



ALEXANDER VON HUMBOLDT
INSTITUT FÜR INTERNET
UND GESELLSCHAFT

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AUTHOR Osvaldo Saldías
osvaldo.saldias@rewi.hu-berlin.de;
Walter Hallstein Institute for European Constitutional Law,
Humboldt University of Berlin

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Patterns of Legalization in the Internet: Do We Need a Constitutional Theory for Internet Law?

Oswaldo Saldías

osvaldo.saldias@rewi.hu-berlin.de;

Walter Hallstein Institute for European Constitutional Law, Humboldt University of Berlin,

Abstract: *The paper acknowledges a growing web of legal norms that regulate governance aspects of the Internet. Some of these norms are legally binding; others are closer to what some scholars call soft law. In order to take stock of these developments, I propose an explorative typology that can bring some systematic order into the plurality of Internet norms. Although my framework is not exhaustive, it already sheds some light into future challenges that we should expect. The prospective types that I provide are (a) positivation of soft law; (b) legalization through complementarity; c) informal legalization; and d) overlapping legalization. The results reveal that different types of Internet norms also contain a considerable potential for mutual conflicts. Whenever this occurs, we will have to make some significant choices related to the prevalence of certain social goods over others. Since the Internet environment is not a democratic republic, we cannot resort to significant procedural rules that could ordinarily prescribe hierarchies. However, the results of my typology also seems to suggest that there is considerable room for ordering principles and values according to deliberative arrangements or public reasoning. Although research on Internet governance has provided valuable insights into actors, processes, and interests, the time seems right to focus on the proto-legal order that is already in place. The normative question is already waiting for us: How should we deal with this nascent web of Internet laws? The paper claims that unless we shut down the Internet, we will have to engage in dialogue about the “c” word; “c” as in constitution.*

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I. Introduction.¹

Is there flood of norms taking place in the Internet? Well, maybe; it depends on what one understands under norms. Moreover, it also depends on what its to be understood under law. The term “flood of norms” was brought to us by legal sociology and underscores the quantitative aspect of an increasing mass of legal material. In the 1907s, this tendency to regulated and over-regulate significant parts of social life irritated some observer.² As law expands into new social spaces, – according to the critics of over-regulation – it brings with it an enhanced role for lawyers and judges. Not surprisingly, people tended to look for “alternatives to law” to guide their social lives.³ Günther Teubner acknowledges much of this discussion and tries to order it under the term “juridification”, which according to legal

¹ I would like to thank Ingolf Pernice, Rüdiger Schwarz, Dirk Heckmann for their valuable comments on previous versions of this paper.

² D Nörr, *Rechtskritik in der römischen Antike*. (Beck, München; 1974).

³ E Blankenburg, et al. (1980) *Alternative Rechtsformen und Alternativen zum Recht*. (Opladen 1980).

sociologist describes a “process in which human conflicts are torn through formalization out of their living context and distorted by being subjected to legal processes.⁴ Teubner focuses on how conflicts are delegalized, and submitted to new para-legal instances for alternative resolution, like arbitration, mediation; and he notes that this tendency is not necessarily unproblematic.

But let us get back to the Internet and the question of flood of norms. If we accept the cyberlaw premise that code is indeed law,⁵ then the assertion becomes reasonable. If Lawrence Lessig is right in that software codes determine the essentials of cyberspace, then there might be something akin to juridification in the Internet; with the difference that software corporations are allegedly getting the lion’s share instead of lawyers and judges. Conversely, if we turn our attention to Internet governance, we will realize that something different is happening. If we accept for one moment the assertion that “self-regulation” is an alternative to law, then delegalization movement seems to have the upper hand against the legal world. But then we ask again, do self-regulation and its driving concept of multistakeholderism really belong to the category of “alternatives to law”? Or are they a special kind of legal development driven by technical specialists? Internet is essentially a technical phenomenon after all, albeit with deep social, legal, economical and cultural implications. In addition, it is not a mystery today that the production of standards, as well as the rule that govern them, have been left to IT specialists⁶ with the hope that developments follow a technical path instead of getting politicized. However, one should not underestimate the conflictual potential of technical standards. Standards and codes always bear the potential to politicize public discussion. For instance, the history the European Union’s constitutionalization shows that rule-

⁴ G Teubner *Juridification of Social Spheres. A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare.* (De Gruyter; Berlin, New York 1987), f. 7-8.

⁵ L Lessig, *Code and Other Laws of Cyberspace.* (Basic Books. New York 1999)

⁶ Von Bernstorff “Democratic Global Internet Regulation? Governance Networks, International Law and the Shadow of Hegemony” (2003) 4 *European Law Journal* 511

making in technical fields can conceal deep constitutional transformations even beyond the national states and stakeholders.⁷

This article delves into these conjectures and tries to introduce new insights about the role of law in the Internet. It is part of a wider project that looks at the Internet with the eyes of constitutionalism.⁸ Accordingly, if there is a role for law to play in the Internet: what is, then, the role of constitutionalism? The overall project, as well as this article, hopes to address some of these questions.

I undertake the examination by ordering current norms and rules into a working typology that will allow me to assess (some of) the role of law in the Internet. I do not claim to be exhaustive. Quite on the contrary, this is an initial proposal to systematize the “legal material”, so that we are not forced into the bold ideas of “flood of norms”, “informal Justice”, or “alternative to law”.⁹ The chosen approach to elaborate a working typology comes from international relations. Kenneth Abbot et al. have coined a useful framework for assessing legalization in world politics by means of soft law. Accordingly, I examine the process of legalization in the Internet by asking:

- How are Internet related norms produced?
- Who produces them?
- Under what circumstances do these norms become legally relevant?
- How does soft develop into hard (constitutional) law?
- Are there identifiable constitutional implications of such processes? Is there a process of juridification of Internet related norms?

⁷ See the neofunctionalist interpretation of European legal integration in A-M Burley and W Mattli “Europe Before the Court: A Political Theory of Legal Integration” (1993) 47 *International Organization* 41

⁸ S Hindelang “Refocusing on Constitution – Approaching Internet Legislation and Regulation through the Eyes of the Constitution” (2011) HIIG Symposium Paper; K Berner “Constitutions Going Online – Internet-related Developments in Constitutional Law?” (2011) HIIG Symposium Paper, both on file with author.

⁹ Teubner 1987

In order to make the questions more operational, I will use a working hypothesis that takes much inspiration from the ongoing debates about Internet governance and bottom-up politics. Specifically, Justin Hurwitz chronicles the creation of the Internet Governance Forum (IGF) and suggests that “controlling Internet governance requires controlling the conversation about Internet governance”.¹⁰ Although Hurwitz states this idea as an inspiring interpretation of the process, rather than a causal inference of its outcome, it is not too far from an operationalized hypothesis. The idea indicates that in the case of Internet governance, much weight is given to the content of deliberation. The conversation about Internet 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. Whether this is true, is something that the project on the Constitution of the Internet is enquiring. In this paper, I reframe the idea into following hypothesis: a) Internet related norms can be legalized by means of public conversation, and b) the patterns of expansion of such norms is qualitative different compared to traditional means related to international public law and national constitutional law.

Possible implications of such a hypothesis are straightforward. Since I assume that the conversations about Internet are global, the patterns of legalization and law making are also global.

II. Legalization of the Law of the Internet. Conceptual and Methodological Framework.

Theoretically, the word Constitution can be written with a capital “big C”, or with a “small c” as the constitution of unwritten norms. Scholars are increasingly realizing

¹⁰ JG Hurwitzs, “Whois WSIS; Whois IGF: The New Consensus-Based Internet Governance” (2007). Available at SSRN: <http://ssrn.com/abstract=954209>, f. 2

that constitution with “small c”, or “the constitution outside the constitution” shapes much more of legal reality than previously imagined. Many of these extra-constitutional, or sub-constitutional norms are crafted as soft law, which sometimes can have as much influence on “The Constitutions” as formally enacted constitutional amendments.¹¹

Soft law refers to norms or statements that are not formally binding, but are able to affect the behavior of people in general, or authorities, agents or addressees in particular. This project uses much of the framework proposed by Abbot et al. for assessing the degree of legalization in world politics.¹² For the sake of this research, soft law refers to norms that are not binding, but do influence the addressees behavior. This happens through three factors: (a) precision of rules; (b) obligation and; (c) delegation. As this research aims at constructing a suitable theoretical framework for assessing the role of law in the Internet, I deem it helpful to include some notions based on Eric Posner’s and Jakob Gersen’s proposal on Authority Allocation by Soft Law. Factors like explicit signaling by regulatory agencies, for instance, can have broader administrative and constitutional implications. This process of transformation can be assessed with instruments of legalization, e.g., delegation, institutionalization, judicialization, etc.

Moreover, for the purpose of assessing how soft law evolves into hard law, we will define soft law broadly, so as to include technical standards. Under normal circumstances, such standards are not binding. We are interested however, whether such soft law evolves into hard law, and under what conditions this might occur.¹³ This is legalization of Internet related norms.

¹¹ J Gersen and E Posner, “Soft Law” (2008) *Public Law and Legal Theory Working Paper No. 213*, The University of Chicago Law School.

¹² I am fully aware that the concept of soft law has been sharply criticised by positivist legal scholars. Nonetheless, I hope to be convincing in regard to the benefit of using socio-legal tools for assessing new terrain for constitutional law. K Abbott, K. et al. “The Concept of Legalization” (2000) 54 *International Organization* 401.

¹³ I am grateful to Gerrit Oldenburg for drawing my attention to the concept of “the normative power of the factual”.

III. How does Legalization of Internet Related Norms Occur?

The term “self-regulation” has become fashionable in the last years. It refers to a technique that is technology-friendly and presupposes the unity of a community. Previous work on Multistakeholderism suggests, however, that there is much more in it than assumed by stakeholders, because it implies an emancipatory act from the multilateral mode of “one state, one vote” contained in previous international agreements concerning ICT.¹⁴ Furthermore, much of the process is driven by semi-public partnerships, that use instruments of public authority. Delegation of compulsory and binding dispute resolution are new elements that characterize governance of DNS around ICANN. Although its organizing statutes and procedure are typically soft law, they have affected fields like legitimacy, the rule of law and the allocation of public authority on the grounds of acts of collaboration between public and private entities.¹⁵

Preliminary data suggests that the Internet has affected norms like: administrative accountability,¹⁶ allocation of supervisory powers among national agencies,¹⁷ decentralization of public tasks or the public failure to provide public goods, Human Rights,¹⁸ judicial review,¹⁹ and state sovereignty.²⁰

All of them started as soft law produced by national states, international/regional organizations like the UN or the EU, private organizations like ICANN or the IGF. The framework of legalization shows that they have considerably affected –or produced right away– not only provisions of hard law, but also norms with constitutional relevance.

¹⁴ von Bernstoff 2003: 515

¹⁵ L Helfer, “International Dispute Settlements at the Trademark-Domain Name Interface” (2001) *Public Law and Legal Theory Research Paper* No. 2001-9, April, Loyola Law School

¹⁶ R Weber, “Accountability in Internet Governance” (2009) 13 *International Journal of Communications Law & Policy* 152

¹⁷ P Weisser, “The Future of the Internet Regulation” (2009) *Legal Studies Research Papers* No. 09-02, University of Colorado Law School

¹⁸ J Kulesza, (2008) “Freedom of Information in the Global Information Society – The Question of the Internet Bill of Rights” 1 *University of Warmia and Mazury in Olsztin Law Review* 81

¹⁹ L Helfer 2001

²⁰ J Trachtman, “Cyberspace, Sovereignty, Jurisdiction and Modernism” (1998). 5 *Indiana Journal of Global Legal Studies* 2

IV. Internet Governance and Multistakeholderism

The early literature on Internet governance is closely linked to the struggle over the control of the Domain Name System (DNS), a technical arrangement that allows converting IP numbers into alphanumerical names. Today, it is practically the only centralized competence in the realm of the Internet; a task carried out by a private corporation: the Internet Corporation for Assigned Names and Numbers, ICANN. The design of the chores that ICANN has to carry out assumes that it be the highest authority for the assignment of domains. Should there be a competing organization aiming at fulfilling the same task, then it would be difficult to imagine how the Internet could continue functioning in terms of an end-to-end web, instead of two or more intranets that are interconnected through one or more bridges.²¹

Interestingly, it has been suggested, that the decided will of the US in order to maintain control over the DNS, partly provoked the changes in the debates over the Internet. Observers have chronicled the attempt of several actors to take the control over the DNS away from American hands. The attempted coup, however, failed; and the US remained the sole controller over ICANN.²² However, this particular outcome redirected the attention of interest groups to other issues related to the future of the Internet that were still on the table. The exchange of information and experiences became increasingly structured, and the agenda for the first meetings of the WSIS drafted its early agenda.²³ One significant move towards materializing participation of interest groups in the early conversations was the establishment of the IGF,²⁴ established as a discussion body with the aim of collecting the voices of civil society

²¹ On legal doubts about ICANN's conformity with the US constitutional order and objection regarding legitimacy, see J Weinberg (2000) "ICANN and the Problem of Legitimacy" (2000). 50 *Duke Law Journal* 187; J Boyle, (2000) A Nondelegation Doctrine for the Digital Age? *Duke Law Journal*. Vol. 50, No. 1, p. 5-16. For an overview, see J Kurbalija, Jovan, *An Introduction to Internet Governance* (Diplofoundation, Geneva 2010)

²² Hurwitz 2007

²³ Ibid.

²⁴ M Flyverbom and S Bislev, "Internet Regulation – Multistakeholder Participation and Authority"; in H K Hansen and D Salskov-Iversen (eds.) *Critical Perspectives on Private Authority in Global Politics*. (Palgrave Macmillan 2008) f. 72-90

and to bring forward proposals for the improvement of Internet governance.²⁵ Initially neglected by the US, the IGF became a hub for new ideas against the backdrop of a rapidly evolving agenda; and with evolving issues at stake, the size and the constellation of the participants changed as well. The term “multistakeholder” became fashionable. This concept refers to “groupings of civil society, the private sector, the public sector, the media, and other stakeholders that come together for a common purpose”.²⁶ Although there is no univocal definition, one thing is clear: it is everything what the ICANN arrangement is not. With the raising awareness about the new issues that were now being debated within the IGF, a new sense of participation flourished.²⁷

It is straightforward that research on Internet governance has paid a great service to the analysis of the social, political and regulatory implications of the Internet. Concretely, Internet governance has the heuristic merit of breaking down the numerous data and facts and sorting them into analytical categories. This allows us to judge developments according to the needs and particularities of different policy fields.²⁸ In addition, many social scientists have focused on the institutionalization of Internet governance. There is an insightful strand that traces the transformation of the national state when it comes to the task of regulating the Internet.²⁹ Other scholars have examined the changing nature of regulation in the Internet. Botzem and Hofmann have discussed a hybrid mode of regulation, where public and private actors share authority.³⁰ Despite these nuanced variation in regard to the emphasis, almost all governance approaches focus on the actors that

²⁵ R Weber, “Accountability in Internet Governance” (2009) 13 *International Journal of Communications Law & Policy* 164

²⁶ A possible definition could read: “groupings of civil society, the private sector, the public sector, the media, and other stakeholders that come together for a common purpose”. Definition taken from http://www.fao.org/Participation/espanol/ft_show.jsp?ID=7363

²⁷ see the concept of Actors’ Integration in S Botzem and J Hofmann “Transnational Governance Spirals. The Transformation of Rule-Making Authority in Internet Regulation and Corporate Financial Reporting” (2010) 4 *Critical Policy Studies* 18

²⁸ See the Internet governance cognitive toolkit in Kurbalija 2010

²⁹ See e.g. R Bendrath, J Hofmann, V Leib, P Mayer and M Zürn, “Governing the Internet: The Quest of Legitimate and Effective Rules“ In: A Hurrelmann, S Leibfried, K Martens und P Mayer (eds.), *Transforming the Golden-Age Nation State*. (Basingstoke: Palgrave Macmillan 2007), f. 130-151

³⁰ Botzem and Hofmann 2010

participate in the process and the causal mechanisms that produce certain outcomes, like regulatory regimes. The benefit of this research is that it opens new horizons of questions. One of them is the role that law plays for the Internet. Focusing on law and its immanent qualities can help us come to grips with the current constellation of norms and practices. This research gauges the formation of law related to the Internet. It makes the empirical question whether there are recognizable patterns of legalization in the realm of the Internet.

V. Towards a Typology For Internet Public Law

The typology presented here breaks the one-dimensional assumption that law is only the object of change. Within the framework of legalization, norms can be at the same time agent and subject of change. The typology works based on a simple matrix based on soft and hard law. Inspired in a proposal by Gregory Schaffer and Mark Pollak where hard law and soft law interact³¹ according to the modus in which soft law becomes hard law, I distinguish 1) positivation of soft law; 2) legalization through complementarity; 3) informal legalization; 4) overlapping legalization.

1. Positivation of Soft Law: The Road Through Parliament

Positivation of law follows traditional procedures for becoming valid law. Probably the finest archetype is the formal sanctioning of statutes in a democratic parliament. When law is the result of the lawgiver's will and power, it is binding because of its formal-procedural qualities. It does need to rely on arguments of immanent quality or teleology to be valid.³² It is arguable whether this mechanism is

³¹ G Schaffer and M Pollack "How Hard and Soft Law Interact in International Regulatory Governance: Alternatives, Complements and Antagonists" (2008) *Society of International Economic Law Working Paper* No. 45/08.

³² U Preuss, "The Political Meaning of Constitutionalism", in R Bellamy (ed.), *Constitutionalism, Democracy, and Sovereignty: American and European Perspectives*, (Avebury, Aldershot 1996), f. 13

truly a case of legalization in the sense advanced by Abbott et al. I admit that there is some force in that objection. However, it makes sense to regard this type as an instance of legalization because it makes the origins of the specific law explicit. Although the intellectual origins of a particular law might not be interesting for practicing lawyers, it is relevant for the observer of a emerging legal system, or a proto-legal order that might have a global reach.

Some paradigmatic cases related to the legalization of Internet governance cases fit this type. They are all related to the emergence of the principle of net neutrality. This principle was first discussed in the US, in a communication by the Federal Communications Commission (FCC).³³ In that paper, the FCC drafted its “policy statements” that aimed at preventing Internet Service Providers (ISP) from intervening in the flux of data across the Internet. Such an intervention in the transmission of data is commonly referred to as network management. The case that triggered the policy paper involved a particular ISP that became able to exercise arbitrary network management. This, the FCC argued, could have potentially derived in anti-competitive practices against other providers, as well as, discriminating between Internet users. As the case progressed, the FCC complemented its principles in a formal “Notice for Proposed Rulemaking”.³⁴ As I show further ahead, the implications of this case for legalization are considerable, because these FCC principles had a global impact, as they began being reproduced, formalized, translated, and complemented elsewhere.

Initially, this formalization of policy guidelines had a strong signaling effect. Although the policy papers had no binding effect, it is a fine example of soft law with constitutional implications. Consistent with the Gersen and Posner framework, the signaling effect of a regulatory agency promotes behavioral changes among the regulated and other authorities.³⁵

³³ FCC 05-151, 23. September, 2005

³⁴ FCC 09-93, 22 October, 2009.

³⁵ Gersen and Posner 2008

Domestically however, the signaling relevance of the FCC's soft law lost relevance as it came into the judicial streamline, as the Court of Appeal of the District of Columbia ruled against the FCC's policy guidelines. The relevance of these defeated policy guidelines, however, transcend the authoritative ruling of the court. Some foreign political bodies adopted the substantive content of the FCC's soft law. Some subjected them to their formal legislative process; other engaged informal conversations about their content. The spread of the principles of net neutrality emerged as a phenomenon with two dimension: First, it was a means for expansion or diffusion of norms;³⁶ second, by reproducing the content, formalizing it, and making any deviation more costly, it was also a mechanism for turning soft law into "harder" law.

In 2007, the Chilean Parliament began discussing the same content that had been previously drafted by the FCC in its proposal, this is, transparency of the services provided to Internet consumers, non-discrimination, and access to content. The evidence does not suggest that this is a case of mimicry or emulation. But it can be conjectured that it might be a case of cross-fertilization, because the legislative proposal was framed as a measure for consumers' protection. During the debate, the proposal was enriched with reasons and justification like "right to access to information", "Freedom of expression"; all concepts that are closer to a catalogue of rights than 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.

To be sure, the facts that parliaments communicate or adapt foreign ideas is not new.³⁷ Nonetheless, the case is interesting in two regards.

- a) What explains that a non-industrialized country – an emerging economy if you may – is the first to pick up and enact principles

³⁶ See a fundamental rights perspective of Net Neutrality, from EU law in F Mayer, "Die Verpflichtung auf Netzneutralität im Europarecht. Europaverfassungsrechtliche Vorgaben und netzpolitische Handlungsdefizite", in M Kloepfer, (ed.) *Netzneutralität in der Informationsgesellschaft*. (Duncker und Humblot, Berlin 2011) f. 81-108

³⁷ A-M Slaughter, *A New World Order*. (Princeton University Press 2004), Ch. 3

regarding the Internet? This is not only puzzling; it contradicts long standing critical theories about law and industrial development. According to these, more developed systems tend to export their legal system to less developed countries, sometimes even through strong negative conditionality. Is this case an exception, or is it a case particular to the Internet?

- b) The proposal mutated from a consumers' protection act, into a general law containing the ordering principles for national telecommunication. It framed new public subjective rights like "right to access Internet content" or "non-discrimination of the end-user". Is this an isolated development, or is it an instance of an Internet related discussion, where subjective rights are being framed?

2. Legalization through Complementation

Section IV briefly introduced the relevance of the Domain Naming System for Internet governance. The centralized architecture of the system also provokes that disputes that concern one of its core business, the attribution of domain names, must also be settled centrally. ICANN established a dispute settlement procedure in its Uniform Domain Names Dispute-Resolution Policy (UDRP). The procedure pursues the one main goal: to tackle "cybersquatting", this is, the deliberate attempt to register domain names that are similar or identical to noted or popular names. The procedure and the rulings are not binding law; at least not in its connotation of positive law. National courts have frequently ignored this body's rulings, but the alleged credibility and intellectual merits of the arbitrators seem to be quite compelling for the private parties. Possibly because of the centralized power of ICANN, holders of intellectual property rights seem to use the UDRP procedure on a

regular basis. Moreover, scholars note that it has surprising levels of compliance in regard to its awards.³⁸ But it is still soft law. Or if may: It *was* soft law.

Beginning in 2000, the US government changed its approach to the negotiation of free trade agreements with third countries. From 2004 onwards, the US 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,³⁹ Dominican Republic and CAFTA,⁴⁰ Morocco,⁴¹ Colombia,⁴² Australia,⁴³ Bahrain,⁴⁴ Peru,⁴⁵ Korea,⁴⁶ Panama,⁴⁷ and Oman.⁴⁸ All these treaties contain the same clause that binds the parties to adapt to ICANN's Uniform Dispute Resolution Policy. 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 UDRP. Soft law is complemented by "hard" trade law, enforceable as any other trade agreement.

3. Informal Legalization

With "informal legalization" I mean the phenomenon by which soft law becomes reasonably binding without the intervention of hard or positive law. Legalization is a process that is not visible to the observer. It has to be "read" by the analyst with the

³⁸ Boyle 2000

³⁹ Entered into force on 01.01.2004. Text available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/chile-fta>

⁴⁰ 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>

⁴¹ Entered into force 15.06.2004, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta>

⁴² 22.11.2006 available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text>

⁴³ Entered into force 01.01.2005, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/australian-fta>

⁴⁴ Entered into force on 11.01.2006, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta>

⁴⁵ Entered into force 12.04.2006, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa>

⁴⁶ Entered into force 30.06.2007, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta>

⁴⁷ Entered into force 28.06.2007, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/panama-tpa>

⁴⁸ Entered into force 01.01.2009, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/oman-fta>

help of indicators. As explained in section II there are already useful indicators of legalization that can be found in international relations. Consider now, that we read legalization not as a static picture, but as a dynamic process. What happens when one or more of the indicators, say formalization or judicialization, become so significant that it becomes almost impossible for the addressees to deviate from such a norm. This can happen, for instance, if the reputation costs become unbearable, or if arbitral awards multiply to such a number that hardly any state could break with them. Or imagine that some states have modified their economic structures and adapted them to some soft. A good example of soft law beyond the Internet is the normative pull of the international financial rules and standards produced in the international financial system. The norms produced by the Bank for International Settlements, for instance, are not binding; but deviating from their technical provisions would be practically impossible for participating banks, because the costs associated with non-compliance are too high.⁴⁹ All these are abstract examples of how soft law cannot only influence behavior, but also constrain it. Although they are still soft law, they can be utterly compelling. And the mechanisms through which it became somehow “harder” are neither the lawgiver’s intervention nor international power politics, but rather soft law’s own dynamic. Under certain conditions it can evolve, multiply, diffuse and appeal to addressees. One could say that these are cases where soft law is so influential, that it ceases to be soft law at all.

The case that I proclaim as reasonable fitting this type, again, begins with the FCC’s policy papers about network management. These principles, to a great extent framed as net neutrality, were progressively adopted by national and international political bodies, and reproduced as guidelines for future action. The core content became distinguishable: transparency, no-discrimination, and access to content. Importantly, they were not enacted as positive law like in the case of the Chilean legislation on this issue; rather, they were stated as written commitment,

⁴⁹ for a comprehensive view on international financial regulation by soft law, see Brummer 2011; also R Weber “New Rule-Making Elements for Financial Architecture’s Reform” (2010) 25 *Journal of International Banking Law and Regulation* 512

programmatic goals, or guiding principles. As the principled set of norms around net neutrality is reproduced, the normative pull also increases. This is not to say that it becomes valid law.⁵⁰ Still, they can be much more than soft law.

Following the disclosure by the FCC, the principles on network neutrality were adopted by the Japanese Ministry of Internal Affairs and Communications' commissioned a policy report.⁵¹ Soon after, the Annenberg Center for Communication at the University of Southern California penned the principles for Network Neutrality in a formal declaratory document. Finally, the Norwegian Post and Telecommunications Agency adopted these policies as guidelines.⁵²

Why these principles show such a rapid dissemination is still puzzling. We still know to little about the Internet in order to understand how its norms emerge. Interestingly, they share the same core content.

4. Overlapping Legalization

Strictly speaking, this is not a type. It serves an important purpose, though. At the risk of disrupting the systematic aim of the proposed typology, I include this group in order to highlight a set of norms that are in conflict. Although overlapping and also contradictory norms are lawyer's daily business, there are usually higher norms that resolve eventual conflicts that might arise from overlapping norms. There are different theoretical approaches to solve them, be it as an ideal *Grundnorm* or a rule of recognition. In the Internet, we are still to explore the contours of such higher norms.

The types shown above are different means of norm creation. How we should resolve conflicts between norms of the Internet, be it because they are merely

⁵⁰ Unless, of course, it finds its way into international public law as customary law.

⁵¹ Ministry on Internal Affairs and Communications of Japan (September 2007) *Report on Network Neutrality*. English version available at <http://www.soumu.go.jp/main_sosiki/joho_tsusin/eng/pdf/070900_1.pdf>

⁵² Norwegian Post and Telecommunications Authority (February 2009) *Network Neutrality. Guidelines for Internet Neutrality*. Available at <<http://www.npt.no/ikbViewer/.../Guidelines%20for%20network%20neutrality.pdf>>

overlapping, or antagonizing⁵³ is a question that we will have to get used to. Concretely, in the described case of complementarity of legalized norms, I pointed to a set of soft norms that was included in traditional international trade law. Together with the UDRP policies, the US government also included a regulatory package related to ISP's. 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 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, shall be removed by ISP without any kind of judicial procedure.

Conversely, the 2003 WSIS Geneva Declaration on Principles affirmed "as an essential foundation of the Information Society, and as outlined in Article 19 of the Universal Declaration of Human Rights, that everyone has the right to freedom of opinion and expression; that this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Communication is a fundamental social process, a basic human need and the foundation of all social organization. It is central to the Information Society. Everyone, everywhere should have the opportunity to participate and no one should be excluded from the benefits the Information Society offers."

Whether this declaration can be harmonized with the "notice and take down" scheme is unclear. It seems, though, that a collision between free communication and copyrights is certain. It remains to be seen when and how such tensions are resolved in the Internet.

⁵³ Shaffer and Pollak 2008

⁵⁴ Kurbalija 2010

VI. Discussion and Outlook: Do we need a Constitutional Theory for the Internet?

So far I have advocated for a view centered on legal norms, be they soft law or traditional positive law. The current literature on Internet governance has opened much possibilities for legal research that focuses on law; but there is still much to do be done. My proposal for a typology aims at taking stock of the plurality of legal norms that are emerging in the Internet. Some are straightforward and well researched. Others are yet to be discovered. The point of a first typology is to make convergence and collisions explicit.

The Article opened with five questions in regard to the role of law and its emergence in the realm of Internet. As this project is in its beginnings, it is useful to recall them at this stage. Before delving into the research, I asked:

- How are Internet related norms produced?
- Who produces them?
- Under what circumstances do these norms become legally relevant?
- How does soft develop into hard (constitutional) law?
- Are there identifiable constitutional implications of such processes? Is there a process of juridification of Internet related norms?

The proposed typology does not answer all the questions. On the contrary, it exacerbates some doubts and confirms that we know too little about the proto-legal order that is growing.

Furthermore, the typology also suggests that the some legal norms (soft law) that emerge from Internet governance have a distinctive trait: their content is shaped by the conversations about Internet governance. The spread of the principles of net neutrality revealed that the content of policy guidelines can expand and diffuse to other settings and become legalized through repeated practice and formalization. This is in sharp contrast with soft law expanding through traditional means of

international law, or formal parliamentary debates. The question that this article leaves open is how to justify the content and results of the conversations about topics like net neutrality. At this point it seems reasonable to remember John Rawls' call for a reasonable procedure for deliberating within a frame of public reason.⁵⁵ Issues like efficacy of the network, or participation of users in the decision-making process are commendable goals. However, they are only helpful doctrines that help us take immediate decisions. We still lack a deeper conversation about the higher political values that we want to attain with the Internet. Should Internet laws be a device that helps us attain more social justice? To what extent should the Internet embody equality of people – not stakeholders?

The typology revealed potential conflicts between different types of norms. A collision between some of them seems to be unavoidable. How, then, are we to order our priorities. Do we have a rule of recognition that settles conflicts of laws in the Internet? Do we have a hierarchy, a *Grundnorm* applicable to the Internet? Is the law of the Internet comparable or subsumable to other legal fields? I guess that these questions cannot be properly answered without introducing some constitutional thinking into the research. To be clear: at this point, I do not know whether there will be ever such a thing like written constitution of the Internet. What I am saying, is that we already have problems with the ordering of norms and principles in this field, and unless we shut down the Internet, we will be having the “c” word in the Internet soon enough.

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⁵⁵ J Rawls “The Idea of Public Reason Revisited” (1997) 64 *The University of Chicago Law Review* 765

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