Draft Principles - The Post-Pandemic Digital Rights Initiative

I.   Executive Summary

➢ The **Post-Pandemic Digital Rights Initiative** (PDRI)'s objective is to draft a charter of principles to serve as a leading guideline for Internet regulation after the Covid-19 pandemic, upholding the world's digital infrastructure and safeguarding a healthy digital environment. This project is headed by the Institute for Technology and Society of Rio (ITS Rio) in partnership with the Minderoo Foundation.

➢ The initiative is set to follow the blueprint of Brazil's *Marco Civil da Internet* (or Internet Bill of Rights) both in substance and procedure. That is, it will be developed upon a **multi-stakeholder process** through which actors representing different sectors of society will be welcomed to submit their views and actively shape the principles that shall guide our post-pandemic digital lives. Just like the Internet we are aiming for, it will reflect the values of collaboration, dialogue, and openness.

➢ The initiative will incorporate principles that are part of other international initiatives, such as content moderation guidelines, AI ethics charters, cybersecurity best practices, and so on. The idea is to build upon emerging consensus or trends, offering the initiative more legitimacy and momentum so that it can be adopted at a global and national level, avoiding the emergence of a patchwork of Internet regulations. Furthermore, moving beyond the Marco Civil, the initiative strives to engage a **global** audience. Our objective is to implement effective Internet governance solutions in a post-pandemic environment.

II.   Statement of Facts: Placing the Guardrails for our Post-Pandemic Digital Lives

The discussion over Internet governance cannot ignore the effects of the Covid-19 pandemic. In fact, the global public health emergency offers a new starting point to this debate. Even before the novel coronavirus started to infect humans in Wuhan, China, Nicolas Suzor argued that, in terms of platform governance, **we are living in a "constitutional**

moment".[1] Just like James Madison pioneered a new political architecture capable of solving the problems credited to the American Confederation in 1787, it is the task of our times to address the flaws or shortcomings of this new dawn of cyberspace. The task only grew in complexity when, in the beginning of 2020, the pandemic moved a big chunk of human interactions into the online sphere in the span of just a few weeks. As Yuval Noah Harari asserted, "today many of us inhabit two worlds - the physical and the virtual. When the virus circulated through the physical world, many people shifted much of their lives to the virtual world, where the virus couldn't follow".[2]

And, as one might expect, this momentous shift is the source of new challenges and potential harms. Because we now depend on cyberspace more than ever before, we are also more vulnerable to the misuse of digital technology; while contact tracing apps can help us fight the virus, they also raise concerns about the integrity of our online privacy; even if social media can help us connect with friends and family during lockdown, it can also overwhelm people with misinformation about health protocols. In this context, the challenge of content moderation is even more pressing. In a time when the borders between the digital and the physical worlds are fading away, it is urgent that Internet intermediaries understand the magnitude of the problem we are facing and how it may impact the effectiveness of the solutions we aim to implement from a public policy perspective.

The point here is that the digital footprints of the pandemic need to be cautiously examined so that our digital guardrails are sturdy enough to guide the healthy development of cyberspace in a post-pandemic world. Likewise, **in his proposal for an "anti-virus for the world", Harari argues that "we need to safeguard our digital infrastructure" to prevent bad actors from wreaking havoc throughout the virtual arena.**[3] But in order to achieve that goal, we need to find a common ground at the global level around the principles that shall guide Internet regulation in this post-pandemic setting. This is key to prevent the emergence of a patchwork of legislations and regulations that, by promoting tension and friction, may lead to the fragmentation of cyberspace.

But before we get there, a brief recapitulation of the tension between cyberspace and regulatory efforts is called for. In 1996, when the digital revolution was in its infancy, American writer John Perry Barlow published his now famous cyberlibertarian manifesto entitled "A Declaration of Independence of Cyberspace". In a fierce defense of the ideals of

---

[1] Nicolas Suzor, 'A Constitutional Moment: How we might reimagine platform governance', Computer Law and Security Review 36 (2020).

[2] Yuval Noah Harari, 'Lessons from a Year of Covid', Financial Times (2021), Available at <https://on.ft.com/3cVIWXi>

[3] *Ibidem*

the digital realm, Barlow asserted that the Internet should always remain a free space. Unlike Antonio Gramsci, Barlow noted that, while the old is dying, the new already walks among us. He makes that contrast clear when he, "on behalf of the future", calls for those "of the past to leave us alone". Cyberspace, "the new home of Mind", was breaking free from the shackles of the "governments of the Industrial World" or the "weary giants of flesh and steel".[4]

In hindsight, Barlow's vision for the Internet turned out to be nothing but a pipe dream. While the early days of cyberspace did live up to his libertarian aspirations momentarily - the canonical examples being the release of the Creative Commons license in 2002 and the launch of Wikipedia in 2001 -, it was just a matter of time for the "weary giants" of the past to infiltrate cyberspace and co-opt this supposedly open sourced and collaborative network to fulfill their economic and political goals. The Internet was progressively transformed into the digital equivalent of a gated community, a place where companies like Facebook, Amazon, Google and Apple act as gatekeepers to its different grounds.

In a clear sign of Big Tech's unrivalled success, Harvard Professor Shoshana Zuboff coined a new term to refer to this emerging economic regime: surveillance capitalism.[5] In broad strokes, while in Barlow's digital utopia people would exercise their freedoms online without having to be mindful of "old" constraints (such as the concentration of political or economic power), in Zuboff's novel account it is exactly the employment of self-expression that constrains fundamental liberties. The more we express ourselves online, the more data we share with Big Tech companies or national governments. As Anne Applebaum puts it, "self-expression no longer necessarily leads to emancipation: The more we speak, click, and swipe online, the less powerful we are".[6]

Hence, we can now agree that government regulation has an important role to play even within the fast-paced cyberspace. Furthermore, as Lessig makes clear, Internet governance is best described as a tug of war between four forces of regulation: law, architecture (code), social norms and the market (economy).[7] In point of fact, it is still important to make sure that, once in place, new regulations will not hinder technological innovation or quickly grow obsolete. As the architects of the Marco Civil have argued, "regulation that addresses technological shifts should follow a principles-based approach to

---

[4] John Perry Barlow, 'A Declaration of Independence of Cyberspace', Electronic Frontier Foundation (1996), Available at <https://www.eff.org/cyberspace-independence>.
[5] Shoshana Zuboff, 'The Age of Surveillance Capitalism', Public Affairs (2019).
[6] Anne Applebaum and Peter Pomerantsev, 'How to Put Out Democracy's Dumpster Fire', The Atlantic (2021), Available at <https://bit.ly/31bvNEi>.
[7] Lawrence Lessig, 'The Law of the Horse: What cyberlaw might teach', 113 Harvard Law Review (1999).

avoid imminent obsolescence".[8] But, as we move past Barlow's cyberlibertarian utopia and towards the age of surveillance capitalism, it is urgent to have a well-thought-out framework that acknowledges some basic rights and liberties to guide Internet regulation going forward. One can refer to these principles as the guardrails of our digital lives.

III.   Project Description and Methodology: Using the Internet Bill of Rights ("*Marco Civil da Internet*") as a Blueprint for the Initiative

If we are to regulate the Internet, why not use the Internet as a medium to shape our regulatory efforts? It was this insight that moved a group of Brazilian lawyers to propose a revolutionary multi-stakeholder process that culminated in a basic framework of rights and principles known as the *Marco Civil da Internet* or Internet Bill of Rights. As Carlos Affonso Souza *et al* recall, **"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".**[9]

In 2007, the Brazilian Congress was debating a controversial bill (known as the 'Azeredo Bill') that, if approved, would have regulated a handful of online behaviors through the repressive handbook of criminal law. By turning millions of Brazilian nationals who use the Internet daily into criminals, the bill held the ravaging potential of undermining freedom of expression and hindering innovation. Writing for the newspaper Folha de S.Paulo, **Ronaldo Lemos presented an alternative: instead of a criminal bill, Congress should consider drafting a civil regulatory benchmark for the Internet.**[10] The proposal was backed by the Minister of Justice, who assembled a commission of experts to spearhead an open, participatory and multi-stakeholder process that was ultimately responsible for the first version of the Internet Bill of Rights.[11]

The bill was drafted mainly on an online platform where representatives from various segments of society could present their views and engage in meaningful discussions. The process was divided into two phases. In the first, participants were encouraged to submit their contributions based on a set of principles that served as an initial framework. In the second,

---

[8] Carlos Affonso Souza, Fabro Steibel and Ronaldo Lemos, 'Notes on the Creation and Impacts of Brazil's Internet Bill of Rights', The Theory and Practice of Legislation (2017), p. 05.

[9] *Ibidem*, p. 19.

[10] Ronaldo Lemos, 'Internet Brasileira Precisa de Marco Regulatório Civil', Folha de S.Paulo (2007), Available at <https://tecnologia.uol.com.br/ultnot/2007/05/22/ult4213u98.jhtm>.

[11] For a full description of how the process came about, *see* Carlos Affonso Souza, Fabro Steibel and Ronaldo Lemos, 'Notes on the Creation and Impacts of Brazil's Internet Bill of Rights', The Theory and Practice of Legislation (2017).

comments were welcomed on specific sections of the draft so the language could be improved through a dialogical interaction among participants. The idea was for the Internet Bill of Rights to mimic the openness and dynamism of online interactions. In other words, the spirit of the Internet was to inform the creation of the bill that aimed to regulate the Internet itself.

The bill is internationally regarded as a success story. After crowdsourcing the initial draft, the commission formally presented the document before Congress in 2011 and it was ultimately voted into law in 2014.[12] One of Marco Civil's trademarks is that, whenever possible, it adopts relatively open-texture guiding principles to set the tone for Internet regulation going forward. It presents itself as a regulatory scheme based on rights and principles. That helped the bill remain relevant until today, seven years after its approval, at the same time that it offers just enough normative grip to effectively uphold some fundamental digital rights.

However, the internet has evolved, as well as the stress on specific social and regulatory issues. We now face hurdles that call for additional principles and rights. With that in mind - and using the Marco Civil as a blueprint -, the Institute for Technology and Society of Rio (ITS Rio) in partnership with the Minderoo Foundation is launching the **Post-Pandemic Digital Rights Initiative (PDRI). The initiative builds upon two methodological premises. First, Marco Civil's legacy of a multi-stakeholder process through which actors representing different sectors of society will be welcomed to submit their views and actively shape the principles that shall guide our post-pandemic digital lives. Second, it aims at a global rather than national audience.** The initiative will also strive to include marginalized voices through active consultation and paradiplomacy methods. As a result, we hope to have a baseline of principles that are shaped by and speak to this moment of human history.

IV.   Draft Principles

The following set of draft principles should be understood as a baseline and guide Internet governance in a post-pandemic age. It was drafted taking into consideration

---

[12] For an english translation of the text approved by the National Congress and an in-depth look into the specifics of the Marco Civil, *see* Carlos Affonso Souza, Mario Viola and Ronaldo Lemos (eds.), 'Brazil's Internet Bill of Rights: A closer look', Institute for Technology and Society of Rio de Janeiro (ITS Rio) (2017), Available at <https://bit.ly/3co1Kzm>.

emerging consensus in different sets of charters of rights, principles, and instruments proposed for international consideration.[13]

01   Freedom of information, opinion and expression

a. Internet users have the right to express their views and opinions online without undue interference or constraints;

b. Any limits or restrictions on free speech online need to satisfy the three-part test of legality, legitimacy, and necessity and proportionality;

c. Internet intermediaries should be transparent about the content that they remove, restrict, label, or demote across their platforms and services;

02   Protection of one's privacy

a. Internet users should be protected from private or public surveillance online;

b. Digital technologies should be designed to optimize the protection and promotion of privacy throughout cyberspace;

c. Privacy-friendly settings should always be presented as the default of online services to Internet users.

03   Protection of one's personal data and informational self-determination

---

[13] The documents considered for these initial set of draft principles are the Brazilian Internet Bill of Rights, Manila Principles, Santa Clara Principles, Christchurch Call, Charter of Human Rights and Principles for the Internet, African Declaration on Internet Rights and Freedoms, Change the Terms, Paris Call, Facebook's Charting a Way Forward, Global Network Initiative Principles, Italian Charter of Internet Principles, Delhi Declaration for a Just and Equitable Internet, Charter for a Free, Open and Safe Internet, Asilomar AI Principles, Camden Principles on Freedom of Expression and Equality, AI Policy Principles, Top 10 Principles for Ethical Artificial Intelligence, Microsoft AI Principles, Toronto Declaration, AI at Google: Our Principles, Universal Guidelines for Artificial Intelligence, European Charter on the Use of Artificial Intelligence in Judicial Systems, Guiding Principles on Trusted AI Ethics, Ethical Framework for Artificial Intelligence in Colombia, Ethics Guidelines for Trustworthy AI, Ethically Aligned Design, and Everyday Ethics for Artificial Intelligence.

a. Individuals should have control over the processing of their personal data, including the right to obtain confirmation of processing, to access their personal data, to correct inaccurate data and to halt processing of data they do not agree with;

b. Personal data should only be processed in a lawful and transparent manner;

c. Processing should be limited to the necessary data in accordance with previously informed legitimate purposes, taking into account appropriate measures, technical and administrative, and ensuring information security and resilience against incidents;

d. Entities processing personal data should act responsibly and should be accountable for their processing actions.

04 Protection and preservation of the Internet's open and participatory nature

a. The Internet should be an open and distributed network where users are free to share information and knowledge with one another online without undue interference or constraints;

b. There should be a fundamental commitment to net neutrality, in the sense that every Internet user, irrespective of his or her background, has the right to access and share information and knowledge online;

c. Internet governance should involve, whenever possible, a multi-stakeholder and cross-industry collaboration.

05 Advancement of Internet stability, security and functionality by all technical means

a. The digital infrastructure of cyberspace should be enhanced by technical solutions that promote safety and an overall healthy digital environment;

b. A cornerstone of Internet stability, safety and functionality is the development of all tools or mechanisms employed online, including AI solutions, in an inclusive, non-discriminatory and diversity-based manner.

06 Right to Equality and Non-Discrimination Online

a. Any tools or mechanisms employed online, including AI solutions, should be designed, built, tested and implemented for safety to ensure that they will not lead to discriminatory or biased outputs;

b. Special attention should be taken to prevent that individuals and groups end up being excluded as a consequence of design or implementation of any tools or mechanisms online;

c. The Internet should be a place where people are free to exercise their cultural, religious, social, ethnic, sexual and linguistic diversity.

07 Holding agents liable, responsible and accountable for their actions, as provided by law

a. Internet intermediaries should only be held liable for third-party content if they fail to comply with a previous and specific judicial order;

b. Internet intermediaries should not be obliged to screen their platforms for illegal content, except when otherwise provided by law;

c. Every person and companies involved in the development of all tools or mechanisms employed online, including AI solutions, are accountable and responsible for considering their impact in the world.

08 Freedom to do business online

a. Everyone should be free to do business on the Internet without undue interference or constraints;

b. The Internet should be an open economic environment which is conducive to competition and innovation among everyone who wishes to sell goods and services online;

c. Future regulations should strive to understand the different dimensions of digital technologies in order to govern them in a way that leaves room for Internet companies to innovate.

09 Fundamentality of the right to access the Internet

a. In the digital age, when most of human interactions take place in cyberspace, access to the Internet shall be understood as a fundamental right;

b. The private and public sectors should work together to ensure that Internet access is affordable to all individuals without discriminations of any kind.