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Volume 27

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Samantha S. Moura Ribeiro

Democracy after the Internet - Brazil between Facts, Norms, and Code

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ISSN 2352-1902 ISSN 2352-1910 (electronic)
Law, Governance and Technology Series
ISBN 978-3-319-33592-6 ISBN 978-3-319-33593-3 (eBook)
DOI 10.1007/978-3-319-33593-3

Library of Congress Control Number: 2016945252

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To Francisco de Moura Ribeiro:

*A man whose eyes both captured and
reflected the best in everyone, thus allowing
goodness to bloom.*

Foreword

In his 2009 collection of essays *Europe: The Faltering Project* (originally published in 2008 under the somewhat more nuanced title *Ach, Europa* ('Oh, Europe'), Jürgen Habermas, scion of the Frankfurt school and keeper of the seal of a discourse that sees modernity as an ongoing project of enlightenment, revealed his considerable ambivalence vis-à-vis 'the Internet' as a new arena for democratic politics.¹ While it helped to 'reactivate the roots of an egalitarian public sphere of authors and readers', it lacked, for the time being, the 'functional equivalents of those structures in the public sphere that capture, select and synthesize in redacted form the decentralised messages' of an interlinked mass public. It is this very ambivalence which Samantha Ribeiro takes as her starting point in this much welcome study on the impact of the Internet on the reality of democratic constitutionalism in a concrete case.

Democracy After the Internet: Brazil Between Facts, Norms and Code uses the incredibly rich scenario of the world's second largest emerging democracy, a veritable laboratory of social, political and economic globalisation, to probe whether the Habermasian account of late modern democracy can incorporate the virtualisation of social relations as well as extend beyond the historical confines of the mature democracies of the Global North. To this end, it examines the effect the communicative universe of the Internet has had on such building blocks of democratic constitutionalism as personal identity, private and public autonomy, participation and legitimacy, and it seeks to assess the ways in which these effects have been processed, either through absorption or blockage, by the organs of administrative power, most notably the (constitutional) judiciary. In line with the Habermasian synthesis of the liberal focus on private autonomy and the republican focus on public autonomy, the monograph builds on a post-Kantian conception of democracy as an interlinkage of popular sovereignty and individual rights that is implemented through a constitutional order that both enables and enforces rational deliberation. Law is the primary device through which this system is collectively operated, which is also why constitutional jurisprudence is accorded a privileged role in the process. The trajectory of legislative and judicial attempts to regulate 'the Internet'

¹ J Habermas *Europe: The Faltering Project* (Cambridge Polity Press) 2009

is, thus, interpreted in light of Brazilian constitutional history—read through a Habermasian lens.

This reading renders the twofold conclusion that real-existing constitutionalism in Brazil falls short of the Habermasian demand for discursive rationality by being partially unable or unwilling to incorporate the emancipatory and democratising potential of the Internet, but that, conversely, the Internet as an alternative system of norms (code) also lacks legitimacy as long as it is not fully reconstructed through democratically generated (public) law. This duality plays out in the empirical manifestation of the two key aspects of the Habermasian conception of democracy, notably empowerment and legitimacy. Their presence in Internet-driven ways of identity construction and community-building and their absence in the selective exclusions induced by the ‘digital divide’ form the analytical context in which these benchmarks of (Habermasian) democracy are explored. Hence a rich array of empirical case studies, ranging from the (mis-)regulation of so-called LAN houses in underprivileged areas to the extensive constitutional bill of rights jurisprudence covering everything from access and freedom of expression issues to the Brazilian implementation of copyright reform, are presented in evidence of the monograph’s cautious assertion of the emancipatory and legitimacy-creating potential of the Internet. However, in line with that guru of progressive Internet regulation, Lawrence Lessig, Ribeiro concludes that this potential is unlikely to unlock itself but that it requires (judicially) enlightened state intervention to bring out the Internet’s full transformative power. If emerging democracies such as Brazil eventually manage to meet this condition, then we might be seeing the emergence of new, Internet-driven public spheres in the Global South to inspire and re-energise their arthritic counterparts in the Global North.

Ultimately, this monograph, which builds on a decade of ‘impact’ scholarship and stands on the shoulders of one of the pre-eminent thinkers of democracy in (late) modernity, healthily dispenses with attempting to provide a one-size-fits-all answer to the normative puzzle of how to organise society in the Internet age. Instead, by taking the Brazilian social cosmos as both a global metaphor and an analytical canvass, it highlights the issues and raises the questions anyone interested in equality and justice needs to consider. The seeming paradox of recent developments bears this approach out. On one hand, we see Brazil, for instance, enact what is widely considered to be one of the most progressive regulatory frameworks of the Internet, the *Marco Civil* of 2014, while on the other hand the United States and the European Union have just joined forces in the *Transatlantic Trade and Investment Partnership* (TTIP) in what many think represents a retrogression in the protection of (Internet) privacy and net neutrality. Likewise, we are witnessing an unprecedented oligopolisation in Internet content provision while, at the same time, experiencing the emancipatory potential of social media. In this moral and political haze, it is books like this one, by a new generation of legal scholars equipped with comparative methodology and transdisciplinary perspective—and increasingly from the Global South—that provide us with the conceptual clarity to look ahead and carry Habermas’ intellectual injunctions to a new age.

Acknowledgements

It was June 2013. While I entered the Sala del Capitolo at the European University Institute to defend my thesis, Brazil was about to witness its first networked social movement taking the streets. Despite the distance, I was overwhelmed with excitement and contentment. The excitement came with the prospect that the democracy in Brazil was reaching the next level with empowered people ready to take the centre stage and tame the administrative power.

The contentment was related to the comforting feeling that my work had followed the right direction. The Internet had intruded the tension between facts and norms transforming the Brazilian democracy. June 2013 was a benchmark for it was the time of a visible spillover of a process that started before and is still ongoing. The Internet opened up a whole new range of possibilities that impacted the subjective construction of identities, understandings, expressions and demands. The online experiences affect people and people change democracy. This new citizenship born amidst the entanglements between institutional and online democracy is still crawling. This book intends to contribute to the intellectual effort of making sense of the ways we are incorporating technologies and (re)creating democracies.

The text you are about to read is the result of a work that started back in 2008 when I was still a Ph.D. candidate. As the years pass by, the debts of gratitude pile up. Most of them I can only pay by expressing heartily appreciation, for I will never be able to return all the support they gave me. I will always be grateful to Sueley, Fernando and Timo for all. Since the core of this book is my thesis, it is only fair to replicate the acknowledgements of my original thesis to reaffirm my gratitude to all those mentioned there. Many of them remain a source of inspiration. I thank Giovanni Sartor, Gisele Cittadino and Florian Hoffman for their support then and now.

In the last years, there were many people, whose words, actions and presence inspired me to continue this work. To them I owe all the good additions to the original text. First I would like to thank Marcelo Neves, who was kind enough to read and make precious comments on a previous paper I presented in Glasgow, which was also incorporated in this text. Further, I thank my colleagues at the Pontifical Catholic University of Rio de Janeiro, for sharing the daily anguishes of the

academic life and/or for having warmly welcomed me with care since the very first day of my return. Thank you all, and, in particular, Adriana Vidal, Fábio Leite, Adriano Pilatti, Francisco de Guimaraens, Gustavo Senechal, Nadia de Araujo, Caitlin Mulholland, Noel Struchiner, Daniela Moreira, Marcia Nina, Maurício Rocha, Thula Pires, Regina Coeli and Thamís Dalsenter.

Rio de Janeiro, February 2016

The task of completing a Ph.D. thesis is challenging in so many ways that it requires the academic and personal support of various people. If I were to name everyone who has somehow gotten involved in the process, I would risk both boring the reader and still leaving someone out. Therefore, I will dedicate this section to thanking only those who have directly contributed to the completion of this thesis.

First of all, I would like to thank my supervisor, Professor Giovanni Sartor. His supervision allowed me to do my research with autonomy, while his continuous support helped me to build the necessary confidence to follow through on this project.

Secondly, I would like to express my gratitude to my co-supervisor, Professor Florian Hoffmann. His support when I first considered enrolling in a Ph.D. programme and his continuous encouragement throughout the process were fundamental, in particular at the most critical times. I thank him for the ‘timely appearances’.

I am also indebted to the European University Institute for financial and academic support. I would like to thank Professor Miguel Poiáres Maduro for the enlightening seminars in the framework of the Global Governance Programme and also for the clarificatory meetings. I am also indebted to Professor Marise Cremona for her support in dealing not only with academic matters but also personal ones. Further, I would like to thank Alison Tuck, Ken Hulley, Françoise Thauvin and Rosanna Lewis for having always been friendly and helpful whenever I needed to contact them. I also thank Filippo Valente for the copy-editing.

I am indebted to many of my colleagues. Some have provided me with academic help and insights, others have made my life much more enjoyable due to their friendship, and there are those who have accomplished both. I would like to thank Ben Farrand, Angela Daily and Ben Wagner for the insightful presentations and discussions on Internet-related topics. I am also grateful to Salem Nasser and Norberto Andrade for more general, but no less elucidating, discussions. I thank Pedro Lomba, José Pereira, Adriana Bessa and Erik Lagerlof for many amusing ‘coffees’ and talks. I would like to express my deepest gratitude to Filipa Raimundo, who has been not only a good friend from the beginning but also a coach towards the end. João Lúcio Fêiteira was the best flatmate I could have. I thank him for being my Portuguese brother in Florence. Also, I would like to thank Danielle Borges and Mário Viola for their friendship in Florence, London and Rio—wherever we go. I will never forget how important it was to find a friend in Joana Farrajota in the very beginning of my stay in Florence. I thank Alessandra and Marcilio Franca, Fabiano Correa and Jaime Ricardo Gouveia for their friendship and support.

Out of the EUI, I am indebted to Professor Gisele Cittadino, who was my supervisor during my master’s courses and whose guidance has been helpful from then

on. I would also like to express my gratitude to Plínio de Aguiar Junior, who actively supported my research while he was an advisor at the Brazilian Internet Steering Committee. The material provided by him was extremely valuable for this research. Further, I would like to thank Professor Daniel Markovits for an insightful discussion on the topic of recognition.

On a more personal note, I am deeply grateful to my dad for his unconditional support and his endless love and for the life he led and the example he left. Ironically, the person, without whom I always thought I would never make it, was the person without whom I had to make it. I wish technologies could make it possible to overcome these barriers.

I thank my mum, Suely, and my brother, Nando, for without their love, their trust and their support I would not have managed to finish my research. I also thank my nephew and godson Dudu just for ‘being’: for proving with his existence that the ‘show must go on’.

Finally, I would like to thank Timo, who has stood (by) me throughout the past 5 years. Anyone more familiar with his restless personality should know that only true love can explain the patience and dedication with which he has been there for me during the most complicated times. His friendship has made everything lighter and more pleasant; his resolute attitudes, despite his indecisive mind, have taught me a great deal about love and life. Also, I am grateful to him for having taken me to Bristol—the perfect place to complete a Ph.D. thesis.

Bristol, March 2013

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