

Internet Governance lessons Africa can learn from Brazil's success story

Paper written on lessons drawn during Conectas XIV International Human Rights Colloquium, by Arthur Gwagwa

In the past decade, most African countries, with a few exceptions, have increased their technical and legal surveillance capabilities, under the justification of fighting crime and terrorism. State surveillance has also impacted negatively on human rights, in particular the right to freedom of speech, privacy, association and political participation. Therefore the cyberspace continue to present important opportunities and challenges for human rights and governance in Africa. States, the private sector and civil society all have a stake in this dynamic environment. While there is consensus about the enormous potential for advancing development, the control of cyberspace and management of crime and terrorism are still being debated (ISS, 2015). In order to address these disturbing trends, African countries need to develop effective legislative, administrative, judicial and/or other measures to ensure the protection of human rights in cyberspace.

While human rights groups in the Global North have managed to form coalitions to roll back states' illegitimate exercise of political power in the cyber space, efforts in Africa remain fragmented. As civil society groups, we o largely lack the wherewithal and social capital that come by working together to effectively speak with one voice. At the same time, the cyber discourse in the Global North, for example, debates on net neutrality, are often far removed from Africa's realities. In Africa, state surveillance is a matter of life and death, as surveillance has, in some cases, been linked to politically motivated forced disappearances and abductions. How can African civil society groups confront this challenge? In the absence of relevant guidance or success stories on how to roll back the state surveillance powers, Brazil might offer vital lessons to Africa, not only because of its strategic position in the Global South but shared similarities with African countries.

This paper briefly looks at the Brazilian civil society advocacy strategy which led to the passage into law of the Brazilian Marco Civil da Internet (Brazilian Civil Rights Framework for the Internet). It also addresses far reaching positive international impact of the Brazilian domestic reforms on internet governance. It observes how, by focussing its foreign policy on cyber-related human rights, Brazil has increased its global soft power. The first part of the article on Brazilian domestic reforms is based on the presentation by Ronaldo Lemos of the Institute of Technology and Society (the "Institute"). The presentation was made in Sao Paulo on 28 May 2015, during the XIV International Human Rights Colloquium hosted by the Brazilian human rights group Conectas. Any misstatements or errors in interpreting what Ronaldo said should be ascribed to me. The paper is produced as an advocacy tool drawing lessons from the Brazilian case study, especially in proving how domestic reforms can give a country credibility in its foreign and international positions on human rights.

Brazilian domestic reforms in adopting the Civil Rights Framework for the Internet

The Marco Civil, also known as Brazil's constitution of the internet sets out principles as well as rights and obligations of the parties to the internet in Brazil. It came into law on April 23, 2014 when Brazil was hosting the Global Multistakeholders Meeting on the Future of Internet Governance ("Net Mundial Conference") in Sao Paulo.

According to Lemos (2015), the Marco Civil promotes freedom of expression, open governance, democratic participation and privacy unlike the Turkish and Russian frameworks that exalts the executive power over the judiciary. The Marco Civil came in the form of society's reaction to a draconian law which had been proposed by a Brazilian Congressman to regulate digital activities. The proposed law, which was almost approved, was so bad such that it prescribed heavy penalties for such offences as file transfers and unblocking of mobile phones. However, as the draconian law was still pending, Lemos wrote an article arguing that the Brazilians did not want a criminal framework for the internet governance but a civil one. He subsequently started a petition for the rejection of the criminal framework and adoption of a civil one, which generated 150 signatures. This put the Brazilian Congress in a state of alert thus prompting it to halt the passage of the bill into law. Thus the approval of the bill was paralysed by the awareness raising created by civil society led by the Institute.

After the hostile law had been halted, the Institute collaborated with the government to come up with a civil framework for internet governance. The drafting process was a collaborative exercise, followed by public debate and public consultation. However, the Brazilian Ministry of Justice did not want the process to be called public consultation but public participation or collaboration in order to distinguish it from the formal and institutional government consultation process which often has legal authority deriving from statute. Whatever name given to the process did not matter but what is important is that the framework came out of the needs of the population, grew and set roots in society. The copy drafted by the Brazilian society 2007 and approved by Congress in March 2014 was subsequently adopted by parliament and signed into law in April 2014.

The collaborative process and the outcome demonstrates an effective manner of dealing with a surveillance state. It brings optimism on the role that technologies can play in advancing rather than undermining democracy. It teaches us that technologies have a lot to contribute to the evolution of democracy.

Brazilian norm leadership role on the global stage

In the months leading to and during the passage of the Marco Civil, Brazil has played a significant role in providing normative leadership at the international norm and standards

setting bodies in relation to internet governance. This role has clearly demonstrated how domestic reforms can provide a framework within which human rights in foreign policy can sit and find strength. It raises a country's credibility bar and increases its soft power with which it can shape global human rights decisions.

By way of background, from June 2013 onwards, the world witnessed a seemingly endless stream of riveting disclosures from former NSA contractor Edward Snowden that gripped the world's attention and put a spotlight on the world's most powerful signals intelligence (SIGINT) agencies: the NSA, GCHQ, and their allies. These disclosures created an atmosphere of suspicion and raised questions about the legitimacy of US and allied governments' "Internet Freedom" agenda but at the same time created an opportunity for countries such as Brazil to provide the required leadership. This was despite the fact that a large number of emerging market economies, led by Brazil, India, and Indonesia, were seen as "swing states" that were not decided on whether the internet should fall into the hands of the UN (and thus state controlled) hands.

Following the alarming Snowden disclosures, Brazil and Germany sponsored a resolution which was adopted by the UN Human Rights Council which states that Internet surveillance is a violation of the right to privacy. The objective of this resolution is to expound that violations of this right are not acceptable, irrespective of the means used to carry them out. As Brazil's Ambassador to the UN Antonio de Aguiar Patriota noted, the resolution "establishes for the first time that human rights should prevail irrespective of the medium, and therefore need to be protected online and offline". This was the first time that Internet surveillance came to be the focus of a UN resolution and marked the tightening of the framework protecting the right to privacy. Brazil backed the UN General Assembly Resolution 69/166 on the right to privacy in the digital age, adopted by consensus on 18 December 2014. In March 2015, it also supported the Human Rights Council Resolution which established the special mandate on the right to privacy

Following Brazil's lead role, other states are following suit in reforming their legal and policy surveillance capabilities, thus restraining the state and political power in the cyberspace. For instance, on 2 June 2015, the U.S passed the USA Freedom Act which amended Section 215 of the Patriot Act to stop the NSA from continuing its mass phone data collection program. Instead, phone companies will retain the data and the NSA can obtain information about targeted individuals with permission from a federal court. Similarly in June 2015, the Paraguayan Senate defeated and archived a mandatory data retention bill that would have compelled local ISPs to retain communications and location details of every user for a period of 12 months.

Conclusion and Advocacy Lessons

The Brazilian case study sheds light on best practice in the fight against a surveillance state. First, it shows the importance of strategy that is solution-focussed as appose to a critical

stance that does not propose alternative solutions. The Brazilian civil society did not just criticise the proposed law but generated a better alternative law. Secondly, we learn that government is not monolithic. In Brazil, the draconian law had been proposed by a congressman but civil society identified those within the government that were supportive of the civil framework. They made them allies, quickly built rapport and established a collaborative working relationship. Most times it is counterproductive to condemn the whole government as activists often do. There may be quiet sympathisers within government, but it is up to civil society to identify them. Thirdly, writing timely analysis of the proposed law and distributing as wide as possible is a good strategy in raising awareness but also in ensuring that the criticisms being raised are based on evidence. This also shows the resourcefulness of civil society in engaging policy as the Institute did. Fourth, the Brazilian experience shows us the importance of building a critical mass in support of a cause. Civil society groups must be seen to be speaking for verifiable constituents and not just advancing their parochial agenda and they can show this by amassing a critical mass. In the case of Brazil, the petition was backed by 150 signatures. This gave credibility to the campaign. Finally, victory on domestic reforms, especially if there was government buy in can lead to international changes. Seeking consensual positions with government can raise that country's international profile, as the government is seen to be listening to its citizens. It generates soft power in its foreign policy. It also underscores how important it is for civil society to lobby its own government's foreign policy on human rights. For instance, civil society could encourage its government to forge voting partnerships with countries in the community of democracy such as Germany in pushing for resolutions that protect human rights. In the case of Brazil, domestic reforms and alliances with Germany gave the government political clout and respect from peer states at the UN. It increased Brazil's stature in world global affairs and changed the contours of geopolitics. Brazil's vigilance at the UN is in sharp contrast with its former coloniser Portugal's insular position especially at the European Union. African civil society groups, including in my own country Zimbabwe have a lot to learn from the Brazilian experience on how to push for reforms on internet governance but also on major issues, such as recalibration of Zimbabwe's foreign policy both on development and human rights.