perhaps the one which contributed the most to the recognition of the important political development that demonstrates that a governance model based on other values, mechanisms and structure is possible. Told from the other side, the story is also true. Internet would probably not have turned into what it is today if it were not for the governance model in which it developed. It seems, thus, that the structure of Internet model draws the multistakeholder model as a proper fit. Essentially technical multistakeholder cooperation, for example, has been in place for almost 50 years in the environment of the Internet Engineering Task Force (IETF), a community in which the practice of decisions by rough consensus (and running code) not only works, but also fits better than traditional law-enforcement practices. The same may hold true for some other global dynamic issues. Evidently, the interests of early times were much less complicated than transversal issues which are on the spotlight today as long as Internet Governance is concerned.

This work attempts to critically analyze multistakeholder processes carried out in Brazil, such as the Internet Governance experience through the Brazilian Internet Steering Committee (CGI), the elaboration of Marco Civil and the discussion of other bills that affect the exercise of citizenship, online rights and freedoms, through the lenses of the arguments expressed above, with the objective of contributing to a broader view of the perspectives, strengths and pitfalls that a multistakeholder approach to such initiatives can bring.

2. MULTISTAKEHOLDERISM

2.1 What is multistakeholder?

When current discussions refer to the term *multistakeholder* they are invariably invoking ideas from governance theory that are indeed closely connected to administration issues, but which are also evidently important in other aspects, since multistakeholder implies a political, a legal, a communicational dimension, to name but a few. In the relevant literature it is possible to address the construction starting from a core assumption that the State alone can no longer deal with all the pressing needs and challenges of society, From that comes a description of a viable new arrangement to tackle this new situation in terms of some of its characteristics such as “responsive regulation’, informal cooperation, public-private partnerships, and multistakeholder processes”.⁽³⁾

A multistakeholder governance initiative, as already mentioned, is one meant to involve players beyond traditional ones, and search to widen the scope of their representation so as to bring new actors, such as civil society, industry and academia, to overall management, policy-making, decision and enforcement discussions, taking into consideration the need for improved legitimacy in the environment they operate.⁽⁴⁾

2.2. What is multistakeholder for?

Issues of transnational, global reach currently seem to demand such an approach naturally, because it seems like no other option can efficiently fit as an optimal solution when governance matters cross borders. However, the fact that the problems transcend geographical limits does not seem to be an essential characteristic for the proposition and adoption of a multistakeholder model. In fact, such initiatives have expanded and are being explored in virtually any circumstance where it is clear that the State is no

3 John Gerard Ruggie, THE GLOBAL FORUM Global Governance and “New Governance Theory”: Lessons from Business and Human Rights, *Global Governance* 20 (2014), 5–17

4 (Adelman and Morris,1997), (Abbott and Duncan Snidal, 2013), (Gillies, 1993), (Pattberg and Widerberg, 2014).

longer in the best position to face the problems exclusively with the resources at its hand.

The purposes of the adoption of such an arrangement also include the necessity of an increment in the perception of legitimacy and representation that the situation demands. Goals in law and public policy are essentially shaped by complex institutional processes and an institutionalist view allows a better analysis of the multi-stakeholder inputs that are apparently relevant to understand the factual of the context, given the scale, the nature and the diversity of the interest groups that legal mechanisms affect in this field, and the intertwined way they collaborate and interact. An institutional perspective is also suitable to try to establish a relationship between the norms of action which are currently applicable to this dynamic environment of broad range institutional experimentation, and norms of being that are eventually identified or proposed as the ones that ought to govern the realm.

A number of relevant global digital-technology-and-innovation-related governance processes are already based on multistakeholder arrangements, in a search to widen the scope of their representation, bringing actors such as civil society, industry and academia, to overall management, policy-making, decision and enforcement discussions. The justification for this new sort of settlement, as already referred to, is the need for improved legitimacy in the environment they operate.

One key question for the present and for the future is to understand if this model which was enough to deal with the simpler questions of early times, full of trust and dreams, remains sufficiently sustainable nowadays so as to be useful in the task of tackling and managing the very delicate issues that range from the existence of adequate legislative procedures currently in place to face the dynamics of social and economical digital models to government surveillance, security, citizenship and democracy, the exercise of freedoms in its various forms, cyberwarfare and ultimately national security. Technological decisions are now clearly much more politically charged than they might have been in the beginning of the development of the Internet, and no other global multistakeholder governance structure faces a similar scale of challenges in the decisions it has to take, or has ever had to go through such increasingly and evolving complexity tests, which will only get more complex as new issues come to the stage. Internet Governance is currently the widest multistakeholder process in

the world, the one that potentially affects more people and global issues, and it is undeniably important because it involves the technical mediation of the public sphere and the privatization of some conditions for freedom in that public sphere⁽⁵⁾, a technical mediation which in the end decides what kind of space unfolds, and which is growingly assisted, fed back and automated by technology, based on the amount of data collected and algorithmically processed in a way we most of the times do not properly understand or even attempt to scrutinize or validate.

Finally, transparency and accountability also appear as desired byproducts of this multidimensional point of view of problem solving.

2.3. Who is multistakeholder?

To consider that a certain initiative has a multistakeholder nature it is not enough that its representatives come from various sectors or backgrounds. It is essential to observe in which capacity they act and which interests they support while acting in the process. If representatives have initial access to the governance structure from different sectors but are institutionally required to abandon the interest of that original group once they take their place, a so to speak multistakeholder model is not precisely what is being described. For that to be configured, it is necessary that representatives hold on to the interests of their original group or sector while developing their activities, although some institutional common grounds for collective action are indispensable for the experience to produce results, much like an “informal parliament”.

That being said, such structures have been concretely adopted in a number of real-life situations⁽⁶⁾, such as in the case of the Worldwide Slot Guidelines (WSG), agreements under the auspices of the International Air Transport Association (IATA) in order to allocate airport capacity, in the *Enquete-Kommission Internet und digitale Gesellschaft*, a parliamentary inquiry body of the German *Bundestag*, in a water resource management initiative in the White Volta River Basin, spanning across Ghana, Burkina Faso, Benin, Togo, Mali, and Cote d’Ivoire, and in some directly technology-

5 DeNardis, L. *The Global War on Internet Governance*. New Haven, CT: Yale University Press, 2014.

6 Gasser, Urs, Budish, Ryan, West, Sarah Myers. *Multistakeholder as Governance Groups: Observations from Case Studies*. The Berkman Center for Internet & Society Research Publication Series: Cambridge, 2015. http://cyber.law.harvard.edu/publications/2014/internet_governance

related initiatives such as the development of the Brazilian Internet Bill of Rights *Marco Civil* and in the NetMundial Initiative, allowing insights and evaluations of their impact and of the consequences of their adoption.

2.4. What is not multistakeholder?

A brief final word to reflect upon this initial conceptual analysis may be necessary to point out some criticism and limitations to the idea of what is to be expected from a multistakeholder model of governance.

The most important one seems to be the general recognition that giving civil society 5 minutes of say just the day before a meeting when decisions have all been already taken is anything but multistakeholder. It is paramount to “observe if stakeholders are participating, how participation is balanced, how the body and the stakeholders are accountable to each other for their roles in the process and if the body constitutes an empowered space”⁽⁷⁾. There is not an initiative where we can say governance is truly shared among interested parts to some extent where “social actors are not actual political actors⁽⁸⁾”, if they do not become real interlocutors in the processes, because this will mean that they do not participate, engage and actually influence the formation of the political discourse. This is probably the reason why the idea in many cases is still considered rather as an abstraction with narrow practical use and impact. Trying to give it a more politically relevant sense would mean facing shortcomings such as those which were highlighted, along with issues of enforcement, sovereignty and jurisdiction, as well as data curation concerning contributions that come from multiple inputs.

7 Malcolm, Jeremy. Criteria of meaningful stakeholder inclusion in internet governance. *Internet Policy Review*, 4(4). 2015 DOI: 10.14763/2015.4.391 <http://policyreview.info/node/391/pdf>

8 Durante, Massimo. *The Democratic Governance of Information Societies. A Critique to the Theory of Stakeholders*. *Philosophy & Technology* 2015.

3. A MULTISTAKEHOLDER EXPERIENCE OF INTERNET GOVERNANCE – BRAZILIAN INTERNET STEERING COMMITTEE (CGI)

3.1. Description and Organization

[Interministerial Ordinance 147](#), of May 31st, 1995, later amended by [Presidential Decree 4,829 of September 3rd, 2003](#), established The Brazilian Internet Steering Committee (CGI.br) “with the purpose of coordinating and integrating all Internet service initiatives in Brazil, as well as promoting technical quality, innovation and the dissemination of the services available”⁽⁹⁾. The importance of its role has recently been strongly reinforced with the recognition of the legal obligation that it be heard and consulted in several Internet Governance-related matters, according to Marco Civil⁽¹⁰⁾. The pursuit of its missions include the proposition of policies and procedures regarding the regulation of Internet activities, the recommendation of standards for technical and operational procedures for the Internet in Brazil, the establishment of strategic directives related to the use and development of the Internet in Brazil, among others. It is also responsible for the administration and the coordination of the allocation of Internet addresses (IPs) and registration in the <.br> domain.

It gathers members appointed by the government, by the internet industry, by the civil society and by the academic community. It is a successful experience of participatory model of governance for the Internet in decisions involving network implementation, management and use. Members have been elected since July 2004 to participate in discussions and to debate priorities for the Internet, together with the government.

3.2. Recent Developments

The Brazilian Internet Steering Committee has been playing an important role in Brazil in general since its establishment, but some more recent episodes can clearly point out specific trends and demonstrate relevant interventions and points of view

⁹ <http://www.cgi.br/about/>

¹⁰Article 9º, §1º, and Article 24, II, of Marco Civil, Lei n.º 12.965, de 23 de Abril de 2014, http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/112965.htm

stemming from this multistakeholder structure, that are worth highlighting for the purposes of the present analysis.

3.2.1. Marco Civil

Brazil has enacted a Bill of Rights for the Internet, widely known throughout the world as Marco Civil. It is legally binding in Brazil as of 2014, and it structures basic principles for the protection of civil liberties regarding the use of Internet in the country, specially considering personal data, liability and the so-called issue of *NetNeutrality*. The Steering Committee had a very important role in the way public consultations for the discussion of the bill were conducted, by enabling a public open platform through which contributions to the process could come from anyone, anywhere, at any time, and also through the promotion of seminars, events, through the participation in public hearings in various commissions in the National Congress and through awareness and capacity building initiatives. It was a very important moment of consolidation for the Committee, and this was reflected in the importance CGI was given in the final enacted text of the Law, which recognized, as already stated, its relevance as an actor in internet governance issues and decisions in Brazil. The diversity of the composition of CGI.br, the different backgrounds and interest groups which its members represent and the several points of view that are shared in its environment certainly contributed to the adequate and successful acting of the organism during the process.

The initiative of Marco Civil contains imperfections, in spite of all the celebration around it. In theory the Statute still permits fractures in the fundamental rights it intends to guarantee. It happens when it establishes, for example, a detailed legal framework for personal data collection and retention without setting – because it does not exist – a similar framework for data protection in Brazil, not even an equivalent one in terms of the level of detailed legal treatment.

These fractures are putting Marco Civil under a stress test. Along the latest weeks, the Committee has been pressed to act in the course of the work of an Inquiry Commission which was established in Brazil in 2015 with the purpose of investigating the scenario of cybercrime in Brazil and its social and economic effects. [The final report](#)

of the Commission was released in April 2016, and it carries unsettling conclusions like that “E-commerce is a wide category of criminal practices (...).” The way the final text was written and presented, showing that there was not even enough time and attention to perceive and correct such an absurd statement gives a good idea of the inconsistency of the work. This has been urging CGI to act towards preventing amendments of Marco Civil that essentially dismantle it as the important, collectively constructed Bill of Internet Rights that it represents. These bills attempt to fill this important piece of legislation with substantive criminal and criminal procedure matters, instead of dealing with these questions in a different and more appropriate legal instrument or debate.

It would not even be necessary to amend Marco Civil and risk its core text, when there is an ongoing process of regulation of the Law, also under the oversight of the Steering Committee, through which minor adjustments are possible without compromising the key issues, without a setback in the rights which are more difficult to guarantee and negotiate under a harder, more controversial legislative process. Marco Civil is not a space to detail strategies of Public Security. Marco Civil is a Bill of Rights for the Citizen. It is not a statute to ensure State prerogatives. It is an affirmation of individual rights and guarantees. Of course it should – and it does – contain general exceptions designed to reconcile the individual interests it protects with other public ones, should conflicts arise. But if this essential conception is not taken into consideration, each and every attempt to amend Marco Civil in Brazil will result in a distortion of its purpose, because of a lack of understanding of the very reasons why it exists. This is a position which is being endorsed by the CGI during this process.

3.2.2. WhatsApp

More recently, a judicial order determining the suspension of the service provided by WhatsApp application in Brazil called once again for the intervention of CGI, through a [clarification note](#). The suspension was decided and determined in the course of a lawsuit in which a first instance judge ordered representatives of Facebook (since Brazilian justice holds that for the purpose of the incidence of national jurisdiction Facebook and WhatsApp are part of the same industry conglomerate) to hand in information deemed essential to the investigation and prosecution in a drug traffic case. The content of certain communications was among that information. Apart

from other arguments, the company raised the issue that the recently default-enabled end-to-end cryptography that it adopted and implemented to protect its users does not allow even the developer to access the content of messages. Controversy established, the order searching to compel the company to hand in the information was implemented for some hours before a suspension order was issued by a higher court.

The episode urged the Steering Committee to take stand as an interpreter of Marco Civil, clarifying that Article 12 of the Statute, used as the judge as legal ground for the suspension order, does not refer to the possibility of suspending services due to general illicit activities, but merely as a sanction against data protection violations, which would hold the suspension order in the case inadequate and illegal, since outside the scope of the mentioned provision. The Committee also pointed out to the disproportional nature of the adopted measure and to the fact that any imposition of liability of Internet stakeholders should be limited “to the specific extent of the activities they perform”¹¹. The Inquiry Commission Report mentioned in the last section also intends to amend issues in this respect, and the clarification from CGI also addresses those particular questions, in an attempt to keep any eventual new measures closely connected with the values and interests which this statute intended to protect, preventing liberties and guarantees which are protected in Marco Civil from being affected by the proposed bills.

11 CLARIFICATION NOTE in virtue of the decision issued by the Honorable Judge of the 1st Lower Criminal court of São Bernardo do Campo, ordering the suspension of the Internet application “Whatsapp” in the national territory of Brazil. <http://www.cgi.br/esclarecimento/clarification-note-december-2015/>

4. CONCLUSIONS – A MATTER OF PERSPECTIVE

There is no perfect governance model ready and thoroughly developed to be adopted in order to face the new challenges that a networked society presents. If the search is for an easy answer in the form a miracle model, then multistakeholderism is a fail, as it is, as a matter of fact, any other governance structure applied to organize and discipline the digital dimension of a modern society.

If, however, the search takes into consideration the specific needs of the time, multistakeholderism, even with its clear limitations, can very well be a way forward. It is in fact hard to think of an adequate strategy in this realm today that does not rise from the multistakeholder perspective. Multistakeholderism may not yet be very well understood, even by the ones who are closest involved with it, not all players are equal, nor all of them have the same weight or exercise the same influence in the same issues, it is certainly not a perfect governance model, but the experiences where it is being employed – internet governance as a main successful example – show that it is still a very interesting and constructive option for managing conflicting interests from different segments of society and to coordinate governance processes in organizations where these different segments must be heard and take part in decision and policy making. In times when issues such as representation and legitimacy can no longer be taken for granted and face a serious crisis, the rise of the alternatives that multistakeholderism present should not be neglected. Such a multi-participative process had already been thought of before, but is now finally possible due to the effective existence of a digital and interconnected environment where necessary interactions can take place. And internet governance is probably the first large and certainly the most relevant global issue that can be conducted under such paradigm. There has to be balance, and it has to be found.

Also, it is an initiative that demands alignment but not necessarily agreement. It is a process of constant consultation among stakeholders, which may ensure that different points of view of a certain issue are looked at each time the discussion is back on the table. In fact it allows the matter never to completely leave the table, with a certain recognized cost to stability, but also with a clear gain in legitimacy, transparency, accountability and oversight. Given the nature of the activities that are connected to the digital environment, the potentially massive and transnational scale of

its activities and consequences to come and the dynamics of this realm, an approach which takes into consideration a greater amount and more diverse inputs makes it plausible to expect a positive impact in the quality of decision-taking and policymaking.

In Brazil, the experience of the Internet Steering Committee, and the recent processes in which it is involved stress out the importance not only of the multidimensional actor itself, but also of innovative problem-solving methods for law discussion, creation and implementation, opposing, for instance, an exclusively court-centric, rights-focused approach to law. Approaching this dimension of normativity through this multiparty and unconventional lens sounds promising, and it is not exclusively an initiative coming from Brazil. The Government in India has recently announced an inclination to a multistakeholder model, though more carefully reserving to the State the functions of security.⁽¹⁾ It is inevitable to recognize that Jurisdiction, as the prerogative to "tell the Law", evidently remains an essential State function, but at the same time it is essential to understand that exploring possibilities of multistakeholder engagements that involve some degree of delegation of that function, possibilities which have already been experienced, sometimes with more, sometimes with less success in a number of situations is a serious alternative, as the one proposed above – mainly in a transnational scenario where both the distinction and the intersection between the private and public spheres seem to be *digitally* thin.

¹<http://thewire.in/2015/06/22/indias-new-multistakeholder-line-could-be-a-gamechanger-in-global-cyberpolitics-4585/>