



Clara Iglesias Keller

Exception and harmonization

Three theoretical debates on Internet regulation

ABSTRACT

The article discusses a selection of theoretical inputs underlying discussions on the regulation of Internet-based services. Since the Internet's expansion into civilian use in the 1990s, the debate on regulation of specific digital markets (e.g. audiovisual services, social networks or transportation services) has skirted around the ideas of exception and harmonization. That is to say that stakeholders have often approached these debates from the narrow perspectives of topical sectoral conflicts of interest, where policy choices swung between extension of pre-existing legislation to new services and exceptional measures (which often meant no measure). There are, however, theoretical frameworks that may underpin and inform regulatory choices in the face of those dilemmas, broadening the understanding of the challenge of Internet regulation and what it demands from legislators. This article aims to contribute to this framework by bringing three strains of theories applicable to Internet regulation. Namely on (i) the theoretical context of insufficiency of traditional regulatory means and the quest for other means of legitimation; (ii) on the peculiar challenges that technologies impose on regulators; and (iii) on how these challenges are reflected in the specific context of Internet based services. Hence, it proposes a recapitulation of the academic literature that has dealt with such issues and that is relevant to digital regulation discussions across different markets.

KEYWORDS

Technology regulation; Internet regulation; Exceptionalism.

INFO

Dr. Clara Iglesias Keller is a postdoctoral fellow at the Leibniz Institute for Media Research and an associate researcher at the Alexander von Humboldt Institute for Internet and Society in Berlin. She holds a Doctorate and a master's degree in public law from the Rio de Janeiro State University and an L.L.M in Information Technology and Media Law from the London School of Economics and Political Science. Her current research is dedicated to information technology regulation, with special focus on internet governance structures and regulation of online speech.

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1 INTRODUCTION

The debate on Internet regulation has been evolving together with the network's own process of transformation and expansion. As a result of several decades' worth of technological development, the Internet was presented for civilian and commercial use at the beginning of the 1990s and subsequently went on to pervade all spheres of life, becoming a tool for work and leisure and for the exercise of citizenship and identity.

As the virtual world has overflowed into the physical world, it has also been exposed to circumstances that traditionally motivate state action as a response to social and economic demands for pacification and legal certainty. Conflicts of interest involving individuals or private enterprises, claims for accountability in the spheres of civil and criminal law, and the emergence of new markets (together with the disruption of traditional ones) have been turning up in ways as dynamic and as creative as the technology itself. Since then, a debate has surfaced about the governmental regulation of those domains. Such a debate may, in a (perhaps overly) simplified way, be characterized as a clash between the ideas of *exception* and *harmonization*. That is to say, while some argue for the exceptional character of the Internet (which would allow governments to address the issue in a different way, or even not to address it at all), others argue for the *harmonization* between the Internet and those legal systems that regulate the activities enabled by the Internet itself.

By the late 1990s, when the Internet was still an enigmatic virtual environment with global reach and the myth of anonymity still prevailed, the possibility of implementing rule of law – either by means of laws or of judicial rulings – was still uncertain. At first, specialized literature on the debate – mostly represented by 'americans who thought about the issue in scientific and activist terms' (Pohle & Thiel, 2019) - addressed the issue as a mere possibility or even as an impossibility: was it possible to regulate the internet?

In his iconic *A Declaration of the Independence of Cyberspace*, John Perry Barlow applauds the emergence of the Internet as a democratizing, decentralized force, with no territorial limits and immune to institutional control (1996). Denying the legitimacy of governmental control over what was then understood as a completely new space, the declaration is still seen as an epitome of the discourse known as *exceptionalism*. Arguing that the Internet would not be amenable to regulation by international law, this view – shared by many engineers and scholars who took part in the network's original implementation – furthered the perception that it was not possible to control the Internet. Such an approach could focus on the promise of users' direct participation in deliberative processes, on the new tool's potential for democratic advancement, or on its transboundary character. David Post and David R. Johnson (1996), for instance, ascribed the impossibility of regulating the internet mostly to its global interconnected reach, which would call for a new regulatory system freed from territorial jurisdiction doctrines, and also for new rules on the definition of property, legal personality, and the

virtual community's fundamental values.

It eventually became clear that the Internet was not immune to 'the longer and deeper forces that shape human history' (Wu, 2010). With works such as those of Joel Reindeberg (1998) and Lawrence Lessig (1999 and 2006), exceptionalist ideas were confronted with the inexorable fact that the systems architecture that enabled the building of the Internet is in itself a means of regulation. The way Internet systems are designed dictates rules of behavior for users, and the implementation of use, information, and access policies is intrinsic to the network's design and setup. All that is done online can only be done because it is allowed, and it is allowed by those who build the codes – the chain of companies and agents that operate all services that jointly make Internet access materially possible.

The idea that Internet operation was characterized by its very own regulatory nature, especially as formulated by Lessig, has paved the way for the specialized literature's subsequent trajectory and stands out as a reference point for scholarly debates about different forms of regulation, including regulation by the government. Nevertheless, those debates – extended over the years to a range of political and economic spheres – still rage on. Reasons for their persistence include the fact that the features that define the Internet and that inspired exceptionalist ideas – its global reach, its private character, and the tendency to innovation and digitalization, for instance – still appear to regulators as challenges that hinder the application of traditional legal mechanisms to virtual interactions.¹

In this context, the tension between exception and harmonization still characterizes most of the debates on the demand for regulation of digital markets. Are social networks similar to other publications or should they be seen as mere intermediaries that promote a different form of communication? Should passenger transport services offered through applications be treated as taxi services? Should audiovisual content provided by online streaming platforms follow the same rules as mass electronic communication services?

Adopting a prescriptive approach in debates such as these is something that calls for a great deal of work in considering the technical specificities of the Internet and the social and economic variables of each market involved in the discussions. Nevertheless, there is indeed a theoretical framework that can inform and underpin regulatory choices involving those dilemmas, which are still approached from a narrower perspective related to

¹ Eager to implement traditional enforcement mechanisms based on the traditional logic of authority and coercion, some regulatory initiatives have enjoined on Internet companies some technical choices that may impinge on the network's openness and, in so doing, may disproportionately restrict the exercise of fundamental rights related to freedom of communication. This is the case, for instance, for the American SOPA/PIPA bills, the French legislation that allows blocking access to sites of terrorist propaganda without a court warrant and the European Union's Copyright Directive (which, among other things, enjoins the use of content filters for the protection of copyright). Other paths have turned out to be ineffective, such as the self-regulatory mechanisms based on consent for the legal treatment of data protection, or court rulings to restrict the circulation of certain contents by blocking sites. In both cases, policies failed to recognize the technical features that determine the virtual behavior of companies and users; unspoken codes of conduct and a whole culture of enjoyment have been built on the basis of those technical features.

topical sectoral conflicts of interest. No doubt that sectoral analyses at that level are relevant and crucial for producing public policies. But they do not represent all that exists in terms of legal arguments capable of defining a role for the state in the face of new technologies (a role that should take into account the full diversity of constitutional values that come to light in those conflicts).

Those analyses should be supplemented by theoretical inputs developed in the specialized literature and are instrumentally related to the context. They have to do with (i) the contemporary scenario marked by the insufficiency of traditional regulatory means, which promotes a quest for other forms by means of which state action may be legitimized; (ii) they also relate to the peculiar challenges which technology presents to regulation agents and (iii) with the way they these challenges present themselves in Internet based policies. This paper's goal is to outline a synthesis of this academic literature, assuming that it should be taken as a starting point by prescriptive analyses of the subjects in question.

As limited as it might be, such a synthesis may facilitate a broader contextual understanding and offer guidelines for deeper segmented analyses having to do with the regulation of Internet-based services. This will be done in three sections related to the aforementioned theoretical perspectives and arranged according to the comprehensiveness of the debates, from the most comprehensive to the most specific. Therefore, the first section will take up the instrumental debate, inspired by a diversity of regulatory environments which are seen as complex and uncertain, which are reflected in different theories focused on the insufficiency of enforcement means. The second section runs through the main contributions of the academic literature with a specific focus on the challenges that technology poses to regulators. Finally, the third section discusses theories which understand the Internet as an autonomous technology, exploring policy choices suitable for the virtual environment.

2 THE INSTRUMENTAL DEBATE: INSUFFICIENCY OF MEANS

Legal relations that hold on cyberspace are influenced by a variety of agents, both public and private, in a domestic or global level, and whose practices can materialize either in a normative or non-normative way. In spite of this fuzzy network of influences, which ultimately amount to the activity of private enterprises, the significant role that states play in Internet governance is now being acknowledged. Now that the myths of non-physicality and of the difficulty of defining a jurisdiction have had their argumentative value partially debunked²,

² I refer here to the loss of argumentative value, since non-physicality, for instance, still persists inasmuch as the Internet still materializes in a virtual environment; what I mean is that the argument itself has long lost its force as an excuse for state inaction. As far as the difficulty of defining a jurisdiction in a global environment is concerned, besides the adoption of technological barricades with potentially antidemocratic and fragmenting implications, few appropriate solutions have been

the organizing action of governments in compliance with the purposes of constitutionalism is not only to be legitimately expected. It is also a defining agenda for the way the Internet is and will be affected by the institutions that underpin democratic regimes.

That occurs in the first place because, irrespective of instrumental debates, positive law has always applied in the virtual domain to a measure that depends on the possibilities of enforcement according to each particular case. There could not be ‘no Internet content regulation at all’ for instance, because legal frameworks have long-established rules of civil and criminal liability whose relevance cannot be denied (Marsden, 2011) – although the relevance of the enforcement mechanisms chosen to apply them can.

Furthermore, news reports of rights violations by companies that operate in Internet markets are always surfacing anew. Personal data violation, virtual surveillance, and harmful content propagation are just a few practices which are so interwoven into the Internet business models that the solution for them will hardly come from self-regulating arrangements. It is not by chance that we are now looking at a nationalization of such debates, in which governments once more take it upon themselves to fight against Internet market failures which have increased to an unsustainable proportion in current democracies.

As such, the demand for state action is now taken for granted. Excluding from the analysis both extremes of state action on the Internet – total permissiveness (either intentional or as a result of analytic paralysis) or the isolated national Internet paradigm – current efforts by public and private agents and scholars now revolve around how to regulate the Internet while imposing the least possible losses on the collective democratic and economic benefits that an open network can potentially generate (West, 2016). In spite of the unquestionable urgency of the matter, one can still notice an insistence in mechanisms that have already been unsuccessfully implemented in the past, in prohibitionist policies, and even in criminal liability-based policies.³

Besides promoting a closed and fragmented Internet (and overruling the network’s unquestionable role on the promotion of freedom of speech, innovation, and access to knowledge), such measures are not effective in promoting the legal purposes that inspire them. In the face of those difficulties, one of the commonly explored arguments in the context of the debates hinges on the presumed *insufficiency of mechanisms for drafting and implementing public regulatory policies in a technological and dynamic environment*. In this perspective, the

envisioned. In this sense, I don’t take the challenge to have been completely beaten, but I do state that it has lost its argumentative value, because there are different ways in which several degrees of territorial limitation of online content can be materialized.

3 See e.g. the Australian law that provides for criminal liability of social media platform executives who fail to remove what is referred to as “abhorrent violent material.” KARP, Paul. Australia passes social media law penalising platforms for violent content. The Guardian, April 4, 2019. Available at: <https://www.theguardian.com/media/2019/apr/04/australiapasses-social-media-law-penalising-platforms-for-violent-content>. Accessed in: April 4, 2019.

discussion on Internet regulation is placed inside a broader instrumental debate about relevant modalities and strategies for the regulation of globalized, complex environments characterized by knowledge uncertainty (Grafenstein, 2018).

In this context, the difficulty of adhering to traditional means can be identified as an *underlying common phenomenon* having segmented theoretical and empirical consequences which are expressed according to different terminologies. These are distinct theories developed in different fields of law that make a common effort towards interpreting the insufficiency scenario. Many of them were developed before or during Internet regulation debates and are not necessarily influenced or conditioned by those debates. Gunther Teubner describes this scenario as the ‘rapidly proliferating number of regulatory spheres in which specific regimes are being established and, as global regimes, are thwarting the local or regional autonomy of the nation state or territory’ (2012). This fragmented subjective aspect, which is necessarily decentralized from the state, favors the adoption of soft law instruments (either by themselves or combined with traditional hard law) ‘capable of directing public policies or recommending the implementation of institutional changes’ (Binenbojm, 2016) in member states or of constituting internal organizational policies in the form of guidelines, general principles, recommendations or product policies.

Indeed, these theories result from the academic literature’s attempts at understanding, and conforming with, a (to some extent) new context of economic and cultural globalization. The transformation of this paradigm has been going on for decades, but one can say that it gained momentum since the 1990s and has been potentialized by an increasingly swift technological development. I refer here to the ideas of *Post-Regulatory State*, *Administrative Decentralization*, *Global Administrative Law*, and *Global Constitutionalism*.

Colin Scott (2004), for instance, talks about the *Post-Regulatory State* when dealing with a future model of state action after the transition from the Social Welfare Model (based on public ownership of means of production, direct state intervention, and integration between the creation of public policies and operational functions) to the Regulatory State. In contrast to the preceding paradigm, the Regulatory State has diluted direct state intervention in the economy, establishing a model that features a separation between operational and regulatory activities, a tendency to separate buyers and suppliers of public services (through hiring policies and market tests), a separation between operational and political activities inside governmental departments, and the creation of executive agencies (Scott, 2004). According to this model, regulation incorporates the idea of subsidiarity, which involves recognizing the general principles of free initiative and free enterprise while the state is left with regulation as an instrument to guide the action of private actors towards the implementation of fundamental values (Justen, 2002).

According to Scott, the next stage – the *Post-Regulatory State* – is characterized by theoretical and empirical tendencies that ‘challenge the idea that regulation should be oriented to the state’s capabilities’ (2004, p. 147).

Its main features are the blurred borders between states and markets and between public and private realms, which were previously sharply defined. The significant features of this model identified by the author and highlighted by Murray (2008) include: *variety in norms*, manifested in a plurality of state actors with formal rule-making capacity and in the adoption of soft law and contractual law instruments (while the Regulatory State was based on primary and secondary legal rules) *variety in control mechanisms*, which used to be based on the state's normative hierarchy and now must be realized through alternate paths (a point illustrated by the author with the help of Lessig's view of four basic types of control mechanisms – law, social norms, market, and architecture); *variety in controllers*, in which the exclusive legitimacy of the nation-state gives way to a range of legitimized governmental, non-governmental, and supra-governmental organizations; and, finally, *variety in controlees*, in which business are no longer the sole addressees of control actions, based on the recognition of the fact that the behavior of a variety of actors has a significant impact on the social and economic order.

In her actor-based approach, Julia Black (2001) describes the same phenomenon as *decentring*, characterised by a moment in time in which regulation begins to materialize by means of indirect strategies. Black relates the post-regulatory movement to a broader understanding of the concept of “regulation” so as to embrace hybrid and indirect techniques in addition to state-centralized normative production.

Although she recognizes that the term applies to a variety of institutional arrangements, what is significant here is Black's reference to “decentralized regulation” techniques or what she describes as ‘regulation in many rooms’ (Black, 2001, p. 114). These techniques reflect the idea that regulatory activity, seen as an influence on collective behavior exerted by a public or private actor, can be separated from the state and be fulfilled in a decentralized way by a range of social actors of a legally diverse nature. That includes private organizations, collective associations, technical committees, professions, and even private market agents.

Furthermore, the existence of a *global administrative law* has been noted and pondered by different authors (Dimitropoulos, 2012; Vermeule, 2012; Baptista & Coelho, 2014). Its distinctive component is the creation of administrative rules with global reach by a network of public and private agents that should not be confused with the state itself (Dimitropoulos, 2012). It may be said to harbor a dispute for the means of implementation of administrative law, for those entities pursue their policies through instruments that break away from the typical normativity of internal (administrative) systems in their not being binding and mandatory. In this sense, global administrative law can be understood as ‘a parallel law framed in international negotiation forums, coined in governmental and non-governmental agencies, with the aim of meeting the needs [of] economic sectors that function in the global space’ (Baptista & Coelho, 2014, p. 803). Its significance is ascribed to the demand for a de-territorialized administrative law. Such a demand is due to the ‘feverish deterritorialization of globalized economy’ (Binenbojm, 2016, p. 311) potentially capable of influencing institutional regulatory design, interacting with primary sources and conditioning the legal interpretation of hard law (such as the actions of national public administrations), and thus becoming an important component of administrative legality.

This paradigm also finds expression in constitutional law, where the debates revolve around the application of constitutional structures to hybrid arrangements (such as international organizations where states are either present or represented, dedicated to the discussion and development of policies in specific arenas) and even to transnational arrangements from which states are completely absent (Teubner, 2011). What gains significance in this context is the application of substantive principles particular to the idea of the Rule of Law, namely due process of law related guarantees (Binenbojm, 2016).

Whereas a deep look into each one of those theories and their results is out of the scope of this article, it is crucial to recognize them as the theoretical setting for Internet services regulation. They illustrate responses to complex regulatory environments, while simultaneously offering a unique perspective on the state and its roles. As theoretical constructions around the same phenomenon, they serve as a background for the pursuit of effective solutions and at the same time have the Internet as a locus of legitimacy, where their institutional alternatives often present themselves as the only viable solution.

Within the scope of the exception-harmonization debate, those theories contribute by exploring a few important points, including the recognition of a general insufficiency of means in a globalized context and in view of the increasing complexity of the relevant systems of regulatory activity; the need to look for means of enforcement outside hard law; and, concomitantly, the quest for alternative means of legitimation.

3 THE REGULATORY DEBATE: DUTIES AND CHALLENGES OF STATES IN THE FACE OF TECHNOLOGY

On this second perspective, discussions on Internet regulation occur inside a debate about the role of the state in the face of technology. In this respect, one must note first of all that regulation is not the only mode of relationship between governments and technologies. As shown in an earlier work written in co-authorship with Patrícia Baptista (2016), interactions between governments and technologies do not take place by means of regulation only, but also under the headings of instrumentality, equivalence, and incentive. These different roles should be considered jointly and can overlap in line with public interests relevant to the case in hand.

Second, it must be stated that a great variety of subjects are subsumed under the heading *technologies* and each one has its own specific needs as far as prioritization, mode of stimulation, risk assessment, and institutional treatment are concerned. Assisted reproduction techniques, for instance, are famous for raising questions that have to do with scientific ethics; agricultural technologies and the safety of materials created by nanotechnology require a careful public health risk assessment; and communication and information technologies demand, among other things, solutions for the protection of individual rights such as the rights to privacy and freedom of

speech.

In spite of such diversity, there is a specialized academic line of enquiry that brings together all reflections on *technology regulation* (Brownsword, Scotford & Yeung, 2017; MOSES, 2014; Fenwick, Kaal & Vermeulen, 2017). According to Lyria Bennett Moses, this general heading can be understood as: regulation (defined broadly or narrowly) in a technological space, a socio-technical space, or possibly a ‘new’ technological space. Ultimately, technology regulation operates in practice as legal scholarship’s answer to the call of sociologists and philosophers to think about how ‘we’ can influence the form that socio-technical complexes take (2014, p. 6).

Inside the field, an effort has been made to identify and address the peculiar challenges posed to regulators by technology. Most difficulties have to do with the gap between the speed of technological evolution and the rate of response of those bodies that produce and enforce public policies; the expertise needed to identify a regulatory goal; the conflict between new services and pre-existing regulatory frameworks; and the constant and inevitable innovation variable (which is present in these equations both as an asset to be preserved and as a catalyzer for unknown risks). While different technological innovations vie for a regulatory environment that contemplates their specificities, there is a whole batch of issues they seem to have in common and which academic literature takes as a starting point in order to look for solutions to balancing the different public interests at play.

Analyzing the literature, Lyria Bennett Moses (2014) identifies and articulates three kinds of regulatory challenges peculiar to technology: the *challenge of regulatory connection*, the *Collingridge dilemma*, and the *pacing problem*. The first group has to do with issues of *regulatory connection*⁴ arising from a possible mismatch between new market logics and regulatory approaches designed for the technological landscape of the past. That mismatch can be seen when a new technology enters into a “regulatory void” (i.e., without a legal framework that addresses its operation) or when stabilized technologies evolve beyond previously established regulatory regimes.

The second group of challenges is based on the work of David Collingridge (1980), who suggests that interpretive flexibility is high in the early stages of a technology’s development, but ultimately stabilizes in a final form – a moment in time referred to as ‘closure’ of the technology (Moses, 2016). Described as the “Collingridge dilemma” these issues have to do with the timing of a regulatory action (or omission), which must be effective without imposing severe limits on the emerging technology’s potential. In that sense, the interpretive flexibility detected by Collingridge would favor early regulatory action, which would be made more difficult after closure. In fields marked by dynamic technological evolution, the regulator often does not have enough information about a certain product or service to draw up rules capable of addressing the risks identified at first, which can even

⁴ Which the author applies according to the concept adopted by Brownsword (2017).

become completely irrelevant as the technology evolves and stabilizes. At the same time, a consolidated technology with a loyal consumer market also becomes less open to regulatory arrangements, whose implementation then involves more cost and attains a lesser degree of success.

Finally, the third group of challenges comprises the so-called *pacing problems*, stemming from ‘the efforts of the state apparatus – especially in its normative role – to keep up with the fast-paced rhythm in which technological evolution takes place’ (Baptista & Keller, 2016). Moses identifies some forms of the problem, such as the need to assess unknown risks and impacts, to apply existing legislation to uncertain circumstances, the constant threat of obsolescence and the danger of applying regulation in an over-inclusive (including the greatest possible number of developments of the technology in question) or, conversely, in an under-inclusive manner (when the care taken to safeguard market development jeopardizes protection of the legal ends which justify regulation in the first place).

Mark Fenwick, Wulf A. Kaal, and Erik P. M. Vermeulen (2017) address those challenges according to another perspective, reflecting on the variables that innovation (as well as its economical and legal outcomes) brings to the regulatory process. The authors highlight how difficult it is for regulators to distinguish and take advantage of beneficial innovations, which in an era laden with disruptive services, is likely to generate a high degree of legal inconsistency and uncertainty. In their view, the very features that characterize legislative and regulatory processes make them inept for this task, mainly due to a lack of communication, debates, and creative conversations between the actors. In a similar vein, Eric Brousseau and Jean-Michel Glachant (2012) conclude that in knowledge-based economies, at least partially characterized by extensive innovation, ‘regulatory models designed in the nineteenth century to manage investments and the pricing of transportation infrastructures are no longer relevant’, calling for solutions that can handle the dynamic evolution of technologies, products, and markets.

The development of this segmented regulatory literature began at least a decade ago and gains relevance in the current context. Mostly due to the Internet’s technological and economical openness, we are witness to an increasingly dynamic emergence of a completely or partially innovative products and services whose treatment by the law is not intuitive. The consolidation of a shared theoretical basis provides a starting point for reflections about the need for state action, making it easier for problems to be identified and for action loci to be defined. At the same time, such a basis should be handled with care in three respects.

First, one should not mistake the recognition of shared challenges posed by diverse technologies for the mechanical transfer of legal regimes from one specific context to another. This is known to be potentially capable of undermining both the effectiveness of the regulation and the development of the technological sectors concerned. The effort towards a functional systematization should be understood as such, so as to enable us to draw specific consequences from the theoretical basis which results from it according to the particular

technology in question.

Second, the articulation of particular challenges calling for specific responses should not be understood as necessarily demanding state action. As in all fields of regulation, also in this case government action remains subject to assessments of convenience and opportunity and should be duly justified (Voronoff, 2018). Technology by itself is not enough to justify regulation, although the way it evolves (both technologically and socially) is crucial to justify specific regulatory responses or even changes in legislation that may be deemed necessary (Moses, 2017). State action should still be preceded by a relevant assessment that ponders “The desirability of particular interventions [...] What is at stake in this debate is not technology or human ingenuity, but newness and the choices (to permit, enable, encourage, discourage or prohibit) that are opened up” (Ibid, p. 583).

Third, it must be noted that technologies are not immune to the traditional rationales of regulatory activity. Identifying peculiar challenges is not the same as relinquishing all tools provided by traditional theories of regulation nor insisting in their application when they prove to be inefficient or inapplicable.

With each new upcoming technology, the natural movement for regulators and law operators is to examine its legal implications and to offer means of containing it when those means are deemed necessary. This task sometimes collides with a technological or market context that has no immediate precedents in common experience, and this situation may either be pleaded to justify a claim for new solutions (in the form of new regulatory frameworks) or to substantiate an insistence on the sufficiency of existing rules. In other words, the semantic conflict between treating technologies in an exceptional way or harmonizing them into existing rules is replicated here. This trap can entail either mistaken choices of public policies or what Nathan Cortez describes as *paralysis by analysis* (2014, p. 201) in which, to avoid both extremes, regulators enter into a state of inertia and hence omission.

The conflict in reality is only apparent, since traditional legal instruments and special regulatory approaches do not exclude one another. This is an important contribution of the literature on technology regulation, and it is highly relevant to theoretical debates about the regulations of services provided through the Internet.

Depending on the defining features of a certain technology and its risks and benefits, different aspects of the regulatory framework may come into prominence. Some regulatory strategies may be met with more compliance than others; some institutional arrangements may prove more effective; and among different motives that underpin state regulatory action, it might be necessary to give some rational priority over others. In this way, challenges faced by regulators are directly related to their ability to identify the peculiar features of each technology and its practical outcomes.

The concept of a balanced approach to regulation and new technologies is adopted by Roger Brownsword (2008, p. 30), in whose view these phenomena do not require “reinventing the regulatory wheel,” but rather refining

public policy intelligence to address unprecedented challenges. The same need for a regulatory framework suited to technological peculiarities has also been pointed out by Lyria Bennett, in whose view the primary issue for regulators is not the need to regulate technology but the need to ensure that laws and regulatory regimes are well adapted to the sociotechnical landscape in which they operate, which changes over time' Moses (2017, p. 577). Mark Fenwick et al., in their above-quoted work, express the significance of "reforming the regulatory framework to address increasing and growing regulatory concerns associated with disruptive technologies" by designing solutions that ensure the safety of the public, whilst facilitating the enjoyment of disruptive innovations. Karen Yeung et al. (2016) also note that, in breaking away from traditional market logic and in confronting regulatory frameworks, technological changes call regulatory legitimacy into question, so that a new regulatory approach may in fact have to be adopted to go on bringing the desired results.

The Internet is a highly successful communication technology that allows for the exchange of information, expands possibilities of self-expression and diffusion of knowledge, and brings people together. Since its implementation, we witnessed an era of innovation that goes way beyond social communication to transform business-making and consumption in multiple sectors. These shifts are largely made possible by the features that make up the system itself. Although those features are inherently technical, they have significant outcomes in the political, social, and economic arenas.

The (apparent) conflict we now describe surfaced when the Internet expanded into civil use. As mentioned before, the Internet's peculiarities fueled, at first, streams of thought that rejected the very possibility of regulation. Afterwards, however, both theory and empirical evidence showed that the Internet would not remain free from traditional forms of expression of state power (Spar, 2001). Nevertheless, attempts to transplant pre-existent regulation models also proved inadequate in terms of effectiveness. When attempts were made to build up an operational regulatory environment for online activities, it soon became obvious that the offline environment could not apply to them in a direct and straightforward way. 'In short, even if there are not literally two worlds, the operative regulatory environments for off-line and on-line activities (even functionally equivalent activities) might be quite different from one another' (Brownsword, 2012, p. 254).

The theoretical framework described in this section makes it clear that we should pay attention to those points that differentiate the regulatory treatment of technologies and that find expression in the challenges pointed out in the above-quoted specialized literature. Specifically regarding the Internet and as a result of those challenges, in the last twenty years or more the implementation of a traditional regulatory logic has proved to be either illegitimate or ineffective. Indeed, exceptionalist ideas have not been able to prevent Internet regulation, but that doesn't mean the Internet does not require an exceptional treatment.

4 THE EXCEPTIONALIST DEBATE: HOW TO REGULATE THE INTERNET

As pointed out previously, the Internet's expansion into civil use was accompanied by a theoretical movement that, through different rationales, concluded that its regulation was unfeasible or unlikely. Ultimately, exceptionalist authors argued that the Internet's unique technical features were an impediment to the application of traditional forms of law.

The Introduction referred to those authors as *exceptionalists*, but one can also find them referred to as *cyberlibertarians* (see Murray, 2010 and Mueller, 2017). It would seem that the two terms refer to the same set of theories, especially because those two perspectives, at the time of their appearance, contributed to the same phenomenon – namely, the alleged impossibility of regulating the Internet. However, a careful interpretation allows the identification of subtle distinctions between these discourses, that in spite of their common origin, are marked by a semantic difference that influenced their evolution⁵.

The work of Julia Pohle and Thorsten Thiel (2019) supports a distinction between these two theories, according to which cyberlibertarianism can be interpreted as 'a pragmatic brand' of exceptionalism that had already served as a major ideological influence on the technical development of the Internet itself' (p. 62). This pragmatic brand would be utterly defined by convictions that 'existing political structures would become obsolete with the expansion of digital communication'. The libertarian brand does not, however, encompass all of the arguments and political implications of the exceptionalism discourse. The authors also identify an exceptionalism approach focused on the 'role of law and territoriality in the context of transnational networks', which questioned the adequacy of traditional means of applying the law in digital networks (p. 64). In this sense, implications of exceptionalism involve mostly instrumental concerns, such as the reach of jurisdiction boundaries, the limited speed of legislative procedures and the effectiveness of traditional coercion mechanisms (as attribution in the digital world was still seen as a 'shaky construction').

Overall, while cyberlibertarianism adds to exceptionalism a conviction that the Internet cannot or should not be regulated, it can still bare different implications, all marked by the assumption that the Internet should be treated as a unique and extraordinary phenomenon. The impossibility or irrelevance of regulation could be a possible outcome of the Internet's exceptional character, but one could also envision other scenarios in which an exceptional treatment would not generate a complete absence of regulation, but would, on the contrary, demand an exclusive, customized regulation.

This difference gave more flexibility and historical relevance to the exceptionalist discourse, allowing it to evolve hand in hand with the technical and political shifts that have affected the Internet since then. Cyberlibertarian ideas, in turn, have not fared as well. Their diminishing popularity can be traced to the works of Joel Reidenberg

⁵ I would like to thank Julia Pohle for the dialogues and inputs that supported this distinction.

and Lawrence Lessig on the idea of regulation by coding, which consolidated the paradigm of an Internet which, besides being subject to different existing forms of regulation, is also a regulated environment in and of itself. Another important stance in favor of the need for Internet regulation is that of Cass Sunstein. In his work *Republica.com* (and in its sequel *Republica.com 2.0*), he argued that the Internet cannot and should not be immune to traditionally established law (2002). Besides arguing for the need to address in the virtual environment the same ills that plague political and social coexistence in the physical world, Sunstein also develops his reasoning on the basis of the impossibility of governing the Internet by means of a consensus between users which would render it immune to other forms of regulation.

Exceptionalism, in turn, comprises a theoretical framework that is still being discussed and is no longer exclusively tied to the irrelevance or inappropriateness of regulation. Its staying power shows itself e.g. on the ideas of Eric Goldman (2010), who identifies three distinct waves in which exceptionalist ideas influenced Internet-related policymaking in the United States. The first wave, which he describes as *Internet Utopianism*, is related to regulatory proposals that gave the Internet a distinct treatment from other media, based on the premise that its unique technology would overcome the structural problems of older media. As an example, Goldman quotes statutes that immunized online providers from liability for publishing most types of third-party content. According to the author, the regulatory pendulum then swung in the opposite direction in a second wave which he calls *Internet Paranoia*, a period in which the Internet's singularity was still recognized, but instead of inspiring a more pliable treatment it was used to justify positions that treated Internet services more rigorously. An example would be content filter technologies, which are known to implement mechanisms of private censorship that impose disproportional restrictions on freedom of speech. The third wave would be that of *Exceptionalist Proliferation*, when the appearance of each new Internet-based technology inspired regulations that addressed it specifically. The movement here is towards the multiplication of service-specific regulatory frameworks and encompasses e.g. regulations targeted at social network sites, which receive specific treatment.

Although its semantic difference from cyberlibertarians does provide exceptionalism with a more complex and diverse theoretical discourse, there is no consensus in the literature as to its essence. In other words, the very idea that the Internet should be seen as something unique that merits special treatment (and even though this should not be taken to mean "no treatment") is called into question. In addition to Lessig's work (whose main implication is that the Internet is subject – albeit in a peculiar level – to the same dynamics that shape power relations in general), those of Yochai Benkler (2006) and Tim Wu (2010), for instance, can also be regarded as exceptionalist.

Wu suggests that an analysis about the Internet's character being exceptional or not can vary according to the analyst's chosen perspective. In all cases, however, he stated that the question: *is the Internet an exception?* should be followed by another question: *an exception to what?* (2010, p. 180). In his view, if the answer to this last question is the Internet's susceptibility to the law, the answer to the first one would certainly be *no*. In a joint

work, Wu and Goldstein (1997) dispute exceptionalism towards the law on the basis of the so-called ‘persistence of physicality’, i.e. the fact that, in spite of the internet being a virtual space, behind its protocols and the operation of all its layers there are human beings, who are always susceptible to the coercive tactics that underpin the workings of law.

When the Internet is seen as an information technology, however, Wu finds that the exceptionality argument has a better chance of success, since the change it has effected in the global social communication panorama is undeniable. In the same sense as Susan P. Crawford (2007) he sees that technologically, and in its effects on business, culture and politics, the Internet seems, by almost any account, an exception, different from the way other systems of mass communications have operated, whether the telephone, radio, or the television.

It is also interesting to note that, although Wu considers exceptionalism unfeasible under the perspective of the Internet’s treatment by the law, he regrets the unlikelihood of some of its unique aspects being preserved. One of those aspects is the distinctive ideology on whose premises the Internet was developed: a research network with no commercial purposes that was subject for a long time to a decentralized governance in the form of a ‘federation of networks’ (2010, p. 184). Another one is Wu’s view that the unfeasibility of exceptionalism threatens not only the network’s decentralization, but also its openness – which finds expression in multiple opportunities and possibilities of a technical, political, and economic nature (West, 2016). According to Wu, the impossibility of giving the Internet some degree of special treatment by inserting those principles in the political game risks having them lose their original significance.

The exceptionalist approach as something that is theoretically established and that may generate diverse outcomes concurs with the literature on the regulation of technologies which we examined in the previous section. In that theoretical context, specific technologies may demand specific regulatory approaches which hinge on the defining features of the technologies concerned and on the potential risks and benefits they bring to the collectivity.

Indeed, given governments’ difficulties in designing legitimate and effective public policies for the online environment, some authors have attempted to look into the unique features of a regulatory designed applicable to the Internet. Even though they do not necessarily identify with the exceptionality discourse, their theoretical inputs do translate and effort to identify what the Internet’s peculiarities demand from regulators.

Andrew Murray, for instance, refers to the *Post-Regulatory Cyberstate* (2008) as a paradigm of Internet regulation, establishing an analogy with Colin Scott’s concept of *Post-Regulatory State*. Just as the Post-Regulatory State succeeded the Welfare State and the Regulatory State, the idea of a *Post-Regulatory Cyberstate* would succeed cyberlibertarian doctrines (as per his terminology) that defend the application of traditional forms of regulation to the virtual universe. According to Murray, it is not possible to just replace the absence of state

online regulation by a direct transplant into the online environment of traditional forms of law, without a previous assessment of a suitable regulatory matrix for this complex, global, interconnected environment.

The main consequence extracted by Murray from this reflection is the relevance of hybrid and indirect forms of regulation, which, as seen above, comprise the basis of the idea of a Post-Regulatory State. This is not to argue for a separate and autonomous *cyberstate* (which does not exist), but to recognize how the cyberspace's unique features demand that its regulation be based on a segmented study. Clearly, the *cyberstate* didn't develop from a welfare state or a regulatory state, but it would be the equivalent of a post-regulatory state in that its basic features assume an exercise of indirect regulation.

Pamela Samuelson (1999), in turn, prescribes a regulation approach based on the challenges that information technologies posed for legal systems in recent years, paying special attention to: (i) deciding if the pre-existent legal order can be applied to the new phenomenon or if new rules are necessary; (ii) balancing between the tendency to impose immediate regulations on unprecedented risks and the need not to inhibit innovation; (iii) formulating regulatory strategies with enough flexibility to be applicable to a rapidly-changing technological environment; (iv) preserving fundamental human rights in the face of strong economic oppression and of technologies that might undervalue those rights; and (v) accepting that building an effective public policy for the Internet requires coordinating with other nation-states to create a consistent legal environment on a global level.

In a similar sense, Roger Brownsword has also articulated a proposal for 'getting the regulatory environment right' for information technologies (2018, p. 252), naming five specific challenges as criteria to be analyzed by regulators. They are: regulatory prudence (related to concerns regarding human rights, health, safety, and environmental integrity); regulatory legitimacy (based on efficiency and on the choice of appropriate regulatory purposes and strategies); regulatory effectiveness (asking if the chosen strategy does indeed impact conduct on the regulated environment); and regulatory connection (referring to the challenge of preserving the connection between regulation and rapidly-changing technological contexts). To these challenges the author adds a pervasive concern for not stifling innovation – a background concern that should underlie reflection on each one of the aforementioned challenges.

These views agree with debates on the insufficiency of means and about peculiar challenges that technologies pose for regulators. As far as the regulation of the Internet is particularly concerned, they recognize the need to adapt regulatory design to the services rendered inside that framework. Even more, they point to the distinctive aspects of such a design, which would merit special attention on the part of regulators.

It is thus possible to state that the exceptionalist debate does indeed provide specific discussions about online services with a flexible interpretive perspective on what exactly is meant by an "exception" and on the legal outcomes that can be extracted from that. In other words, an exception is not synonymous with state inaction;

rather, it means that exceptional attention must be paid to specific points and to the most promising forms of legal implementation.

Naturally, this approach is just a first step in the process of regulating those services and has no claim to producing a regulatory formula or rendering an absolute judgement on what applies and what does not apply to a complex and dynamic regulatory environment such as the Internet. As mentioned above, other theoretical and empirical inputs peculiar to the market in question also play a key role in the hunt for solutions.

5 CONCLUSIONS

Discussions about the regulation of digital markets are as vast as the different activities that have arisen or expanded by means of the Internet. Many sectors comb through the regulatory challenges posed by the virtual universe's peculiarities, calling attention to a range of unique features and sectoral conflicts of interest. Some theoretical background discussions, from which significant empirical implications can be drawn, also underlie the debates and can potentially inform them.

The first such discussion is the debate on the possible insufficiency of means of applying the law. It is reflected in distinct theories which produce segmented theoretical and empirical conclusions expressed in different terminologies. These are the ideas of *Post-Regulatory State*, *Administrative Decentralization*, *Global Administrative Law*, and *Global Constitutionalism*. An analysis of those theories is important because they contribute to the recognition of a general insufficiency of means that comes with globalization and the increasing complexity of those systems that are relevant to regulatory activity; they also encourage a quest for means of implementation that serve as alternatives to hard law and for a pursuit of new forms of legitimation.

As far as technologies are concerned, there is a solid literature dedicated to exploring the duties and challenges posed to governments by their regulation. This task is hindered at times by a technological or market context that has no immediate precedents in past experience; this may be a basis both for demanding new solutions (in the form of new regulatory frameworks) or for insisting on the sufficiency of existing forms. Confronted with the harmonization-exception dilemma, some authors have attempted to identify the challenges or requirements specifically faced by technology regulation. In general, those unique features have to do with the gap between the evolution of technology and the rate of response of the bodies that produce and implement public policies; with the necessary expertise for identifying regulatory targets; with conflicts between new services and pre-existing regulatory frameworks; and with the constant and inexorable variable of innovation (which comes into the equation as both an asset to be preserved and a catalyzer of unknown risks). An analysis of the views in question shows that the ideas of harmonization and exception are not mutually exclusive. In this sense, Internet phenomena do not require "reinventing the regulatory wheel," but rather refining public policy intelligence to

address specific challenges.

The debate on regulating the Internet as an autonomous technology was born in the orb of exceptionalism. The development of the exceptionalist debate gave greater flexibility to the original views of this theoretical stream. As seen above, the defining features of the Internet should not be understood as a basis for the absence of regulation (a cyberlibertarian idea); on the contrary, nowadays the sounder view is that they should influence the regulatory design unique to Internet-based services. Different authors have identified different peculiarities, but it is safe to say that the distinguishing questions hinge around issues of legitimacy, uncertainty, and flexibility, which also flow into the debate about suitable means.

As a whole, these theoretical foundations have the potential to suggest and substantiate solutions to regulators in specific sectoral debates. In spite of their significance, though, they are by no means exhaustive. Segmented analyses should be made of the peculiarities of each market, of the public significance of all legal benefits involved, and of the way in which the Internet's technical reality influences its particular dynamics. Those specific analyses can vary and they are beyond the scope of this article; nevertheless, the theoretical basis for their development has already been set.

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