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Implementing a National Data Strategy: The Need for Innovative Public Consultations

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Key Points

- There are a number of challenges involved in developing a national data strategy, including diverse competing interests, which make public consultations a necessary part of the process.
- The public consultation process used in the development of Brazil's *Marco Civil da Internet* legislation (Internet Bill of Rights) could be used as a model for governments looking to adopt a data strategy.
- Interviews with academics, policy makers, industry officials and civil society activists in Brazil involved in developing *Marco Civil* suggest that it enjoys a high degree of legitimacy, attributed, in part, to the open and transparent consultation process.
- Data-strategy consultations should be undertaken within a human-rights framework, involve transparent, two-stage consultations, designed by non-partisan and impartial policy experts, and include a decisive role for legislators.

Introduction

In the wake of the Facebook/Cambridge Analytica scandal, the push for countries to craft national data strategies is gaining urgency. Moreover, the transformative nature of the move to a data-based society is forcing governments to wrestle with the implications of these changes for their societies and economies.

While there exists a growing policy literature regarding what a national data strategy should look like,¹ the necessarily far-reaching scope of a data strategy requires consultations that are not only extensive, but also specifically designed to address the particular challenges posed by this complex issue.

This policy brief proposes that governments interested in adopting a data strategy model their efforts on the innovative public consultation process used by Brazil in the run-up to the adoption of its 2014 Internet Bill of Rights, or *Marco Civil* legislation. This model, moreover, can be used to evaluate existing consultations, such as the economic-focused “digital and data transformation” consultations launched by Innovation, Science and Economic Development Canada in the summer of 2018

¹ For a Canadian perspective, see Medhora et al. (2018a) as well as a recent CIGI-coordinated essay series on data governance, which appeared online and was collected in a special report. See www.cigionline.org/data-governance-digital-age and Medhora et al. (2018b).

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(the consultations concluded on October 12) (Government of Canada 2018).

The structure of this policy brief is as follows. The next section outlines the specific challenges that a national data strategy must confront. The following section describes the *Marco Civil* consultation, highlighting four key lessons for any data-strategy consultations. The brief concludes with three recommendations.

The Challenges of a Data Strategy

Designing a national data strategy presents three key challenges that must be addressed in order to ensure the strategy's effectiveness and legitimacy. First, the breadth of issues that a data strategy must consider goes far beyond the scope of other industrial, economic or social policies. The rise of big data and the increasing importance of intellectual property rights to economic activity — driven and reinforced by the increasing ubiquity of digital communication technologies — is remaking every corner of society. These changes are forcing us to rethink long-held policy orientations. The shift toward a data-driven economy, with its pervasive capture of personal data by both state and corporate entities, raises important questions about the control and ownership of data; the division of authority between state and non-state actors in setting rules regarding the collection, use and control of data; and the privatization of data as governments around the world turn to private sector vendors to introduce technology into their infrastructure and community assets (see, for example, Hoffmann 2017). Further, the surveillance needed to create and capture data potentially conflicts with the need for individual privacy in a healthy liberal-democratic society. Economic policies such as free trade, designed for manufacturing-based economies, can be counterproductive and even destructive for economies based on the control of data and intellectual property (Haggart 2018).

Second, both non-specialized policy makers and the general public share a lack of understanding about what data is and how it affects our everyday lives. Even those experts directly focused on, for example, surveillance issues, are only now beginning to think about how their issues affect the wider society. For the citizenry, given the breadth of issues that may

be considered within such strategies, including privacy, intellectual property, cybersecurity and international economic agreements (see Medhora et al. 2018b), informed public input is vital for the democratic legitimacy of any data strategy.

Third, and related to the first two points, the necessarily wide scope of a data strategy means that a diverse range of interests will be affected. Trade-offs among different issues and players will be needed. On most data-related issues, moreover, it may not be obvious how the public interest should be defined. Widespread public consultations are needed to ensure that the resulting data strategy does not reflect only the interests of “a small subset of the diverse ecosystem,” in the words of University of Ottawa law professor Teresa Scassa (2018, 6).

The presence of diverse competing interests makes public consultations necessary. However, the existence of low levels of understanding among citizens and policy makers and high levels of uncertainty about what an optimal data policy should look like also means that traditional consultative mechanisms — department or parliamentary committee-led hearings — will be insufficient to ensure the emergence of a robust policy with strong democratic legitimacy. A successful national data-strategy consultation will not only collect perspectives from the public, it must also have an educative function for the public and policy makers.

The Brazilian Example: Lessons from the *Marco Civil da Internet* Consultations

Brazil faced a similar challenge when dealing with the issue of internet governance in 2008. Much like data governance today, internet governance was a complex issue, and little understood by the Brazilian public. In April 2014, the Brazilian government implemented an Internet Bill of Rights, or *Marco Civil da Internet*, which set the standard for similar efforts worldwide to codify rights on the internet. *Marco Civil* provides an overarching set of principles on privacy, freedom of expression and net neutrality. In April and May 2018, the authors concluded research interviews in Brazil with

academics, policy makers, industry officials and civil society activists directly involved in coordinating the *Marco Civil* consultations and drafting the law. According to all of the people interviewed, *Marco Civil* enjoys a high degree of legitimacy with the Brazilian public, attributed, in part, to the open and transparent consultation process that created the law. While some of the interviewees argued the law did not actually change much — a position echoed by several scholars (see Hoskins 2017) — other interviewees contended its true value was how it has shaped the overall internet governance discussion in Brazil and also cultivated public legitimacy in a civil-rights-based approach to internet governance.

Five key lessons are offered from the interviews in Brazil to guide the creation of a national data strategy.

Lesson One: The Importance of Strategic Framing

Brazilian political and public interest in internet governance issues arose in 2007 against the backdrop of public protests against a cybercrime bill.² Among other issues, civil society groups objected to the punitive measures contained in the bill, including, for example, the imposition of severe penalties for the violation of copyright, such as copying music from CDs. In an influential newspaper editorial, Ronaldo Lemos, a well-known expert on internet law and intellectual property, as well as a lawyer, activist and one of *Marco Civil*'s architects, advocated for a civil rights regulatory framework (a “*Marco Civil*”) instead of a criminal law approach. Key to this process was a speech by then Brazilian President Lula Da Silva at a 2009 International Free Software Forum, in which he told then Minister of Justice Tarso Genro that Brazil needed a civil rights framework for the internet (Tiemann 2009).

This framing of internet rights as human rights was crucial for a number of reasons, but primarily because it provided a hierarchy of values for the discussion of these issues that prioritized human rights over other considerations, shaping public discussions and the resulting text of the bill (Souza, Steibel and Lemos 2017).

Similarly, a national data strategy can be framed in many different ways, effectively prioritizing different outcomes, such as human rights,

² Bill of Law No. 84/99.

economic development or cyber security. For example, prioritizing a cyber-security framework could end up enhancing state surveillance capabilities in the name of security while restricting public access to encryption tools needed to ensure commerce and individual privacy.

Lesson Two: Two-stage Consultations

The design of *Marco Civil*'s consultation process, which occurred in two broad phases between October 2009 and May 2010, was crucial to its success. Before seeking public comments, the Ministry of Justice, which coordinated the public consultation, invited a group of experts, including academics, to help design an open consultation process involving an online platform for submissions (ibid.). In cooperation with the ministry, this expert group, which included Ronaldo Lemos, identified, defined and provided explanations of key topics, such as data retention, net neutrality and privacy. In doing so, the experts provided structure to the consultations, offering a level of education to the public and ensuring that the results would (hopefully) become a useful input into the policy process.

In the first phase, the public could make submissions on the predefined topics, suggest alternative topics or propose new approaches. The consultations allowed participants to see all other comments, thus enabling a dialogue among the process organizers and fellow submitters. This dialogue represents a departure from traditional consultations, in which governments seek input and record and report the results.

Following these consultations, the expert group and ministry staff analyzed all contributions and created a draft bill. This text then formed the basis of the second phase of public consultations. In this phase, participants could offer support or suggest alternative wording for each article in the bill.

This process demonstrated that a structured, open consultative process that sets out parameters to guide the discussion, but also enables participants to suggest alternative topics or approaches, can facilitate an informed and interactive public discussion. Providing the opportunity for comments at the initial and draft stages allowed the public to compare the draft document with the initial consultations, increasing the democratic legitimacy of the process and the eventual bill.

Lesson Three: Full Transparency

Embracing full transparency was just as important as the decision to hold online two-stage consultations. The ministry ordered that all comments on the bill must be made to the public consultation's online platform and any comments submitted directly to the government would be uploaded to the platform for public review. One of the civil society interviewees, who previously worked for the Ministry of Justice, termed this "radical transparency."

According to the interview subjects, requiring that all submissions be made public effectively levelled the playing field between large, economically powerful actors, such as the telecommunications industry, and civil society groups. As is discussed below, however, this transparency requirement did not prevent interest groups from engaging in traditional lobbying efforts to advance their policies. Instead, it improved the relative power of civil society groups against traditional economic powerhouses. Equally important was that all interested parties openly disclosed their comments and the online platform allowed parties to comment publicly on each position in an interactive, two-way consultation process.

As the same power asymmetries are present in the data economy, the importance of transparency in data-strategy consultations is obvious. Because everything had to be done out in the open, these groups could not count on backroom deals to fix the consultations in their favour.

Lesson Four: Politics and Power Still Matter

Lest open consultations be seen as a simple panacea capable of overcoming politics as usual, a note of caution must be provided. While the *Marco Civil* consultations were very helpful in crafting a fair internet governance bill that enjoys widespread legitimacy, the consultations did not replace politics with some ideal direct-democracy "wisdom of the crowds." While the process affected the relative power of the involved actors as discussed above, traditional political dynamics still proved decisive. Four points at which the exercise of power was most obvious are identified.

First, academics and civil society groups played a crucial role in promoting a human rights framework for internet governance, as did a president who promoted the idea of internet rights as human rights. Similarly, and second, the

Brazilian Ministry of Justice and its independent expert group played a gatekeeping role in terms of what issues were prioritized and, eventually, accepted. In other words, individuals mattered: had other groups or agencies seized the initiative, the final bill's emphasis on human rights could very well have been downplayed significantly.

Third, the consultations complemented the normal political process — they did not replace it. Moving beyond the consultations, *Marco Civil* still had to be passed by the Brazilian Congress and signed into law by the president. It was not immune to the horse-trading and circumstantial events that characterize most democratic processes. In a demonstration of the lobbying prowess of powerful incumbents, for example, copyright holders carved copyright out of *Marco Civil* in exchange for their support for its net neutrality provision and a promise of future copyright reform.

Fourth, and finally, chance and circumstance played an important role. According to the interview subjects, the bill's passage on April 24, 2014, was made infinitely easier thanks to the contemporaneous revelations by Edward Snowden that the US National Security Agency was eavesdropping on the world, including then Brazilian President Dilma Rousseff. As with many successful policies, the linkage of a proposed solution (*Marco Civil*) to a perceived problem (US spying) provided an opportunity to move the policy forward. In the current moment, the Facebook/Cambridge Analytica scandal provides a similar opportunity for data policy making.

Overall, this necessarily brief account of *Marco Civil*'s passage from idea into law serves as a reminder that an open consultation process can build public legitimacy and improve representation in the political process, but it does not replace the often-messy democratic process of political debate.

Policy Recommendations

Like Brazil's internet governance debate, the emerging discussion around data regulation involves an all-encompassing issue, has low levels of public understanding and implicates many powerful interests. Based on these similarities, this policy brief makes the following recommendations and offers some final comments.

Any data-strategy consultations should be undertaken within a human-rights framework.

Data can be considered in many different ways — socially, economically, politically. The transformative nature of the move to a data-driven economy and society means that any data strategy will have long-lasting effects.

A narrow, one-dimensional focus, for example, only on data as an economic resource, will fail to consider data's place in the wider society. Given data's pervasive effects on human society, only a human-rights perspective, which places the individual in their social/community context at the centre of analysis, is capable of appropriately balancing the myriad issues posed by data governance issues. A balanced consultation should address innovation issues, but within a context that emphasizes the effect of data governance on, to quote the Digital Rights Now campaign, "our quality of life, the governance of our economy, and the safety of our democracy."³

Transparent, two-stage consultations should be designed by non-partisan and impartial policy experts.

In order to best legitimize this process, and to develop an appropriately balanced data strategy, governments should call upon a representative group of non-partisan academic and civil society experts to design the framework that will guide the consultations. The framework should be designed in such a way as to educate and inform the public, not merely to solicit their input.

While certain industry representatives possess information that can inform this process, it would be inappropriate for them to be involved in designing this process (as opposed to participating in the consultations), as industry will be some of the main subjects of data regulation. Similarly, knowledgeable government officials will have the opportunity to shape the eventual strategy at the next stage.

In order to ensure balance within this process, consultations must be fully transparent, with all participants able to review all comments, once anonymized, to ensure the protection of personal data.

Finally, a two-stage consultation, with a (moderated) online social media component,

³ See <https://digitalrightsnow.ca/>.

will ensure a full and informed discussion of the issues, and that the eventual text embodies as much of the initial consultations as possible. While the final text will not reflect everyone's preferred policies, the consultation process should ensure that all participants' perspectives are included and considered.

There should be a decisive role for legislatures.

This process is not designed to replace the role of Parliament, which, in our representative democracy, is the ultimate legitimating authority for public policy. Any resulting data governance strategy must pass through the regular legislative process.

Conclusion

The success of *Marco Civil*, in particular the legitimacy it enjoys in Brazil, offers a guide for designing national data consultations. Drawing from the success of *Marco Civil*, a good public consultation process has the following elements: effective strategic framing of the issue to encompass a broad focus on the society-wide effects of data, an interactive and open consultation process, meaningful transparency and informed participants.

Marco Civil also suggests ways to improve ongoing consultations, such as the current Canadian data consultations. While a full analysis of the Canadian consultations is beyond the scope of this brief, the *Marco Civil* example highlights the need for the Canadian government to move beyond its current focus on data as a resource, and instead start from the idea that data rights are human rights. Continuing consultations at a time when many Canadians are not on summer vacation would also help improve their legitimacy.

The framing of the Canadian data consultations — of any consultations — shapes both participants' input and the eventual output. As with the *Marco Civil* consultations, a broad framing emphasizing both the social and economic elements of data would provide data consultations with a more comprehensive, nuanced understanding of data and its regulation.

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