

HIIG Discussion Paper Series

Discussion Paper 2014-06

Coded for Export!

***The Contextual Dimension of the
Brazilian Marco Civil da Internet***

17 November 2014

Oswaldo Saldías

saldias@hiig.de

Alexander von Humboldt Institute
for Internet & Society

Abstract

Marco Civil da Internet is Brazil's attempt to regulate fundamental aspects of an open and free Internet (Data Protection, Net Neutrality and Freedom of Speech) by means of securing civil rights before sanctioning misbehaviours criminally. In addition, *Marco Civil da Internet* has an implicit global ambition in that it was conceived as a possible template for global regulation. Despite this unifying aspiration, there has been no reflexion so far on how Marco Civil would impact upon foreign legal systems. Moreover, there has been no debate about the regional implications of Marco Civil da Internet.

The article claims that any regulatory unifying project should seriously consider the relevance of contextual elements; a point blatantly neglected in the debate on *Marco Civil da Internet*. This work attempts to tackle the problem, offering a first outline of the transnational and regional context that will most probably determine the diffusion of Marco Civil da Internet. Using analytical toolkits offered by comparative legal studies and the diffusion of ideas, it sketches the current regional legal patchwork, of which Marco Civil is part. In doing so, it uncovers upcoming challenges and frictions; solving such tensions, the article suggests, is an inherent task of democratic institutions.

Keywords

Marco Civil da Internet, Internet Regulation, Brazil, Comparative Law, Net Neutrality, Data Protection, Freedom of Speech

Contents

1. INTRODUCTION	1
2. LAWS CODED FOR EXPORT	2
3. WHEN THE CONTEXT CHANGES ACROSS TIME: DATA PROTECTION	7
4. WHEN CONVERSATIONS AND IDEAS SHAPE THE CONTEXT: NET NEUTRALITY	11
5. WHEN BLACK LETTER LAWS COLLIDE: FREEDOM OF EXPRESSION AND TRADE LAW	18
6. CONCLUSION	20

1. Introduction¹

During April 2014, the Brazilian Civil Rights Framework for the Internet, also known by its name in Portuguese “Marco Civil da Internet” (hereinafter Marco Civil), was established in the midst of the global Internet Governance conference NET Mundial held in Sao Paulo.

Being a framework, Marco Civil aims to regulate at least three critical fields of Internet law & politics: data protection, net neutrality and freedom of speech. The reason for regulating them together is the will of securing citizens’ rights and the civil coexistence of users and providers. Such a holistic approach is rare in the global context, and it is not surprising that it got worldwide attention. In addition, it did not take long until key actors on the political stage began demanding that Marco Civil be used as a model for the region and even for the world. For many policy-makers and activists Marco Civil is appealing. Be it because of its encompassing approach, be it because it was not an industrialized country that promoted it. As I show in this article, Marco Civil gives the impression of being coded for export, even though its origins are very local and idiosyncratic. The regional and global appeal of Marco Civil requires that we ask whether Marco Civil is suited for being diffused across South America. However, although the initiative started in 2007, there seems to be no reflection about the external or transnational dimension of Marco Civil. For those who believe that the context of a given legal arrangement can decisively influence law, the quest for an external or comparative dimension of law is crucial. Conversely, some observers do not consider the context as too relevant for the law to unveil its effects. The latter usually assume that what really matters is the text of the law. Closely related to such a perspective, is the assumption that legal problems are very similar across regions, and that there is a similar solution for problems that are similar. This is the so-called

¹ This article stems from a lecture given by the author at the Brazilian Institute for Public Law (IDP, at the international seminar “**Marco Civil da Internet: Direito, Inovação e Tecnologia**”. The article benefited from valuable comments of the audience, as well as from critical feedback provided by Prof. Dr. Ingolf Pernice, Rüdiger Schwarz and Dr. Ulrike Höppner. All errors are exclusively mine.

praesumptio similitudinis, an assumption that has promoted functional legal solutions throughout the world.²

The perspective this article puts forwarded assumes that the context matters. The context determines much of the law's efficacy, and the external or transnational dimension of Marco Civil cannot be understood without contextual elements. In doing so, it makes a first attempt to sketch its external dimension, identifying the functional linkages that make Marco Civil so suitable for export. Among these linkages we find ideas and conversations (pillar of net neutrality), a certain idea of technological determinism (pillar of data protection), and system competition (pillar of freedom of expression).

2. Laws Coded for Export

The initial support for Marco Civil came from the academic community, and the approach towards Internet regulation put the emphasis on formalizing subjective rights of users instead of thoroughly institutionalizing the incumbent business models. These models, which dominated the Internet traffic in those years, reinforced the punitive dimension of Internet law. The initiators of the Marco Civil initiative mostly belonged the IP-Law scholarly community, and represented a refreshing strand that articulated a pledge in favour of an access friendly and open Internet. Their claims aimed at rationalizing punitive law and shifting the burden of proving malicious uses of online content from the individuals on to the industry. In addition, a general awareness about the vulnerability of lower-income social groups decisively influenced the initiative.³ The social reality in Brazil indicated that if punitive

² Zweigert, Konrad (1973) Die "Praesumptio Similitudinis" als Grundsatzvermutung rechtsvergleichender Methode, In M. Rotonda (ed.) *Inchieste di Diritto Comparato-Scopi e Methodi di Diritto Comparato*: Lepaulle.

³ See for instance the Ronaldo Lemos and Paula Martins article on Brazilian LAN houses, and the informal sector. Lemos, Ronaldo and Martins, Paula (2010) LAN Houses: A New Wave of Digital Inclusion in Brazil. *Information Technologies & International Development*. Vol. 6 Special Edition.

laws were enacted in the way the planned Ley Azeredo⁴ was attempting to, more than 60% of the population would have been rendered criminal offenders overnight.

The initiators claimed that criminal sanctions should be only an extreme measure punishing deviations from an established civil coexistence, whereas the current Brazilian predicament was the lack of a previously agreed civil –as opposed to criminal– framework that could tell people how to legitimately behave in a digital environment. Emerging relationships between users and actors of the digital economy had to be regulated first, establishing explicit rights before criminalizing the most seriously deviating behaviour. Hence, the State ought to enact criminal statutes only the grounds of a pre-existing civil framework.⁵ A gross misfit between law in books and the social context that would not only threaten the aspiration of coherency within the legal system, but also provoke a highly differentiated application of law. Because it would be unthinkable to lock 60% of the population in jails, only a small percentage would face a prosecution. If we consider the endemic inequalities that affect Latin American societies we could also speculate that poorer users would have a higher probability of meeting a criminal tribunal simply because of a negative selection process that punishes those who are least able to defend themselves. A kind of class-justice or *Klassenjustiz*. The German scholar Gustav Radbruch noted already in the 1920s his concerns about the asymmetric criminal treatment of offenses against property as compared to crimes against physical integrity. Radbruch's writing during the German Weimar republic testify to his perplexity as he notes that cases of theft were investigated ex officio, while assault or personal injury required an explicit denunciation by the victim. The protection of material goods, he goes on, is abundant compared to the protection of the only asset of the dispossessed: labour power (*Arbeitskraft*).⁶

⁴ See Projeto de Lei de Crimes Eletrônicos, PL Nr. 84/99, available at the Web Site of the Brazilian Lower Chamber, <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=15028>

⁵ Lemos, Ronaldo (2007) Internet brasileira precisa de marco regulatório civil. UOL Tecnologia, 22 May 2007, available at <<http://tecnologia.uol.com.br/ultnot/2007/05/22/ult4213u98.jhtm>>

⁶ “Noch gilt das Ding dem Rechte vielfach mehr als der Mensch. Noch bedroht unser Strafgesetzbuch den Einbruchs- und Rückfallsdiebstahl mit derselben Höchststrafe, wie den, der einm anderen absichtlich beide Augen ausschlägt, noch wird einfache Körperverletzung nur auf Antrag des Verletzten, den Diebstahl oder Unterschlagung ungleich wahrscheinliche als bei Beleidigung oder Körperverletzung, noch genießt das Vermögen im Strafgesetzbuch selber den vielfältigsten Schutz, das einzige Vermögen des Unvermögenden aber: die Arbeitskraft,

Klassenjustiz, thus, does not mean that a particular group is bending the law; it rather refers to using discriminating prejudices in spite of the fact that it underpins the judge's notion to be acting in good faith.⁷

So if Marco Civil was a concrete response to a legal arrangement that blatantly ignored the social reality of Internet usage in Brazil, why should we care about its external dimension? Is not Marco Civil a domestic reaction to national Internet law?

The article makes the case that even though laws are enacted locally, sometimes they seem to be genetically coded for export. It is not a surprise that as soon as Marco Civil was promulgated, there were plenty of noted voices claiming to use it as a model for Latin America and for the world.^{8 9 10} The explanation for this has more to do with global functional linkages than any genetic engineering. Transnational linkages of ideas, conversations, as well as the global reach and pervasive nature of the Internet¹¹ are responsible for shaping an external dimension of laws that aim at regulating and steering it.

However, it is not easy to assess the external dimension of Marco Civil, especially when the origins are clearly local. The potential impact of exported-coded laws can be assessed with the help of the comparativist perspective. In fact, comparative legal scholarship provides some analytical tools to assess the export of laws from one system to another. Whatever understanding we might have of comparative law, it has been stressed that it serves several purposes: it

nur in zerstreuter Bestimmungen oder Sondergesetzen unvollständige und unzureichende Sicherung." Radbruch, Gustav (1993). *Justiz, Reform des Rechtssens und der juristischen Ausbildung*. Gesamtausgabe. Gustav Radbruch. Band 13, Politische Schriften aus der Weimarer Zeit. A. Kaufmann. Heidelberg, C.F. Müller.

⁷ Ibid.

⁸ Norberto Berner, publicly admitted that Marco Civil is a suitable model for the Argentinean Commission for Internet Policies (Capi). "Lo digo desde un sentido político. Yo quiero un marco civil de telecomunicaciones". <<http://www.lavoz.com.ar/ciudadanos/las-ensenanzas-que-deja-la-regulacion-brasilena-internet>>

⁹ Brazilian senator Lindbergh Farias claimed that the project is a model, and as such, it explicitly attempts to shape the international agenda. <<http://www.alliance-journalistes.net/article300.html>>

¹⁰ In a speech immediately prior to the signing, inventor of the World Wide Web Tim Berners-Lee called it a "fantastic example of how governments can play a positive role in advancing web rights and keeping the web open" and called for other countries to follow suit. <http://www.theregister.co.uk/2014/04/23/new_bill_signed_in_brazil_guaranteeing_civil_right_s_on_internet/>

¹¹ Schmidt, Eric (2013) Google in Europe: Innovations for a Digital Future, in Pernice, I. and Schwarz, R. (eds.) *Europa in der Welt – Von der Finanzkrise zur Reform der Unión*. Forum Constitutionis Europae- Band 12. Baden-Baden, Nomos.

is an academic discipline,¹² it serves as tool for reforming domestic law,¹³ as a tool of construction for filling gaps in legislation,¹⁴ as an complementary means of understanding or interpreting legal rules,¹⁵ and as a tool for promoting systematic unification and harmonization of law.¹⁶

The complexity of the problems arising from a hyper-connected world seems to vanish the clear boundaries between these purposes of comparative law. Pressing legal challenges, like “regulating the Internet” touches upon the whole disciplinary toolkit of comparative law, water down the boundaries within the discipline. Therefore, in attempting to elucidate Marco Civil from comparative perspective, it seems appropriate to begin with fundamental tasks like sketching the outlines of an external or comparative dimension of a certain law. In this case, we ask about the concrete meaning of Marco Civil’s external dimension. What is it? Why does it matter?

In order to begin with sketching the contour of what should be known as the external dimension of Marco Civil, we are well advised to begin conceptually at the abstract level, with the general textualism-contextualism dichotomy. On the one hand, contextualism suggests that if we want to study a foreign legal system, we should pay attention to the wider context, and specially its social function. This has been often linked to the “law in action” approach.¹⁷ The object lesson for this perspective is Montesquieu’s demand that this kind of study ought to consider even geographical issues of the legal systems. In a

¹² Savigny, Carl F. (1814) *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*. Heidelberg.

¹³ Cf. Sacco, Rodolfo (1991) *Legal Formants: A Dynamic Approach to Comparative Law*, *The American Journal of Comparative Law*, 39, 1, 1-34.

¹⁴ For an interesting typology, see Sitaraman, Ganesh (2008) *The Use and Abuse of Foreign Law in Constitutional Interpretation*. *Harvard Law Journal*.

¹⁵ Häberle, Peter (1989) *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat – Zugleich zur Rechtsvergleichung als „fünfte“ Auslegungsmethode*, *Juristenzeitung*, p. 913 ff; see also Frankenberg, Günter (1985) *Critical Comparisons: Rethinking Comparative Law*, *Harvard International Law Journal*, 26, 2, Spring, 411-56.

¹⁶ Comparative law has frequently been understood as the study of foreign law. In addition, this has assumedly served purposes related to the legal profession rather than the logic of generalization and the formation of working hypothesis. Since legal comparatists are frequently mandated to inform about foreign legal statutes, legal comparison has become a mere heaping up of data with no theoretical guidance. Such a “malaise” has been proclaimed by William Ewald, who made an analogy of comparative law with the activity of trivia, where data is thoroughly collected, but with no methodological consistency Ewald, William. (1998). “The Jurisprudential Approach to Comparative Law: A Field Guide to “Rats”.” *The American Journal of Comparative Law* 46(4): 701-707.

¹⁷ Ewald 1998: 702

popular passage he states that laws “should be so closely tailored to the people for whom they are made, that it would be pure chance if the laws of one nation could meet the needs of another”.¹⁸ Similarly, Lawrence Friedmann warned against taking laws as historical accidents or in any way autonomous of economy and society. Law – Friedman argues – should be conceived as a “mirror of society”, which reflects its “wishes and needs”.¹⁹

Competing with contextualism, we find textualism, mainly based on the insights provided by Allan Watson, arguing that law is mainly autonomous of surrounding society. He makes his case based on the fact that the *Corpus Juris Civilis* was transplanted from Roman Law, essentially unaltered, from society to society. I do not pretend to settle this old debate, but rather to take a closer look on one of the arguments put on the table. An ever more recurring phenomenon called “transplants” or “borrowings”. This is often referred to as “law in books”.²⁰

With the help of the textualist-contextualist dichotomy, the article will illuminate how contextual elements touch upon Marco Civil, exerting pressure on it, influencing its interpretation, and predicting policy collisions with Brazil’s neighbours. All of this begins to outline what I call the external or transnational dimension of Marco Civil; a dimension that would remain invisible without the comparative perspective. I do not claim the sketch to be exhaustive. I selected one legal provision from each of the three pillars of Marco Civil, this is, data protection, net neutrality and freedom of expression.²¹ The selection of these legal problems is consciously exploratory, because I am not aware of a previous scholarly reflection or description of the global role of Marco Civil.

¹⁸ Montesquieu, Charles (1961) *De l’Esprit des Lois*. Book I, Ch. 3 (Des lois positives) Ed. Garnier Frères [1741]

¹⁹ Friedmann, Lawrence (1973) *A History of American Law*. Simon and Schuster: New York.

²⁰ Watson, A. (1993). *Legal Transplants. An Approach to Comparative Law*. Athens and London, The University of Georgia Press.

²¹ Marco Civil became noted for these three pillars. However, a fourth aspect has not gotten the same amount of attention: the modernization of public administration.

3. When the Context Changes Across Time: Data Protection

One pillar of Marco Civil is data protection, regulated in its Chapter II. In regulating the treatment of personal data, MCI requires data controllers to secure the explicit consent from the affected person before processing his or her data.²² The “informed consent” scheme assumes that the data subject has a fair understanding the implications of him or her giving the consent. The scheme resembles the German “Einwilligung”. Empowering citizens to control the information about them is not new in Brazil. During the phase of dictatorship in Brazil (1964-1985), the State secretly collected critical information on its citizen in order to control political opposition. Once democracy was re-established and the National Information Service (SNI) disappeared, civil organizations feared that the collected data and information could be destroyed in the attempt to conceal the repression carried out by the secret services. Therefore, and with the aim of allowing citizens to know the information about them stored in public databanks, the constitution of 1988 contains a judicial action called Habeas Data. According to this legal provision, each person had the right to claim access to the previously secret data held by the State. This constitutional action underpinned the collective notion that data touches upon the personal sphere and impinges on the possibility of self-determination of the individual.²³ When done in violation of the rule of law, the affected individual is entitled to know, to correct, or complement the data. Although it was originally not conceived as a subjective right, but a judicial action, Habeas Data not only promotes a systematic understanding of the constitution of 1988, but also considerably influenced a portion of Latin America, but this was largely unintended because it was never conceived to be model for data protection regulation in the region.²⁴ Therefore, one could say that the notion of “informed consent” –even if borrowed from Europe– seems

²² “Art.7 Internet access is essential to the exercise of citizenship, and following rights are assured to the user:” [...] “VII. Non-delivery to third parties of his/her personal data, including connection logs, as well as access to internet applications, unless free, explicit and informed consent is given, or in those cases foreseen by the law” (my own translation)”

²³ Mendes, Gilmar and Branco Paulo (2014) *Curso de Direito Constitucional*. 9th Edition. Saraiva: São Paulo p.449

²⁴ Doneda, Danilo. (2008). 5º Encontro Íbero-Latino-Americano de Governo Eletrônico e Inclusão Digital. Florianópolis. available at
<http://egov.ufsc.br/portal/sites/default/files/livro_governo_eletronico_2.pdf#page=55>

to meet a distinctive local context, and to complement a pre-existing local legal institution like Habeas Data.

The challenge is to understand Marco Civil as a potential donor of norms. Comparative law and comparative politics offer an analytical toolkit of norm-diffusion that is insightful. Comparisons are not restricted to geographic criteria, this is, comparing two foreign systems. The comparativist is equally interested in anachronistic criteria, like comparing one system in different periods of history. Anachronistic comparisons allow for the analysis of different laws that ruled one single place; but it is also possible to study one single legal arrangement across time.²⁵ As the text of the law endures, it will often face a changing socio-legal context. Therefore, understanding a changing context can be crucial in fully understanding of political and legal institutions.²⁶

The time factor is especially pressing when it comes to technological progress. As law begins to address technology, the state of the art will have probable changed and moved forward. The Collingridge Dilemma probably best grasps this difficulty. Douglas Collingridge stated the famous dilemma consisting in the difficulty of regulating or controlling technology under uncertainty. It is uncertain, Collingridge said, how and where technology is evolving to. It will be almost impossible to predict eventual undesired consequences of technology at an early stage of its development. However, when problematic consequences of a certain technology become visible, it will be too late to regulate it because of its embeddedness in society.²⁷ When industries realize that they can profit from the efficiency of specialized IT providers and the underlying economy of scales, they begin to accept their dependency on third party suppliers. Lokke Morel claims that because of this logic of market competition information technology is turning into a critical business function for companies with the consequence that “now we see the early signs of information technology becoming a ‘utility’”. Morel goes even beyond Collingridges dilemma and ascribes to the technological imperative; technology, she says, cannot be stopped and will

²⁵ For an overview, see Djelic, Marie-Laure (2007) Sociological Studies of Diffusion: Is History Relevant?, in: Uppsala Lectures in Business Uppsala University, Department of Business Studies

²⁶ Nohlen, Dieter (2007) Ciencia Política. Teoría Institucional y relevancia del contexto. Ed. Universidad del Rosario: Bogotá, 2nd Ed.

²⁷ Collingridge, David. (1980). The social control of technology. New York, St. Martin.

progress well beyond the control of regulators.²⁸ Nicolas Carr phrased this imperative eloquently in that “the grid always wins”.²⁹

In regard to the explosive expansion of the Internet, just a few years ago there were some optimist notions about its inherent positive impact upon society. Most notable Yochai Benkler predicted a substantial democratic improvement of networks.³⁰ Today, scholars are admitting a sense of disenchantment.³¹ Among the several suggestions made by David Collingridge for coming to grips with the dilemma, is developing technology that remains controllable by political decision-makers. It should be stressed that this suggestion is one of a compound of solutions forwarded by Collingridge. If one is to be fair with his thesis of “The Social Control of Technology” and scrutinize the real impact of their claims, then the claims should be considered as a whole. Be that as it may, as the state-of-the-art of technology progresses, some scholars have noted that some of the assumptions of Collingridge might not hold in current times. Liebert and Schmidt claim that as we have entered the period of technoscience, many context related elements have changed dramatically. Thus, the culture of science has changes rendering knowledge “ubiquitous throughout the entire innovation process”.³²

It follows from the views mentioned above that regulating (information) technology not only supposes making decisions under ignorance and uncertainty, it also implies that steering technology is a challenge for political decision-making. The process of datafication that is being unleashed by big data analytics seems to confirm this deterministic view. Computer scientists are now able to derive novel kind of insights from their data thanks to the volume, velocity, and variety of the sources. New patterns of inferences appear when visualizing this ocean of data, and observers begin to identify correlation between phenomena; correlations that might sound absolutely counter-intuitive

²⁸ Morel, Lokke (2014) Big Data Protection. How to Make the Draft EU Regulation on Data Protection Future Proof. Appointment Lecture, Tilburg University, 14 February. p. 6. Available at http://www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/Moerel_oratie.pdf

²⁹ Carr, Nicholas (2013) The Big Switch. Rewiring the world, from Edison to Google. W.W. Norton & Co.: New York.

³⁰ Benkler, Yochai (2006), The Wealth of Network. How Social Production Transforms Markets and Freedom. Yale University Press: New Haven and London.

³¹ Moerel (2014)

³² Liebert, Wolfgang and Jan C. Schmidt (2010). "Collingridge's dilemma and technoscience." *Poiesis Prax*(7): 55-71.

for those who are used to thinking in consequentialist terms. Hence, new possible uses emerge for data; and for these secondary uses to provide useful insights, the data analyst requires more than “a lot” of data. He or she requires “all the data”.³³ The inferences and predictions that become possible are already enshrined in new services and business models for the private as well as for the public sector. Undoing big data seems unthinkable and would confirm Collingridge’s dilemma. Scholars are increasingly warning that the user has no possible means to foresee all the uses that personal data allows. In this scenario, the requirements of informed consent and data minimisation lose their entire efficacy. When the user checks the box at the end of a website disclaimer risks becoming a banality.³⁴

Nonetheless, there are some authors that reject any sort of technological determinism that they might perceive from this debate. Even though they admit that it is just a matter of time that technology will find its path anyway, they claim that it is not true that society cannot control it by means of regulation. Francis Fukuyama argued that “the pessimism about the inevitability of technological advance is wrong, and it could become a self-fulfilling prophecy if believed by too many people. For it is simply no the case that the speed and scope of technological development cannot be controlled”.³⁵

At this point, the comparativist would ask whether it is not becoming clearer that the context of data usage decisively influences the efficacy of law across time. Comparing the technological state of the art of 2007 with today suggests that, if we are to export Marco Civil to the region, it would be wise to include a reflection about datafication and the dramatic changes it provokes in the context in which law has to operate. Big data is exerting strong pressure on our current paradigms of informational inquiries, intellectual reasoning, and our sense of identities.

³³ Mayer Schönberg, Viktor and Cukier, Kenneth (2013) *Big Data. A Revolution That Will Transform How We Live, Work, and Think*. Houghton Mifflin Harcourt: Boston and New York.

³⁴ Lokke Moerel calls this „routinization of consent“, Moerel (2014) p. 24, also referring to Brownsword, Roger (2009) *Consent in Data Protection Law*, in Gutwirth, S. et al. (eds.) *Reinventing Data Protection?* Springer, p. 90

³⁵ Fukuyama, Francis. (2002). *Our Posthuman Future*. London, Profile Books.

4. When Conversations and Ideas Shape the Context: Net Neutrality

Marco Civil settled the question of net neutrality in Brazil. Article 9 introduces the formal policy of net neutrality, the second pillar. Network or net neutrality is a principle, according to which the access to the network, to its applications, contents and websites should be provided on a non-discriminatory basis. Those who manage the network should not be able to give priority to some users over others in terms of quality or speed.

If we are to accept the thesis of Law in Context, we can also tinkle with the thought that when laws and norms begin to spread, they face specific historical and social contexts in which they are adapted and transformed.³⁶ This is contextualization in action. When it comes to ideas and beliefs, they have to be translated from “from one historical time and cultural setting to another. Such translation processes may involve appropriation, resistance, and reinterpretation”.³⁷ The law in context approach is not so much interested in the exegetic properties of the law. It rather asks about the contact, impact or interaction between law and context; what we called contextualization. For this to be meaningful, we need to consider the drivers for laws to be exported and imported. One important driver is an idea, especially when it is able to persuade lawmakers to enact specific statutes. But most ideas are also bound to contexts. Therefore, the process of translation is very relevant for ideas to travel and for those ideas to persuade policy makers to adopt laws.

Thus, unless we ascribe to the law in books or textualist thesis, we realize the critical function of the ideas on which laws are grounded. These ideas travel too. Moreover, they are connected to the text of the laws that begin to be enacted in the new setting. These connect between ideas that travel, and the laws that emerge upon them are one of the major determinants of the contextualization of law. And comparative legal scholarship is the discipline called to understand the interaction between travelling ideas, adaptation and, ultimately, their crystallization into law. The spread of law across territories will

³⁶ see e.g. Djelic, Marie-Laure (2007) Sociological Studies of Diffusion: Is History Relevant?, in: Uppsala Lectures in Business Uppsala University, Department of Business Studies

³⁷ Börzel, Tanja and Risse, Thomas (2012) From Europeanisation to Diffusion: Introduction. West European Politics, Vol. 35, Issue 1.

have a different mechanism depending on whether the law was incorporated because of sheer mimicry or a rational process of socialization and persuasion. This analytical tool is applicable to the spread of the law establishing the principle of net neutrality in Brazil. The search for the external dimension of Marco Civil leads to the ideas and debates around the policy issue of net neutrality. How do they diffuse from Brazil to its neighbours? What is the context that receives them? What are the probable implications of importing ideas and promoting laws based on these ideas?

Conversely, the law in books approach would immediately ask whether there are other systems that have already incorporated the text of the laws governing net neutrality. Textualists would immediately command their attention to the case of Chile, where net neutrality has been established by statutory law already in 2010, and assume that there is a probable link between them. Conversely, the contextualist approach would be interested in comparing the contexts, assuming that there are links and functions between the text and the context. Therefore, a contextualist question would be as follows: in terms of their relationship with their respective context, what are the differences between the Chilean (or any South American case) and the Brazilian case? Is there a link between the internal legal-political environments of South American legal systems with Brazil in particular? If so, what role do these connections play in the establishment of Internet law in general, and net neutrality regulation in particular?

The literature on diffusion of norms and ideas –especially its analytical toolkit– is very helpful in answering those questions. When ideas and debates are diffused, transmitted and exported, they bear the potential of persuading others to take action. They can equally unleash new conversations; conversations that will nourish the immediate intellectual and policy environment, as well as the broader cultural context. Nonetheless, the comparativist scholar is not only interested in idiosyncratic particularities of a given legal system. As suggested above, the resulting interaction between systems is what the scholar is interested in. By regulating net neutrality, Marco Civil da Internet touches upon the broader legal context of South American legal systems; it impacts their conversations, their legal cultures, as well as their underlying beliefs about their political economy. Furthermore, when it comes to Internet governance, those

ideas and beliefs take on a critical role. Justin Hurwitz made it explicit as he chronicled the creation of the Internet Governance Forum; he suggested that “controlling Internet governance requires controlling the conversation about Internet governance”.³⁸ The idea indicates that in the case of Internet governance the act of deliberation and its content are very important. As the conversation and ideas about Internet get translated into the context, they become part of it and might even have a greater influence in controlling the Internet than formal law-making process that are currently available in international public law or national constitutional law.

Hence, delineating the external dimension of Marco Civil da Internet entails, *inter alia* analysing the conversation about net neutrality in the region. The debate in South America is not nearly as passionate compared to the current policy struggles in Europe or the USA. Nonetheless, and despite the relative apathy that surrounds the internet governance debates in South America, there are interesting controversies that were imported from the US American policy debates.

The analysis of current debates on net neutrality is predominantly contained in US and European scholarship. It has been suggested, that much of the discussions taking place in the public sphere consists of advocacy work by different stakeholders, regardless of whether they adhere or not to the principle of network neutrality. Interestingly, vast portions of the debates are framed by a specific pattern of assumptions, which is, that the progressive penetration of information technologies, especially Internet, into society will spur more participation, more inclusion and enhance democracy. The positive mood around the initial moments of the Arab Spring underpinned this assumption. We now realized, that this techno-optimism³⁹ is just an assumption, or an attitude at best.

Douglas Kellner introduced the notion of informationism to describe the ideological twist of such an idea. A theory based on informational determinism

³⁸ Hurwitzs, Justin G. (2007) Whois WSIS; Whois IGF: The New Consensus- Based Internet Governance. Available at <SSRN: <http://ssrn.com/abstract=954209>>

³⁹ Brownsword, Roger (2004). What the World Needs Now: Techno-Regulation, Human Rights and Human Dignity. Human Rights. Global Governance and the ques for justice. R. Brownsword. Oxford, Hart. 4: 203-234. referring to Ridley, M. “We’ve never Had it so Good– and it’s all Thanks to Science” Guardian Life, 3 April 2003, p. 8

Kellner argues “exaggerates the role of knowledge and information. Such concepts advance an idealist vision that excessively privileges the role of knowledge and information in the economy, in politics and society, and in everyday life”⁴⁰

When applied to the debate of Internet regulation, informationism can be deployed at will to defend any policy stance whatsoever. Brian Dolber sketches the paradoxical traits of the net neutrality debate in the US. Two industries claimed simultaneously to be advancing democracy, whilst invoking arguments that contradicted each other. Telecommunication corporations instantiated the thesis that access to the network was essential for full political participation. This was especially true –so the argument– for the lower income and less educated population. On the other side, there was the “cultural production thesis, which argues that new media technologies open up the possibilities of user-generated content, disrupting the top-down flow of information characterized by the broadcast era”.⁴¹

For advocates of both positions, the principle of net neutrality plays a critical role. Enterprises that provide online contents, as opposed to mere access to the network, have a vested interest in multiplying the production of digital content. The more freedom users have to produce, upload, share and consume online contents, the more will the market grow for content providers. Search engines, social media, and online news agencies usually bolster a public discourse that associates their business model with the maintenance and provision of freedom of expression. Stating the argument in other words, in a free Internet both, the digital economy as well as freedom of expression will blossom together. According to this discourse, net neutrality can safeguard the necessary freedom of expression because it would treat every user equally in that their data-packages sent through the network would be conveyed on an egalitarian basis, regardless whether they correspond to videos, sound, pictures files or mere e-

⁴⁰ “Hence, in order to avoid the technological determinism and idealism of many forms of postindustrial theory, one should theorize the information or knowledge “revolution” as part and parcel of a new form of technocapitalism [...]rather than merely obsessing about “new technologies” or “globalization,” without seeing the articulations of these phenomena.” Kellner, Douglas (2003). *Media Spectacle*. London, Routledge.

⁴¹ Dolber, Brian (2013). *Informationism as Ideology: Technical Myths in the Network Neutrality Debate*. *Regulating the Web. Network Neutrality and the Fate of the Open Internet*. Z. Stiegler. Plymouth, Lexington Books.

mail text. No data crossing the network can claim priority to pass. As a consequence, no user will enjoy priority over others. Upholding this principle makes it, therefore, unnecessary to inspect the data at the network level. The consequence is that users have no need to fear censorship. Content providers brand themselves as “[providing] a public service to the tech savvy”.⁴²

The opposite discourse comes from the side of telecommunication providers, albeit equally democracy-oriented. These companies provide the necessary infrastructure for the user to access the network. They transport their data regardless of whether it is a power-user that originates a heavy traffic load, or an occasional web surfer. The principle of net neutrality hinders business models based on differential treatment of their clients because they cannot discriminate their data traffic. Hence, telecommunication firms cannot charge different prices based on consumption patterns. Here the discourse affirms that this is a market malfunction that hinders the expansion of their scope of services. Thus, if the market was allowed to work efficiently –by developing custom tailored services- these firms could reach new users that are currently deprived from enjoying Internet access. It is notorious that it is not precisely the prosperous groups that lack Internet access, but the poorer communities. Similarly to the cultural production thesis, the “access thesis” claims that net neutrality hinders the inclusion of segregated population. It expands the digital void because it keeps them away from reaping the benefits of online communication.⁴³

The existence of a public conversation depends on the existence of a public sphere, be it digital, printed or broadcasted.⁴⁴ In turn, how the public understands the problems under discussion is related to how the media frame the discussion; “facts remain neutral until framed”.⁴⁵ Free and pluralistic press

⁴² Ibid.

⁴³ Allegedly, this is especially true for those racial minorities in the US that are underrepresented in the cultural, economic and political life of the country. According to this discourse, access can curb the democratic deficit by enhancing inclusion and participation. Dolber shows how American telecom companies specifically targeted African American leaders to support legislation that was explicitly not network neutral. In order to reinforce the notion of access as participation, the discourse framed net neutrality as a “white” issue that predominantly benefited highly educated, white population. See Dolber (2013)

⁴⁴ A public sphere is crucial for giving voice to people. In the digital era, the Internet can provide the necessary space for the individual to participate in policy processes that have a global reach. See Pernice, Ingolf „Global Constitutionalism and the Internet. Taking People Seriously”, p. 21, forthcoming.

⁴⁵ Kuypers, Jim A. (2002). *Press Bias and Politics: How the Media Frame Controversial Issues*. Westport, Praeger.

coverage can underpin an informed public debate. Stiegler and Sprumont mapped the net neutrality debate held in the US media. In their work, they acknowledge several attempts by some to frame the network neutrality debate as a narrow, one-issue problem. It is a communications manoeuvre known as agenda-extension, and which “occurs when the media move beyond the strict reporting of events” and “frame and issue so that it will be interpreted in a specific manner”.⁴⁶ Despite the marked ideological framing found in some media, Stiegler and Sprumont were still positively impressed by the considerable amount of neutral, fact-oriented reports found in the press that balanced the debate.⁴⁷ But along with balanced media coverage, it should not be forgotten by anyone that it is the democratically elected political institutions that are ultimately accountable for sustaining democracy and not the corporate elites. To be sure, there are plenty of innovative forms of regulation, where private stakeholders can participate, including modes of self-regulation or, why not, even co-regulation. However, allowing the ideology of informationism to constrict the legal debate will not only be unhelpful, but also undermine an informed political deliberation.⁴⁸

In terms of the external dimension of Marco Civil, the establishment of network neutrality can have immense effects on Brazil’s neighbours. Whether this is positive or negative is a normative question that goes beyond the goal of this article. However, the interest here is the analytical framework of comparative law in order to outline the expected impact of the diffusion of Marco Civil da Internet. If network neutrality were to be exported to other South American systems by simply copying the black letter, it would certainly get the attention of scholars using the law in books approach. Conversely, law in context emphasizes the ideas, beliefs and conversations that surround the law. This is what impacts the core of Internet governance; controlling the conversation about Internet governance implies controlling Internet governance. Thus, observing how the conversation itself about net neutrality

⁴⁶ Definition by Jim Kuypers, in Kuypers, J. A. (1997). *Presidential crisis rhetoric and the press in the post-cold war world*. Westport, Praeger.

⁴⁷ “The value of the neutral stories in our sample is that they tend to provide audiences with the most information about net neutrality, presenting various aspects of the debate for audience members to evaluate”

⁴⁸ Moreover, if the “access thesis” be accepted, it would openly contradict article 7 of Marco Civil, which states that access to the Internet is essential to the exercise of citizenship

spills over to other systems is much more relevant for assessing the impact of Marco Civil within the region. Furthermore, accurate and pluralist information can empower citizens in order to join constitutive dialogue and participate in the political processes that are currently taking place at the global level.⁴⁹ The contextualist approach would expect these conversations to eventually crystallize in legal statutes that correspond to the idiosyncrasy of every legal system. This would happen so, unless there is a mere repetition of ideological arguments based on informationism. This would entail a war of slogans against slogans.

In addition, as the ideas underlying Marco Civil begin to spread across the region, law in context will pay attention to eventual clashes with contexts shaped by different legal-cultures. An example of this scenario is the eventual collision of laws with the Chilean system, where the net neutrality debate began as a matter of consumer protection law in 2007. In that year, inspired by the proposal drafted previously by the US Federal Communications Commission, the Chilean Parliament began discussing the same issues, this is, transparency of the services provided to Internet consumers, non-discrimination, and access to content. The legislative proposal was initially framed as a measure for consumers' protection. During the debate, the proposal was complemented with provisions like "right to access to information", "Freedom of expression"; all concepts that are closer to the Brazilian debate on Marco Civil da Internet than Chilean consumers' protection law. Be it as it may, the proposal mutated from a consumers' protection act, into a national "framework law" regulating overall telecommunication, and was approved by the Chilean Congress in 2010. Today, the regulatory practice of the government suggests that in Chile, net neutrality seems to be rather a matter of anti-trust law and not as a democracy enhancing issue.⁵⁰

⁴⁹ Pernice, Ingolf (forthcoming) Global Constitutionalisms and the Internet. Taking People Seriously. On file with the Author. For Pernice, *taking people seriously* entails several constitutive elements, among them knowledge, education and information. They all enable people to participate in relevant political fora. See p. 19, 20

⁵⁰ Until today, it is mostly the Chilean Trade Commission that has further regulated net neutrality with the aim of securing a functioning digital market and suppressing monopolistic behavior within it. See <http://www.subtel.gob.cl/transparencia/Perfiles/Transparencia20285/Normativas/Oficios/140c_0040.pdf>

To be sure, the diffusion of Internet law across South America is an under-researched topic. It is clear, though, that the diffusion of the Brazilian net neutrality provision will meet some contexts that are shaped by different beliefs and narratives. Engaging those culturally and legally differing contexts is a task of the external dimension of Marco Civil.

5. When Black Letter Laws Collide: Freedom of Expression and Trade Law

Section III, art. 19 is properly a provision of tort law. It exempts Internet access provider from any liability in case of violation of property laws perpetrated by the users,⁵¹ and holds content providers liable only if they fail to obey a previous judicial order.⁵² This last norm hands to the judiciary the power to authorize the blocking and takedown of online content. Apparently, the boldness of this provision is due to the impact that the Electronic Crimes Law (*Lei Azeredo*) caused on the promoters of Marco Civil. Art 22 of that criminal statute established the duty of Internet Service Provider to discretely alert the authorities whenever a suspected crime was reported to them. So, the law would have “created an obligation of surveillance by private entities, disregarding constitutional principles including those governing criminal, like the presumption of innocence, privacy and due process of law.”⁵³

Regarding the external dimension of Marco Civil, the scheme stands in open contradiction to the dominant regulation in South America; at least with South American trade law as instantiated by the US commercial strategy. That arrangement crystallizes the “notice and take down” framework, a regulatory scheme introduced by the Digital Millennium Act, by which ISP’s do not bear responsibility for the content end users are giving to the Internet service. That

⁵¹ “Art. 18 The provider of internet connection will not be civilly liable for damages stemming from content generated by third parties” (my own translation)

⁵² “Art. 19 With the aim to ensuring freedom of expression and to prevent censorship, the provider of Internet applications can only be held liable for civil damages arising out of content generated by third parties if, after specific court order, fails to take measures within the framework and technical limits of its services and timely mentioned, to make the content identified as infringing unavailable, except for contrary established statutory provisions.” (My own translation)

⁵³ Fundação Getulio Vargas (2008) Comentários Sugestões sobre o Projeto de Lei de Crimes Eletrônicos. August 2008, p. 5 (my own translation)

immunity, however, is conditional on the immediate response to eventual copyright infringement, as soon as the provider is notified.⁵⁴ In other words, content that appears as contravening copyrights must be removed by ISP without any kind of judicial procedure.

Beginning in 2004, the US government changed its overall approach to the negotiation of free trade agreements with third countries and required the inclusion of a set of provisions related to Internet. The package of Internet provisions were introduced in the free trade agreements that the US signed with Chile,⁵⁵ Dominican Republic and CAFTA,⁵⁶ Morocco,⁵⁷ Colombia,⁵⁸ Australia,⁵⁹ Bahrain,⁶⁰ Peru,⁶¹ Korea,⁶² Panama,⁶³ and Oman.⁶⁴ All these treaties contain the same clause that binds the parties to adapt to the notice & takedown scheme.⁶⁵ From that moment, it becomes an obligation stemming from international public law that states introduce into domestic legislation any needed change necessary to conform with the agreements.

This particular collision seems to underpin the notion of system competition. The idea behind this term is that transnational flow of capital will promote the unification of national and regional regulations.⁶⁶ However, there is little research on the frictions and tensions produced by capital driven and Internet

⁵⁴ Kurbalija, Jovan (2010) *An Introduction to Internet Governance*. Diplofoundation, Geneva.

⁵⁵ Entered into force on 01.01.2004. Text available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta>

⁵⁶ Entered into force on 05.08.2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta>

⁵⁷ Entered into force 15.06.2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta>

⁵⁸ Entered into force 22.11.2006 available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>

⁵⁹ Entered into force 01.01.2005, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta>

⁶⁰ Entered into force on 11.01.2006, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta>

⁶¹ Entered into force 12.04.2006, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-fta>

⁶² Entered into force 30.06.2007, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta>

⁶³ Entered into force 28.06.2007, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-fta>

⁶⁴ Entered into force 01.01.2009, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta>

⁶⁵ The same applies to the inclusion of ICANN's Uniform Dispute Resolution Policy as a condition for negotiating these agreements.

⁶⁶ Sinn, Hans-Werner (2003) *The New Systems Competition*, London; Wilson, John (1999) *Theories of Tax Competition*. *National Tax Journal* 52: 2, 269-304, for an overview.

driven forces for unification. The story of conflict of laws around the takedown of protected digital content is still beginning.

6. Conclusion

When it comes to the efficacy of Internet law and policy, context elements are crucial, especially when laws aim at going regional, or global. Roger Brownsword stated it in the following words:

“When local regulation attempts to go regional, these problems do not recede; and as regulation assumes global aspirations the limitations are exacerbated and, if anything, multiply. We might say, therefore, that global law is local regulatory limitation writ large”.⁶⁷

Marco Civil gives the impression to be coded for export. This is due to the transnational and global linkages that are connected with the global and pervasive nature of the Internet, and the diffusion of discourses, ideas and conversations. Therefore, many policy-makers feel the urge of exporting or importing certain type of Internet law. However, as I claim in this article, importing a plural conversation is preferable to importing black letter text both, for democratic deliberation and for the efficacy of law. To be sure, the procedures must also be rational.⁶⁸ This argument should be taken seriously in times of prevalence of the *praesumptio similitudinis*, this is, that similar problems must have similar solutions.

Finally, the external or transnational dimension of Marco Civil requires people to pay attention to the tensions, contradictions, and collisions that this statute may encounter when crossing the borders. For contextualism, these tensions are normal and even healthy; hence, we need not work them out by disabling one system. What is truly required is that the collisions, conflicts of laws, and tensions be worked out within the rules of democratic deliberation, whether

⁶⁷ Brownsword, Roger (2004). What the World Needs Now: Techno-Regulation, Human Rights and Human Dignity. Human Rights. Global Governance and the quest for justice, in Brownsword, R. (ed.) Oxford, Hart. 203-234.

⁶⁸ Rawls, John (1997) The Idea of Public Reason Revisited 64 *The University of Chicago Law Review* 765

through legal harmonisation or through rules of conflict, and by lawyers, policy-makers, and users that have a sense for “law in context”.

.