Estímulo à inovação através de regulamentações para a proteção de dados pessoais: o impacto da replicação da GDPR na LGPD

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Resumo: Utilizando uma abordagem metodológica pós-colonial, que coloca a relação subalterna entre Brasil e Europa no centro da análise da pesquisa, este artigo aborda a pegunta: Até que ponto a hegemonia eurocêntrica influencia a legislação brasileira de proteção de dados quanto ao estímulo à inovação? Primeiro, este artigo argumenta que a replicação do Regulamento Geral Europeu sobre a Proteção de Dados (GDPR) na Lei Geral de Proteção de Dados Pessoais do Brasil (LGPD) incentiva a inovação pois fornece direitos para contestar monopólios de dados e permite que empreendedores sejam flexíveis em suas escolhas tecnológicas para atender aos requisitos da lei. Por outro lado, este ensaio advoga que no Brasil, onde o estado de direito é relativamente fraco, a insegurança jurídica decorrente do princípio de *limitação da finalidade* dificulta a inovação. Além disso, a introdução do princípio de *privacidade por design* sem a exigência de que tal princípio leve em consideração o estado da técnica desencoraja os empresários brasileiros a desenvolver tecnologias novas e mais compatíveis. Por fim, o artigo defende que estimular a inovação no Brasil por meio da regulamentação sobre a proteção de dados favorece as empresas europeias em detrimento das brasileiras, e a principal consequência é que esse processo amplia a distância tecnológica entre as duas regiões, aumentando a dominância econômica daquela sobre esta. Este artigo conclui que regimes de proteção de dados - como quaisquer outros - não devem ser transplantados acriticamente de países ocidentais para a legislação brasileira. Deve-se avaliar se tal reprodução é adequada às especificidades locais e se não é apenas mais uma faceta do projeto de dominação expansionista dos países europeus sobre o Sul Global.

Palavras-chave: GDPR; LGPD; proteção de dados; inovação.

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Stimulating Innovation through Personal Data Protection Regulations: assessing the replication of GDPR into LGPD

Abstract: Using a postcolonial methodology, which places the subaltern relationship between Brazil and Europe at the core of research analysis, this essay addresses the research question: To what extent does Eurocentric hegemony influence the Brazilian data protection legislation in stimulating innovation? Firstly, this paper argues that the uncritical replication of the European General Data Protection Regulation (GDPR) in the Brazilian General Data Protection Law (LGPD) incentivizes innovation. It provides data

subjects with rights to contest data monopolies and allows entrepreneurs to be flexible in their technological choices to meet data protection requirements. On the other hand, this essay posits that in Brazil, where the rule of law is relatively weak, legal uncertainty stemming from the replicated principle of "purpose limitation" hampers innovation. Furthermore, the uncritical introduction of the principle of "privacy-by-design" without a further requirement for the state of the art discourages Brazilian entrepreneurs to develop new and more compliant technologies. Finally, the paper advocates that stimulating innovation through the Brazilian data protection regime favours European rather than Brazilian firms. The main consequence is that this process widens the technological gap between both regions, increasing the economic dominance power of the former over the latter. This paper concludes that data protection regimes - such as any other- should not be uncritically transplanted from Western countries into Brazilian legislation. One should assess whether such reproduction is suitable to local specificities and whether it is not just another facet of the expansionist dominance project of European countries over the Global South."

Keywords: GDPR; LGPD; Data Protection; innovation.

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1. Introduction

This essay aims to shed light on the effects of the European influence over the Brazilian data protection (DP) regime, with a particular focus on the latent function of fostering innovation. Firstly, I argue that, due to the European control over the Brazilian legal imaginary, Brazil has uncritically reproduced the European DP regulation in its own law. This replication led to positive as well as negative effects on promoting innovation. Secondly, this essay argues that stimulating innovation through the Brazilian DP regime favours European rather than Brazilian firms, increasing the technological gap between both regions. Therefore, beyond the mere uncritical reproduction, the replication of the European model leads to an expansion of the European economic dominance over Brazil.

All being said, section 2 contextualize the discussion for subsequent sections. Firstly, the section debates the importance of studying innovation stimulation by DP regimes. Then it discusses the mechanisms by which Europe exports its legal standards to the Third World. Finally, the section highlights what has not been said and states the research questions.

Section 3 debates the methodological approach to historicize the subaltern relationship between European countries and Brazil and to place it at the centre of the analysis, namely the Third World Approaches to International Law (TWAIL). The section also presents the method chosen to accomplish the goal, namely the Functional comparative method, as well as the research design.

Following, I proceed with two analytical sections. Section 4 first debates how the uncritical reproduction of the European DP regime has positive effects on innovation stimulation in Brazil. The argument draws on replicated rights that help tackle data monopolies, as well as principles and rules that abide by the "Porter Hypothesis", consequently incentivizing innovation. In turn, the section posits that the replication of GDPR into LGPD has negative impacts on innovation. I argue that the principle of "purpose limitation" only incentivizes innovation when the rule of law is heavily enforced, which may happen in the EU, but not exactly in Brazil. Also, the negative argument relies on the replicated principle of "data protection by design". It is effective to foster innovation in the EU but not in Brazil because the European legislation commands that innovative solutions should account for the state of the art, allowing for room for technological innovations. In the end, the section briefly suggests solutions for such issues.

Section 5 goes beyond the uncritical reproduction of European DP regimes in the Brazilian one and sheds light on how innovation stimulation by DP regimes expands the economic dominance over Brazil. I argue that, at the same time, exporting European-based concepts of innovation as well as stimulating innovation through DP regimes creates a synergetic effect that tends to favour European innovative firms rather than Brazilian. Therefore, Europe is yielding double beneficial results: expanding its DP values to the Third World, and expanding the market for data-enhancing innovations maintaining the competitive advantages of its companies.

Finally, section 6 concludes the paper not simply summing up the arguments and conclusions from previous sections but also highlighting their implications. This uncritical reproduction hampers the conversation between the Brazilian DP regime and its local issues, and the Brazilian legislation does not address properly the specificities of Brazilian innovation needs. This essay concludes that the reproduction of European DP regimes in Brazil (and the rest of the Third World) is just another chapter in the history of the European dominance project over the Global South. As a solution, this paper stimulates activists and students to advocate ideas against certain political projects that favour Western countries at the expense of Brazil.

2. Background and Contextualization

This section introduces DP regulations as a legal solution taken by countries to tackle data privacy threats stemming from the digital economy, with a particular focus on the Brazilian General Data Protection Law (LGPD) and the European General Data Protection Regulation (GDPR). Next, this section introduces the

latent function of promoting innovation through DP regulations, highlighting its importance nowadays. Therefore, as the heart of our research is to analyze innovation stimulation via DP regulations in Brazil and the European Union (EU), subsection 2.2. sheds light on previous comparative studies between LGPD and GDPR. In turn, it provides an overview of how the influence of the European dominance over Brazil's legal imaginaries leads to uncritical legal transplants and constraints in the normative aspect of DP law. Therefore, one must account for the historical subaltern relationship between Europe and Brazil to contextualize mutual impacts on DP regimes. In the last part, I acknowledge what has not been said in the literature and I present the research questions that will guide our analysis in the following sections.

2.1. the Latent Function of Innovation Stimulation via DP Regulations

In a digital world, individuals are constantly confronted with decisions about providing data in exchange for online services, eventually accepting privacy-unfriendly terms. Individuals struggle to assess how their information will be treated after collection. There is a growing body of literature that raises concerns that rampant data collection may lead to catastrophic consequences for privacy and dignity interests, including profiling, targeting and other manifestations of surveillance capitalism(DELACROIX; LAWRENCE, 2019).

Many countries legally responded to this challenge by enacting DP regulations that provide individuals with rights to restrict the processing of their personal data by other institutions and firms (DETERMANN, 2018). In 2016, DP calls led to the implementation of the GDPR in the EU, which came into full effect in 2018. Amid the turmoil caused by *Cambridge Analytica* case in 2018, Brazil also took the decisive step to implement the LGPD, fully implemented in August 2020. The explicit goal of such regimes, similarly written in their legal statutes, is to provide natural persons with the right to protect personal data (GDPR, 2016; LGPD, 2018a).

The aforementioned explicit aim of DP regulations is what is known as the manifest function of law. They are clearly recognized by legislators and lawmakers, objectively informing judges on how to interpret the regulation (MICHAELS, 2006). Nevertheless, legal statutes and regulations often present functions that are unknown to lawmakers or judges. This unintended functionality is known as a latent function because it opposes the objective and manifest one (MERTON, 1968).

For not being previously recognized by legislators, latent functions provide researchers with fruitful insights into the studied legal regime (MERTON, 1968). It allows room for disclosing non-obvious outcomes as well as non-perceived obstacles imposed by the legal subject matter. This happens to be the case for DP regimes, from which scholars assessed an interesting latent function: stimulating technological innovation.

DP regulations considerably change the market structure and the incentives for innovation. Firstly, to comply with DP principles required by law, firms increase their demand for technologies in the field of data protection known as privacy-enhancing technologies (PETs), leading to stimulating innovation among innovation producers (ZARSKY, 2015). Secondly, DP policies compel companies to stand out from their competitors. This factor stimulates entrepreneurs to innovate to demonstrate to their customers that they are more effective to protect their sensitive data (BACHLECHNER; LIESHOUT; TIMAN, 2020).

Not surprisingly, the PETs market is bourgeoning after the enactment and worldwide spread of DP legislations. In 2017, before the introduction of most DP regulations in the world, there were 51 privacy-related technology vendors and by 2021, they are 365 (IAPP, 2021). Therefore, it is convenient to debate the impact of DP regimes on innovation promotion.

2.2. The European dominance over the Brazilian DP regime

After the implementation of GDPR, the EU has expanded its legislation on a global scale. Third-World countries have reproduced it in an identical or very similar fashion (NIEBEL, 2021) and incorporated exogenous European legal transplants into their own DP regulations (KUNER ET AL., 2017). In this paper, legal transplantation is defined as "the adoption into the national legal system by one state (the 'adopter' country) of a rule originating in a foreign state (the 'originator' country)" (MORIN; GOLD, 2014).

In the context of Brazil, following the introduction of LGPD, scholars and practitioners attempted to assess similarities and differences between both regimes (ALLEASY, 2020; ONETRUST, 2020; GATEBY, 2021). They concluded LGPD is closely equivalent to the European counterpart in terms of wording and legal provisions to ensure DP. They are equivalents concerning *inter alia* their principles, rights, the scope of the regulation, unlawful conducts, and fines for non-compliance (INSIDE PRIVACY, 2018; MONTEIRO, 2018).

There is no doubt that, naturally, legal regimes influence each other (KENNEDY, 2003), and DP regimes are no exception. Nonetheless, the European influence over Brazil's DP regime is best explained by the long-lasting European dominance over the Third World. Scholars particularly emerging from the Third World posit that modern forms of domination over the Third World are a continuation of previous ones, practiced in the precolonial and colonial periods (GATHII, 2011). These scholars belong to a political and intellectual movement named Third World Approaches to International Law (TWAIL) (MUTUA, 2000).

TWAILers claim that, after an extensive period of political and economic domination over the Third World, former colonies' legal imaginary is dominated by the European worldview (GATHII, 2011). Imaginaries are structures of subjectivity that inform the collective discourse. In turn, all social institutions, for not existing separately from collective discourses that give meaning to it, are also informed by these imaginaries, and the legal *corpus* is not an exception (GATENS; LLOYD, 1999). Therefore, European worldview is embedded in the legal institutions in the Third World.

This European embeddedness in the Third-World legislations takes the form of legal transplants, and it may occur by means of two different mechanisms: emulation and coercion (DOBBIN ET AL., 2007).

Firstly, the European legal system is seen as a role model by the Third World, leading to the fact that lawmakers, whenever facing legal claims, will look to Europe in search of inspiration for legal solutions. This mechanism is called *emulation*, or "lesson-drawing" (ROSE, 1991). An illustration of this mechanism is that International Law and Governability teaching is dominated by Eurocentric topics and subjects, failing to connect legal reasoning with local problems in the Third World (RESTREPO; PRIETO-RÍOS, 2017). It turns that Brazil, a representative of the Third World, is not an exception. Critical approaches to international law are not common in Brazil and the international law teaching is a propagation of the European worldview. It fails to reflect the country's own experience and prevents students from self-awareness about the specificities of Brazil (CASTRO, 2019).

Secondly, *coercion* can explain legal transplants from European regimes into the Third World. After the post-colonial period, coercion takes place through *indirect imposition*, since the Third World countries are threatened with sanctions if they do not follow the European rules. Therefore, they voluntarily transplant exogenous legal rules into their legislation (MORIN; GOLD, 2014). In the context of DP, this coercion occurs through economic constraints, in the so-called "Brussels effect" (NIEBEL, 2021).

The "Brussels effect" refers to the fact that the EU can expand its legislation across borders and set new standards in international governance. To do business in the EU, countries adhere to its requirements, causing "unilateral regulatory globalization" (BRADFORD, 2012). Solid institutional mechanisms for law enforcement and a strong political will are the perfect recipe for the Brussels effects concerning DP regulations (NIEBEL, 2021). In turn, as Brazil is the largest economy in Latin America, other countries will have to abide by Brazilian norms if they want to engage in business with Brazil. This will set a *domino effect* that exports GDPR standards to the entire Third World (MONTEIRO, 2018).

Briefly, Brazil uncritically incorporates exogenous European legal rules in its DP regime. Therefore, the colonialist legacy imposes significant constraints on the Brazilian DP regime, as they set Brazil's (and the Third World's) DP standards and shapes the normative dimension of Law (SORNARAJAH, 2006).

2.3. What has not been said about innovation stimulation through DP regulation in Brazil and the influence of the European regime?

The straightforward answer to the question in the above subtitle is: nothing has been said. More

specifically, the literature on the comparison between the Brazilian and European DP regime lacks analysis on two fundamental grounds:

First, all comparative studies, although leaving room for harmonizing Brazilian and European data rights, solely highlight the legal provisions and institutions that may be functional equivalents for the manifest function of protecting data privacy. It happens that no comparative study has mapped the differences and similarities between both DP regulations in terms of the latent function of fostering innovation.

Secondly, to compare the commonalities or differences between the European and the Brazilian DP regime, it is insufficient to analyze the regulation *per se* only. One must place the subaltern relationship between Brazil and Europe at the core of research analysis. However, discussion on how European domination has impacted the stimulation of innovation through DP regulations in Brazil is non-existent and many questions remain unanswered. The law scholarship has never debated what undermines the commonalities or differences between the European and the Brazilian DP regime. Not at all, it has discussed whether they are due to the hegemonic dominance that Europe exercises over Third-World countries. Also not debated whether this innovation promotion based on European concepts is really beneficial for Brazil, or whether it embodies the European interests only.

Finally, the overarching question to be addressed is: to what extent does Eurocentric hegemony influence the Brazilian DP legislation in stimulating innovation? More specific research questions are: How has the legal transplantation from GDPR into LGPD impacted innovation in Brazil? Has the European expansion of European DP standards to Brazil favoured European rather than Brazilian innovators? Therefore, this paper originally contributes to the intersectional debate between TWAIL scholarship and Innovation studies.

3. Methodology

3.1. TWAIL Methodological approach and the functional comparative method

TWAIL as a research methodology aims at deconstructing the solid structures of Eurocentricity in modern Law, particularly concerning Third-World legislations. They aim at reconstructing alternatives to it, accounting for the Global South's worldviews (ESCOBAR, 2018). In line with this, three principles of the TWAIL approach informed the elaboration of our research question. Firstly, the TWAIL approach historicizes the unbalanced relationship between former colonies and colonizing countries and uses it as lenses to analyze current issues in the law scholarship (BURGIS-KASTHALA, 2016). Therefore, it perfectly fits the aim of this research of accounting for the subaltern relationship between Brazil and European countries. Secondly, the TWAIL approach praises that interdisciplinarity with other legal and non-legal disciplines may allow for learning (MICKELSON, 1998). Thus, by using the theoretical framework of innovation studies to explain the causal relations between DP regulation and innovative performance, this essay kept with the principle of transdisciplinary. Third, TWAIL methodology posits that scholars should suspect about universalizing narratives (BURGIS-KASTHALA, 2016), which was accomplished by contesting that the European worldview is *per se* the ultimate efficient version of DP regulations in the world.

Also, the central role of a research methodology is to inform on the choice of which research method to use. Consequently, to assess the impact of the European DP regime on the Brazilian one, this essay compared the commonalities and divergences between both regimes in search of what aspect of the European regime impacted positively and negatively on the Brazilian one. Because this assessment is grounded on the function of stimulating innovation, the method should be based on the functionalities of both legal statutes. Therefore, this research used the functional method to compare primary sources from both regimes.

It is worth mentioning that, after the cold-war, comparatists adopted mainstream political neutrality in their studies. Opposing this, this paper recognizes the importance of assuming a contesting political

position against the European worldview domination over the Third World. I keep with the work of David Kennedy (1997), which states one of the directions of comparative studies is taking seriously the historical relation between colonizers and former colonies to build better international governance.

3.2. Research Design

The analysis followed the 4-step analytical structure praised by David Kennedy (2003) for comparative studies. Firstly, I define the studied legal phenomenon and I set boundaries to the studied legal regimes. Secondly, I analyze the similarities and differences caused by legal transplants. Third, I assess the differences and similarities due to cultural and technical specificities. Then, I conclude the section holding all arguments together in an explanatory causal relation, providing policy advising.

Regarding step 1, this essay defines the subject legal phenomenon as *innovation stimulation through DP regulations*. The legal regimes to be compared are the *Brazilian and the European Union DP regimes*. My analysis will draw on doctrinal law through primary sources. Therefore, on the EU's side, they comprise the European Data Protection directive 2016/679, which settled GDPR, as well as recitals from the European Data Protection Board. On Brazil's end, primary sources comprise the LGPD, and the publications and orientation documents from the Brazilian Data Protection Authority.

Next, this essay took the second step very seriously since legal transplants from GDPR into Third World legislations were largely observed. Therefore, this was a departing point to analyze similarities between both regimes. Beyond that, the transplant hypothesis can also be an important tool to assess differences (KENNEDY, 2003). Transplanted law can be influenced by local culture, understandings, misreadings and reactions.

Surpassing the transplant hypothesis step, I moved forward into explaining differences and similarities between the EU and Brazilian DP regimes in terms of their cultural and technical features, which is step 3. Step 3 is crucial because uncritical legal transplants may lead to opposite effects because of differences in the cultural and technical background (KENNEDY, 2003). The decisive fourth step is presented at the end of sections D and E, providing insights into the solutions for the raised problems.

Beyond the legal comparison between both regimes, for understanding the concept of innovation imposed by the EU and incorporated by Brazil, I will use non-doctrinal non-legal resources. Resources that helped assess the universalization of the European concept of innovation are The OECD Oslo Manual (OECD, 2018), the OECD Frascati Manual (OECD, 2015) and the WIPO Global Innovation Index 2021 (WIPO, 2021). Also, the Brazilian Digital Transformation Strategy was used to elucidate the incorporation of the European innovation concepts into the Brazilian data governance (BRAZIL, 2018b).

4. Reproducing the GDPR in LGPD

This is the first of two sections that show the findings of our research method. In this section, analysis identified that uncritical reproductions of GDPR into LGPD led to positive as well as negative effects in stimulating innovation in Brazil.

In the first subsection, this essay posits how the positive effects lie in the compliance, by GDPR as well as LGPD, to the requirements of the "Porter Hypothesis", which leaves room for the innovation endeavour. The hypothesis is supported by the openness of the principle of "purpose limitation" and the creation of DP authorities. The positive effects also draw on the transplant of data rights that help to challenge data monopolies.

On the other hand, subsection 4.2. debates the negative effects, advocating that the principle of purpose limitation brought forward legal uncertainty, that may be suitable to innovation promotion in the EU, but it is counter-productive to Brazil due to differences in the rule of law. Furthermore, the replication of the concept of "Data Protection by design" works well in the EU, but not in Brazil for promoting innovation.

Subsection 4.3. holds together all arguments and conclude with policy insights into the solutions for the negative effects.

4.1. What did go well? Positive effects of replication

4.1.1. The openness of the principle of "purpose limitation"

GDPR, in article 5, lays down one of its most important principles concerning data processing, the principle of purpose limitation. GDPR states that personal data must be collected for "specified, explicit, and legitimate purposes, and not be processed further in a manner incompatible with those purposes" (EU, 2016).

However, innovation is a process that depends on new insights over the same available resources. Therefore, at first sight, the principle of purpose limitation seems to hinder innovativeness since data controllers will not be able to use collected datasets for purposes that they could not anticipate at the moment of collection (GRAFENSTEIN, 2018). In this case, the principle introduced by the DP regulation would shift the costs from one group (data subjects) to another (entrepreneurs). Individuals would not have to bear the costs of having their data processed in privacy-threatening ways while entrepreneurs would have limitations to their innovative process. This dichotomic idea that DP regimes may hamper innovation reflects a mainstream concept that public regulations and innovation are opposing actors.

Nonetheless, the conundrum between regulation and innovation was contested by Porter and van der Linde in the so-called "Porter Hypothesis" (PORTER; VAN DER LINDE, 1995). These authors heavily drew on the Environmental regulations landscape to posit that regulations may incentive rather than hinder innovation. They argue that neoclassical economics mainstream analysis on the dichotomy "regulation versus innovation" draws on a very static concept and it ignores that competition is a dynamic framework, in which innovation can move the boundaries. The hypothesis asserts that compliant firms increase their productivity. As well, entrepreneurs are not aware of all possibilities that may increase profits and innovation at the moment a regulation is implemented.

In line with this, Porter and van der Linde advocate two principles that should drive well-designed regulations to accomplish the goal of fostering innovation. Firstly, regulations should stimulate ongoing advancement in technologies rather than focusing innovation on one particular mode. Secondly, regulations should avoid misleading, doubtful and confusing requirements (PORTER; VAN DER LINDE, 1995).

GDPR fits all requirements of well-crafted public regulation (NIEBEL, 2021). The principle of purpose limitation set by GDPR does not require any specific technological standard. It leaves room for diverse technical solutions to achieve the regulatory aim. It allows entrepreneurs to choose the best solution on their own terms (GRAFENSTEIN, 2018). Concerning the second requirement, GDPR has set the European Data Protection Board (EDPB), which guides the interpretation of DP requirements imposed by GDPR. So far, EDPB has already published more than 172 recitals on clarifying principles and concepts entrenched by GDPR.

Likewise, as identified by this research, the Brazilian LGPD reproduces the purpose limitation principle in its article 6:

> "Art. 6. Personal data processing activities must observe good faith and the following principles:
> I - purpose: processing for legitimate, specific, explicit and informed purposes, without the possibility of further processing in a manner incompatible with these purposes." (BRAZIL, 2018)

LGPD upon transplanting the main values of GDPR also abides by the principles praised by Porter and Van der Linde. Likewise, the Brazilian regulation does not require any specific technology to accomplish the DP aims, keeping it open to innovators. Also, it provides provisions for implementing the Brazilian Authority for DP (ANPD) (BRAZIL, 2019). ANPD is" responsible for overseeing, implementing and supervising compliance with this Law throughout the national territory" (BRAZIL, 2018, art. 5). Therefore, ANPD fits the objective to clarify the regulations. Therefore, one may expect that this replication stimulates innovation in Brazil.

4.1.2. Tackling data monopolies

Data monopolies hinder innovation by preventing entrepreneurs and start-ups from accessing the

large datasets that function as fuel for data-driven innovation. Therefore, GDPR incentives innovation because it provides data subjects with powers to contest large concentrations of data by big-techs, namely the Portability Right and Erasure Right (NIEBEL, 2021).

The portability right is provided by art. 20 (EU, 2016, art. 20): "The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided…". The portability right allows for mitigating the "lock-in" effects of incumbent tech firms holding monopolized large databasis (NIEBEL, 2021).

The erasure right is enabled by art. 17 of GDPR (EU, 2016, art. 17): "The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay". The "right to be forgotten", as it is known, allows for diminishing the large competitive advantage enjoyed by big-techs and incumbent firms that hold large databases (NIEBEL, 2021).

These are two rights that seemly execute the function of stimulating innovation by allowing for data subjects to firstly require their own data from any data holders and, secondly, to order that all data related to his natural person be removed from companies' large datasets.

LGPD has reproduced these two rights in art.18, V and VI, respectively known as *direito à portabilidade* and *direito ao esquecimento (*BRAZIL, 2018, art. 18). They are equivalents of the rights provided by GDPR, also allowing for contesting data monopolies of firms.

Therefore, these legal transplants from GDPR to LGPD, at first motivated by an uncritical importation of European rules into Brazilian legislation, theoretically seem to incentive innovation.

4.2. The Negative effects of the Uncritical reproduction of the European DP regime

4.2.1. The principle of Purpose limitation and the Subsequent Legal Uncertainty

Upon implementing open regulatory aims, public regulations leave room for legal uncertainty since entrepreneurs will question whether they are complying or not (RAAB; DE HERT, 2008). In countries where the rule of law is strong, entry firms and start-ups have enough means to ensure their interests, favouring their engagement to innovative initiatives. On the other hand, in weak-rule-of-law countries, innovators have fewer legal means to protect their own interests against third parties, discouraging entrepreneurship (LEVIE; AUTIO, 2011). As innovators prefer to understand what the law expects from them, legal uncertainty has a definitive negative moderating role in the innovative process (MAYER-SCHÖNBERGER, 2010).

The rule of law moderates the entrepreneurial activity even when the regulatory burden is heavy. Strong rule of law combined with a heavy regulatory burden causes entrepreneurial to engage in innovative activities more than in countries where the rule of law is weak (LEVIE; AUTIO, 2011).

As discussed in the previous section, GDPR and LGPD have a very open concept of purpose limitation, favouring innovation because it allows for flexibility in the innovators' choices. Nonetheless, Brazil has a weak rule of law compared to the EU, particularly concerning litigation related to innovation. In the report "Global Innovation Index 2021", Brazil was ranked 72nd among 132 economies in the category "rule of law" for innovation (WIPO, 2021), while the EU is ranked among the top. Therefore, one may expect that the openness of the purpose limitation has quite different effects in Brazil and the EU.

4.2.2. The principle of Data Protection by design and the requirement for the state of the art

GDPR introduced, in its article 25, the principle of Data Protection by design:

> "…the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organizational measures […] in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects." (EU, 2016, art.25)

The recital 78 of GDPR clarifies that the principle praises that DP must be incorporated since the very beginning of data processing by data controllers.

GDPR also introduced further requirements regarding privacy by design in article 25: “Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing[…]” ((EU, 2016, art.25). Therefore, article 25 informs the conditions for the obligation of Data Protection by design, the most important is that it requires to account for the state of the Art (HILDEBRANDT; TIELEMANS, 2013).

State of the art is defined by the Oxford Dictionary as “the most recent stage in the development of a product, incorporating the newest technology, ideas, and features”. Therefore, upon being forced to account for the state of the art, data processors have to implement the best available technologies. Consequently, it incentivizes entrepreneurs to develop new and more compliant technologies (HILDEBRANDT; TIELEMANS, 2013).

In the Brazilian context, LGDP, although not explicitly using the term “Data Protection by design”, advocates the same principle in its article 46:

> “Data processors must adopt security, technical and administrative measures capable of protecting personal data from unauthorized access and accidental or unlawful situations of destruction, loss, alteration, communication or any form of inappropriate or unlawful treatment” (BRAZIL, 2018a, art. 46).

This article reflects the same function as its European counterpart. Afterwards, The Brazilian Strategy on Digital Transformation explicitly materialized and introduced the concept, asserting that one should “comply with international standards of privacy by design [...] in the national technology production as well as in the procurement of hardware, software and app”. The Policy document even quoted GDPR to explain the concept of Data Protection by design (BRAZIL, 2018b, p. 40).

However, LGPD, although reproducing the European concept, did not introduce further requirements such as accounting for the state of art. Therefore, Brazilian entrepreneurs are not as compelled to develop innovative technical solutions as in the EU.

4.3. Brief Policy advising

The replication of GDPR into LGPD brought forward many advancements in stimulating innovation. Besides the power to challenge data monopolies, it settled open-ended concepts that allow entrepreneurs to flexibilize their technological choices. However, the identified flaws upon automatically replicating GDPR into LGPD lead to obstructive effects that one-size-fits-all DP models did not foresee. Therefore, although it seems “cost-reducing” and “righteous” to look beyond Brazilian borders to the European territory whenever facing legal challenges, one must be critical of the reproduction of legal transplants.

The negative effects assessed by this study raise questions regarding what the solution would be. This essay suggests a few future directions on that issue.

One important aspect is to ensure innovators’ interests and goodwill to engage in innovative activities. As debated, the rule of law in Brazil is weak, downplaying innovation efforts after the implementation of public regulations that bring legal uncertainty. The solution would pass by implementing stronger institutions that may allow efficient litigation in the field of innovation.

5. The Expansion of the European Dominance

Going beyond the fact that the uncritical reproduction of the European DP model may yield negative results in stimulating innovation in Brazil (as debated in section D), this section argues that this replication rather expands the economic dominance of Europe over the Third World, clearly exemplified in Brazil’s case.

Firstly, subsection 1 debates the incorporation of European-based concepts of innovation models

into the Third World via international manuals, known as *isomorphism*. This same isomorphic phenomenon was effectively replicated by the Brazilian data protection regime, compelling Brazilian firms to compete with European ones. Then, subsection 5.2 discusses how the EU, for being better positioned in the international economic hierarchy, has an advantage in introducing innovations in the DP tchnologies field. Finally, I posit how both effects – exportation of European-based innovation models and higher hierarchical position - synergistically favours European rather than Brazilian firms. Ultimately, it increases the technological gap between both regions and the economy power of the former of the later. Last, some policy advising is suggested in view to address such issue.

5.1. Exportation of European innovation models to the Third World

The uncritical reproduction of European values does not take place by legal transplantation only, as debated in the previous sections of this essay. The European domination also lies in the universalization of concepts and models that embody European interests and values (MUTUA, 2000).

In the context of innovation, the EU succeeded in setting universalized standards on "what is good innovation", "how to engage in innovative activities" and “what is good research” that embodies European values. This conceptualization has been craved in international manuals, particularly the ones from the Organisation for Economic Cooperation and Development (OECD) (KUHLMANN; ORDÓÑEZ-MATAMOROS, 2017).

The OECD Oslo Manual, which gives guidance for innovation policies, praises that good innovation is what is “new-to-the-world”. Also, the OECD Frascati Manual, a paramount of universalized principles about research, advocates that good research only comes from the scientific method (KUHLMANN; ORDÓÑEZ-MATAMOROS, 2017).

Also, these European concepts embedded in OECD international manuals inform innovation indexes. By default, innovation is measured by the number of patents filed, and research is measured by the number of research articles published in peer-reviewed journals. These indicators are notably materialized in the Global Innovation Index.

The practice of reproducing European models for innovation is common in Third world countries. It is called “isomorphism” (KUHLMANN; ORDÓÑEZ-MATAMOROS, 2017). It takes place by reproducing principles embedded in the OECD Manuals, as well as innovation indicators based o them. However, problems stem from reproducing universalized European-based concepts in the Third World, because they ultimately lead to “solving the wrong problem” since the program was inspired by misleading theoretical assumptions (DUNN, 2016).

Therefore, upon introducing one-size-fits-all models for innovation, the Third World fails to stimulate innovation in their own region (DELVENNE; THOREAU, 2017), and Brazil is not an exception.

Brazil has uncritically followed the OECD International manuals to diagnose and plan its innovation actions embodied in the LGDP and in the Brazilian Digital Transformation Strategy (BDTS). BDTS is a trans-ministerial policy document developed by the Brazilian central government, aims at offering a broad diagnosis of the challenges to be faced, strategic actions, and indicators to monitor the progress in accomplishing an effective digital transformation (BRAZIL, 2018b). One of the main principles of both -LGPD and BDTS- is “the economic and technological development and innovation” (BRAZIL, 2018a, art. 2).

However, the replication of European-based concepts of innovation undermines Brazilian innovative activity since the principle of “new-to-the-world” places barriers to regional and non-world-class technologies developed in the country. Also, the principle that research must only follow the scientific method, praised by the Frascati manual, downplays alternative sources of knowledge, most common in Third-World countries.

Furthermore, Brazil has replicated the international index embedded with European values. BDTS states that “…as a reference, existing and consolidated international indicators such as the Global Innovation Index can be used” (BRAZIL, 2018b, p. 36). This has implications in the diagnosis of the innovation landscape, because the Brazilian government relies on statistics on patents and published articles to assess whether the strategy of digital transformation has been effective.

Therefore, upon following these guidelines and international index, entrepreneurs in Brazil may

think that they should only invest their scarce research and innovation resources in developing world-class technologies and research, directly competing with European incumbent firms.

5.2. The Winner Takes it All

The international economic hierarchical position of countries depends to a large extent on their economic dynamism (CASSIOLATO; LASTRES, 2000). The EU (and the Western countries in general) has a more dynamic economy because it draws on knowledge-intensive activities. They specialize in high-value products and services.

On the other side, Third-world countries focus their economic activity in areas with less knowledge-intensive technologies, usually related to natural resources. These activities, opposing the ones in the EU, have less added value, leading to unfavourable exchange relations. Innovations in the field of DP technologies are a notorious example of a knowledge-intensive industry because it bases its activities on R&D and software departments. For this, they predominate in Western countries, particularly the EU (SOARES; CASSIOLATO, 2008).

As the development and diffusion of technologies do not occur instantly, economies better placed in the international hierarchy, for having a more dynamic economy, have an initial advantage in launching new products and services in the market, increasing their participation in international commerce. Therefore, the EU accumulates wealth through the development of new technologies and temporary monopolies via intellectual property rights (COZZENS, 2010).

Innovation may foster the accumulation of wealth in the hand of a few countries. The winner(s) take(s) it al. Ultimately, it leads to a greater technological gap between the EU and the Global South and an expansion of its influence over the rest of the World (SOARES; CASSIOLATO, 2008).

Therefore, DP regulations as an innovation policy may yield positive or negative results depending on your position in the international economic hierarchy. Upon incentivizing a *domino effect* that will spread European DP standards to the rest of the world, as discussed in section B, the EU settles a worldwide market for its data-related technologies. At the same time because of the dynamism of its knowledge-intensive industry, the EU can maintain competitive advantages of their firms compared to the Global South. Not surprisingly, European firms are booming in the data protection technologies market representing almost half of all companies, while third-world firms represent an insignificant part of it (IAPP, 2021).

5.3. Policy Advising

Briefly, innovation promotion through DP regulations does not benefit different countries in the same way, and it is not clear what are Brazil's objectives in stimulating innovation through the DP regime. Is it to develop Brazil-based innovation? Is it innovations to tackle specificities of Brazil, such as social inequality and poverty? What has been shown so far is that, upon transplanting the European model, it tends to increase the technological gap between Brazil and Western Countries, creating other problems.

As a solution, this paper posits that the Brazilian DP regime should introduce local content requirements for DP innovations. Local content means that technologies to ensure DP should come from Brazil rather than being imported. Local content requirements are a powerful economic tool to encourage innovation in several countries, and it has already been effectively used to bolster innovation in the Brazilian Naval and related industries (PEREIRA ET AL., 2021). Therefore, this essay suggests that LGPD should introduce the requirement of accounting for the national state-of-the-art technology in data processing.

6. Conclusion

The discussion and conclusions derived from this paper may confuse readers that this essay advocate removing principles and rights from LGPD, such as the purpose limitation and privacy-by-design.

Furthermore, upon debating how stimulating innovation through DP regimes in the Third World benefits European firms, one may think that this paper intends to refuse DP regulations in Brazil. It is not true. Instead, this paper acknowledges the positive effects of such regime on innovation.

The main conclusion is that DP regulations (such as any other) should not be uncritically reproduced from Western countries. It is essential to assess whether such transplants are suitable to local specificities and whether it is not just another facet of the expansionist dominance project of European countries. Furthermore, this paper intends to compel the Brazilian critical mass to address the right problems of Brazil. Problems such as the abyssal technological gap compared to the Global North remain unaddressed.

Critics of TWAIL claim that the discipline does not have a positive agenda for changing International Law, drawing on nihilism to criticize it and not propose reforms (GATHII, 2011). Bhupinder Chimni recognizes that TWAILers must be vigilant against the trap of nihilism by refuting all the whole of International Law and states that criticism without offering a constructive response turns to be "an empty gesture" (CHIMNI, 2006). On the contrary, this paper gives a glimpse of the future directions upon which to build a critical response.

The conclusions and policy advice derived from this essay could be expanded to any Third-World country, as long as it keeps with the requirements that:

- This one country has reproduced GDPR into its own DP regulation;
- The rule of law is weak in this country, and
- They occupy an inferior position in the international economic hierarchy.

It seems to be the case for a significant part of the Third World, especially in the American continent. Therefore, the analysis in this paper is not restricted to Brazil only but may reach well other parts of the globe. Luckily, I hope it may compel students and activists against some prejudicial projects imposed by economic elites in Latin America.

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