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TAKING AIM AT “FAKE NEWS”: BRAZIL’S LEGISLATIVE AGENDA FOR ONLINE DEMOCRACY

JEFFREY OMARI*

ABSTRACT

Like the United States, Brazil has recently been plagued by a crisis in online disinformation. After the country’s 2018 presidential elections, many Brazilians experienced a shock similar to that experienced by U.S. voters after the 2016 election of Donald Trump. The shock was the result of the election of Brazil’s far-right wing Jair Bolsonaro and his striking political ascent, which was fueled by supporters who mobilized online disinformation campaigns for Bolsonaro’s competitive advantage. During Brazil’s 2018 elections, Bolsonaro’s supporters employed these disinformation campaigns, which often preyed on Brazil’s poor, to gain a voting base in disadvantaged communities. Moreover, these disinformation networks created a polarized digital climate, helped incite the rapid spread of “fake news” in Brazil, and led to the rise of the extremist Bolsonaro.

To mitigate this problem of digital malfeasance, along with issues of digital inequality and data privacy concerns, the Brazilian government has recently advanced a series of internet laws. These laws seek to further democracy by advancing digital access and inclusion, promoting data privacy, and curbing the spread of online disinformation. This Essay examines the social, political, and historical context that led to the pursuit of these internet laws, how each law builds upon the foundations of its predecessor and discusses the relative strengths and weaknesses of each. In addition to this analysis, this Essay places a special emphasis on Brazil’s recent swell in online disinformation, and how these internet laws have attempted the seemingly contradictory effort of promoting digital access while simultaneously curbing the spread of fake news. In attempting to advance democracy through internet governance, this Essay argues that discourse should focus not only on legislation and policymaking, but also on grassroots efforts that advance effective inclusion on digital platforms to help further cyber civil rights.

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INTRODUCTION

Similar to the United States, Brazil has recently been plagued by a crisis in online disinformation.¹ After Donald Trump's successful 2016 U.S. presidential bid, which was bolstered by Cambridge Analytica and its misappropriation of Facebook user data,² Brazil reached an apex in social media disinformation during its 2018 presidential elections. During those elections, Brazilians witnessed a bevy of misleading online information that was facilitated not by Facebook per se, but by Facebook's corporate subsidiary, the messaging application WhatsApp.³ Because rates for sending and receiving short message service ("SMS") messages are very expensive in Brazil, the web-based WhatsApp offers an inexpensive alternative.⁴ In recent years, Brazilians have thus migrated to the application, which is used by more than 120 million people⁵ in the social-media savvy country.⁶ Moreover, because WhatsApp allows its users to join large-scale messaging chains, the application has become a prime social-media instrument for targeted political disinformation campaigns in Brazil. This fact is especially true among supporters of that country's far-right president, Jair Bolsonaro.⁷

While Bolsonaro supporters have embraced the spread of disinformation through platforms like WhatsApp, many Brazilians are concerned about the ongoing dissemination of online disinformation and how it might shape the country's next presidential contest in 2022. These concerns have been amplified by the disastrous effects of the Covid-19 pandemic, which has ravaged the

1. Drawing from Brazilian media studies scholar David Nemer, this Essay defines "disinformation" as the spread of false information with the intent to deceive or mislead. Accordingly, "misinformation" refers to information that may be false or inaccurate but is not generally intended to mislead. "Fake news" is thus an umbrella term that includes both disinformation and misinformation. See DAVID NEMER, *TECHNOLOGY OF THE OPPRESSED: INEQUALITY AND THE DIGITAL MUNDANE IN THE FAVELAS OF BRAZIL* (2022).

2. Matthew Rosenberg et al., *How Trump Consultants Exploited the Facebook Data of Millions*, N.Y. TIMES (Mar. 17, 2018), <https://www.nytimes.com/2018/03/17/us/politics/cambridge-analytica-trump-campaign.html>.

3. David Nemer, *WhatsApp is Radicalizing the Right in Bolsonaro's Brazil*, HUFF. POST (Aug. 16, 2019), https://www.huffpost.com/entry/brazil-jair-bolsonaro-whatsapp_n_5d542b0de4b05fa9df088ccc; Leticia Cesarino, *On Digital Populism in Brazil*, POLAR: POL. & LEGAL ANTHROPOLOGY REV. (Aug. 19, 2019), <https://polarjournal.org/2019/04/15/on-jair-bolsonaros-digital-populism/>.

4. Jeffrey Omari, *Is Facebook the Internet? Ethnographic Perspectives on Open Internet Governance in Brazil*, 45 L. & SOC. INQUIRY 1093, 1102 (2020).

5. Nemer, *supra* note 3.

6. Julie Ruvolo, *Why Brazil is Actually Winning the Internet*, BUZZFEED (June 29, 2014), <https://www.buzzfeed.com/jruv/why-brazil-is-actually-winning-the-internet>.

7. See, e.g., Nemer *supra* note 3; Cesarino, *supra* note 3; Robert Muggah et al., *Digital misinformation not only threatens Brazil's 2020 municipal elections, it undermines democracy*, OPENDEMOCRACY (Nov. 23, 2020), <https://www.opendemocracy.net/en/democraciaabierta/digital-misinformation-threatens-brazil-2020-municipal-elections-undermine-democracy/>.

Brazilian people, and continued distress over an economic crisis brought upon by the pandemic.⁸

In addition to the recent economic concerns caused by the pandemic, Brazil has a lengthy reputation of vast socioeconomic inequality.⁹ To help combat such inequality, internet access and inclusion are necessary for citizens to gainfully engage in civil society.¹⁰ Indeed, across the globe, the internet is an “indispensable tool for realizing a range of human rights.”¹¹ For these reasons, the Brazilian government has turned to internet governance¹² to help mitigate many of its societal inequities.¹³ In doing so, the country has recently advanced a series of internet laws with the aim of furthering democracy by cultivating digital access and inclusion, advancing data privacy, and curbing the spread of online disinformation. Accordingly, this Essay provides a sequential examination of Brazil’s three recent internet laws: (1) the *Marco Civil da Internet*—Civil Rights Framework of the Internet, or MCI, (2) the *Lei Geral de Proteção de Dados Pessoais*, or LGPD, and (3) the Internet Freedom, Responsibility, and Transparency Law—widely known as the “Fake News” Bill.

While exploring the requisite social, political, and historical context that led to the pursuit of these internet laws, this Essay investigates how each law builds upon the foundations of its predecessor and discusses the relative strengths and weaknesses of each. In addition to this analysis, this Essay examines how

8. Muggah et al., *supra* note 7.

9. See, e.g., JAMES HOLSTON, INSURGENT CITIZENSHIP: DISJUNCTIONS OF DEMOCRACY AND MODERNITY IN BRAZIL 19 (2008).

10. BARBARA VAN SCHEWICK, CTR. FOR INTERNET & SOC’Y AT STAN. L. SCH., NET NEUTRALITY AND ZERO-RATING (2015). This white paper report was filed with the Federal Communications Commission along with an *ex parte* letter on February 19, 2015.

11. U.N. Hum. Rts. Council, Report on the Special Rapporteur on the Promotion and Protection on the Right to Freedom of Opinion and Expression, U.N. Doc. A/HRC/17/27, at 85 (2011).

12. According to Laura DeNardis, internet governance involves a broadly conceived orientation that takes shape in four areas: (1) critical internet resources; (2) intellectual property rights; (3) communication rights; and (4) cybersecurity. Critical internet resources relate to internet protocol address space and management. Intellectual property rights refer to ownership interests in trademarks, patents, and copyrights. Communication rights, conversely, involve freedom of speech, freedom of expression, freedom of association, as well as data privacy concerns. Meanwhile, because of the open and worldwide aspect of the internet, DeNardis notes that cybersecurity involves a wide variety of concerns and must include input from national governments, the private sector, individual users, and technical communities. See LAURA DENARDIS, PROTOCOL POLITICS: THE GLOBALIZATION OF INTERNET GOVERNANCE 14–17, 19–20 (2009). Because this Essay addresses regulatory provisions that relate to internet access, net neutrality, online privacy, and content moderation issues, the internet governance discussion herein concerns the communications rights aspect of DeNardis’s definition. For an analysis of the significance of communications rights and policymaking, see Olivier Sylvain, *Internet Governance and Democratic Legitimacy*, 62 FED. COMM. L.J. 205, 206, 209, 227 (2010).

13. See, e.g., Jeffrey Omari, *Digital Access Amongst the Marginalized: Democracy and Internet Governance in Rio de Janeiro*, 41 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 277, 277 (2018).

Bolsonaro's supporters employed online disinformation campaigns, which often manipulated Brazil's poor, to gain a voting base in disadvantaged communities. Such communities were thus subject to state-sponsored efforts to advance digital access (the MCI) and to targeted online disinformation campaigns. Through examining internet legislation in this relevant sociopolitical context, this Essay shows how Brazil's internet laws have attempted the seemingly contradictory effort of promoting digital access (the MCI) while simultaneously curbing the spread of online disinformation (the "Fake News" Bill). This Essay argues that, in attempting to advance democratic standards for cyberspace, discourse should focus not only on legislation and policymaking, but also on grassroots efforts that support effective inclusion on digital platforms to help further cyber civil rights.¹⁴

I. SETTING THE STAGE: THE *MARCO CIVIL DA INTERNET*

This author spent the entirety of 2015 conducting ethnographic fieldwork in both Rio de Janeiro and São Paulo, Brazil.¹⁵ At that time, the country was fresh off the heels of successfully hosting the 2014 World Cup, and there was great anticipation for the upcoming 2016 Olympic Games in Rio. Because of these mega-events, there was a considerable amount of technological development taking place in the country's urban areas. As discussed elsewhere, this technological development was intended, in part, to increase digital access and inclusion among Brazil's marginalized populations.¹⁶ The lack of such access and inclusion, and the social and digital inequalities this disparity facilitates, has been a longstanding issue in Brazil. Indeed, social and digital inequalities have restricted the political engagement of Brazil's marginalized populations.¹⁷ This socioeconomic stratification was mapped onto social media as the social networks of rich and poor Brazilians did not often overlap.¹⁸

Driven in part by an effort to mitigate these digital inequalities,¹⁹ the Brazilian government enacted its visionary Civil Rights Framework for the

14. See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009) (noting that because of the aggregative and disaggregative qualities of cyberspace, internet governance raises important civil rights issues that require a fundamentally pro-regulatory cyber civil rights agenda).

15. Although this Essay is not ethnographic in the traditional sense, it remains informed and inspired by a collective eighteen months of fieldwork conducted in both Rio de Janeiro and São Paulo, Brazil, between 2012 and 2015. The focus of this fieldwork was the various sociocultural, political, and legal interests at play regarding the Brazilian government's attempt to codify a civil right to internet access.

16. Omari, *supra* note 13.

17. David Nemer & Michael Tsikerdekis, *Political Engagement and ICTs: Internet Use in Marginalized Communities*, 68 JASIST 1539, 1540 (2017).

18. *Id.*

19. The term "digital divide" assumes that by closing the gap in digital access, digital technologies are beneficial to all citizens. It thus references access to digital technology without any consideration for its effective use. This author therefore employs the term "digital inequalities,"

Internet, the MCI, in 2014.²⁰ The MCI codifies democratic principles of internet openness by advancing a civil right to internet access, protecting net neutrality, providing preliminary guidelines for data privacy, and protecting internet intermediaries.²¹ This law has been widely championed by scholars for its democratizing potential.²² Indeed, a principal founder of the MCI, Brazilian lawyer and legal scholar Ronaldo Lemos, claimed the law's enactment was "a victory for democracy."²³

As its name suggests, the MCI's objective is to create a civil rights framework for the regulation of cyberspace. This framework is based upon principles established by Brazil's *Comitê Gestor da Internet* ("Internet Steering Committee" or "CGI"), which consults the Brazilian Congress in developing internet legislation.²⁴ At its core, however, the MCI is based on the three principles of privacy, human rights, and freedom of expression, which are thought to provide direction for the Brazilian government in advancing internet legislation.²⁵ Engaging in both rights-based concepts (e.g., data privacy and freedom of expression) and technical concepts (e.g., net neutrality), which are both "explicitly linked to civil rights,"²⁶ demonstrates the sophistication of the CGI in furthering the MCI's objective. Moreover, these concepts connect the law to the work of scholars like Lawrence Lessig, who argue for the necessity of code in both political and technical terms.²⁷

Because of its commitment to advancing cyber civil rights,²⁸ the MCI is, in theory, an idyllic model of democratic internet legislation. In practice, however, the objectives of the MCI have been stifled by the disjunctions that exist in Brazil's democratic institutions.²⁹ These disjunctions relate to the country's systemic inequities and to its recent political saga.

which is considered more practical. See Jo Tacchi, *Digital Engagement: Voice and Participation in Development*, in *DIGITAL ANTHROPOLOGY* 225, 227 (Heather A. Horst & Daniel Miller eds., 2012).

20. For a detailed history of the MCI, see Daniel Arnaudo, *Brazil, the Internet and the Digital Bill of Rights: Reviewing the State of Brazilian Internet Governance*, IGARAPÉ INST., Apr. 2017, at 2, <https://igarape.org.br/o-brasil-e-o-marco-civil-da-internet/>.

21. Omari, *supra* note 13, at 280.

22. See, e.g., *Id.* at 38.

23. Carlos Affonso Pereira de Souza et al., *Understanding Brazil's Internet Bill of Rights*, INSTITUTO DE TECNOLOGIA E SOCIEDADE DO RIO DE JANEIRO, 2015.

24. Arnaudo, *supra* note 20, at 5.

25. *Id.* at 8.

26. *Id.* at 15.

27. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 6 (1999).

28. Citron, *supra* note 14.

29. See Omari, *supra* note 13, at 278 (noting that violence and informal governance in Brazil's disadvantaged communities index broader disjunctions in contemporary Brazilian democracy. In these communities, such sociopolitical realities create corresponding disjunctions in the MCI's pledge of a civil right to internet access for all Brazilians).

The MCI was enacted under the guidance of Brazil's former president, Dilma Rousseff (widely known as Dilma) and her Progressive Worker's Party ("PT").³⁰ The PT controlled the Brazilian executive from 2003 until 2016.³¹ During this time, a prime aim of the PT was to reduce the socioeconomic inequality that has plagued Brazil for decades.³² As a part of that mitigating effort, Dilma and the PT developed policies like the MCI "to address national issues of democracy and inequality"³³ in Brazil.

Sustaining momentum for the PT's democratic objectives seemingly came to a halt in 2016, when the Brazilian government experienced a radical political shift to the right. During that year, Dilma was impeached³⁴ and removed from office on charges of manipulating the country's budget.³⁵ Dilma's former Vice-President, Michel Temer, assumed office and challenged many of Dilma's progressive policies until the 2018 election of the far-right Bolsonaro. While Dilma's successors (Temer from 2016–2018; Bolsonaro from 2019–present) have ushered in more conservative and even controversial political agendas, through the enactment of the MCI, Dilma and her PT allies "created a strong legacy of open [and] democratic"³⁶ internet governance. These disparate political trajectories nevertheless illustrate the recursive trope of politics in internet policymaking and the difficulty of maintaining continuity in Brazil's ongoing legislative efforts to advance internet governance.

30. See Omari, *supra* note 4, at 1107 (illustrating that through embracing open-source ideology, challenging international patent norms, and promoting open access to copyrighted music, the PT's progressive values in matters of technology and intellectual property long predate the MCI's 2014 enactment).

31. Omari, *supra* note 13.

32. *Id.*

33. Omari, *supra* note 4, at 1099.

34. Dilma's impeachment was the result of an ongoing federal criminal investigation known as *Operação Lava Jato* (Operation Car Wash). The probe initially involved money laundering, but morphed into an expansive investigation involving *Petrobras*, Brazil's largest public oil company headquartered in Rio de Janeiro. Executives from the oil company allegedly accepted bribes in return for rewarding inflated contracts to several of Brazil's largest construction firms. Because the investigation challenges a long system of impunity for the elite, the corruption scandal grew to implicate many of the most prominent politicians and executives in Brazil and Latin America more broadly. Because Dilma was a board member of *Petrobras* during the time of the alleged corruption, she became a subject of the criminal inquiry. Jeffrey Omari, *Democracy and Digital Technology: Internet Governance and Social In/exclusion in Rio de Janeiro* (Sept. 2018) (Ph.D. dissertation, UC Santa Cruz) (on file with eScholarship.org), <https://escholarship.org/uc/item/6fx857q5#main>.

35. Jonathan Watts, *Dilma Rousseff: Brazilian Congress Votes to Impeach the President*, *GUARDIAN* (Apr. 18, 2016), <https://www.theguardian.com/world/2016/apr/18/dilma-rousseff-congress-impeach-brazilian-president>.

36. Arnaudo, *supra* note 20, at 17.

II. NEXT STEPS: THE LGPD

Internet governance issues related to data protection and online privacy have been an ongoing concern in Brazil. Indeed, the MCI was made a constitutional priority after Edward Snowden’s 2013 disclosures regarding U.S. espionage.³⁷ Snowden’s disclosures of a global U.S. surveillance program revealed evidence of spying on Brazilian citizens, executives, and government officials.³⁸ In a September 2013 address to the United Nations, former President Dilma Rousseff condemned this spying by “calling it a breach of democracy and international law.”³⁹ Because Article 7 of the MCI protects the right to privacy in Brazil and was a “direct response to Snowden’s revelations of NSA spying,”⁴⁰ the spying disclosures expedited the MCI’s 2014 enactment. However, while advancing the right to privacy, scholars have argued that the MCI lacks sufficient language for the protection of user data.⁴¹ Dilma’s attempt to implement legislation with specific data privacy protections was frustrated by her 2016 impeachment.⁴² Upon her removal from office, the Temer administration began developing its own data protection law.⁴³ The result of this development is the LGPD.

While the MCI provides the democratic principles necessary to guide the country in internet governance, the LGPD provides specific regulations concerning data privacy. Sanctioned by the administration of former president Temer in 2018, the LGPD is a comprehensive data protection law that aims to regulate and safeguard the personal data of all individuals residing in Brazil.⁴⁴ Moreover, it provides a framework for sharing, collecting, storing, and handling the personal data managed by various companies and organizations.⁴⁵ Modeled after the European Union’s General Data Protection Regulation, the LGPD seeks to provide clarity in Brazil’s data protection realm, which is currently experiencing great legal uncertainty.⁴⁶ Because Brazil has been a hotspot in reported Covid-19 cases, there has been great debate regarding the use of personal data for digital contact tracing.⁴⁷ Brazilian privacy experts and other industry stakeholders view the LGPD as a legal mechanism that could help

37. See, e.g., Arnaudo, *supra* note 20; Omari, *supra* note 13, at 279.

38. Arnaudo, *supra* note 20, at 6.

39. Omari, *supra* note 13, at 279–80.

40. Arnaudo, *supra* note 20, at 8.

41. *Id.* at 10.

42. *Id.* at 11.

43. *Id.*

44. Andrada Coos, *Brazil’s New Data Protection Law*, ENDPOINT PROTECTOR (Mar. 8, 2019), <https://www.endpointprotector.com/blog/about-brazils-new-data-protection-law/>.

45. *Id.*

46. *Id.*

47. The Brazilian Report, *The Impact of Postponing Brazil’s Data Protection Law*, WILSON CTR. (May 4, 2020), <https://www.wilsoncenter.org/blog-post/impact-postponing-brazils-data-protection-law>.

ensure the responsible use of personal data by the Brazilian government and other organizations in relation to the Covid-19 pandemic.⁴⁸ Although the LGPD was approved by the Brazilian government in 2018, as of this writing, the law will not go into effect until the second half of 2021 because of a provisional measure that delays its applicability.⁴⁹

Transnational in scope, the LGPD applies to any company located in Brazil and to foreign companies that process the personal data of individuals residing in Brazil.⁵⁰ Enforcement and compliance issues will be overseen by Brazil's new, presidentially-created National Data Protection Authority ("ANPD").⁵¹ Critics argue, however, that because ANPD was created by executive order and is presidentially supervised, the political interests of Bolsonaro are likely to influence its decision-making.⁵² In matters of internet governance, the influence of Brazil's executive branch is an ongoing concern given the deep political polarization of recent times.

III. POLITICAL POLARIZATION & THE SPREAD OF DISINFORMATION

As noted above, the 2013 spying disclosures by Edward Snowden marked a geopolitical turning point that provided the Brazilian government with the political will necessary to enact the MCI. The following year, in 2014, another issue of transnational concern highlighted the need for data privacy, controlling the spread of disinformation, and internet governance writ large. That year, a data profiling company named Cambridge Analytica gained access to the private data profiles of 50 million Facebook users.⁵³ Through a seemingly innocuous offer that paid these users to take a personality quiz, the company was able to obtain personal data from users' profiles and those of their Facebook "friends."⁵⁴ Unaware that their data had been hijacked, they were also unaware that their information would be sold to Donald Trump's 2016 presidential campaign and allegedly used by that campaign to manipulate their voting interests.⁵⁵

48. Hunton Andrews Kurth, *Brazilian President Delays Applicability of LGPD Sanctions, but Other Provisions Remain Uncertain*, NAT'L. L. REV. (June 17, 2020), <https://www.natlawreview.com/article/brazilian-president-delays-applicability-lgpd-sanctions-other-provisions-remain>.

49. *Id.*

50. Aaron Tantleff et al., *Brazilian Government Makes the LGPD Effective Imminently*, NAT'L. L. REV. (Sept. 10, 2020), <https://www.natlawreview.com/article/brazilian-government-makes-lgpd-effective-imminently>.

51. *Id.*

52. Miguel Rodriguez, *The Definitive Guide to Brazil's Privacy Law, the LGPD*, OSANO (Feb. 21, 2021), <https://www.osano.com/articles/brazil-lgpd>.

53. Zeynep Tufekci, *Facebook's Surveillance Machine*, N.Y. TIMES (Mar. 9, 2018), <https://www.nytimes.com/2018/03/19/opinion/facebook-cambridge-analytica.html>.

54. *Id.*

55. Rosenberg et al., *supra* note 2 (noting how Cambridge Analytica used illicitly obtained Facebook data to perform "psychographic modeling techniques" on voters in the US and the UK, which affected their voting behavior).

Because Facebook records its users’ browsing histories, along with every click and “like” made on the site, the amount of illicit data collected in this exercise is troubling.⁵⁶ Also troubling is that while this data was apparently used to influence the U.S. presidential elections, data obtained in a similar fashion may have also influenced the 2018 Brazilian presidential elections.⁵⁷ After disclosure of the U.S. breach, Brazilian prosecutors revealed that they were opening an investigation into whether Cambridge Analytica improperly harvested personal data from millions of Brazilians.⁵⁸ Considering that this improperly obtained data was apparently used to aid Donald Trump’s 2016 presidential bid,⁵⁹ and also by the winner of Brazil’s 2018 presidential elections⁶⁰—the far-right Bolsonaro, Cambridge Analytica’s data harvesting and any corresponding political manipulation that occurred in these countries are sure to have a profound and lasting impact.

It is perhaps no coincidence, then, that during the time of the Cambridge Analytica ordeal the Brazilian body politic experienced a sharp political shift to the right.⁶¹ This era (2013–2016) was marked by great political unrest, which included extraordinary social movements⁶² and frustration over longstanding political corruption.⁶³ Within this fragile political climate, right-wing protesters, activists, and organizers employed disinformation campaigns implemented via social media platforms (e.g., Facebook and WhatsApp) to mobilize teenagers and young adults from low-income *favelas*,⁶⁴ among others, to criticize the left

56. See Tufekci, *supra* note 53.

57. Carole Cadwalladr, *Fresh Cambridge Analytica Leak ‘Shows Global Manipulation is Out of Control’*, GUARDIAN (Jan. 4, 2020), <https://www.theguardian.com/uk-news/2020/jan/04/cambridge-analytica-data-leak-global-election-manipulation>.

58. Ricardo Brito, *Brazil Prosecutors Open Investigation into Cambridge Analytica*, REUTERS (Mar. 21, 2018) <https://www.reuters.com/article/us-facebook-cambridge-analytica-brazil/brazil-prosecutors-open-investigation-into-cambridge-analytica-idUSKBN1GX35A>.

59. Carole Cadwalladr, *Fresh Cambridge Analytica Leak ‘Shows Global Manipulation is Out of Control’*, GUARDIAN (Jan. 4, 2020), <https://www.theguardian.com/uk-news/2020/jan/04/cambridge-analytica-data-leak-global-election-manipulation>.

60. Brito, *supra* note 58.

61. Vincent Bevins, *Revisiting Brazil’s Dizzying Fall Into Far-Right Rule*, INTELLIGENCER (June 26, 2019) <https://nymag.com/intelligencer/2019/06/revisiting-brazils-fall-from-democracy-to-far-right-rule.html>.

62. June of 2013 marked the beginning of a series of mass protests in Brazil. These protests, which became known as *Jornadas de Junho* (June Journeys), consisted of over 2 million people marching the streets in over 400 Brazilian cities. The protests were the result of city and state governments across Brazil increasing bus and metro fares. These increases primarily affected the low-income residents of Brazil’s urban *favelas*. See Nemer, *supra* note 1.

63. See Omari, *supra* note 13, at 278.

64. In the City of Rio de Janeiro alone, approximately 1.5 million people live in *favelas*, which are informal, historically low-income communities. Residents of these communities were the primary beneficiaries of the PT-implemented economic and digital inclusion initiatives intended to mitigate Brazil’s myriad socioeconomic inequalities. The great irony here is that many of these

(i.e., Dilma and the PT).⁶⁵ According to Brazilian media studies scholar, David Nemer, these right-wing groups “piggybacked on [Brazil’s] economic and political crises to expand their reach on Facebook and create an unsustainable environment of anger and discontent with [the PT].”⁶⁶ As underprivileged Brazilians increasingly gained internet access through smartphones, they also became subjects of these targeted disinformation campaigns.⁶⁷

Amid these online disinformation campaigns, the MCI provides statutory provisions that apply directly to internet intermediaries. Specifically, Articles 18 and 19 of the MCI extend intermediary liability carveouts for internet service providers (“ISPs”) and applications. These provisions are similar to § 230 of the Communications Decency Act (“CDA”)⁶⁸ in the United States in that they place civil liability for internet content on internet users, and not on the applications or ISPs. The MCI’s intermediary liability provisions are intended to safeguard freedom of expression and prevent censorship.⁶⁹ Accordingly, such provisions allow companies like Facebook to police their own platforms, which is exactly what Facebook did. In an attempt to combat a coordinated network of disinformation in Brazil, the social media behemoth purged thousands of pages and profiles from its site.⁷⁰ Undeterred, the right-wing disinformation campaigns soon migrated to WhatsApp,⁷¹ which provided an ideal alternative platform because of its widespread use in Brazil and because its end-to-end encryption ensured that only the intended recipients would receive the contents of the messages. Such encryption practices made it difficult for the Facebook-owned WhatsApp to identify these disinformation campaigns.⁷²

same residents became supporters of the far-right Bolsonaro after being subjected to online disinformation campaigns.

65. Nemer, *supra* note 1.

66. *Id.* at 153.

67. *Id.*

68. The CDA has been interpreted to mean that operators of internet services shall not be deemed publishers or distributors of information and thus are not civilly liable for the content of third parties who use their services. This interpretation creates broad immunity for many internet service providers operating within the United States. *See, e.g.,* *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). Moreover, this provision provides private online platforms (e.g., Facebook, Whatsapp, Twitter, etc.) with the ability to self-govern the content that appears on their sites. Similar to the MCI, the aim of § 230 is to both foster “Good Samaritan” behavior by encouraging platforms to actively remove offensive content, and to protect the free speech of users by avoiding censorship. *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1602 (2018).

69. Jeffrey Omari, *Postscript to “Digital Access Amongst the Marginalized: Democracy and Internet Governance in Rio De Janeiro”*, POLAR: POL. & LEGAL ANTHROPOLOGY REV. (Mar. 16, 2020), <https://polarjournal.org/2020/03/16/2020-virtual-edition-on-digital-politics-jeffrey-omari/>.

70. Nemer, *supra* note 1.

71. *See, e.g.,* Nemer, *supra* note 1; Nemer, *supra* note 3; Cesarino, *supra* note 3.

72. Nemer, *supra* note 1.

Brazil’s digital disinformation is not merely limited to Facebook and WhatsApp, however. The online extremism reached such an extent in the country’s 2018 presidential elections that the Brazilian state intervened by commissioning an inquiry into such disinformation.⁷³ The inquiry uncovered a so-called “hate cabinet” that was commanded by President Bolsonaro’s son, Carlos.⁷⁴ The hate cabinet allegedly oversaw an expansive disinformation campaign that included a “network of fake news channels, right-wing blogs and social media profiles aggressively spreading disinformation and threatening opponents, including via Facebook, Instagram, YouTube and WhatsApp.”⁷⁵ With Brazil’s climate of digital malfeasance reaching levels that are clearly undemocratic, its government is considering legislation to combat these online harms.

IV. THE “FAKE NEWS” BILL

In response to the country’s toxic environment of online disinformation, the Brazilian government is currently considering its so-called “Fake News” Bill.⁷⁶ Initially approved by the Brazilian Senate in June of 2020, the bill must now be voted on by the Brazilian Congress before being presented to President Bolsonaro for final approval.⁷⁷ The bill seeks to address the warranted concerns presented by the inundation of online disinformation and defamatory content and, if approved, would apply to internet platforms with over 2 million users.⁷⁸ As currently constituted, the bill provides a practical example of the challenges in combating disinformation, propaganda, and defamation in the online realm.⁷⁹ Moreover, the bill does little to address the individuals and organizations who finance the spread of fake news across social media platforms in Brazil. It also poses threats to the data privacy guidelines of the LGPD, and to the universal internet access and freedom of association provisions of the MCI.

Article 2 of the draft legislation notes that it must remain in compliance with both the MCI and the LGPD.⁸⁰ However, the bill’s overbreadth and ambiguity challenge the freedom of expression and privacy safeguards enacted by its internet governance predecessors.⁸¹ For instance, the bill requires social media

73. Muggah et al., *supra* note 7.

74. See, e.g., *Id.*; Patricia Campos Mello, *Brazil’s Troll Army Moves into the Streets*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/04/opinion/bolsonaro-office-of-hate-brazil.html>.

75. Muggah et al., *supra* note 7.

76. Jeffrey Omari, *Undercutting Internet Governance in Brazil*, VERFASSUNGSBLOG (July 19, 2020), <https://verfassungsblog.de/undercutting-internet-governance-in-brazil/>.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Omari, *supra* note 76.

platforms to monitor users' identities by requiring that users provide identification and a valid mobile phone number.⁸² Linking mobile phone numbers to social media accounts provides the potential for the unauthorized surveillance of internet users.⁸³ Additionally, residents of favelas and other members of Brazil's vulnerable populations rely heavily on mobile phones to access the internet.⁸⁴ These populations often lack the financial resources to maintain uninterrupted mobile phone service.⁸⁵ By preventing users without mobile phone accounts from using social networks, the bill would likely impede internet access for Brazil's vulnerable populations. Such requirements run counter to the principles of the MCI, which promote privacy, democracy, and universal internet access, and also to the safeguards of the LGPD, which seek to advance data minimization and risk prevention in processing and storing personal data.

Other provisions are just as troubling. "For example, the Senate-approved bill orders social media platforms to track and store the chain of forwarded communications of Brazilian internet users."⁸⁶ As previously noted, these messaging chains were a major issue in Brazil's 2018 election cycle when Bolsonaro supporters mobilized WhatsApp as a tool for spreading disinformation.⁸⁷ The bill's massive data collection requirements, which would affect millions of Brazilian internet users, could easily be misused for political gain, unauthorized surveillance, or to disclose the sensitive communication details of individuals, groups, and their various associations. Consequently, the Fake News Bill has stirred considerable controversy in Brazil's highly charged political climate. Brazilian critics have argued that the bill would stifle the principles of free expression and association that are embedded in the MCI, and

82. *Id.*

83. *Id.*

84. See, e.g., David Nemer, *Online Favela: The Use of Social Media by the Marginalized in Brazil*, 22 INFO. TECH. FOR DEV. 362, 367 (2016).

85. See Omari, *supra* note 4 (noting how poor and working-class Brazilians often rely on controversial "zero-rating" promotions, which allow users free access to certain limited internet services (e.g., streaming videos) or smartphone applications (e.g., WhatsApp)). For a comprehensive legal analysis on the pros and cons of zero-rating, see BJ Ard, *Beyond Neutrality: How Zero Rating Can (Sometimes) Advance User Choice, Innovation, and Democratic Participation*, 75 MD. L. REV. 984, 988–89 (2016).

86. Omari, *supra* note 76.

87. Nemer, *supra* note 3; Cesarino, *supra* note 3.

that it does little to protect the values of user privacy granted by the LGPD.⁸⁸ As a result, these same critics claim that it would lead to unjust censorship.⁸⁹

Meanwhile, legal scholars in the United States caution us to be wary of hiding behind free speech norms when promoting cyber civil rights.⁹⁰ Moreover, these scholars have aptly claimed that proscribing disinformation preserves online dialogue and promotes a culture of socioeconomic equality.⁹¹ As it currently stands, however, the "Fake News" Bill remains inconsistent with the pro-democracy MCI and illustrates the complex challenges of curbing the harms of online disinformation while maintaining democratic norms in cyberspace.

CONCLUSION

The above sociolegal analysis provides the requisite political and historical context for understanding Brazil's recent battle with disinformation and fake news. While attempting to advance democratic norms for cyberspace, an underlying concern is the influence of politics in internet legislation and policymaking. The country's bedrock internet law, the MCI, was the result of geopolitical concerns, yet its objective is to promote democracy and mitigate national issues of socioeconomic inequality. The spread of fake news clearly compromises these objectives. However, with its identification requirements and data collection provisions, the Fake News Bill veers away from the democratic aims of the MCI. These objectives must be taken seriously if the country truly values alleviating inequalities of power.

The 2018 shift in the Brazilian executive was accompanied by a markedly different use (and abuse) of social media.⁹² This shift shows both the power of online platforms to influence national elections and the vulnerability these platforms have to disinformation campaigns. Thus, while legislation combating the spread of fake news is necessary, the Brazilian government should limit the influence of the Brazilian executive in matters of internet governance. This influence is seen in the executive's broad authority over agencies like ANPD. Because of Brazil's highly polarized political climate, the regulatory bodies that enforce internet legislation should be independently overseen.

88. See, e.g., Diogo Tulio dos Santos, *Brazil, Democracy, and the "Fake News" Bill*, GLOB. AM. (Jan. 4, 2021), <https://theglobalamericans.org/2021/01/brazil-democracy-and-the-fake-news-bill/>; Raphael Tsavkko Garcia, Opinion, *Brazil's "Fake News" Bill Won't Solve its Misinformation Problem*, MIT TECH. REV. (Sept. 10, 2020), <https://www.technologyreview.com/2020/09/10/1008254/brazil-fake-news-bill-misinformation-opinion/>.

89. *Id.*

90. Citron, *supra* note 14, at 67.

91. *Id.*

92. See, e.g., Nemer, *supra* note 3; Cesarino, *supra* note 3; Muggah et al., *supra* note 7.

Finally, the ability to distinguish legitimate online information from disinformation, propaganda, and fake news remains an ongoing concern.⁹³ This fact is especially true for members of Brazil's vulnerable populations, many of whom have only recently gained internet access.⁹⁴ Indeed, social and economic inequality affects internet access and inclusion.⁹⁵ As legal scholar Olivier Sylvain reminds us, exclusion from the internet's affordances is often "the consequence of material misfortune and disadvantage."⁹⁶ Because Brazil's favelas are rife with material misfortune, disadvantage, and inequality, residents of these communities are likely more susceptible to propaganda and disinformation, as the manipulation of newly enfranchised internet users illustrates. Internet laws purporting to advance digital access and inclusion, like the MCI, should therefore be coupled with grassroots efforts that advance the digital tools necessary for effective inclusion on digital platforms. In countries like Brazil, supplementing internet laws with practical social policies that promote successful digital inclusion is the true path towards cyber civil rights.⁹⁷

93. Robert Muggah et al., *Misinformation is Threatening Brazil's Elections, Too*, AMERICAS QUARTERLY (Nov. 12, 2020), <https://americasquarterly.org/article/misinformation-is-threatening-brazils-elections-too/>.

94. When this author completed fieldwork in December 2015, Brazil—a country of 212 million people—had an internet penetration rate of fifty-four percent. Since that time, its internet penetration rate has increased to seventy-one percent. See Simon Kemp, *Digital 2020: Brazil*, DATAREPORTAL (Feb. 17, 2020), <https://datareportal.com/reports/digital-2020-brazil>.

95. See Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. 443, 443 (2016).

96. *Id.* at 447.

97. Citron, *supra* note 14.