

THE DOGMATIC FUNCTION OF LAW AS A LEGAL REGULATION MODEL FOR CYBERSPACE

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Internet and cyberspace regulation has been discussed throughout the world and we can identify some theoretical models. International agreements, code-based regulation and the traditional regulation model of applying domestic laws to cyberspace are three examples of those models. This article proposes that law has an inherent dogmatic function. Law creates dogmas that are accepted by the society that gives the strength to the legal dogma. A legal dogma may become not acceptable by the society to which the dogma is applied. In that case, in democratic societies, where legal dogmas cannot be maintained by the authoritarian strength of the state, the dogma collapses and new dogmas are created. We demonstrate that legal dogmas can be used to regulate cyberspace, despite of its technological particularities or architectures. In doing so, adjusting and applying existing legal dogmas to cyberspace is our proposal for Internet legal regulation. The application of that regulation model to cyberspace is addressed under the Brazilian Law perspective. In Brazil, Federal Law has been interpreted to define the Internet as a private environment. Therefore, in Brazil, the Internet is not within the same legal public law-based framework as ordinary telecommunications are. That legal approach is better for the regulation of the Internet in Brazil because it makes it possible for private entrepreneurs to develop the Internet without having to apply for licenses from the Federal Government. This article concludes that, today, an important source of regulation for the Internet, in Brazil, is the Brazilian Consumer Protection Code – CDC.

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INTRODUCTION

This is an article about the legal regulation of cyberspace, under a theoretical approach. This text is the basis of my presentation on October 2nd, 2004, at the “Internet and the Law – A Global Conversation”, a conference held at the University of Ottawa, in Canada, when we gave a talk about the Internet and Regulation in Brazil.

We will review the dogmatic function of the law that we take as inherent to the law, despite to the legal system it belongs to. This article presents the dogmatic function of law as an efficient regulatory model for cyberspace. In fact, we think that the challenge for cyberlaw is to identify the correct legal dogmas that will regulate cyberspace, accordingly and in respect to the culture and the tradition of each country.

After presenting the theory, this paper shifts to the identification of the application of the dogmatic function of law, under a Brazilian legal perspective.

This text basically covers the origins of telecommunications law in Brazil and how it was adapted to regulate the Net.

Brazilian net surfers are well ranked among international Internet users.¹ That fact could sound interesting to foreigners. How could a developing country, such as Brazil, show relatively good Internet use rates? The answer may be in the past history of Brazilian high inflation rates.

Electronic transactions have not been something new for the average person in Brazil. That fact has some historical roots in the late seventies and early to mid eighties. One of the most important reasons for the acquaintance of the Brazilian people with the on line world is indeed an economical issue.

During the second half of the last century, the Brazilian economy experienced very high inflation rates. Due to many economical factors that are beyond the scope of this text,

¹ *Internautas Brasileiros Superam Americanos em Tempo On-Line*. Folha On line (visited May 21, 2004) <<http://www1.folha.uol.com.br/folha/informatica/ult124u16018.shtml>>. Accordingly to a recent research done by IBOPE, there are 12 million residential Internet users in Brazil, which spent an average of 13 hours and 43 minutes on line on April 2004.

the inflation kept rising throughout the seventies and the eighties. Inflation rates reached a tremendous rate of 80% (eighty per cent) a month in the early nineties.

A high inflation economy makes paper money a useless asset. Therefore, money was mostly kept in the banks, where there was some protection against the day-to-day devaluation of the currency. Brazilian banks developed their electronic networks very rapidly during the eighties. Debit cards and ATM machines were spread throughout the country. Money transfers were easily made throughout the vast territory of the country, even from Southern Brazil to the most far away regions of the West or the Northern region.

Brazilians had to learn how to make electronic transactions to avoid great losses due to the day to day devaluation of the currency. Of course, that was a very good reason for people to get involved with the on line world.

If, on the one hand, the electronic sector was relatively developed in Brazil, during the last decades of the past century, on the other hand, telecommunications was really a problem. The telecommunications system had been working slowly under a state-owned public monopoly model. The Federal Government controlled all telecom companies but had little or almost no money to invest in the services. The consequence was a very low offer of phone lines to consumers. Besides that, phone lines were highly expensive in the market.

The change for the telecom market came in the mid nineties, when the market was deregulated. Actually, an amendment² to the Brazilian Constitution of 1988 was required to break-up the public monopoly of the Federal Government. With the deregulation of the telecom market, private investment, both, Brazilian and foreign, became welcome in the country. Brazilian consumers, of course, rapidly felt the good results of the privatization. Telephone lines had their very high prices lowered to something very close to zero in less than six or seven years.

The good news from the telecom sector and the experience that Brazilian consumers had with electronic banking led to a wide growth of the Internet in the country. Not only the

² We refer to the Eight Amendment to the 1988 Constitution of Brazil, August 15th, 1995.

private sector, but also most of the government agencies felt comfortable in investing time and resources to develop the Brazilian “.br” branch of the Internet.

The public sector did also contribute a lot to the development of the on line world in Brazil. A Federal Statute of 2000 created a fund of 1% of the gross revenue of telecom companies for the development of Internet access for schools and public libraries.³ At this point in time, the public sector has turned its attention to fostering the use of open software.

The country had its first electronic election for president in 1994. At this point in time, ten years later, almost all of the Brazilian states have adopted e-voting machines and paper ballots have become something of the past.

Brazilians tax payers are used to filing their tax returns to the Federal Government through the Internet. The system was made available during the mid nineties and, at this point in time, most of the tax payers send their tax returns on line. Besides that, the Brazilian “IRS” has become very efficient in providing on line services to tax payers such as on line tax compliance certificates.

Brazilian courts have also taken a positive approach towards the use of cyberspace. Some circuits of the Federal Justice have implemented electronic lawsuits.⁴ Courts are analyzing projects that could lead to the wide use of the Internet as a way to make judges closer to the people, especially in the remote areas of the North (usually of difficult access due to the Amazon forest).

In the academic legal field, researches began during the mid nineties. The law of the on line world became a legal discipline. Actually, the discipline “Virtual Law” (Cyberlaw) was first taught for LL.B. students in 1997 as a mandatory discipline at Faculdade de Direito

³ Lei n. 9.998/2000.

⁴ We refer to the “Especial Federal Lawsuits”. These courts have jurisdiction over federal civil and federal criminal cases. Civil cases must discuss a value not higher than sixty minimum wages (around five thousand United States dollars). Criminal cases are heard only when the maximum sentence for the felony is not higher than two years in prison. The federal statute n. 10.259, enacted in July 12th, 2001, article 8th, section 2, allows for the filing of electronic documents before the Federal Courts in those cases.

Milton Campos.⁵ Cyberlaw turned to be a regular discipline offered in most of the Brazilian first tier law schools and the scholarship has grown a lot in the area.⁶

The law of the on line world in Brazil addresses legal issues related to the use of cyberspace. Consumer laws, on line torts, cyber crimes, privacy issues, freedom of expression and the legal protection of intellectual property are some of the legal issues that Cyberlaw teachers and law students deal with in Brazil.

This Article covers the dogmatic theory for cyberspace regulation and some of the most relevant issues of the regulation of the Internet in Brazil. Due to the fact that the scope of the article could become too wide, we will focus on two separate main issues, divided in two the parts of the text.

The first part of the Article presents a theoretical analysis of the law of cyberspace. Item A of part one identifies the existence of some academic schools of regulation of the on line world. We will present the dogmatic function of law as an inherent characteristic of the legal regulation. After explaining our approach or the dogmatic function of law, we will present it as a model of regulation for cyberspace and we will take the position that legally choosing the right dogmas for each society is the best way to regulate cyberspace. After that study of the theory of cyberlaw, we turn to the application of the theory for the law of the on line world in Brazil. Item B of the first part will review the telecommunications law and policy in Brazil, from the state-owned public monopoly times to the legal and practical effects of the deregulation of the market (pos the 1995 Amendment of the Brazilian Constitution), when the first Brazilian Agency was created. In item C, at the end of the first part of this Article, we will explain the legal dogmatic framework that the Internet has had in Brazil,

⁵ We started to offer that discipline at the Faculdade de Direito Milton Campos School of Law (FDMC), in Belo Horizonte, MG, during the first semester of 1997. Since then, it has become an obligatory third-year discipline for all of the LL.B. students at FDMC. From 1997 to today many other Law Schools have followed the approach first taken by Milton Campos School of Law, and many top law schools offer Cyberlaw (or other related discipline, under another title) in Brazil for both LL.B. and LL.M. students.

⁶ See generally Carlos Alberto Rohrmann, *Notas Acerca do Direito à Privacidade na Internet: A Perspectiva Comparativa*, 38 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* (2000); see also Carlos Alberto Rohrmann, *O Governo da Internet: Uma Análise sob a Ótica do Direito das Telecomunicações*, 6 *Revista da Faculdade de Direito Milton Campos* (1999); see also Carlos Alberto Rohrmann, *O Direito Comercial Virtual - A Assinatura Digital*, 4 *Revista da Faculdade de Direito Milton Campos* (1997).

since its beginning in the mid nineties. Finally, we will demonstrate that the Internet is not a public service in Brazil and, therefore, the Internet is legally considered to be a private enterprise in the country. The legal consequences of that dogmatic regime for the Internet in Brazil will be briefly addressed at the very end of the first part.

The second part of the Article deals specifically with some of the most important Brazilian legal dogmas regarding the Internet in Brazil. Item A of the second part addresses the regulation of the Internet Services Providers in Brazil, under a tax perspective. It is an interesting legal analysis because it demonstrates how courts are still struggling with the law in order to determine what legal dogma will be applied to the ISPs in order to tax their services. Items B and C deal with e-commerce. In doing so, this Article presents the importance of Consumer Laws in the Brazilian regulation of e-commerce. We will show that Brazilian Consumer Laws have grown in importance as a source of legal dogmas for cyberspace in Brazil. Item B of the second part will also make the policy analysis of the Panasonic Case, decided by the Superior Court of Justice in Brazil. Even though it is not a cyberlaw case, it is important to analyze the Panasonic Case due to the fact that the Brazilian Consumer Law was applied to a transaction between a Brazilian consumer and an American offeror. This application of the Brazilian Consumer Law to transactions occurred outside the boundaries of Brazil may be a precedent for applying the same law in electronic transactions. Finally, in item C, we will address the legal responsibility for computer virus infections under a Brazilian tort analysis. We will show that Brazilian courts are likely to impose liability on web site owners for damages caused by computer virus on third parties.

This article concludes that law has an inherent dogmatic function that can be applied as a good model of regulation for cyberspace in democratic societies. Therefore, domestic laws should be used to regulate cyberspace. When legal dogmas are correctly chosen by courts and by the legislature, for the regulation of cyberspace, other kinds of regulation such as code-based regulation would have more of a symbolic value to help the dogmatic function of law than a legal role.

Finally, under a theoretical and comparative perspective we will demonstrate that the regulation of the Internet, in Brazil, as a private place is very close to the way American Law has addressed the issue (as decided by the United States Supreme Court in the 1997 case *Reno v. ACLU* – the first internet law case⁷ to be heard by the Supreme Court). Besides, this article concludes that, under the application of the Theory of the Dogmatic Function of the Law, the application of Brazilian Consumer Laws as a source of legal dogmas for cyberspace is, at this point in time, one of the most important sources of regulation for cyberspace in Brazil.

I. A THEORETICAL APPROACH TOWARDS THE REGULATION OF CYBERSPACE

A. The Theory of the Dogmatic Function of Law Applied to Cyberspace

We define cyberspace as the telecommunications medium that was created back in 1835 when Morse invented the telegraph. We take cyberspace and the on line world as synonymous. Therefore we assume that Cyberlaw is the legal discipline that studies the law of the on line world.

We know that, on the one hand, there are many legal scholars who argue that there are some instances of the technology should or could not be *regulable* by the law itself without a change in the code of the software. On the other hand, there is the so called “traditional regulation model”, or “applying existing rules and developing new legal frameworks at the individual country level”, as defined by UCLA law Professor Stuart Biegel, in his book *Beyond our Control*.⁸

The question of how would be the legal regulation of cyberspace is a much debated issue. Legal scholars have proposed interesting different solutions. The proposals range from

⁷ *Reno v. ACLU*, 521 U.S. 844 (1997).

⁸ See STUART BIEGEL, *BEYOND OUR CONTROL? CONFRONTING THE LIMITS OF OUR LEGAL SYSTEM IN THE AGE OF CYBERSPACE* 123 (2001).

the position that the Internet should have no external legal regulation⁹ (or even that the Internet should be established as a separate jurisdiction¹⁰) to the other extreme, considering the Internet as nothing new for the law (therefore no new external legal regulation should be specifically designed for the Net).¹¹

The libertarian position reflects the early American concept of a group of people that forms a free community without direct government interference.

That position has its roots in the formation of the United States, when people came first and built communities where they could enjoy their freedom such as the freedom of religion. Since the people was searching for more freedom that usually was not the situation of the place where they had come from, new communities and the lack of government were associated to freedom. A government, a law would be seen under precaution due to the risk of restriction of freedom. Therefore, the external rulers would represent something such as a threat to the freedom of the people of the new community.¹²

In other words, under that theory, law could be a threat to freedom; law could restrict the freedom that the community enjoys from its own rules.

We can identify an analogy between that American concept of community and the modern concept of communities in the Internet. Under the new cyberspace approach it has been said that “technology creates freedom”. After the technological freedom has been enabled, the same way as the old communities would fear the government, nowadays there is a fear of the law (or of the lawyers) as what could “take freedom away from cyberspace”.

⁹ See generally David R. Johnson & David Post, *Law and Borders--The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367 (1996) [hereinafter Johnson and Post, *Law and Borders*]; see also David G. Post & David R. Johnson, “Chaos Prevailing on Every Continent”: Towards a New Theory of Decentralized Decision-Making in Complex Systems, 73 Chi.-Kent L. Rev. 1055 (1998) and DAVID R. JOHNSON & DAVID G. POST, AND HOW SHALL THE NET BE GOVERNED?: A MEDITATION ON THE RELATIVE VIRTUES OF DECENTRALIZED EMERGENT LAW, IN COORDINATING THE INTERNET (1997).

¹⁰ See generally Timothy S. Wu, *Cyberspace Sovereignty? – The Internet and the International System*, 10 Harv. J.L. & Tech. 647 (1997).

¹¹ See generally Eugene Volokh & Jack Goldsmith, *Regulation of the Internet: Three Persistent Fallacies*, 73 Chi.-Kent L. Rev. 1119 (1998).

¹² See generally John Perry Barlow, *A Declaration of the Independence of Cyberspace* (visited Apr. 10, 2000) <<http://www.eff.org/~barlow/Declaration-Final.html>> "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather."

Law creates freedom, not technology. Cyberspace technology helps people in enhancing creativity and communication. Thus, technology has a strong symbolic function in the expression of freedom but technology is no guarantee of freedom.

The tool that society has to enable freedom in cyberspace is law, not technology. We can quote as example countries that restrict freedom of speech. In those countries the law imposes a dogmatic restriction on cyberspace speech. If the government decides to adopt an Internet filter solution, to make it harder (or not possible) for its nationals to access a certain web site, that computer code has a strong symbolic function. The symbolic function of the computer code, in that case, does not confer to the code the role of regulating the behavior of the people when they go online. People will comply with the law for some reasons, among which: first, the society might agree that accessing those restricted web sites might not be a good idea (what happens for most of the people in the case of child pornography); or, second, because the society fears the government (mostly common in dictatorships).

From the example we gave, we can identify that the code of the software has a symbolic value but bypassing it does not mean that someone would be outside of the scope of the law (and therefore outside of the sanctions that might be imposed). Besides, if someone wants to access the restricted web sites, he or she will always have the law as the way to access them. Under the law, the one which will ultimately decide if someone will access the restricted web sites is a judge. In other words, it is not the computer code that determines what shape the speech has in a certain place, but the law as it is applied to cyberspace.

One could take that example of free speech and say that cyberspace is not *regulable* because the law would not be able to stop people from accessing this or that web site. Besides, another one could also say that, without the aid of the blocking software, cyberspace would not be *regulable* (the regulation would require a change in the architecture).

We think, on the contrary, that cyberspace is *regulable* and, despite the fact of being a new media, we should apply the traditional law as the main source of regulation for Cyberspace. Of course this position does not mean that we don't need to make changes and

adjustments in the Law in order to better regulate cyberspace. Those changes must reflect the dogmatic aspects of the law that we need to address specifically for cyberspace.¹³

Our position means that the Internet is not a separate jurisdiction. Therefore, we do need public laws to regulate the Internet, instead of codes or “virtual states”. We also realize that an international agreement¹⁴ could be reached in order to better regulate certain aspects of the Internet that is to say, once again, a body of laws that are edited by the public power (or by public powers from various states throughout the real world). Of course, those treaties should be implemented by the local state.

We take the law as a much broader concept than the narrow concepts of “statutes” and “law enforcement”, for example. Law has some characteristics that make it separated from other systems of rules such as moral norms, technical norms, etiquette norms or even “netiquette norms”.

The law is made for the public good, it is made for the public benefit, and its ultimate goal is to promote general and equal justice. If the law is corrupted at a certain point in time and in a certain place up to a point where the law stops to pursue the public good, that system naturally collapses. Of course the means to achieve the public good vary throughout the world, but the goal, the focus of multiple juridical systems is ultimately always the same: the achievement of the public benefit, the final achievement of justice.

Besides the public benefit, we do take the position that law has a universal authority, which means that all the people under the jurisdiction of the law are bound by the law. No one in a certain jurisdiction can just “bypass” the law. No one in the jurisdiction of the law can claim to be outside the scope of the legal system. Of course there might be situations in which a specific statute is not applicable to a certain individual. This does not mean, however, that such law lacks universal authority. The reason is simple: if a certain individual

¹³ Of course there are certain aspects of the on line world that makes it important for the off-line law to make a certain regulation that does only apply to the virtual world. A good example is the Digital Signature Laws. They are laws that were made in the real world to better regulate the on line world.

¹⁴ This position of an international perspective for the on line regulation reflects the movement that some countries have taken towards the liberalization of their markets for certain partners. The European Union initiatives for cyberspace regulation are a good example of this perspective. *See generally* EU Declaration Sets Stage for Global Internet Regulation, 9 No. 9 J. Proprietary Rts. 20 (1997).

who is not subjected to such statute, for example, decides to become a member of the class of persons that are subjected to that statute, he or she will be bound by such piece of legislation. We could take as an example the law that regulates the legal profession. Such laws only bind someone after he or she decides to go into the legal profession (but indirectly, that law binds everyone, since whenever anyone decides to become a lawyer, he or she will face the parameters set by that law).

Finally, public authority ultimately enforces the law.¹⁵ Rules that are not enforceable by the public authority, such as the rules of the *Netiquette*,¹⁶ are not within the scope of the law. They are not laws and they are not the objects of the juridical science.

All of the three characteristics of the law enumerated above point to a common objective: the achievement of justice. We cannot make confusions between the law and the instruments of the law enforcement. The difficulties of the law enforcement do not mean that the law would not be able to regulate a specific human relationship.

The reason for not keeping the aim of the analysis exclusively in the law enforcement aspect is simple. There are many people that obey the law, regardless of the level of the enforcement. The law is often taken as a model to be followed, to be observed. This thought is demonstrated by the great number of juridical relationships that take place everyday, within the scope of the law. If we take into consideration the number of times that the law is obeyed, we can see that relatively only few cases are brought to court. Besides, the fact that in some instances the system fails to enforce the law; it does not mean that the public benefit is not still being targeted by the society.

We see the law as a dogmatic system of regulation that the human society uses to regulate whatever relationship it wants to regulate. We understand the law as dogmatic because the law can create legal dogmas to impose legal fictions in some relationships. Once

¹⁵ The “public authority” can be understood as the “state”.

¹⁶ For a list of the “Netiquette Guidelines”, *see generally RFC 1855*, Netiquette (visited Jan. 29, 2000) <<http://sunsite.cnlab-switch.ch/ftp/doc/standard/rfc/18xx/1855>>.

those legal fictions are created by the law, and accepted by the society, they are also able to regulate any given situation.

Law can create legal dogmas. Legal dogmas often ignore the "architecture" of the real world. Legal dogmas can redefine the nature the way the law wants. The legal dogmas can be understood in the same way as the religious dogmas. A legal dogma is a legal statement that is accepted as true, for the juridical system, regardless of any scientific (or architectural) accuracy. The reasons why the legal dogma is accepted as true are many and they are related to the cultural aspects of each society and of each country.

Take for example the way humans have sons and daughters. No one could disagree with the science, at this point in time, that we have sons and daughters through sexual intercourse (or through artificial insemination). The law can create a dogma that allows for someone to have a son or a daughter without sexual intercourse (or artificial insemination). It is the institution of adoption. No scientist would say that an adopted child is a biological son or daughter, but that does not change anything for the dogmatic aspect of the law. The dogmatic function of the law can make an adopted child have exactly the same legal status as a biological child has.

We think that the digital technology may present some questions to be addressed by new laws. But we understand that believing that technology itself is not *regulable* (or that it should be established as a separate jurisdiction) would be almost the same as a utopia. It would be the utopia of a new technological world, created by the computer digital technology that could be "free from the power of law" and that would lead to the growth of code regulation.¹⁷

The idea that the Internet should be established as a separate jurisdiction demonstrates this utopia of the "technological world". In that case, technology would have created a world of freedom that would be set outside the scope of the legal systems of the "real" world. The proposal of establishing the Internet as a separate jurisdiction is another attempt at having a

¹⁷ See generally Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 Tex. L. Rev. 553 (1998).

world of freedom, created by technology. Under that proposal, technology would have created, as Hanna Arendt has lectured about, a “promised land”¹⁸ of freedom, away from the legal system. Once again, we propose the law and its dogmatic function as the main source of freedom.

We think that instead of establishing a separate jurisdiction for the internet, it would be more efficient trying to identify the correct dogmatic function of the law for each country, accordingly to each culture, in order to regulate the international aspects of the Internet. If we took the French Yahoo! case as an example, we would see that someone who makes online business with consumers of other countries should be aware of the possible application of the laws of the country of the consumer. As a matter of fact that might be a pretty general rule, despite of the electronic commerce.

As we have seen, through the dogmatic function of the law, it can create the legal dogmas that are necessary for the regulation of cyberspace. Therefore, we will take the regulation of the Internet in this text as the law of the net, a law that is being applied to the Net in Brazil, at this point in time.

Now that we have defined our theoretical understanding of the legal regulation of the Internet (as a *regulable* environment under the correct application of the Dogmatic Function of the Law), we turn to some practical specific issues related to the legal treatment of cyberspace in Brazil. We will begin with an overview of telecommunications law.

B. *Historical Origins of the Regulation of Telecommunications in Brazil*

Since we have defined the on line world as also referring to telecommunications and not only to the internet itself, this article dedicates some words to explain the legal framework for the regulation of telecommunications services in Brazil. We will see that telecommunications service has been regulated as a state owned monopoly and than, under

¹⁸ See HANNA ARENDT, DA REVOLUÇÃO (2nd. Ed., Ed. Ática, 1990, p. 111) where she says that technology made the American dream of a “promised land” true.

the dogmatic function of law it has evolved, in Brazil, to be public service that can be offered by private players.

Telecommunications has been, since its origins, an international and widespread enterprise. It is interesting that, despite the fact of being an undeveloped country in the Eighteenth Century, Brazil was one of the first customers that Mr. Graham Bell had for his invention, the telephone.

The second emperor of Brazil, D. Pedro II, went to the fair in Philadelphia and bought a telephone from Mr. Bell. The Emperor went to the exhibition in Philadelphia, where he got impressed by the telephone Mr. Bell had invented.¹⁹ The first line was installed in Rio de Janeiro, connecting the Imperial Palace to another palace, in the late 1870s. After that, the first line was working under a license granted to Mr. Charles Paul Mackie to explore telephone lines in the Rio de Janeiro area and also in the nearby city of Niterói (across the Guanabara Bay). That first telephony license was granted by the Imperial Decree n. 7.539, in November 15th, 1879.²⁰

Of course, Brazil had had telegraph lines before the first licenses for telephony were granted. Back to 1873 a license to explore under the sea lines between Brazil and Europe (more specifically, between Rio de Janeiro and the capital of Portugal, Lisbon) was granted to a Brazilian entrepreneur of the nineteenth century called *Barão de Mauá*.²¹

Brazilian telecommunications services were first governed by a system that followed the American model for the regulation of telecom. Just like in the early twentieth century, in the U.S., where AT&T was a private player, a regulated monopoly, due to the “natural monopoly” argument²², in Brazil, private telecom companies were free to apply for licenses from the government. That legal model had its roots in the imperial licensing framework.

¹⁹ See generally GASPAR LUIZ GRANI VIANNA, DIREITO DE TELECOMUNICAÇÕES (1976).

²⁰ See generally JOÃO CARLOS MARIENSE ESCOBAR, O NOVO DIREITO DE TELECOMUNICAÇÕES (1999).

²¹ See GASPAR LUIZ GRANI VIANNA, *supra* note 5, at 16.

²² See THOMAS G. KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 344 (1998) [hereinafter Krattenmaker, *Telecommunications Law and Policy*], where Prof. Krattenmaker explains why the local telephony is a natural monopoly.

The declaration of the Republic of Brazil, in 1889, did not itself change the legal framework for telecommunications service in the country.

The first problems with the old Brazilian telecom model began to arise in the late 1920s, and the early 1930s. The lack of investments in infrastructure was a major problem for the development of a telecom company in a big country such as Brazil. We have to remember that Brazil was still a mostly agricultural country in the early twentieth century. The industrialization process of Brazil did only begin until the middle of the past century.

The lack of private investment in telecom infrastructure led to a movement towards increasing in the role of the Brazilian state as the investor in the field of telecommunications.

The legal framework thus changed in order to accommodate the role of the state as the new most important player in the telecom industry. Telecommunications started to be a public service in the hands of the Brazilian state.

Here we have to make a little explanation about the Brazilian federalism. The country has adopted federalism since it became a republic in 1889. The Brazilian states were “artificially created” from the unitary imperial state. Therefore, Brazilian states have never been as autonomous as, for example, American states. Most of the legal and the constitutional powers are concentrated in the hands of the federal government. Brazilian commentators refer to federalism in Brazil as always “converging to the center”.²³

Throughout the last century, Brazilian constitutions started to concentrate the responsibility for the telecommunications service in the hands of the federal government. That is a trend that started with the 1946 Constitution. In 1967, the Constitution imposed by the military government established that only the Federal Government was allowed to exploit telecommunications services in Brazil.²⁴

A federal, state-owned company, named “Embratel” had been created back in September 16th, 1965, to provide long distance inter-exchange telecom services. Seven years

²³ See generally ALEXANDRE DE MORAES, DIREITO CONSTITUCIONAL (2000) and KILDARE GONÇALVES CARVALHO, DIREITO CONSTITUCIONAL DIDÁTICO (1999).

²⁴ Constitution of Brazil of 1967, article 8th, section XV.

later, still during the military administration that ruled the country from 1964 to 1985, a holding telecom company, named “Telebrás” was created to centralize the operation of all of the local telecom providers. Only very few private telecom companies were allowed to provide the service in very restricted areas of the country, nothing relevant at all.

It is important to make it clear that the first years of the military administration back in the mid sixties to the mid seventies was a period of high intervention of the federal state-owned government in the Brazilian economy. Not only “Telebrás”, but many other public federal companies were created. Of course, the federal government did invest a lot of public resources and money in those companies. The results for the telecom services were pretty good: a lot of public investment in infrastructure and a quick increase of the total area of the Brazilian territory covered by the state-owned telecom companies.

As an example of the fast development of the telecom services in Brazil, we quote the rate of the increase of new fixed telephone lines installed in Brazil during the twenty first years of the activities of the Telebrás holding: almost five hundred percent (500%).²⁵

The project that once began with the hope of the construction of a developed country through massive state investments did not work for more than twenty (20) years. The economic crisis of the oil prices in 1973 was the start point for the reduction of foreign investments and of foreign loans to Brazil. The lack of incoming capital to the country led to a crisis of state investment. With very little, or no money to invest in the state-owned telecommunications company, the state model that had been conceived to be a solution, came to be a problem.

The eighties are known as “the lost decade” for the Brazilian economy. The economy was shaken by problems such as: There were almost no investments neither from the state, nor from foreign players; the interest rates were very high and Brazil faced many difficulties in the renegotiation of old foreign credit lines. The results were almost two large defaults in the payments of external debits, one in 1982 and the other in 1987.

²⁵ See LUCAS DE SOUZA LEHFELD, AS NOVAS TENDÊNCIAS NA REGULAMENTAÇÃO DO SISTEMA DE TELECOMUNICAÇÕES PELA AGÊNCIA NACIONAL DE TELECOMUNICAÇÕES – ANATEL 15 (2003).

The new Federal²⁶ Constitution of Brazil dates back to 1988. It is a democratic Constitution that kept the most of the model of the intervention of the state in the economy. Therefore, telecommunications services were constitutionally regulated as a “public service”, among the exclusive powers of the Federal Executive Branch of the government. It means that not only new laws pertaining to telecommunications had to be federal laws, but also, only the federal government, directly, was legally entitled to offer telecommunications service. It was a public monopoly of the telecom system.

The trend of liberalization and privatization only started in Brazil during the first years of the nineties. It was only after the inauguration, in 1990, of the first president of Brazil to be elected by the people, after the military dictatorship, since the early sixties that the Brazilian economy turned back to a liberal capitalist model.

The first democratic administration of Brazil after the military period did not address the issue of the federal monopoly for telecommunications services. It was only during the Administration of President Fernando Henrique Cardoso that the model for telecom changed in Brazil. The Cardoso Administration had the privatization of the “Telebrás” system as one of its goals.²⁷

Brazilian commentators refer to the crisis of the Brazilian state and the lack of state investments as two of the most important reasons that led to the privatization wave that swiped the country during the nineties.²⁸

The legal problem related to the privatization of “Telebrás” was that a constitutional reform would be required. Since the federal constitution of Brazil established that only companies controlled by the Federal Government were allowed to provide telecommunications services in the country, the Federal government had to amend the Brazilian Constitution of 1988, in order to be able to sell its telecom companies.

²⁶ See generally JOSÉ ALFREDO DE OLIVEIRA BARACHO, *TEORIA GERAL DO FEDERALISMO* (1986).

²⁷ See José Alfredo de Oliveira Baracho, *A Teoria Geral das Privatizações*, *Revista do Conselho da Justiça Federal*, set-dez 1998, at 57.

²⁸ See generally MESSOD AZULAY NETO & ANTÔNIO ROBERTO PIRES DE LIMA, *O NOVO CENÁRIO DAS TELECOMUNICAÇÕES NO DIREITO BRASILEIRO* (2000).

The Brazilian Constitution is very extensive²⁹ and it establishes many legal conditions for its amendment procedure. Therefore, amending the Constitution is not an easy task at the Brazilian Congress. The Constitution requires that the proposed Amendment has to be approved by three fifths (3/5) of each house in two separate occasions. The Constitution of Brazil of 1988 is a rigid one, when we consider the procedure related to its Amendment.

Despite the fact that it is difficult for the Federal Constitution of Brazil to be amended, the Fernando Henrique Cardoso Administration was able to make many amendments. During the second semester of the first year in office, President Cardoso had the article of the Federal Constitution of Brazil that refers to the telecommunications service amended by the Congress of Brazil. We refer to the Eight Amendment to the Brazilian 1988 Federal Constitution. The new constitutional regulation for telecom in Brazil, after the edition of the Eight Amendment to the Brazilian Constitution of 1988 is that the Federal Government is entitled to the powers to explore directly, or through licensing (private companies), the services of telecommunications, under the terms of the federal statute that shall regulate the organization of the services, the creation of a regulatory agency and other institutional aspects.³⁰

It is interesting to highlight that the Eighteenth Amendment to the Brazilian Constitution of 1988 not only made it possible for the federal government to sell its telecom companies but also mandated the creation of a regulatory agency.

Brazilian administrative law did not have the institution of the “Administrative Agency” (or the “Regulatory Agency”) before the Eight Amendment became law. Even

²⁹ There are 250 articles in the 1988 Constitution of Brazil.

³⁰ See Art. 21 of the Brazilian Constitution:

“Art. 21. The Federal Government has the powers to:

[...]

XI – explore, directly, or through licensing [private companies], the services of telecommunications, under the terms of the statute that shall regulate the organization of the services, the creation of a regulatory agency and other institutional aspects;” (our translation)

“Art. 21. Compete à União:

[...]

XI - explorar, diretamente ou mediante autorização, concessão ou permissão, os serviços de telecomunicações, nos termos da lei, que disporá sobre a organização dos serviços, a criação de um órgão regulador e outros aspectos institucionais;”.

though there was a similar institution in Brazil, it was not a real independent agency such as the American Federal Communications Commission – FCC.

The intention of the Eight Amendment was really to enable the creation of an independent agency for the regulation of the telecommunications service in the country. Once again we refer to the tradition of Brazil of having a strong federal government. An independent agency was an idea that would start to change the concentration of powers in the hands of the federal administration (and, therefore, in the hands of the president of the country).

Brazilian commentators³¹ say that the Cardoso administration did also start the period of the “agencification” of the Brazilian administrative law. Brazilian commentators also pointed that the North-America administrative law was the source of inspiration for the regulation of the Brazilian recently created agencies.³² There are Brazilian commentators that even see that theory with some restrictions.³³

An agency was created to regulate the public telecommunications in Brazil. Federal Statute n. 9.472, enacted on July 16th, 1997, created the “National Agency of Telecommunications” – ANATEL.³⁴

The next step was the total privatization of the Brazilian telecom system. That was a much more complex process due to the legal reactions. Of course the discussion was not only economical but it also had to do much with ideology. Many public hearings were held and sometimes the tone of the arguments turned pretty much emotional.

The Brazilian telecom system was privatized in many auctions where the highest bidder would be granted a ten or a twenty-year license to explore telecommunications services in some restricted areas for the first years. Fostering competition was also considered during the privatization process in such a way that the incumbent telecom provider

³¹ See MARIA SYLVIA ZANELLA DI PIETRO, DIREITO ADMINISTRATIVO 386-387 (2000).

³² See generally ALEJANDRA HERRERA, INTRODUÇÃO AO ESTUDO DA LEI GERAL DE TELECOMUNICAÇÕES NO BRASIL (2001).

³³ See CELSO ANTÔNIO BANDEIRA DE MELLO, CURSO DE DIREITO ADMINISTRATIVO 151 (2002).

³⁴ See Federal Statute n° 9.472/97, article 8th.

for a specific area would have, for a specific period of time, only one competitor (known as “the mirror company”).

The privatization process of the Brazilian telecom system was successful and foreigner investors were able to buy some companies and to acquire some telecom licenses for both local and long distance telephony and also for mobile services.

The practical results of the deregulation of the telecom market were felt very soon after the privatization. The access to telephone lines was made cheaper and quicker. The only bad news for consumers was that the prices for the telecom services, at the first moment, soared.

An important legal conclusion from the liberalization of the telecom market in Brazil is that, even though private players were allowed to offer telecommunications services in the country, the service itself does also remain as a public service that ultimately belongs to the powers of the federal government. In other words, it means that for someone to be allowed to offer telecom services in Brazil, a license from the federal government is required by law (and by the Brazilian Constitution of 1988).

In the mid nineties a legal doubt arose: what about the Internet? What legal dogma should be associated to the definition of the environment of the net in Brazil? This question will be addressed in the next item of this paper.

C. The Legal Framework for the Internet in Brazil: A Public Service or a Private Enterprise?

The first discussions regarding the regulation of the Internet in Brazil were related to the doubt whether the Internet should be legally addressed as a public federal telecom service or not. We have to remember that if the Internet were considered to be a kind of telecommunications service, in the early nineties, it would fall within the scope of the Federal Government’s public monopoly. In other words, at that time, no licenses would be granted to

private players who would never be allowed to offer Internet services in Brazil. Therefore, services such as the ones provided by the Internet Services Providers – ISPs would have to be provided by a company totally owned (or at least controlled) by the Federal Government.

At the very first moment of the arrival of the Internet in Brazil, there was an attempt to include the Net under the monopoly power of the Federal Government for telecom services. The state owned “Embratel” company, which was responsible for long distance (and international) inter-exchange telecom services, tried to develop the argument that, under the law, Internet services could only be provided in Brazil by that corporation.

We have to make it clear that when we refer to the arrival of the Internet in Brazil, we mean the moment when the Internet was made available for the population as a commercial enterprise. Of course, there was access to the Net before. Brazilian universities had access to the Net under the so called “Rede Nacional de Pesquisas – RNP”. RNP was restricted to academic purposes, and it was made available only for universities and to some colleges.

When “Embratel” demonstrated its position to take the absolute control of the Internet in Brazil, during the early nineties, a strong reaction was felt. The press and most of the people did not agree that the constitutional monopoly for telecommunications should also comprise the way Brazilians would access the Net.

We understand that leaving the access to the Internet in the hands of the federal government would be a threat to the rights of the citizens to access the resources of cyberspace. Also, the constitutional granted right to free speech would be at jeopardy by that position.

It is important to highlight the importance of freedom of expression as an argument for not having the Internet in the hands of the Federal Government, especially in the case of Brazil, that has had a bad history of dictatorships.

The 1988 Constitution of Brazil was written in the years that followed the end of the military ruling of the country. One of the legal points that were stressed the most in the Constitution of 1988 was the right to free speech. Besides securing freedom of expression as

a fundamental right, the constitution also dedicates a chapter to the regulation of communications, from article two hundred and twenty (220) to article two hundred and twenty three (223). Article 220 of the 1988 Constitution of Brazil expressly prohibits all kinds of political, ideological and artistic censorship.³⁵

When we consider the bad history of dictatorships in South America we can see the importance of the separation between the Government and the control of the Internet. Unfortunately, Brazil has had many years of strong governments that did really restrict the freedom of the press and free speech. Even though most Brazilians believe that the dark days of the dictatorships were left in the past for ever and after, that is still something hard to predict.

In a world where commentators³⁶ are worried about the way the code can be used for regulation and about too much classification of the information available in the Internet, we can get especially suspicious about having governments controlling the access to the Net.

Under Brazilian Constitutional law, economic activity belongs to private entrepreneurs. The state can only develop economic activities under very restrict situations. Those situations are basically two: when the economic activity is required by the national defense or in cases of relevant public interest, as to be defined by the law (or, more precisely, by a statute to be passed by the legislative power).³⁷

³⁵ Federal constitution of Brazil, article 220:

Art. 220. A manifestação do pensamento, a criação, a expressão e a informação, sob qualquer forma, processo ou veículo não sofrerão qualquer restrição, observado o disposto nesta Constituição.

§ 1º - Nenhuma lei conterá dispositivo que possa constituir embaraço à plena liberdade de informação jornalística em qualquer veículo de comunicação social, observado o disposto no art. 5º, IV, V, X, XIII e XIV.

§ 2º - É vedada toda e qualquer censura de natureza política, ideológica e artística.

³⁶ See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 Harv. L. Rev. 501 (1999); see also Lawrence Lessig & Paul Resnick, *Zoning Speech on the Internet: A Legal and Technical Model*, 98 Mich. L. Rev. 395 (1999); Lawrence Lessig, *The Limits in Open Code: Regulatory Standards and the Future of the Net*, 14 Berkeley Tech. L.J. 759 (1999); Lawrence Lessig, *Keynote Address: Commons and Code*, 9 Fordham Intell. Prop. Media & Ent. L.J. 405 (1999); Lawrence Lessig, *Open Code and Open Societies: Values of Internet Governance*, 74 Chi.-Kent L. Rev. 1405 (1999); Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 Jurimetrics J. 629 (1998); Lawrence Lessig, *The Constitution of Code: Limitations on Choice-Based Critiques of Cyberspace Regulation*, 5 CommLaw Conspectus 181(1997); Lawrence Lessig, *Constitution and Code*, 27 Cumb. L. Rev. 1 (1997); Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 Emory L.J. 869 (1996); Lawrence Lessig, *Intellectual Property and Code*, 11 St. John's J. Legal Comment. 635 (1996); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. Pa. L. Rev. 2181 (1996); Lawrence Lessig, *The Zones of Cyberspace*, 48 Stan. L. Rev. 1403 (1996); and Lawrence Lessig, *The Path of Cyberlaw*, 104 Yale L.J. 1743 (1995).

³⁷ Constitution of Brazil, article 173:

If, on the one hand, the economic activity in Brazil, due to the constitutional rule, belongs to private players, on the other hand, public services are within the scope of the state. The state must offer public services directly or indirectly to the people. When public services are offered directly by the state, we may have a government controlled corporation and the one that offers the service. In Brazil, when the public service is performed “indirectly”, usually there is a private corporation who owns a temporary license granted by the state, offering the public service to the people.

Under Brazilian administrative law there is no difference whether public services are performed directly by the state or not. In other words, the service does remain as “public” and it is ruled by the principles of public law, among those we cite: importance of the public interest and precedence of state policies against the private interest. Besides, if the licensee is not performing the public service with good quality, the license can be revoked and sometimes even with no rights to compensation. Of course, a deep analysis about Brazilian administrative law pertaining to the regulation of public services in the country is beyond the scope of this text.³⁸

The regulation of the governance of the Internet in Brazil dates back to 1995, when the Ministry of Communications and the Ministry of Science and Technology issued a “Joint Note” about the Net. That Joint Note was the basis for the understanding of the way the Brazilian Federal Government would address the framework for the legal regulation of the Internet.

Basically, the Joint Note addressed the following items: the definition of the Internet as “a worldwide net of nets of computers”; the position that Internet services in the country should be offered preferably by private entrepreneurs (private Internet service providers); government-owned Internet service providers would be an exception (they would only be accepted to foster the development of the Net in places where the public sector would be

Art. 173. Ressalvados os casos previstos nesta Constituição, a exploração direta de atividade econômica pelo Estado só será permitida quando necessária aos imperativos da segurança nacional ou a relevante interesse coletivo, conforme definidos em lei.

³⁸ See generally CELSO ANTÔNIO BANDEIRA DE MELLO, CURSO DE DIREITO ADMINISTRATIVO (2002).

necessary to open the market for private Internet service providers); and, finally, the creation of an Administrative Committee for the Internet in Brazil (*Comitê Gestor – CG*).³⁹

That Administrative Committee for the Internet in Brazil (*CG*) was further regulated by the new Administration that took office in the year 2003. Decree n. 4.829, of September 3rd, 2003, established the powers of the *CG*. Basically, the *CG* is now responsible for outlining the framework for the development of the Internet in the country. Besides, the *CG* does also manage the domain name system and the IP address allocation table in Brazil.⁴⁰

Therefore, we conclude that the edition of the Decree n. 4.829 of 2003 did not change the legal framework for the Internet in Brazil. The role left for the government regarding the Net in Brazil is mostly administrative and scientific, not offering the service itself (as it is in the case of telecommunications, such as for telephony, for example).

It was very important, for the legal community, that Decree n. 7.829 did not change the legal environment for the Net in the country, especially in the beginning of a new administration in the country.

That “Joint Note” was very important in the past because it made it clear that the legal framework for the Internet in Brazil would be a private economic activity to be explored by private players, without the need for licenses from the Federal Government. In other words, the Brazilian Internet access is not within the scope of the public services of telecommunications, constitutionally held by the Federal Government of Brazil. The Internet was left to the private sector, what was the right choice for Brazil.

Despite the fact the Internet is not a “telecommunications service” in Brazil, some doubts about its tax treatment arose afterwards. This doubt led to a new confusion regarding the Internet being, or not, a public telecom service.

³⁹ *Comitê Gestor* (visited Aug. 18, 2004). <<http://www.cg.org.br/regulamentacao/notas.htm>>.

⁴⁰ See *supra* note 24 *Comitê Gestor* (visited Aug. 18, 2004). <<http://www.cg.org.br/regulamentacao/decr4829.htm>>.

We see that Brazilian law went basically the same way as the American law did in the case *ACLU v. Reno*, where the Internet was seen as a place closer to a private mall than a public forum.

We will now turn to address some specific laws pertaining to the regulation of the Internet in Brazil, starting with tax related issues. The choice for tax law is due only to the fact that it intertwines with the Internet governance, as we will demonstrate in the next part of this text.

Besides tax laws, we will also address other related issues in Part two of this text. We will especially analyze the laws related to the protection of the consumer rights. Once again, we chose consumer protection laws due to the fact that it has gained a lot of importance as dogmatic source for the regulation of cyberspace in Brazil. As we will see, there are many cases related to the Internet in Brazil that are decided mostly on the basis of the protection of consumers' rights. Of course, this option for consumer laws reflects a tradition of the Brazilian society in protecting consumers.

II. LEGAL ANALYSIS OF LAWS PERTAINING TO THE REGULATION OF THE INTERNET IN BRAZIL

A. Tax Law and the Legal Dogmatic Definition of the Internet Service Providers (ISPs)

An interesting and curious legal point related to the regulation of the Internet in Brazil is how the dogmatic function of law would be applied to services rendered by Internet Service Providers – ISPs for tax reasons.

Brazilian tax system is far from being something very simple. The tax legal regulation is all based primarily on the Constitution of the country and then on other laws that

regulate the constitution. The analysis of the Brazilian legal tax system is beyond the scope of this Article.

We will only focus on the definition and the application of one specific tax that is a kind of a “Value Added Tax – VAT”, called, in Brazil, the “*Imposto sobre circulação de mercadorias e sobre prestações de serviços de transporte interestadual e intermunicipal e de comunicação – ICMS*” (hereinafter “ICMS tax”).⁴¹

The ICMS tax is a state tax that is defined by article 155 of the Brazilian Constitution of 1988.⁴² It applies to most of the commercial operations such as the sales of goods (a state sales tax). Besides being a sales tax, the ICMS tax does also apply in the hypothesis of communications services. This is the point that led to the legal discussion regarding the taxation of the Brazilian ISPs.

Since the ICMS tax collects funds for states’ governments, it is understandable why Brazilian states developed studies regarding the application of the ICMS in new situations. It was exactly the case of the ISPs in Brazil.

When the first ISPs started their services, states began to work on the argument that ISPs would be, in fact, performing communications services. Therefore, ISPs should have to collect the ICMS to the states.

Here we just open a small paragraph regarding some peculiarities of the ICMS tax. Besides being a state tax, it corresponds to a very high taxation. Whereas simple taxes for services are due to the municipality and usually are about five percent (5%) of the price of the services, the ICMS tax for telecommunication services is due on the amount of twenty five percent (25%) of the price of the service. Of course, ISPs would rather pay nothing than paying any taxes. But, in the event of having to pay taxes, Brazilian ISPs would rather to

⁴¹ See generally LUCIANO AMARO, DIREITO TRIBUTÁRIO BRASILEIRO (2003).

⁴² See The Constitution of Brazil of 1988, article 155:

“Art. 155. Compete aos Estados e ao Distrito Federal instituir impostos sobre:

I – [...]

II - operações relativas à circulação de mercadorias e sobre prestações de serviços de transporte interestadual e intermunicipal e de comunicação, ainda que as operações e as prestações se iniciem no exterior;”

have to pay the regular five per cent (5%) service tax to the municipality than the very high ICMS tax to the state.

From that discussion, we had some of the first tax law cases related to cyberspace in Brazil. Basically it was a discussion between states and the municipalities regarding who would be legally entitled to tax the ISPs.

Of course, states wanted to classify the services of the ISPs as telecommunications services. Their first argument was that ISPs allow for people to communicate on line. Therefore, ISPs offer the medium for communication and, in doing so, they would be performing telecom services (so, please collect state taxes).

ISPs' arguments went to the other direction. ISPs said that they did not perform any telecom services. On the contrary, ISPs would be clients of telecom service providers. ISPs services would be more related to offering e-mail storage services, web hosting services and IP allocation services.

States' arguments relied upon the legal definition of telecommunication services that is embodied on article 60 of the Brazilian Telecommunications Law of 1997.⁴³ Article 60 of the Brazilian Telecom Law defines telecommunications services as "The set of activities that make it possible to offer telecommunications".

ISPs challenged the argument of the states by saying that ISPs did not offer telecommunications services, but instead, they added something to the telecommunication services provided by telecom services providers. In doing so, ISPs based their arguments upon article 61 of the same Brazilian Telecommunications Law of 1997.

⁴³ Lei n. 9.472, of July 16th, 1997:

Art. 60. Serviço de telecomunicações é o conjunto de atividades que possibilita a oferta de telecomunicação.

§ 1º Telecomunicação é a transmissão, emissão ou recepção, por fio, radioeletricidade, meios ópticos ou qualquer outro processo eletromagnético, de símbolos, caracteres, sinais, escritos, imagens, sons ou informações de qualquer natureza.

§ 2º Estação de telecomunicações é o conjunto de equipamentos ou aparelhos, dispositivos e demais meios necessários à realização de telecomunicação, seus acessórios e periféricos, e, quando for o caso, as instalações que os abrigam e complementam, inclusive terminais portáteis.

Article 61 of the Brazilian Telecommunications Law of 1997 defines the so called “service of added value”.⁴⁴ It is a legally defined service that is distinguished from the telecommunication service as it is defined by article 60 of the same statute. Article 61 defines the “service of added value” as the activity that “adds to one telecommunication service that works as its basis and that cannot be confused with the first, also new utilities related to the access, storage, presentation, movement or the retrieving of information”.

In other words, on the one hand, states wanted to classify ISPs under article 60 and ISPs would see their services under article 61, and, therefore, not within the scope of the ICMS taxation.

It is rather interesting that the Brazilian Agency for telecom – “ANATEL”, does not classify ISPs as telecom service providers. But, despite that fact, states still want to charge ISPs as telecom companies for the purposes of the ICMS.

Many law suits were filed in the country regarding that tax issue. It is important to highlight that the only issue being addressed by the courts in those cases is the tax question. But, the remaining question would be: If ISPs are held responsible for the ICMS tax would they also be required to have licenses granted by the federal government in order to perform their services? This is an on going debate.

States courts have decided in favor of the ICMS taxation for ISPs as if they were telecom service providers.⁴⁵ Appeals were filed on the Superior Court of Justice in Brasília (Superior Tribunal de Justiça – STJ).

The STJ is not the Supreme Court of Brazil. STJ is a Superior Court in Brasília that hears appeals regarding decisions that could be against federal laws. Therefore, if the case is

⁴⁴ Lei n. 9.472, of July 16th, 1997:

Art. 61. Serviço de valor adicionado é a atividade que acrescenta, a um serviço de telecomunicações que lhe dá suporte e com o qual não se confunde, novas utilidades relacionadas ao acesso, armazenamento, apresentação, movimentação ou recuperação de informações.

§ 1º Serviço de valor adicionado não constitui serviço de telecomunicações, classificando-se seu provedor como usuário do serviço de telecomunicações que lhe dá suporte, com os direitos e deveres inerentes a essa condição.

§ 2º É assegurado aos interessados o uso das redes de serviços de telecomunicações para prestação de serviços de valor adicionado, cabendo à Agência, para assegurar esse direito, regular os condicionamentos, assim como o relacionamento entre aqueles e as prestadoras de serviço de telecomunicações.

⁴⁵ See generally ApCv 262.730-5, TJMG, 18 Nov. 2002 and ApCv 281.280-8/000, TJMG, 06 Feb. 2004.

related to constitutional law, it is heard by the Supreme Court of Brazil in Brasília, but, if the case only addresses federal laws, the STJ is the court that hears appeals in the case.

The STJ, at this point in time, has not fully decided the question.⁴⁶

There is one decision from the SJT, a case from the Brazilian state of Paraná, decided in 2001, that held that ISPs do provide telecom services under the terms of article 60 of the Brazilian Telecommunications Act of 1997 and, therefore, they must collect ICMS to the states.⁴⁷

But, in the year 2003, the same STJ decided the same legal question in an opposite way. It was a case from the same southern state of Paraná. It was decided that ISPs are not telecommunication services providers, but, instead, they provide “service of added value”, under the terms of article 61 of the Brazilian Telecommunications Law of 1997. Thus, accordingly to this decision, ISPs are not within the scope of the ICMS taxation.

At this point in time, the STJ is hearing the case under a new appeal called “Embargos de Divergência”, a kind of an *en banc* decision that will decide the contradiction of the two decisions of the cases within the same Superior Court of Justice in Brasília.⁴⁸

It is interesting that Brazilian courts are struggling with the legal definition of the services provided by ISPs.

We just need to remember here, that the Brazilian legal system belongs to the Civil Law system and does not follow the rules of the Common Law system regarding juridical precedents. Therefore, decisions of one Superior Court do not, *per se*, bind other courts in the country.

There are other cases related to tax law in Brazil and cable Internet service providers. One case has held that cable Internet providers are telecom service providers and therefore

⁴⁶ The law as it is by August, 2004.

⁴⁷ RESP 323.358, 03 Sep. 2001.

⁴⁸ Embargos de divergência n. 456.650.

they must collect the ICMS tax (and their legal treatment for the ICMS taxation of Internet data is even higher than for video).⁴⁹

Under a comparative perspective, regarding this decision about cable access Internet providers as telecom service providers, by Brazilian courts, we find it somehow similar to what was recently decided by the Ninth Circuit, in the case *Brand X Internet Services, et al. v. FCC*.⁵⁰

We conclude that, at this point in time, the legal definition of the services rendered by ISPs in Brazil is still an on going debate at the court level. Depending upon the decision of the STJ in its *en banc* decision, we will be likely to say, with more legal basis, if ISPs are within the scope of article 60 of the Brazilian Telecom Law or not (under article 61). Besides the tax question, another important issue will be the consequences, if any, of a decision for article 60, regarding the legal treatment of the services in the scope of the Telecom Agency. In other words, the question would be: Does a court decision for the application of article 60 for tax reasons correspond to legally defining ISPs as within the scope of the Public Telecommunications Service as defined by art. 21, section XI of the Federal Constitution of Brazil? If the answer is “yes” we would have a step back towards the governance of the Internet as a public service, not as an economic activity left for the private sector.

Now that we have defined some of the constitutional issues regarding the Internet dogmatic governance in Brazil, we turn to the study of the electronic transactions and the application of consumer protection laws in the everyday use of the Net.

B. Consumer Protection Laws and the Regulation of Electronic Transactions in Brazil

⁴⁹ See Tribunal de Justiça de Minas Gerais – TJMG, Mandado de Segurança – MS n. 267919-9/000-1, 09 Apr. 2003.

⁵⁰ See *Brand X Internet Services, et al. v. FCC* (2003) (visited Sept. 28, 2004) <[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/58AF00C2122345DD88256DB7005BFAA3/\\$file/0270518.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/58AF00C2122345DD88256DB7005BFAA3/$file/0270518.pdf?openelement)>.

In order to address the dogmatic function of law for the regulation of electronic transactions in Brazil, we will spend some time discussing Brazilian Consumer Protection laws.

Consumer protection has constitutional basis in Brazilian Law. The Federal Constitution of Brazil of 1988 establishes, in article fifth, section thirty two, that “the state shall incentive, under the terms of the law, the protection of consumers”.⁵¹

Less than two years after the Federal Constitution of 1988 became law, Congress passed a new federal statute for the protection of consumers. It is the so-called “Code of the Defense and of the Protection of Consumers - CDC” (federal statute number 8.078, of September 11, 1990).⁵²

It is interesting that consumer protection became a very important field of the law in Brazil. During the nineties, consumer laws were widely applied by Brazilian courts to many situations in many cases, besides, at that time, consumer law also started to be a separate discipline in law schools.

The Brazilian Judiciary branch also gives a lot of deference to consumer laws. Some Brazilian courts have even created groups of judges specialized in cases that involve consumer law. Law suits that address consumers’ rights are also very common these days in the Brazilian Judiciary legal system.

The Brazilian society took consumer protection as an important source for the creation of legal dogmas. Those legal dogmas have been fully applied to cyberspace with some level of success, as we will demonstrate in this article with some cases by Brazilian courts.

Consumer law in Brazil deals with contracts that have the consumer as a part. Commentators say that there are four definitions of “consumer” under the Brazilian CDC.⁵³ We can define the consumer as “the one who acquires the product or service as the end

⁵¹ See CF-88, art. 5º, XXXII:

“XXXII – o Estado promoverá, na forma da lei, a defesa do consumidor”.

⁵² The federal statute n. 8.078/90 is generally known in Brazil as simply “Código de Defesa do Consumidor – CDC”.

⁵³ See generally CLÁUDIA LIMA MARQUES, *CONTRATOS NO CÓDIGO DE DEFESA DO CONSUMIDOR* (2002).

user”.⁵⁴ The CDC imposes many legal restrictions on consumer contracts in order to broaden the consumer protection.⁵⁵

The first relevant legal issue that arises from electronic contracts is the problem of evidence. Even though the contracts for sale of goods, in Brazil, are not, *per se*, required to be in writing, some legal issues have to be addressed.

The Brazilian Civil Code has a provision that could be analogous to the Statute of Frauds of the U.S. Uniform Commerce Code – the UCC.⁵⁶ We refer to article 221 of the Brazilian Civil Code that establishes that: “The private writing signed by someone who is entitled to the administration of his businesses proves obligations of any amount”. But, it is interesting that art. 221 also says that: “The proof of the private writing can be made by other legal evidence accepted in court”. Therefore, it is preferable to have the contract in writing and signed by the parts, but if that is not possible, it does not, *per se*, invalidate the terms of the agreement (as long as they can be proved by any other evidence).

One could read article 221 of the Brazilian Civil Code and come to the conclusion that a written contract would not be required at all. That would be a precipitated conclusion due to article 227 of the Brazilian Civil Code. Article 227 prohibits the use of only oral evidence for contracts when the amount involved in the agreement is higher than ten minimum wages (roughly eight hundred and seventy US dollars).

Article 227 makes it more difficult for certain contracts of sales of goods to be made not in the written form (and therefore not signed by the parts). The problem for electronic contracting in Brazil, under article 227 of the Civil Code would be: how do I sign the agreement?

The solution came from a so called “provisory measure” issued by the president of Brazil and that has the same legal status as a Federal Statute passed by the Brazilian

⁵⁴ See Brazilian Federal statute n. 8.078/90, art. 2nd.

⁵⁵ See generally CDC, articles 46 to 54, under Chapter VI (contractual protection) of Title I.

⁵⁶ See Uniform Commercial Code - Article 2, Sales, Formal Requirements; Statute of Frauds.

Congress. “Provisory Measure n. 2.200-2 of 2001” (hereinafter MP 2.200-2) addressed the issue of digital signatures in Brazil.

Under MP 2.200-2, digital signatures that are certified by a Certification Authority that belongs to the “Brazilian Digital Certification System”, have the same legal value of handwritten signatures.⁵⁷

The Brazilian Digital Certification System is the Public Key Infrastructure that has the Certification Authority of the Federal Government as the first CA that certifies the private CA which then certifies the end user.

We conclude that digital signatures can be used in Brazil for electronic contracts that will be legally binding. Of course, Brazilian consumers are also entitled to use digital signatures in their electronic contracts.

Once we have defined that there is no legal obstacle for electronic contracts in Brazil, at this point in time, we can turn to two important legal issues related to consumer laws. First we will address the right of the consumer to withdraw from a legally binding contract. Second, we will study the application of the Brazilian Consumer Laws in on line agreements that involve a foreign party.

Article 49 of the Brazilian CDC allows for consumers, in a period no longer than seven (7) days, to withdrawing at no cost, from contracts that have been formed outside the property of the one who is selling the product (or the service). Article 49 refers basically to phone sales or to door to door sales.

The legal question that arose from sales through the Internet is: Does article 49 of the Brazilian CDC apply to web sales? In other words, is the Brazilian consumer entitled to withdraw him or her from a contract formed on line, up to seven days after accepting the contract?

Commentators are mostly unanimous in saying that article 49 of the CDC applies for web sales and, therefore, the answer would be “yes”.⁵⁸ There are few commentators in Brazil

⁵⁷ See generally *Infra-Estrutura de Chaves Públicas* (visited Sept. 28, 2004) <www.icpbrasil.gov.br>.

that take the opposite position under the argument that web sites should be taken as part of the physical installations of the merchants.⁵⁹

It is understandable that Brazilian commentators have interpreted the statute in order to extend the consumer withdrawal right to on line sales. Article 49 of the CDC expressly refers to sales by telephone and therefore on line sales should not be interpreted in another way.

The only unresolved problem at this point in time, regarding the application of article 49 of the CDC is related to intangible items. How would a consumer withdraw him or herself from a web contract regarding the software licensing, for example? In other words, how would be the return of the software, since it is always hard for the licensor to prove that the consumer did not keep an unauthorized copy of the software in his or her computer seven days after entering the license?

The other point that has also to be addressed is the application of the Brazilian CDC to protect Brazilian consumers in web site sales with foreign merchants. This is still an on going legal debate in Brazil.

At the first look, the Brazilian CDC is only applicable to contracts that are closed in Brazil. When we address international contracts, Brazilian law⁶⁰ considers that the contract is subjected to the law of the country of the offeror. In that case, if we refer to a consumer contract formed on line, in thesis, the law of the country of the company that maintains the web site should apply. This, of course, means that the Brazilian CDC is not applicable to the case and therefore, the Brazilian consumer, if a part to the on line contract, could not invoke his or her rights under Brazilian Law.

⁵⁸ *See generally* CLÁUDIA LIMA MARQUES, *CONTRATOS NO CÓDIGO DE DEFESA DO CONSUMIDOR* (2002); *see also* NEWTON DE LUCCA, *ASPECTOS JURÍDICOS DA CONTRATAÇÃO INFORMÁTICA E TELEMÁTICA* (2003).

⁵⁹ *See generally* FÁBIO ULHOA COELHO, *CURSO DE DIREITO COMERCIAL* (2002).

⁶⁰ *See* Decreto-Lei n. 4.657, of September 4th, 1942, article 9.

Commentators agree that, under Brazilian Law, there is a legal presumption that contracts are formed in the territory of the offeror.⁶¹ That solution of the Brazilian Law seems to be reasonable.

However, in the year 2000, the Superior Court of Justice (Superior Tribunal de Justiça – STJ), in Brasília, Brazil, decided a very interesting and innovated case related to the protection of Brazilian consumers' rights in international contracts of sales of goods. It is the “Panasonic Case”.⁶²

The facts of the “Panasonic Case” are simple: A Brazilian consumer traveled abroad and, outside the territory of Brazil, he bought a Panasonic video camera and brought it back with him to Brazil. When he arrived in the country, the camera had some technical problems and he decided to sue the Brazilian branch of Panasonic, under the terms of the Brazilian CDC. Even though the contract was physically formed outside the territory of Brazil since the Brazilian consumer had traveled abroad, the Brazilian STJ Court decided to apply Brazilian Law. The rationale of the decision was based upon the argument of the global economy. Since Panasonic is a world brand that promotes its trademarks in Brazil and targets the Brazilian market, the Brazilian consumer should be entitled to the legal protection guaranteed by Brazilian consumers' rights.

Our analysis of the Panasonic Case is that it would apply to on line transactions in the same situation. In other words, if a world corporation uses a web site to direct its sales to the Brazilian market, it would be, in thesis, subjected to Brazilian consumer laws. At this point in time, this would be a reasonable interpretation.

The way Brazilian commentators see the application of the CDC to on line sales and the Panasonic case demonstrates our affirmation that Consumer Laws (especially the CDC) are, at this point in time, the most relevant source of regulation for electronic transactions in Brazil.

⁶¹ See MARIA HELENA DINIZ, *LEI DE INTRODUÇÃO AO CÓDIGO CIVIL BRASILEIRO INTERPRETADA* 265 (1997).

⁶² STJ, RESP 63981/SP; Recurso Especial n. 1995/0018349-8, relator Min. Aldir Passarinho Junior (1110). Relator para o Acórdão Min. Sálvio de Figueiredo Teixeira (1088), julgado em 11 abr. 2000, publicado no DJ de 20 nov. 2000, p. 00296.

Since not always we have a direct contract between the parts that are involved in electronic transactions, we now turn to a final analysis of the regulation of the Internet in Brazil, regarding some cases that involve a tort situation.

C. Legal Responsibilities for Computer Virus Infections in Cyberspace

We have seen that, in Brazil, if there is a contract that has a consumer as one of its parts, the Brazilian Consumer Protection Code, the CDC, will be the applicable law. The Internet is no exception to the application of the CDC. Here, we reaffirm that we take the position that the Internet is legally regulable (as seen in item A of this second part of the article).

Some cases involving on line torts have been addressed by Brazilian Courts. We will concentrate our legal analysis in the issue of damages caused by computer viruses to a third part data. The case this item presents was decided by one of the two highest courts of the state of Minas Gerais, the “Tribunal de Alçada de Minas Gerais”, hereinafter simply “TAMG”.⁶³

The facts of the case were: One organization keeps a web site that allows its clients making research about the credit history of a person. The web site also allows for the client to make a bad referral to someone’s credit history and, if so, the information is sent to a credit bureau. The plaintiff had his bad credit data sent to the credit bureau and complained that he had had no credit problems at all. It was found that the operator of the web site did not send any information to the credit bureau regarding the plaintiff’s life. Instead, a computer virus infected the web site computer and did the wrong thing. We note that the plaintiff was not a client of the web site referral services.

⁶³ At this point in time, the state of Minas Gerais has two Supreme Courts. One that deals mostly with public law (Tribunal de Justiça de Minas Gerais) and the other that hears cases that address private law (Tribunal de Alçada de Minas Gerais – TAMG).

The plaintiff sued the web site owner for moral damages. Moral damages, under Brazilian law, are not necessarily proven. They are found to happen in certain situations where the other elements of torts such as duty of care, breach and causation are identified but the plaintiff did not suffer, obligatorily, actual damages. The parameters for the fixation of moral damages are pretty arbitrary and are ultimately set by courts. Moral damages in Brazil are far cheaper than American punitive damages.

The arguments of the defendant were that there was no breach of his duty of care because the virus was beyond his duty of care. Therefore, the defendant argued that there was no causation between the defendant's conduct and the moral damages suffered by the plaintiff.⁶⁴

The court ruled against the defendant, under the theory of negligence.

A further analysis of the case shows that, in Brazil, the owner of the web site is very likely to be held liable for damages caused by computer viruses to third part's data. Even if the third part is not a direct consumer of the company that keeps the web site, liability is likely to be found by Brazilian courts.

If the web site deals with databases that collect consumer data, courts will impose strict liability due to articles 12 and 43 of the Brazilian Consumer Protection Code, the "CDC".

Another important issue related to the facts of the case under analysis is the liability of the software company.

Let us assume that the web site owner decides to sue the company that has licensed the anti virus software to recover the loss he or she suffered due to the consumer's law suit. What would happen? We think that the decision would depend upon the terms of the software license. If the software license excludes any responsibility of the software developer, it is likely that the plaintiff would loose, under the validity of the "as is" clause.

⁶⁴ TAMG, Apelação Cível n. 281.733-6, 16 jun. 1999.

Besides the Brazilian Law of Software, article 8th says that the obligations of the licensor of the software are within the terms of the way he describes the functioning of the software.⁶⁵

Finally, we note that a defense that the web site owner could have used is the lack of payment between him and the plaintiff. In other words, if there is no payment, there is no contract (roughly, there would be no consideration) and therefore consumer rights could not be applied to regulate the facts.

The problem about the lack of payment as a defense in that case is that the Superior Court of Justice in Brasília has recently rejected it as a defense, in a similar case, for open television under the theory of an “indirect payment”.⁶⁶ In other words, one could say that a free Internet service of web search would be subjected to Brazilian consumer laws because it profits from the fact that consumers dedicate their time to visit the web site and that more visits means more clients and more revenue from the web sites’ sponsors, for example.

So, we think that on line torts in Brazil are likely to be decided under the principles of the Brazilian CDC if there is any contact between the web site and Brazilian consumers, despite the fact that there is payment or not.

CONCLUSION

We propose that law is a dogmatic system of regulation that can be applied to regulate cyberspace despite of its inherent technical characteristics. Under the dogmatic function of law, the creation of new legal dogmas allows for law to properly regulate cyberspace. Technical based regulation would have more a symbolic function than a legal function itself. Therefore, we conclude that cyberspace is better *regulable* by law through the application of the theory of the legal dogmas.

When there is a problem in the regulation of cyberspace, we should first look at the legal dogmas that are being applied in order to identify if those dogmas reflect the history, the

⁶⁵ Lei n. 9.609 of 1998, art. 8th.

⁶⁶ RESP n. 436135/SP, j. 12 august 2003.

culture, the tradition and the will of the community. Instead of looking to other solutions, better addressing the dogmatic function of law is an effective way to regulate cyberspace in a better cost-effective manner.

Other kinds of regulation should be taken more as a symbolic issue than as a legal way because norms such as computer programs do not have the characteristics of law, such as the goal in the public good, the universal application and the public authority. Without those three characteristics, all of other ways of regulating cyberspace will lack the main important feature of law: being the best way that mankind has created for the solution of disputes.

The Internet has been regulated in Brazil as a private enterprise. On the one hand, Internet is not considered as telecommunications in Brazil, therefore no licenses are requested for private players to provide Internet access. On the other hand, the taxation of ISPs as telecom providers is still an on going debate.

Even though the public sector is not responsible for providing Internet services, it has contributed to the growth of cyberspace in Brazil. Electronic law suits, electronic voting and other government initiatives for the Net have made cyberspace closer to the average Brazilian person. The use of open source code software by the government has been stimulated.

In Brazil, at this point in time we have found no real difficulty in regulating the on line world. Most of the legislation comes from the application of existing norms such as the Consumer Protection Code and from the edition of new legal norms. The fact that the law might be ambiguous in certain instances of the regulation of cyberspace (such as for tax reasons) does not mean that law cannot regulate the Net.

The Internet is a private place in Brazil and ISPs are mostly private players. In this matter, the regulation of the Internet in Brazil is close to the approach taken by the United States Supreme Court in the *ACLU v. Reno* case.

The most important source of regulation of the use of the Internet in Brazil is consumer's protection laws. Thus, consumers have the right to withdraw from on line contracts in the term of seven days after the closing of the deal. Besides, Brazilian courts are

likely to apply domestic consumer laws for foreign websites that direct their activities to Brazil. Web sites that improperly alter personal data are likely to be held liable under a strict liability tort, even if the facts would be due to a computer virus infection.