

ABOUT THE REGULATION OF INTERNET: CONSTITUTIONAL ISSUES,
MODELS AND CHALLENGES*

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Abstract

The theme of basic “constitutional” rules for the Internet is a recurring one. But recently a question arises: is an Internet Bill of Rights still possible? This is the focus of the present essay, which is structured upon two different, although related, topics.

Firstly, the choice of the regulatory model best suited for the Internet is considered - the hard law and binding one, or the soft law and self-regulatory one - together with the issues of constitutional legitimacy arising from each model at the national and European levels.

Secondly, attention is given to the specific experience of the Italian Internet Bill of Rights, drafted by a Committee charged by President Boldrini and approved on November 23rd, 2015, with a motion voted by a transversal majority in the Chamber of Deputies of the Italian Parliament. The basic legal questions concerning fundamental rights addressed by the Bill are analyzed, while underlining its value as a political guideline for the future legislator of the Internet.

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I wish to point out that I will express here only my personal views and opinions. Therefore, what I will say should not be considered an official assessment of the Committee’s work.

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1. Key questions

My aim is to explore the basic question concerning the sources of the rules designed to regulate the Internet. Preliminarily, the focus will be concentrated on the necessity to constitutionalize the Internet. Then the regulation which best suits the net will be identified; this question implies *per se* the rejection of the US thesis according to which Internet should remain the reign of regulatory anarchy.¹ Finally, a detailed alternative regulation to the constitutionalizing of the Internet will be offered: namely a supranational “Bill of Rights” for the Internet.

In this perspective I will analyse the Italian experience of the Boldrini Committee in order to assess if its proposal, the Declaration of Internet Rights, can constitute a regulatory framework covering both aims of equality and legality, as conditions for the exercise of fundamental rights in the Net.

The proposal of a Bill prompts further questions: which legislative body should write this Bill? What should the relationship be between binding rules and the policies of self-regulation? What kind of content would be appropriate or necessary for the Bill? Should the Bill give greater weight to fundamental rights than to economic interests? Which value could be assigned to the Bill?

To answer these questions, I will not simply tackle a single freedom concerning netizens. This article’s analysis will instead focus on the basic need that fundamental rights, normally protected by national constitutions, should receive universal protection regardless of territorial boundaries, in accordance with the a-territorial nature of the Internet. Therefore, rather than focusing on specific rights, whether they be freedom of expression, communication, or the right to access the Internet,² this article intends to propose the essentials of a statute for fundamental rights, one that is sufficiently general to encompass every freedom, regardless of its specific features. This statute should also be supranational so that every freedom is consistently protected regardless of the variances in national legal systems. This would also ensure equality of treatment.

The above questions refer to the necessity of general regulations that extend beyond both national boundaries and the sectional interests prevailing in any given moment. A comprehensive view of the possible answers will support the assertion that all technical issues concerning the Internet cannot

¹ J. PERRY BALOW, *A Declaration of the Independence of Cyberspace*, 1996, <https://www EFF.org/de/cyberspace-independence>.

² Let me allow to refer to G. DE MINICO, ‘New Social Rights and Internet: Which Policies Combine Them’, (2013) 15 *Inter.Comm.L. Rev.* 261. For a wide overview on specific rights, see M. BOARDMAN, ‘Digital Copyright Protection and Graduated Response: A Global Perspective’, (2011) 33 *Loy. L.A. Int’L & Comp.L. Rev.* 223, 235-243.

be left to the invisible hand of a market-oriented technological development, rather, it should be goal-oriented towards achieving a common good. Should this happen, the Internet would finally be a unique and effective opportunity for everyone to pursue personal growth and participation in the virtual political process. Such an outcome, however, can only be ensured through clear choices made by policymakers and netizens. If this outcome has already occurred or is going to happen, we can't anticipate now but we will look at it later.

2. Is a constitutional source to the Internet necessary?

Moving on to the first issue, we will delve here into the matter of whether the Internet should be regulated at the constitutional level, considering that most national Constitutions do not mention the Internet at all. There are few exceptions, for instance the Constitutions of Greece and Ecuador.

As a starting point, two Constitutions - namely the Italian and American ones - will be discussed, as they already entail norms protecting traditional media - radio, television, and newspapers - yet at the same time lack specific rules for online media such as Internet blogs and social network websites³.

More specifically, art. 15 and 21 of the Italian Constitution (freedom of communication and speech, respectively) do not refer to the Internet at all. This is easily explained considering that the constitutional formulas have remained unchanged since 1948. Recently, there has been considerable debate among scholars⁴ and decision makers about the necessity of introducing new *ad hoc* constitutional provisions.⁵

It can be argued against the thesis of a formal revision that any new formula would be focused on the existing technology, and could not easily cover the inevitable and unforeseeable future developments.

³ Only two Constitutions dealt with new media through explicit provisions, see 2008 Syntagma[SYN.][Constitution] 5a, co. 2 (Greece) and Constitucion de República del Ecuador [C.R] art. 16.

⁴ S. RODOTÀ, *Il mondo della rete. Quali diritti e quali vincoli* [The word in the net. What rights and what constraints] (Bari: Editori Laterza, 2014).

⁵ See for what concerns the Leg. VXII the “disegno di legge costituzionale, A.S. 1317, 17/2/2014, modifica all'articolo 21 della Costituzione, <http://www.senato.it/leg/17/BGT/Schede/Ddliter/43981.htm> [hereinafter Project of constitutional law 1317/2014] and also the “disegno di legge costituzionale, A.S. 1561, 10/7/2014, introduzione dell'articolo 34 bis della Costituzione, <http://www.senato.it/leg/17/BGT/Schede/Ddliter/44665.htm> [hereinafter Project of constitutional law 1561/2014]. In doctrine see: O. POLLICINO, ‘Esame in sede referente dei DDL 1317 e 1561 (diritto di accesso ad Internet)’, <http://www.medialaws.eu/esame-in-sede-referente-dei-ddl-1317-e-1561-diritto-di-accesso-ad-internet/> and G. DE MINICO, ‘A proposito dei disegni di legge di revisione costituzionale, A.S. 1561 e 1317, I Commissione del Senato, Leg. XVII, 10/3/2015’.

This would expose any constitutional innovation to the risk of premature obsolescence: a detailed provision might be adequate today, but useless, or even harmful, tomorrow. It should be further noted that the real focus of Internet regulation is found—as it will be explained more extensively later - in the identification of a supranational rule-maker. A national Constitution, applicable within the territory of a single State, might be an obstacle in the broader perspective of a discipline that encompasses a number of States with different legislative histories, experiences, and economic and social interests. From this point of view, a specific and detailed provision might not be the right answer.

An alternative is found in a broad interpretation of the existing constitutional provisions, in order that they may be applied to the new virtual reality.

This approach would be made easier by the inherent flexibility of many Constitutional provisions. This is the case of art. 15 and 21 of the Italian Constitution, which grant protection to the above named media, but also refer respectively to “every other form of communication” (Art. 15) and “any other means of communication” (Art. 21).

A similar example is given by the First Amendment of the U.S. Constitution.⁶ In fact, the Supreme Court has encompassed the defence of the Internet within the constitutional safeguards of freedom of speech, and no reform of the Amendment has been deemed necessary.⁷

To avoid any misunderstanding, it is important to clarify that the extension of the same constitutional protection to rights and liberties offline and online does not imply an automatic transfer of the offline discipline, as a whole, into the world of virtual reality. The extension considered here is limited to the basic constitutional guarantees of rights and liberties, while a different sub-constitutional regulation may remain to be provided for in detail.

Therefore, offline media regulations cannot as such be made applicable online. Should this happen, the Internet would lose its uniqueness. Furthermore, an unfettered Internet is essential to the circulation of ideas which is a basic instrument of economic and social growth. As a consequence, regulations should be kept at a minimum level, as we shall see later.

⁶ On the elasticity of the text and the discretionary power Justice Harlan stated: “I do not see why Congress should not be able as well to exercise its ‘discretion’ by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court.”, in *Katzenbach v. Morgan*, 384 U.S. 641, 669 (1966). See also J. VARAT ET AL., *Constitutional law: cases and materials*, (New York: Foundation Press, 14th ed., 2016) 1184.

⁷ Supreme Court, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

3. The guarantees of modern constitutionalism instead of the constitutional source

The heritage of constitutionalism provides two basic safeguards for fundamental offline rights, valid also for liberties online. To examine these measures we will use the Italian Constitution as a starting point to then discuss them at a supranational level.

In the Italian Constitution these measures consist in both the “riserva di legge”⁸ and the “riserva di giurisdizione”.⁹

A) The first, named the law clause, is a binding way of allocating regulatory work between primary and secondary rules, in force of which the Constitution entrusts in whole or in part the regulation concerning a given matter to the law adopted by Parliament.

As a consequence the Government will be enabled to adopt a more specific secondary regulation only after the legislator has enacted the general norms and steering guidelines, to which the secondary rule must conform.

Therefore, a preliminary necessity is to test the constitutional compatibility of the rules enacted by the legislator. This compatibility will depend on the completeness of the legislative discipline, which in turn will define the scope of the secondary rules.

In the matters concerning the copyright and Internet, the legislative Decree n. 44/2010¹⁰ doesn't seem to comply with this principle. In fact, the Decree says little about online copyright, leaving the regulatory onus on the competent Independent Authority (Authority for the Guarantee of Communications). In the absence of a specific legislative foundation,¹¹ the Authority

⁸ For the purpose of this essay, it will be sufficient to make reference to: G. ZAGREBELSKY, *Il sistema costituzionale delle fonti del diritto*, (The constitutional system of the law sources) (Torino: Giappichelli, 1984) 84-87; also L. CARLASSARE, *I regolamenti dell'Esecutivo e principio di legalità* [The rules of the Government and the legality principle] (Padova: Cedam, 1966) 223 and E. CHELI, *Potere regolamentare e struttura costituzionale* [Regulation power and Constitutional structure] (Milano: Giuffrè, 1977) 50.

⁹ To our purpose we just quote: V. ANGIOLINI, *Riserva di giurisdizione e libertà costituzionali*, (Padova: Cedam, 1992), 176 ff.; A. PACE, *Problematiche delle libertà costituzionali. Parte generale* (Padova: Cedam, 2003), 176 ff. and F. SORRENTINO, *Le garanzie costituzionali dei diritti*, (Torino: Giappichelli, 1998).

¹⁰ See the Legislative Decree, March 15th, 2010, n. 44, at G.U. 29 March 2910, n. 73.

¹¹ In more general terms for what concerns the specific title of regulatory power entrusted to the Independent Authorities see: P. CARETTI (a cura di), *I poteri normativi delle autorità indipendenti, Osservatorio sulle fonti*. 2003-2004 (Torino: Giappichelli, 2005); M. MANETTI, *Poteri neutrali e Costituzione* (Milano: Giuffrè, 1994), 61; G. DE MINICO, *Regole. Comando e consenso* (Torino: Giappichelli, 2005), in part. cap. 1; P. BILANCIA (a cura di), *La regolazione dei mercati di settore tra autorità indipendenti nazionali e organismi europei* (Milano: Giuffrè, 2012); F. LUCIANI, *Le autorità indipendenti come istituzioni pubbliche di garanzia*, (Napoli: Edizioni scientifiche italiane, 2011); R. TITOMANLIO, *Potestà normativa e funzione di regolazione. La potestà regolamentare delle autorità amministrative indipendenti*, (Torino: Giappichelli, 2012), *passim*.

has assumed the power of closing websites or requiring that some contents be cancelled, following a summary assessment of their illicit nature.¹² A strong doubt arises, because the Authority's decision is a secondary source, and therefore in virtue of the "law clause" is not allowed to introduce an original innovation in the legal system without an adequate foundation in a primary source.

Consequently, the compliance of the Legislative Decree 44/2010 with the law clause and the hierarchy principle was challenged before our Constitutional Court. Although the Supreme Judge, having adopted a formal judgment of inadmissibility, didn't define the merit of the issue, he did affirm a very important principle useful to my aim, namely that: "Occorre preliminarmente osservare che le disposizioni censurate non attribuiscono espressamente ad AGCOM un potere regolamentare in materia di tutela del diritto d'autore sulle reti di comunicazione elettronica".¹³ [Preliminarily it must be noted that the challenged norms do not explicitly give to the AGCOM a regulatory power concerning the topic of copyright on the electronic communications network]. From my point of view,¹⁴ the Court's statement would not in principle exclude that the lack of lawful basis of the Authority's regulatory power could determine the invalidation by the hand of the administrative judge of the Deliberation 680 for breach of the law clause. However,

¹² *Deliberation n. 680/13/CONS*, <http://www.agcom.it/default.aspx?DocID=12228>.

¹³ See: Constitutional Court, *Decision n. 247/2015*, <http://www.giurcost.org/decisioni/index.html>, in part. Cons. 4.2. For an in-depth analysis of the case before the Constitutional Court see: M. AVVISATI, 'Diritto d'autore in rete e Costituzione: concerto tra le fonti?', *Osservatorio sulle Fonti*, (2014), 3. For a lively debate among scholars on the Court's decision one can listen to the program "*Presi per il web*", on Radio Radicale, at 19.30, on December 6th, 2015, with interventions of I. ADINOLFI, G. DE MINICO, A. GAMBINO, M. OROFINO AND O. POLLICINO.

¹⁴ Scholars have drawn opposite conclusions from the ruling of the decision. For some of them, the Court would have held, by way of an *obiter dictum*, that the norms under review were not attributing to the Authority a regulatory power on the subject matter. Hence the Administrative Tribunal could have annulled the regulation because of the lack by the Authority of the necessary power. On this point see: G. DE MINICO, 'Diritto di accesso e copyright: la parola va al Tar', *Il Sole 24 Ore*, 6th December 2015; A. GAMBINO, 'Regolamento Agcom, diritto d'autore e Corte costituzionale', <https://www.dimt.it/index.php/it/dirittoautoreinrete/14462-24regolamento-agcom-diritto-d-autore-e-corte-costituzionale-prof-gambino-ministro-franceschini-prenda-iniziativa-su-web-e-copyright>, on December 8th, 2015 and F. SARZANA, 'Corte Costituzionale ed AGCOM: inammissibile la richiesta del TAR, ma l'AGCOM non ha poteri regolamentari sul diritto d'autore', *Nova Il Sole 24 Ore*, on December 4th, 2015.

Others believe on the contrary that the Court would have found a basis for the regulatory power of the Authority by means of a systematic interpretation of the provisions: O. POLLICINO – M. BASSINI, *Le parole contano*, ovvero "tanto rumore per nulla". *Sulla (prevista) inammissibilità della questione di legittimità costituzionale della base giuridica del Regolamento AGCOM #ddaonline*, *Media-Laws*, on December 4th, 2015, <http://www.medialaws.eu/le-parole-contano-ovvero-tanto-rumore-per-nulla-sulla-prevista-inammissibilita-della-questione-di-legittimita-costituzionale-della-base-giuridica-del-regolament/>.

it must be noted that recently the administrative Judge has deemed this Deliberation valid despite the lack of a legal basis.¹⁵

At the supra-national level – including both the Court of Justice and the European Court of Human Rights, whose understanding of the rule of law doesn't entirely overlap -¹⁶ the “rule of law”¹⁷ concept corresponds to the Italian law clause, albeit with some differences. In the perspective of the rule of law the secondary normative sources of EU law are usually allowed a much wider discretionary power in comparison with the room acknowledged to the Italian secondary sources. Consequently, the decisions from a public authority (containing general and abstract provisions) are allowed to intervene, and not only the Assembly's legislative acts.¹⁸

Therefore, at the supra-national level the form of the normative act (whether parliamentary or governmental) is not as important as “how” the act is expressed. It is requested to be at least “adequately accessible”¹⁹ and “formulated with sufficient precision to enable the citizen to regulate his conduct.”²⁰

In addition to the first limit, the previous legislative intervention, the rule of law entails further substantial limits to the policymaker: namely the param-

¹⁵ Tar Lazio (Administrative Tribunal Lazio), Decision. n. 04101/2017, at <https://www.civile.it/internet/visual.php?num=93668>.

¹⁶ On the well known different opinions of the two judges see: R. LAWSON, ‘Confusion and conflict? Diverging interpretation of the ECHR in Strasbourg and Luxembourg?’, in R. LAWSON-M. DE BLOIJS (eds), *The Dynamics of the protection of human rights in Europe: essays in Honour of Henry G. Schermers* (Netherlands: Kluwer, 1994); P. VAN DIJK-G. VAN HOOFF, *Theory and practice of the European Convention on human rights* (Netherlands: Kluwer, 3rd ed., 1998) 21; A. ROSAS ‘The European Court of Justice in context: forms and patterns of Judicial dialogue’, (2007) 1 *EJLS* 2.

¹⁷ The literature concerning the “rule of law” is unlimited. For present comparative purposes, it is sufficient to refer to scholarly contributions based on recent case law developments; with regard to the European Charter of Fundamental rights see, among others: F. FABBRINI, *Fundamental rights in Europe: challenges and transformations in comparative perspective* (Oxford: Oxford University Press, 2014); D. CHALMERS ET AL., *European Union law: Text and materials*, (Cambridge: Cambridge University Press, 3rd ed. 2014) 256-58; S. PEERS, ‘Taking Rights away? Derogations and limitations’, in S. PEERS – A. WARD (eds.), *The EU Charter of fundamental rights: politics, law and policy* (Oxford and Portland: Hart Publishing, 2004), 141 ss. and D. TRIANTAFYLLOU, ‘The European charter of fundamental rights and the “rule of law”: restriction in fundamental rights by reference’, (2002) 39 *Com. Mark. L. Rev.* 53.

As for the European Convention on Human Rights see: D. HARRIS ET AL., *Law of the European Convention on Human Rights*, (Oxford: Oxford University Press, 2nd ed., 2009) 345-349 and W. A. SCHABAS, *The European Convention on Human Rights* (Oxford: Oxford University Press, 2015) 402 ff.

¹⁸ Silver, 5 Eur. H.R. Rep. at 372. *Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. 271(47) (1979). For a wide case law survey of the Court of Justice referring to the content of the “provide for by law” requirement (art. 52, par. 1, CH) see: S. PEERS - A. WARD. (eds), *The EU charter of fundamental rights*, quoted.

¹⁹ See: ECHR, *Silver v. United Kingdom*, 5 Eur. H.R. Rep. 372 (87) (1980).

²⁰ See: ECHR, *Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. 245, 271 (49) (1980).

eters of necessity and proportionality. The respect of both these criteria doesn't constitute an incontrovertible issue with certain and objective outcomes; instead the binding contents of the above criteria depend on the margin of discretionary appreciation of the European judge.²¹

The second limit (necessity) is a one-way approach, requiring the sacrifice of a right to be accepted only if it cannot be avoided. Conversely, the sacrifice cannot be accepted if an alternative in which that same right remains uncompromised is viable.²²

To clearly explain what the necessity consists of we can refer to a famous Court of Justice Decision, known as Digital Rights Ireland,²³ which invalidated the entire Directive 2006/24 on Data retention. In order to prevent terrorism, the Directive allowed a massive collection of data of all persons using electronic communications services, including those persons who were not, even indirectly, in a situation liable to give rise to criminal prosecutions.

The judge gave a clear-cut answer. While acknowledging the demand of public security and the necessity of modern investigation techniques, the Court affirmed that "such an objective of general interest, however fundamental it may be, does not, in itself, justify a retention measure such as that established by Directive 2006/24 being considered to be necessary for the purpose of that fight" (Consid. 51).

It is not without significance that in the reasoning of the Supreme Court the principle of necessity is mentioned 35 times and that its infringement, together with the breach of proportionality, led to the Directive's invalidation.

The third limit, proportionality, is the real test for the reasonableness of any legal provision. Costs and benefits must be assessed in order to check that a proper balance has been found between the interests embodied in the protected rights and those on which the legislative restriction is founded. The goal is to prevent limitations to those which do not grant any significant and corresponding advantage to the competing interests.²⁴

²¹ On this issue, see, with further references: Y. ARAI-TAKAHASHI, *The margin of appreciation doctrine and the principle of proportionality in the Jurisprudence of the ECHR* (Cambridge: Intersentia, 2002) and A. LEGG, *The margin of appreciation doctrine in international human rights law: deference and proportionality* (Oxford: Oxford University Press, 2012).

²² The distinction between the necessity and the proportionality principles is easy to be drawn at the conceptual level, but it gives rise to difficulties in practice, also because "the case law often makes no clear attempt to separate them", see: S. PEARS - A. WARD (eds), *The EU charter of fundamental rights*, quoted, 1480.

²³ Court of Justice (Grand Chamber), 8 April 2014, in C-293/12 and C-594/12, at <http://curia.europa.eu/juris/celex.jsf?celex=62012CJ0293&lang1=it&type=TEXT&ancre=>. Interesting reflections on this issue can be found in O. LYNKEY, *The foundations of EU data protection law*, (Oxford: Oxford University Press, 2015) 65.

²⁴ Court of Justice, Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v Netlog NV* (16 February 2012), para. 51,

An example of regulation which does not comply with the aforesaid principles may be found in the French Law Hadopi 2,²⁵ which prevents internet users who visit websites suspected to infringe copyright laws from accessing the net. The law fails on at least three different grounds. Firstly, it balances heterogeneous values: a fundamental right (to access the net) vs. an economic interest (copyright). Secondly, it charges the former (the fundamental right) with excessive and disproportionate bounds. Finally, the restrictions applied were not proved to be necessary.

Indeed, also this new version of Hadopi is unsatisfactory because of its non-compliance with the recalled principles, even if its excessive and disproportionate sanctions are now not inflicted by an Independent Authority but by a judge.

B) Turning now to the second constitutional safeguard we find the jurisdictional clause – known in the Italian doctrine as “riserva di giurisdizione”²⁶

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CJ0360&from=EN>.

For a specific reference to data retention and electronic communications see the above quoted Court of Justice (Grand Chamber) (8 April 2014), in particular, the paragraphs n. 46, 69 e 70, in which the Court recalls its previous decisions and finds in the violation of proportionality one of the conclusive reasons for the invalidity of Data Retention Directive (2002/58).

Just some scholars: T. TRIDIMAS, *The general principles of EU law* (Oxford: Oxford European Union Law Library, 2007), chapters 3-5. This principle shouldn't be confused with the limit concerning the “essential core” of the fundamental rights. This road map requires the legislator to respect the untouchable core of the right as his first duty. Only after having complied with it, the legislator would be able to shrink the residual part of the liberties in coherence with the proportionality mandates. As noted by P. CRAIG, *The Lisbon Treaty: law, politics, and treaty reform* (Oxford: Oxford University Press, 2010), 224, the Court has often merged the doctrine of proportionality with that of the “essential core”.

²⁵ This version completes Hadopi1 Law n. 2009-1311, on October 28th, 2009 concerning the penal protection of literary and artistic property on the internet *Loi n. 2009-1311 du 28 octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet* (<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021208046&categorieLien=i.d.>), by substituting Hadopi (the independent authority created by Hadopi 1) with the judge, who has the power to sanction Internet users. This change of authority was imposed by the Conseil Constitutionnel (2009-580 DC, 10 June 2009, <http://www.conseil-constitutionnel.fr/decision/2009/2009-580-dc/decision-n-2009-580-dc-du-10-juin-2009.42666.html>) in that: “eu égard à la nature de la liberté garantie par l'article 11 de la Déclaration de 1789, le législateur ne pouvait, quelles que soient les garanties encadrant le prononcé des sanctions, confier de tels pouvoirs à une autorité administrative dans le but de protéger les droits des titulaires du droit d'auteur et de droits voisins”. [“seeing the nature of liberty guaranteed by article 11 of the 1789 Declaration, the legislator could not, regardless of the guarantees framing the sanctionary decisions, give these powers to an administrative authority to protect the rights of copyright owners and related rights.” *My translation*].

²⁶ For the references see note 10.

– which is an expression of the principle of divided powers²⁷ which entrusts the power of judicial review solely upon the judiciary.

It means that limitations of constitutional rights and liberties require an authoritative act adopted by an independent judge deciding according to a due process of law.²⁸

The jurisdictional clause is present also at the international level. In the European Court of Human Rights' decisions, for instance, it is found in the weaker form of due process.²⁹ In fact the European Convention on Human Rights (especially, Articles. 5-6) does not require EU Member States to confer power, as detailed above, only to a judge, allowing that it be entrusted also to different authorities, provided that their decisions are based upon a fair hearing and an adequate motivation.

We have illustrated the constitutional safeguards of liberties which cannot in any circumstance be sacrificed in either world, virtual or real. However, we wish to stress the point that the substantial equivalence of guarantees between rights off and online does not entail the automatic extension to the latter of specific regulations enacted for the former.

The basic principle that every regulation must be tailored to the specificity technicalities of the means was construed in the American experience. We have already referred to the well known decision *Reno v. ACLU*, in which the Justice Stevens delivered the Court's opinion, clearly acknowledging the Internet's "uniqueness" and its non-coincidence with traditional media, and calling for regulations independent from those intended for *broadcast*.³⁰

²⁷ This concept indicates a more or less rigid division of power between the Legislative, the Executive and the Judiciary aimed at the essential checks and balances required by democracy. For a supra-national analysis beyond specific States, see: C. MOELLERS, *The three branches: a comparative model of separation of powers* (Oxford: Oxford University Press, 2013) 150.

²⁸ The constitutionality of the Italian Legislative Decree 44 /2010, above quoted, was challenged, not only for its alleged infringement of the law clause, but also upon the allegation that it did not comply with the "riserva di giurisdizione". As we have said the Constitutional Court did not decide the case on the merits, so this controversial point is still open and could be represented before the Court in the future.

²⁹ The ECHR has developed its own substantive requirements for a "tribunal." In particular, the body must have the power of decision; operate on the basis of rules of law and after proceedings conducted in a prescribed manner; determine matters within its competence; motivate its decisions and be independent and impartial. See: M. KUIJERS, *The blindfold of lady justice: judicial independence and impartiality in light of the requirements of article 6 ECHR*, (Nijmegen: Wolf Legal Productions, 2004) 175.

³⁰ Just to sum up: in that case the heart of the matter was represented by the transferability to the net of the content limitations enforced on television in protected time slots so as to safeguard juvenile public. Such limitations would result in an unjustified and disproportionate restriction of the right of adults to access the so-called hard content of the net. This is because the structure of the net does not lend itself to time-differentiated access, as it is the case with television. Therefore, the provisions of the Communications Decency Act 1996 banning patently offensive speeches (Lipschultz, 2008) on the net were deemed unconstitutional.

We think that we can draw from *Reno* one more basic assumption: it is necessary to draw for Internet a specific regulation to be in all cases maintained at a *minimum* level, because the net is an irreplaceable instrument for individual growth and the fostering of informative fluxes. This entitles it to protection against heavy authoritative intervention.

4. Which is the best regulation of the Internet?

I started my discourse by denying the need for a formal modification of the Constitutions in order to encompass the Internet. It may now be useful to take a further step in stating the necessity of an “Internet Bill of Rights”.³¹ A conclusive and satisfactory answer cannot be found in the interpretation broad as it may be of some constitutional provisions written at a time when there was no awareness of this new reality.

The global situation does indeed urge a proper “Internet Bill of Rights”. In doing so, another question is then raised: who is the constituent power of the Internet? In other words: which Authority shall be legitimated³² to write the fundamental Charter of the Internet?

The hypothesis of one or more national States assuming such a role must be rejected because the a-territorial nature of the Internet would be incompatible with an Authority entrusted with powers constrained within State boundaries.³³

The features of the Internet require, as stated above, that only a supranational legislator should be called upon to write its Constitution. Even so, one question remains open: should it rather be the community of Internet ‘surfers’ through self-regulation, or should such a legislator be an international body through an authoritative hard-law regulation?

A) In this former model a State leaves all initiative to private bodies, and gets involved only when self-regulation, although necessary, is missing. This form of self-regulation takes place within the limits of the freedom of negotiation. As long as no problem arises, the State does not directly intervene. Nevertheless, the fact itself that the public authority may act turns its absence into a potential presence, on the assumption that ‘if nothing is done State action will follow’.³⁴

This self-regulation model may be defined as “independent” from the law, since the law is entirely lacking, even as a minimal framework for the *inter*

³¹ Among the most significant voices, see: L. LESSIG, ‘Reading the Constitution in Cyberspace’, (1996) 45 *Emory L.J.* 3, 7-18.

³² R. W. RIJGERSBERD, *The State of Interdependence. Globalization, Internet and Constitutional Governance* (Hague: Asser Press, 2010) 49-68 and 213-30.

³³ C. REED, *Making laws for cyberspace* (Oxford: Oxford University Press, 2012) 30-34.

³⁴ R. BALDWIN – M. CAVE, *Understanding Regulation*, (Oxford: Oxford University Press, 1999)126.

partes negotiation. ³⁵ It appears to be a historically regressive model. ³⁶ That is because private stakeholders, left by themselves, have shown time and again that they pursue only egotistical interests. ³⁷ Therefore, the achievement of the common good depends on chance, whenever it happens to correspond with private interests and it has frequently proven to be unable to build the consensus necessary to condense and shape the common good in a supranational synthesis. ³⁸

B) On the contrary, the latter model consists in a supranational and binding authority that could fall easily under the influence of strong national States, the interests of which only occasionally coincide with a broader common good. In brief, international organizations tend to reproduce, albeit on a smaller scale, the basic flaw of world politics; at best a system of interactions between autonomous nation-States may occur.

Therefore, I propose a median hypothesis coherent with the order which links binding sources and self-regulation. First, the legislative power should be vested in a public supranational authoritative body, based on legal and binding provisions, which also defines the nature and scope of its powers. Second, the decision-making process of such a body should encompass a strong representation of private interests concerning the Internet such as entrepreneurs, web surfers, and consumers. Opposing stakeholders should discuss basic issues before a public authority, which is able to make a final decision after the different views have been listened to and fully taken into account. The problems of standing and those concerning the choice of interests to be admitted to such a procedure have been extensively explored by the American doctrine, which could be a reference on this point. ³⁹

³⁵ The name “independent” was a my intellectual creation launched in a my previous work – ‘A Hard Look at Self-Regulation in the UK’, (2006) 1 *EBLR*, 211 – in order to stress its to operate out of a legal framework like an use *prater legem*.

³⁶ The example of financial markets can show that when objective values are at stake, such as the good name of single markets, the trust in a free trade economy and the safety of private savings, the English legislature did no longer rely on one-sided regulation. It deeply changed self regulatory models with the purpose of making public regulatory powers prevail.

³⁷ J. KAY - J. VICKERS, “Regulatory reform: an appraisal”, in G. MAJONE (ed), *Deregulation or re-regulation? Regulatory reform in Europe and the United States* (London: Pinter, 1990) 239, where the authors underline that the private bodies “may claim that their objective are in line with the public interest, but whether or not this is so will depend on the frameworks in which they operate”.

³⁸ See: G. TEUBNER, *Constitutional fragments. Social constitutionalism and globalization*, (Oxford: Oxford University Press, 2012), 66.

³⁹ See, e.g., S. G. BREYER ET AL., *Administrative law and regulatory policy* (Alphen aan den Rijn: Wolters Kluwer, 4th ed., 2017) 869-881; see M. SHAPIRO, ‘APA: Past, Present, Future’, (1986) 72 *VA. L. REV.* 447; see also R. J. PIERCE, JR., ‘Rulemaking and the Administrative Procedure Act’, (1996) 32 *TULSA L.J.* 185; and see B. SCHWARTZ, ‘Adjudication and the Administrative Procedure Act’, (1996) 32 *TULSA L.J.* 203.

We find a complex relationship between binding law and consensual law.⁴⁰ A binding framework should be set defining the respective roles of law and self-regulation. Not only will the former have to give a foundation to the competence of the latter, but the law will also have to provide guidelines for the substantive regulation to be adopted, and to outline the structural features⁴¹ of the private regulator so that adequate representativeness and the democratic nature of its decision-making processes remain assured.⁴² These restrictions are especially justified when self-regulation tends to bind a wider community than the one strictly represented by the self-regulator, i.e. whenever private self-regulation aims towards *erga omnes* effectiveness.⁴³

Conclusively, in a correct order, law comes first, self-regulation follows. If the order is inverted, the inherently secondary nature of self-regulation with respect to the law will be merely fictitious. Self-regulation will be applied as a fully source of law. Damages to the constitutional architecture will be inevitable.

Nevertheless, it may happen that the correct relationship between heteronomy and autonomy⁴⁴ may be found. But such an order does not seem to be wholly accepted in every State.⁴⁵ From such an approach could follow the entrusting of the rules on fundamental freedoms on line to the economic powers operating on Internet, that is to say by an uncontrolled self-regulation by the "management of private interest"⁴⁶. This kind of outcome would expose the net to the danger of a neo-corporative and selfish involution, given the absence of a heteronomous guide towards the common good.

⁴⁰ G. DE MINICO, 'A hard look at self-regulation in the UK', quoted, 197-200.

⁴¹ L. B. SOLUM, 'Models of Internet Governance', in L. A. BYGRAVE - J. BING (eds.), *Internet governance* (Oxford: Oxford University Press, 2011) 61-69; S. BEATTIE, *Community, space and online censorship* (Burlington: Ashgate, 2009) chap. 5.

⁴² R. H. WEBER, *Shaping Internet governance: regulatory challenges* (Heidelberg: Springer, 2009) 105. Also: J. GOLDSMITH - T. WU., *Who controls the Internet?* (Oxford: Oxford University Press, 2006) 17.

⁴³ J. BLACK, *Constitutionalizing self-regulation*, quoted, 26.

With specific reference to the Internet topic see: J. CAVE, 'Policy and regulatory requirements for a future internet', in I. BROWN (ed) *Research Handbook on Governance of the Internet* (Cheltenham: Edward Elgar, 2013) 161.

⁴⁴ See C. MARSDEN, *Internet co-regulation*, (Cambridge: Cambridge University Press, 2011), 58.

⁴⁵ For opposite approaches consult: G8 Summit, *G8 Declaration renewed commitment for freedom and democracy*, on May 26-27th, 2011, Deauville, France, at http://www.whitehouse.gov/sites/default/files/uploads/deauville_declaration_final_-_eng_8h.pdf.

⁴⁶ The expression belongs to W. STREECK - P.C. SCHMITTER, 'Community, market, State and associations? The prospective contribution of interest governance to social order', in W. STREECK - P.C. SCHMITTER (eds), *Private interest government* (London: Sage, 1985) 16.

4.1. Net neutrality in the light of the models of regulation

The current *querelle* on how to regulate net neutrality offers a valid example of the antagonist approaches, examined above.

For present purposes suffice it to say that net neutrality is the duty imposed to the Internet service providers (ISPs) to allow the Internet content providers (ICPs) an undifferentiated use of the net in order to permit the netizens to select their digital services regardless of the bandwidth.⁴⁷ Should the definition of such a conflict be entrusted to the ISPs, neutrality would soon disappear, since they would find it more convenient to diversify the bandwidth offer, according to the price which the purchaser is willing to pay. Therefore, a small blog, much less competitive than a big online publisher, would inevitably have to settle for a second-rate Internet, because the fast superhighway would have been occupied by the economically stronger and bandwidth-consuming operators. Thus, it is not by chance that the U.S. Federal Communication Commission⁴⁸ claimed jurisdiction in regulating net neutrality, against the request to allow rules discriminating access.⁴⁹ The public

⁴⁷ A clear and comprehensive definition of net neutrality has been delivered by the FEDERAL COMMUNICATION COMMISSION, *The Open Internet Report and Order*, D.C. 20554, December 2010, par. I, 2, at https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf. While for a recent synthesis see: C. CREECH, *Electronic media law and regulation*, 6 th ed., (NY- London: Routledge, 2014) 351. Among the Italian Scholars who have been dedicating attention to the profile of the fundamental rights touched by net neutrality let me quote my recent essay: 'Net neutrality e le generazioni future' ['Net neutrality and the future generations'], in M.R. ALLEGRI-G.D'IPPOLITO (a cura di), *Accesso a Internet e neutralità della rete fra principi costituzionali e regole europee*, [Access to the Internet among Constitutional principles and the European rules](Roma: Aracne, 2017), 159-191.

⁴⁸ Hereinafter FCC

⁴⁹ December 2010: FCC, *Report and order. Act to preserve Internet freedom and openness*, at http://braunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf. For the dissenting opinion: FCC, *Dissenting Statement of Commissioner Robert M. McDowell*, at http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0822/FCC-12-92A3.pdf.

January 2014: *D.C. Circuit in Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), at [https://www.cadc.uscourts.gov/internet/opinions.nsf/3af8b4d938cdeea685257c6000532062/\\$file/11-1355-1474943.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/3af8b4d938cdeea685257c6000532062/$file/11-1355-1474943.pdf), annulled FCC's order for reasons connected to the title of its regulatory power.

February-March 2015: FCC, *Report and Order on Remand, Declaratory Ruling, and Order*, FCC-15-24, released on March 12, 2015, at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf, where the FCC claimed her task to protect the net neutrality against discriminatory conducts of ISPs in virtue of a different title.

June 2016: the Court of Appeals, District of Columbia (*United States Telecom Association, et al. v. Federal Communications Commission and United States of America et al.*, No. 15-1063, June 14, 2016, at [https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/\\$file/15-1063-1619173.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/$file/15-1063-1619173.pdf)), stated the legitimacy of the previous FCC's order.

May 2017: the Court of Appeals, District of Columbia (*United States Telecom Association v. Federal Communications Commission and United States of America, et al.*, No. 15-1063, May 1, 2017,

regulator's claim revealed a concern that net neutrality could be at risk, were its protections to be entrusted to market operators, only interested in the perspective of higher profits.⁵⁰

This system was distributed on two different levels of sources: at the top we found the binding rules posed by the FCC. Basically, these norms coincided in the prohibition to the Internet service providers to create a different access to the broad band according to the economic capabilities of the Internet service contents. To sum up: no degradation, no prioritization and no blocking were allowed in order to let both the incumbents and the new entries start at the same playing field.

The second level, occupied by the negotiations between ISPs and ICPs, presents significant derogations to the primary rules provided that these alterations are necessary, proportional and justified by a prevalent public interest - zero rating is one example - and always if this agreement gets the green light from the FCC. Therefore, the first season of net neutrality was characterized by a mixed combination of sources, whether binding or not, and by the *ex post* intervention of the authority, meant as a last resort to assure the defense of fundamental rights from the greed of the "Giants" of the Internet.

I have used the past-tense because with President Trump, and consequently with the new body of the FCC, net neutrality has been rolling back,⁵¹ but its repeal is just one small part of a massive, larger plan to eliminate nearly all meaningful federal and state oversight over some of the least-liked and least-competitive companies in America. To be clear: the net neutrality repeal

at

[https://www.cadc.uscourts.gov/internet/opinions.nsf/06F8BFD079A89E13852581130053C3F8/\\$file/15-1063-1673357.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/06F8BFD079A89E13852581130053C3F8/$file/15-1063-1673357.pdf)) reconfirmed the previous judgment.

⁵⁰ Among others, T. WU, 'A FEMA-level fail': *The law professor who coined 'net neutrality' lashes out at the FCC's legal strategy*, <http://www.washingtonpost.com/blogs/the-switch/wp/2014/01/14/a-fema-level-fail-the-law-professor-who-coined-net-neutrality-lashes-out-at-the-fccs-legal-strategy/>.

The Obama Administration has taken a cautious stand: *Obama Backs Away From Net Neutrality Campaign Promises After FCC Vote*, <http://time.com/101794/obama-backs-away-from-net-neutrality-campaign-promises-after-fcc-vote/>.

⁵¹ FCC, *Acts to restore Internet freedom. Reverses Title II Framework, Increases Transparency to Protect Consumers, Spur Investment, Innovation, and Competition*, December 14th 2017, at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1214/DOC-348261A1.pdf.

It must consider that on May 2017 the above act was anticipated by another one directed to repeal the FCC's *Open Internet Order 2015* (*contra* see: V. Pickard, 'It's Not Too Late to Save Net Neutrality From a Captured FCC', *TheNation.com*, 5/5/2017 at <https://www.thenation.com/article/its-not-too-late-to-save-net-neutrality-from-a-captured-fcc/>; *contra*, cfr. P. Agostin, 'Trump's FCC chief is right to roll back net neutrality rule', *TheHill.com*, 5/5/2017, at <http://thehill.com/blogs/pundits-blog/technology/332099-ajit-pais-fcc-is-right-to-roll-back-the-regulatory-overreach-of>).

itself is an awful policy because it ignores both competition regulation and consumer needs. In fact it eliminates a wide variety of consumer protections that prevent incumbent ISPs from abusing a lack of competition in the broadband market. Without these rules, ISPs will be able to engage in all forms of bad behavior, from paid prioritization deals that disadvantage smaller competitors, to imposing unnecessary usage caps that their content is allowed to bypass.

Ironically, the FCC order is named “acts to restore Internet Freedom” even if it is able to do everything except allow Internet to grow. This affirmation is justified in the light of two heavily linked situations: the fact that consumer protection will be depending on the economic interests of ISPs and the lack of preventive remedies in the hands of the FCC. Indeed, the latter can only move to protect consumers after a violation has happened and this action can only occur if it’s painfully clear that an ISP engaged in “unfair and deceptive” behavior, something that’s easy for an ISP to dodge in the net neutrality era, where anti-competitive behavior is often buried under faux-technical jargon and claims that it was done only for the health and safety of the network.

This illiberal order seems to be based on a wrong assumption: “[...] that the regulatory uncertainty created by utility-style Title II regulation has reduced Internet service provider (ISP) investment in networks, as well as hampered innovation, particularly among small ISPs serving rural consumers.”⁵²

This premise has been only affirmed, not also demonstrated by the chairman. Therefore, the order is more the son of a precise dogma “deregulation is the panacea of all evil” than an outcome of an economic theory. No evidence of the fact that net neutrality would have stifled the investments has been given.⁵³ Because of this faith in the unlimited salvific capacity of deregulation, the FCC has left the Internet in the unfettered hands of the Giants, free to behave as they prefer regardless of the well-being of the consumers or the competitive balance of the market, as stated in a recent letter signed by 21 writers.⁵⁴

⁵² FCC, *Acts to restore Internet freedom. Reverses Title II Framework, Increases Transparency to Protect Consumers, Spur Investment, Innovation, and Competition*, quoted above.

⁵³ Chairman A. PAI, *Oral statement, Restoring Internet Freedom*, WC Docket No. 17-108, December 2017, at https://apps.fcc.gov/edocs_public/attachmatch/DOC-344948A2.pdf.

⁵⁴ *Internet Pioneers and Leaders Tell the FCC: You Don’t Understand How the Internet Works*, <https://pioneersforinternetneutrality.tumblr.com/>, in this letter has been argued that the FCC’s entire

The history of net neutrality reveals its nature: it is a “political issue”. As such it is susceptible to be the sample of both a self-regulation model encompassed in a legal framework - the reference is obviously to the net discipline enacted by the FCC in the age of Obama - and an example of dangerous deregulation steered by the new Trump administration. We are faced before antagonistic outcomes which depend on opposite political visions.

It is time to conclude our reflections on the sources: to reduce the risk of Internet’s selfish degradation, self-regulation cannot be taken as an exclusive source, or as a source acting independently of the law. Rather, it should be built as ancillary to political decisions and laws.⁵⁵ Such a relationship is fit to ensure the construction of public policies, at the service of which self-regulation must place itself.

I want to reconfirm my proposed model as a suitable answer to the questions on rule-maker legitimacy as it would be based on formally legal provisions. It would also offer at least a partial answer to the doubts aroused by the possibility that the supranational body be captured by the interests of the stronger national States participating in its decisions. Such a risk is reduced by the fact that the private competing interests taking part in the decision may formally have a territorial or national identity, but this will not decisively affect their interests or policies.

5. The experience of the Italian the Boldrini Committee: a new approach

On July 28th, 2014 the President of the Italian Chamber of Deputies, Laura Boldrini, opened the works of the Committee she had established to draw a Declaration of Internet Rights.⁵⁶

rationale for dismantling the net neutrality protections rests on a misunderstanding of how the internet actually operates: “It is important to understand that the FCC’s proposed Order is based on a flawed and factually inaccurate understanding of Internet technology. These flaws and inaccuracies were documented in detail in a [43-page-long joint comment](#) signed by over 200 of the most prominent Internet pioneers and engineers and submitted to the FCC on July 17, 2017. Despite this comment, the FCC did not correct its misunderstandings, but instead premised the proposed Order on the very technical flaws the comment explained. The technically-incorrect proposed Order dismantles 15 years of targeted oversight from both Republican and Democratic FCC chairs, who understood the threats that Internet access providers could pose to open markets on the Internet.”

⁵⁵N. KROES, *Introducing speech at Internet Governance Forum*, Nairobi, Kenya, on September 27th, 2011, at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/605&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁵⁶The whole documentation and official meetings of this Committee are found in the website of Chamber of Deputies: <http://www.camera.it/leg17/1179> .

Preliminarily, one must note that neither the law nor the Regulation of the Chamber of Deputies gave to the President the power to nominate a Committee of study in a composition of both Deputies and experts. However, it was the exercise of a legitimate faculty aimed at soliciting from the decision-maker a future regulation of the Internet oriented towards the normative framework laid down in the Declaration.⁵⁷

For this reason we cannot agree with the criticism⁵⁸ made against the legitimacy of the Committee's work, which was not intended to compete with the Parliamentary committees, lacking the correspondent legal powers. Its power was merely one of moral suasion towards the Legislator.

It was the first time in Italy⁵⁹ that in a Parliamentary framework a Committee was given the task to elaborate a Declaration of Rights for the Internet.⁶⁰ This is true but we have to remember that the Committee was able to rely on and refer back to previous proposals which the Berkman Centre at Harvard University counted to a total of 87.⁶¹

If we apply to the Italian Bill of Rights the classification used by the Berkman Centre, its author cannot be defined neither completely public nor completely private. It was drafted by a mixed organ composed both by representatives from each political group in the House of Deputies and by experts.

⁵⁷ See the speech given by the President L. Boldrini during the first meeting of the Committee on July 28th, 2014, http://www.camera.it/application/xmanager/projects/leg17/attachments/attivita_commissione_internet/files/000/000/001/Resoconto_28_07_2014_definitivo.pdf. "Certo, si tratterebbe di forme di regolamentazione diverse dal canonico modello normativo, costituito esclusivamente da regole e sanzioni; si tratterebbe invece, a mio avviso - ma è un aspetto su cui vorrei aprire un confronto - di favorire, alla luce delle caratteristiche proprie della materia, un approccio più orientato ad individuare principi generali entro i quali bilanciare i diversi diritti in gioco". ["These should be, in my opinion, forms of regulation which are different from the usual normative model based exclusively on rules and penalties. They should favor instead - but I want to open a discussion on this - an approach, taking into account the characteristics of the subject, more directed at determining the general principles within which to balance the various rights that are in play."] (My translation).

⁵⁸ For them see: L. NANNIPIERI, 'Sulla "Dichiarazione dei diritti in Internet. Alcune notazioni critiche', *Informatica e diritto*, Vol. XXIII, 2014, 2, pp. 127-128.

⁵⁹ So it was underlined during, the 10th annual meeting of the IGF on the theme "Evolution of Internet Governance: Empowering Sustainable Development", in João Pessoa, Brazil, on November 10 to 13, 2015, where the Italian proposal for an Internet Bill of Rights was presented as topic of an entire workshop session, whose I took part with a speech, https://www.intgovforum.org/cms/wks2015/index.php/proposal/view_public/3 at.

⁶⁰ For the final English version of this Document look at the official website: http://www.camera.it/application/xmanager/projects/leg17/commissione_internet/testo_definitivo_inglese.pdf.

⁶¹ L. G.D. REDEKER – U. GASSER, *Towards Digital Constitutionalism? Mapping attempts to craft an Internet Bill of Rights*, Research Publication n. 2015-15, on November 9th, 2015, <http://ssrn.com/abstract=2687120>, in this study the Bills are classified according to their author, content, and their value, the latter is meant whether the bill was binding or not.

The latter, chosen on the basis of their political neutrality, mitigated and counter balanced the political orientation of the former.

The author despite having a national character didn't write the Charter following the model of Bills of national origin. Instead, it shared with the Charters originating from international subjects contents which went much beyond narrow national borders.⁶² Proof of this is the entire set of values and rights which followed the corpus of principles shared by the international community on the theme of fundamental rights. This was of course also necessary because of the borderless nature of Internet.

The mixed origin of the author, public and private, meant the Charter did not draw a framework in which private interests would prevail. Examples of the latter model⁶³ are those Charters focused mainly on the rights of the users or of the Over the Top, while the Italian Bill focuses on the fundamental rights of the citizens and addresses the indispensable limits of the public powers to safeguard the essential content of liberties.

Furthermore, its decisional process was not concluded in the closed rooms of those in power. In fact, before the final approval as the Declaration of Rights it underwent a reasonably extended phase of public consultation.

This top-down origin of the Declaration represents in Italy the first significant example of a political document brought to public consultation. It must be noted that the rules of this consultation were not narrowly formulated as to the 'who', the 'how' and the value of the observations. Many criticized the process arguing that precise rules should have been defined and set out before the consultation began. This criticism may be answered considering that the widest and most spontaneous participation possible was sought, whereas an excess of rules would have had a chilling effect on it. In my opinion, a defect in the procedure may be found, in the fact that once the consultation was over, the Committee did not adequately explain for each suggestion or objection the reasons for taking it into account or rejecting it, as the American experience of notice and comment should have taught us to do. This was due to

⁶²Just to give the most significant examples: COUNCIL OF EUROPE, "Declaration by the Committee of Ministers on Internet governance principles," <https://wcd.coe.int/ViewDoc.jsp?id=183577>; Civil Society and the Trade Union Advisory Committee to the OECD "Seoul Declaration to the OECD Ministerial Conference on the future of the Internet economy," at <http://thepublicvoice.org/events/seoul08/seouldeclaration.pdf>; INTERNET GOVERNANCE FORUM (United Nations) "Internet Rights & Principles Dynamic Coalition," <http://internetrightsandprinciples.org/wpcharter/>.

⁶³L.G.D. REDEKER – U. GASSER, *Towards Digital Constitutionalism? Mapping attempts to craft an Internet Bill of Rights*, quoted, p. 11: "These documents identify corporations as the central locus of power and users—rather than citizens or another constituent community—as primary rights-holders. We see this in examples such as the *Bill of Rights for Users of the Social Web*, presented at the 2007 Data Sharing Summit in the 2010 *Social Network Users' Bill of Rights*, a document triggered by major privacy policy changes at Facebook and Google that year".

the short time allotted to the Committee and the huge amount of observations produced by the public consultation, rather than an intentional unwillingness by the Committee.

The Bill did follow a top-down approach, but the public consultation was very important because the outcomes were taken into proper consideration, though they did not formally exceed the nature of non-binding opinions. However, one must admit that the participation of a public body, the Committee, and of private citizens, through the consultation, was not equal, which is to say that the two parties did not contribute to the decision in an even way.

We can say that the *iter* of the Italian Bill presents its own uniqueness: indeed, it has not followed the steps of the *Marco Civil*, which has anticipated our bill in time because the latter, born from public consultation, has already been turned into a formal legislative act.⁶⁴

6. Its content

Now we have to address the question related to “what” the Declaration states: namely we have to examine its content according to the key points rather than in the specific dispositions.

In adopting a constituent approach,⁶⁵ the Declaration provides a ‘framework regulation’ regarding the Internet Governance and the digital Liberties. So, its structure imitates a real Constitution, even if there is no reference to a territorial State, in accordance with the a-territorial nature of the Internet, and if the document lacks a binding value, due to the a-parliamentary nature of its Author, as seen above. Indeed, the act stands on the very two pillars of French post-revolutionary constitutionalism (1789): powers and freedoms. The focus of the Declaration is concentrated on the subordination of the powers to the rights, because the powers exist if and to the extent that they recognize the fundamental freedoms and implement the social rights. Therefore, these two entities, powers and rights, are not aligned on the same playing field: the former may not be conceived as *legibus soluti*, being susceptible

⁶⁴ Law No. 12.965, April 23rd 2014, establishes the principles, guarantees, rights and obligations for the use of Internet in Brazil. You can find also for preliminary works at http://legislacao.planalto.gov.br/legisla/legislacao.nsf/Viv_Identificacao/lei%2012.9652014?OpenDocument.

⁶⁵ Concerning this particular aspect let me refer to my speech during the presentation of the final test of the Declaration to the public on July 28th, 2015; on that occasion I talked about the “constitutional spirit” of the Declaration in order to distinguish its constitutional substantive value from its incontestable soft law *status*, at <http://webtv.camera.it/evento/8233>.

of constraints in order to protect the liberties. This special relation encompasses the hard core of the modern Constitutionalism.⁶⁶

As to the powers: the Declaration dictates that the Internet governance – however shaped – shall obey to the principles of democracy and representation. These ones shall be specified – in accordance with Teubner’s scientific heritage⁶⁷ – through the imposition of a multistakeholder composition and a representative legitimation for economic actors and online social subjects.⁶⁸ Therefore it would be useless to look in the Declaration for further details concerning both the concepts of multistakeholderism and the standing of legitimation. The act has preferred not to chill the ongoing international debate, leaving to it the task to achieve the widest possible consent on the subject. At the moment, though, this appears still far in the future.⁶⁹

On the contrary, the pillar of liberties is the one to which the Declaration devotes almost all its articles. These ones can be classified in two categories: general rules, applicable to every right at stake, and specific rules, concerning the single subjective entitlements. The dispositions of the first category are not perfectly in line with the rule of law and the due process principle, illustrated before. Indeed, there is no general statement requiring that freedoms are only limited in favour of an equally ranked value and in accordance with the necessity and proportionality principles. Instead, this balancing test is provided only for some liberties on separate basis. We have already criticised this drafting technique, focused on single cases rather than on general rules;

⁶⁶ See: G. AZZARITI, *Contro il revisionismo costituzionale*, (Roma-Bari: Editori Laterza, 2016) 248, where the Author states that “il costituzionalismo democratico nasce per dividere il potere e assicurare i diritti”.

⁶⁷ See G. TEUBNER, *Constitutional fragments. Social constitutionalism and globalization*, quoted, 56.

⁶⁸ It is not a coincidence that the Internet Governance Forum of Joao Pessoa, that had to draw the governance of the net, hadn’t gone beyond very promising but non concluding debates on this topic, at <http://www.intgovforum.org/cms/documents/igf-meeting/igf-2015-joao-pesso>.

⁶⁹ On the different models of multistakeholderism see: A. DORIA, *Use [and Abuse] of Multi-stakeholderism in the Internet*, in R. ROXANA – J.M. CHENOU – R.H. WEBER. (eds.), *The Evolution of Global Internet Governance. Principles and Policies in the Making*, (Berlin: Springer, 2014), at p. 116. For the Author these models can be reduced into two: “(1) those that uphold the belief in a structure with equivalent stakeholders who participate on an equal footing; and (2) those that uphold the belief that one stakeholder is more equal than the other stakeholders and that the primary stakeholder discharges their duty by consulting the other stakeholders before making decisions.”

On the contrary, from the point of view of J. WAZ-P. WEISER, ‘Internet governance: the role of multistakeholder organizations’, *J.Tel.H.Tech.L.*, (2013) 10, 2, 336: “The term does not lend itself to simple definition, and its application will vary from case to case, but one would generally expect to see at least two things in a “multistakeholder” organization: (i) representation (or, at a minimum, openness to representation) from a diversity of economic and social interests (and not limited to a single economic perspective), and (ii) a representational role for civil society, generally defined as relevant stakeholders other than government and industry”.

indeed, we have voiced our remarks both in the Commission and in scientific contexts.⁷⁰

Neither is the due process clause provided in general terms. Rather, it is established only occasionally. For example, it supports in the art. 11, co. 3 “Right to be forgotten”, stating that: “Where a request to be removed from search engines is granted, any person may appeal the decision before the courts to ensure that the public interest in the information is preserved”; but not also in art. 1, in which it was expected to be mentioned in line with its nature of the general provision.

Concerning the single rights, a basic premise is to be made: the listing is only exemplifying, and not comprehensive. Therefore, the freedoms which are not expressly stated are not necessarily excluded. We can think, for example, to the right to be forgotten. In these cases, the Commission was simply not able to reach an agreement.

‘How’ the Bill has established a framework for the Internet is not a methodological issue. Which is to say that it relates not to the procedure – which has been already described earlier – but to the values met by the Declaration.

The ‘equality-legality’ pair has become the cornerstone of the whole architecture of the Bill, as explained in the very preamble of the Declaration.⁷¹ Such choice was only viable because the Bill had refused to entrust its own genesis to the private powers. Indeed, these ones would have acted in an egoistic way, bending the rules to their individual and lucrative interests. This does not mean that its rules are the best possible ones. Rather, more simply, the Author of the Bill has managed to avoid being ‘captured’ by the strongest stakeholders.

One could think about how the right to net neutrality has been designed (art. 4). This one has been endowed with the dignity of a fundamental right⁷², while even the EU Regulation on the Digital Single Market⁷³ had fallen short

⁷⁰ Let me refer to my intervention during the Committee’s meeting, October 8th, 2014, http://www.camera.it/application/xmanager/projects/leg17/attachments/attivita_commissione_inter_net/files/000/000/003/resoconto_commissione_8ottobre.pdf.

⁷¹ Its preamble states: “This Declaration of Internet Rights is founded on the full recognition of the liberty, equality, dignity and unique diversity of each individual. Preserving these rights is crucial to ensuring the democratic functioning of institutions and avoiding the predominance of public and private powers that may lead to a society of surveillance, control and social selection”.

⁷² Art. 4 (*Net neutrality*)

1. Every person has the right that the data he/she transmits and receives over the Internet be not subject to discrimination, restrictions or interference based upon the sender, recipient, type or content of the data, the device used, applications or, in general, the legitimate choices of individuals.

2. *The right to neutral access to the Internet in its entirety is a necessary condition for the effectiveness of the fundamental rights of the person.*” (The italic is mine).

⁷³ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC

of attaining such result. This outcome has shifted the regulatory axis from its traditional economic vocation to a new one, belonging to the field of individual liberties. In other words, what is served by the equal access is not the ISPs' freedom of economic enterprise, but the enjoyment of everyone's right to be informed. Indeed, the latter would suffer an excessive upstream constraint if some contents arrived to us with better quality and speed, because we would be forced to choose these privileged contents over the slower ones.⁷⁴

It would be superfluous to recall here what already set out above, we will limit to add only some reflections concerning the regulatory source of this right. Its source was not identified in the self-regulation negotiated between the ISPs and the ICPs. Indeed, entrusting the regulation to a contract would downgrade the web from a common good to a commodity, tradable in exchange of the highest market price. In that case, those who already dominate the online band market would be able to attract the largest flow of byte and impede the access to newcomers, who cannot afford to pay the same price.⁷⁵ Concerning this point, the Declaration has not been as clear as it has been in the statement of the right to net neutrality. Indeed, it has not mandated a public act to be the source of every operator's right to non-discrimination – in comparison with its competitor – as to the breadth and quality of the band, regardless of everyone's capability. Here the Declaration has lost its occasion to state a principle of equal treatment oriented towards the fundamental rights.⁷⁶

on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2120&from=EN>.

The act dedicates to this topic the art. 3 "Safeguarding of open internet access", that doesn't explicitly refer to the concept of net neutrality.

⁷⁴ D. C. NUNZIATO, *Virtual freedom: net neutrality and free speech in the Internet age* (Stanford: Stanford University Press, 2009) pp. 136 ff., identified the main focus of the net neutrality regulation in the free speech, rather than in competitive concerns.

⁷⁵ The question is much debated in the juridical literature, and twists with the issue of the legitimacy of the zero rating. There are disagreeing claims about its admissibility: T. WU, *Preface*, in *Annual Report of the UN IGF Dynamic Coalition on Net Neutrality, Net Neutrality Reloaded: Zero Rating, Specialised Service, Ad Blocking and Traffic Management*, December 2016; D. BRAKE, 'Mobile Zero Rating: The Economic and Innovation Behind Free Data', at <http://www2.itif.org/2016-zero-rating.pdf>. Among the Italian scholars, it is possible to call to: M. AVVISATI, 'Autorità indipendenti, vigilanza e procedimento amministrativo. Il caso zero rating', *Pol. Dir.*, (2017), 3, 505-542.

⁷⁶ Allow me to refer to my book, *Antiche libertà e Nuova frontiera digitale* (Ancient freedoms and New digital frontier) (Torino: Giappichelli, 2016) 195 ss.

Also, the reference to another liberty in the Declaration, the right to access (art. 2),⁷⁷ confirms the centrality of the aforementioned pair. Here the Declaration has not limited itself to acknowledge this right. Indeed, the Bill has made its content near to a social right, which is to say that it has compelled the State to be proactive and lay down the broadband on the whole national territory, regardless of the digital citizen's residence and spending capability. Therefore, the band shall also cover the white zones, the ones where market fails, where the private hand will never be able to arrive because of economic disutility. Now, this means that the actualisation of the right to access is instrumental to the exercise of fundamental liberties, but, to be concrete, needs the State to promptly fulfil its duty of service. The essential content of this right is the entitlement to an action coming from the State. And its connection with the substantial equality principle is evident since the rule includes among the beneficiaries of this right all those who experience conditions of digital divide, "including those created by gender, economic condition or a situation of personal vulnerability or disability". So, the access becomes a tool for substantial equality, because it is a lever for the public power to move the flow of wealth from the 'haves' to the 'have nots'. It becomes a booster which multiplies wealth⁷⁸: those who are excluded from digitalisation won't have to bear the burdens of the access, but will be entitled to receive it as a social service, which is necessary because it allows them to fill the distance between the digital included and them.

Article 2 creates inequalities with the purpose of equalising. Indeed, in times of economic scarcity, the universal service needs to be articulated in relative terms: the State cannot ensure everything to everyone, and so supplies the whole essential only to the needing ones. Article 2 provides differential treatments based upon the spending capability of the beneficiary. Namely, the broadband provision shall be paid less than its market value by those who live in digital divide areas, while the same shall not be true for those who reside in areas with a full digital inclusion. Article 2, then, is a precept introducing benevolent asymmetries in rules. Indeed, it ensures a favourable discipline for those who had not been admitted, until that moment, to enjoy economic prosperity and social inclusion. So, it lets everyone take part to the benefits of e-society.

⁷⁷ Let's reflect in particular on the 5 para. of the article 2: "Public institutions shall take the necessary measures to overcome all forms of digital divide, including those created by gender, economic condition or a situation of personal vulnerability or disability".

⁷⁸ Clearly said by L. WAVERMAN, 'Economic Impact of Broadband: An Empirical Study', www.connectivityscorecard.org/images/uploads/media/Report-Broadband-Study-LECG-March6.pdf, p. 9: «The results from our study show that broadband – the ultimate melding of the telephone line [...] can have significant payoffs in terms of increasing productivity and economic growth».

The circle is closed by a precept (art. 14) which rules the reciprocal relations among the regulatory sources of the Internet: the Declaration refers both to the binding sources – i.e. to the law, regardless of its national or supranational author – and to self-regulation, entrusted to the masters of the net, the Over the top.

And here the Declaration has struck, not effortlessly, a laudable compromise, because it has dictated a cogent order of intervention: laws first, and self-regulation afterwards. That way, the Bill has prevented the fundamental political choices over the net – i.e. the pair ‘equality-legality’ – from being sacrificed by the myopic and egotistical ideas of some well-founded and well-structured operators: “to prevent all forms of discrimination and to prevent the rules governing its use from being determined by those who hold the greatest vital tool for promoting individual and collective participation in democratic processes as well as substantive equality”.

This discourse about the regulatory approach has made a *fil rouge* emerge: namely, between the content of the rights – only limitable by the Legislator and consistently with the proportionality and necessity principles – and their sources, which have to follow the principle of hierarchical prevalence of the imperative will over the contractual one. Indeed, such link corresponds to the idea that the economic liberties are a means to protect the fundamental liberties, but this relation can never be reversed.

7. The value

The Declaration, from a formal standpoint, holds the same value as a political act. Moreover, it is even more significant, as a political engagement, since it has been approved on November 23rd, 2015, with a motion⁷⁹ voted by a transversal majority in the Chamber of Deputies of the Italian Parliament. As every motion,⁸⁰ it has to be properly taken into account by the Executive power in its concrete political-administrative activity. Yet, being a political act, the Declaration will only stand until its political sponsors will maintain their support. As to its juridical value, it cannot be enforced judicially, neither against a public subject, nor against a private one. Indeed, it does not generate any juridical obligation to be fulfilled.

⁷⁹ For the text of the motion see: http://www.camera.it/leg17/1131?shadow_comunicatostampa=9558.

⁸⁰ Although the concept of motion is out of my analysis, suffice it to affirm that the discussion on its natura is still open among the Italian scholars. For those who identify its nature in the control function see: V. DI CIOLO - L. CIAURRO, *Il diritto parlamentare nella teoria e nella prassi* (Milan: Giuffrè, 2012), p. 786; on the opposite side, there are those who stress the ability of the motion to define political directives, see for all: L. GIANNITI - N. LUPPO, *Corso di diritto parlamentare* (Bologna: Il Mulino, 2008), 168.

At this point, it seems appropriate to mention that also the European Union Charter of fundamental rights used to have the same value as our Declaration, before being incorporated in the Lisbon Treaties. Indeed, many national⁸¹ and European judges⁸² kept nevertheless assuming it as a criterion to interpret other binding juridical sources.⁸³

In sum: despite the Declaration does not have a direct juridical relevance, an indirect and implicit legal value is not to be excluded. We are denying a legal *status* to the Declaration, but at the same time we may expect that it will be taken into account “in transparency” by those who will have to take legally binding decisions. The Declaration as point of reference of a new culture of the Internet, as the Advocate general Mischo stated in referring to the value of E.C. “I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order”.⁸⁴

⁸¹ In the Italian system we have to remember, among others, some basic decisions of our Constitutional Court nn. 135 e 445 /2002 and 393 e 394/2006. In particular, in the former the Supreme Judge underlined that the Charter had significance for “il suo carattere espressivo di principi costituzionali comuni” (for its feature able to express common constitutional principles).

It is worthy to be mentioned also the Tribunal Constitucional Português, Acórdão n. 275/02, at <https://dre.pt/web/guest/pesquisa/-/search/1964181/details/maximized>.

⁸² At first the Court of Justice refused to refer to the Charter, despite of the several recalls its favor of the Advocate Generals; only in the 2006 the Court broke this silence, 27 June 2006, C-540/03, European Parliament v. Council of E.U., at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-540/03>. On the contrary, the European Court of Human Rights, case of *Christine Goodwin v. The United Kingdom*, at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-540/03> m, (Application no. 28957/95), 11 July 2012, [http://hudoc.echr.coe.int/eng#{"itemid":\["001-60596"\]}](http://hudoc.echr.coe.int/eng#{), in Cons. 100 didn't hesitate to refer to the Charter clearly: “The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women”.

⁸³ In the Italian doctrine about its value of parameter of interpretation, before its incorporation in the Lisbon Treaty, see: A. SPADARO, ‘La Carta europea dei diritti fra identità e diversità e fra tradizione e secolarizzazione’, (2001) *Dir. pubbl. comp. eur.*, 621; ID., ‘Sulla “giuridicità” della Carta europea dei diritti: c’è (ma per molti) non si vede’, in G. F. FERRARI (a cura di), *I diritti fondamentali dopo la Carta di Nizza. Il costituzionalismo dei diritti*, (Milano: Giuffrè, 2001) 257 ss.; L. LANZONI, ‘Tutela e limitazioni dei diritti dell’uomo nell’art. 52 della Carta dei diritti fondamentali dell’Unione europea’, in M. PEDRAZZA GORLERO (a cura di), *Corti costituzionali e Corti europee dopo il Trattato di Lisbona*, (Napoli: ESI, 2010), 369 ss.; C. SALAZAR, ‘Lisbon story: la Carta dei diritti fondamentali dell’Unione europea da un tormentato passato... a un incerto presente?’, at <http://www.gruppodipisa.it/wp-content/uploads/2011/12/SALAZAR-diritti-sociali-2011.pdf>.

⁸⁴ Opinion of Advocate General Mischo, delivered on September 20th, 2001, in Joined Cases C-20/00 and C-64/00, Booker Aquaculture Ltd trading as Marine Harvest McConnell and Hydro Seafood GSP Ltd, v. The Scottish Ministers, in Cons. 126, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=46618&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=277787>.

At this point we can give a comprehensive evaluation of the Italian experience: what are its advantages and drawbacks?

As to the first ones, it may be noted that it is a flexible regulation, able to orientate Internet towards the fundamental values of democracy and equality, and “porous” to the private stakeholder’s self-regulation, without granting to the latter any prevalence over the binding sources.

Among its disadvantages, we cannot include the scarce prescriptiveness of the language, even if such criticism was expressed during the press conference following the presentation of the Declaration.⁸⁵ Indeed, it would be contradictory of the Declaration to pursue a constituent intent while stating strict obligations and prohibitions. Conversely, just as any constitutional Charter, it has to be elastic enough to account for future situations, which may be unpredictable. This is especially true given that the Declaration is addressed to an ever-evolving reality: Internet.

However, we do find some drawbacks. Firstly, the one we have already mentioned while illustrating the single parts of the Declaration: namely, the due process and the rule of law are inadequately safeguarded. Nevertheless, the true defect does not lie in the Chart itself; it is rather to be found in the lack of attention to it by the political decision-maker. Indeed, some subsequent normative acts, which should have been consistent with the Declaration, have been drafted as if the Declaration had never existed. We can consider the recent law on cyberbullying⁸⁶ or the previous anti-terrorist legislation⁸⁷. This is not the place for an in depth analysis of such acts, we will be satisfied with stating just one conclusion. In few words, the Declaration, which conditions the limitation of freedoms to a necessity principle, is not coherent with the counter-terrorism legislation, which allows derogations to liberties in consequence of an abstract danger (when necessity is still absent). Similarly, the Declaration, stating that liberties can only be restricted by a public and impartial authority, is in contradiction with the Law on cyberbullying. The latter unconditionally delegates this power to ISPs, which are allowed to obscure, delete or block the personal data without any adversary

⁸⁵ At [Sala del Mappamondo-Palazzo Montecitorio](#) (webtv) July 28th, 2015 the print conference was held with the topic of “Declaration of Internet Rights” in the presence of the President of the Chamber of Deputy, on. le Laura Boldrini, professor Stefano Rodotà and other components of the Committee of study, among who the author of this essay.

⁸⁶ Law n. 71, 29th May 2017, “Disposizioni a tutela dei minori per la prevenzione ed il contrasto del fenomeno del cyberbullismo”, at (GU Serie Generale n.127 del 03-06-2017).

⁸⁷ Law Decree n. 7, 18th February 2015, coordinated with the Converted Law, 43, 17th April 2015, n. 43 (at GU Serie Generale n.91 del 20-04-2015). See in particular the art. 2. For what concerns the aspects related to terrorism allow me to refer to my book: *Costituzione. Emergenza e Terrorismo* [Constitution. Emergency and Terrorism] (Jovene: Napoli, 2016), in part. cap. II, parag. IV.

procedure and on a very short notice. Indeed, ISPs are *ex parte* subjects that have nothing in common with a public and impartial authority.

Then, the disadvantage of the Declaration is not in the method or in the drafting, but in the fact that the political decision-maker is not willing to take it in consideration.

Moreover, this contradiction is not an isolated and only national case. At the European level this contrast is clearly visible as to the safeguards of online fundamental rights. The adversarial dialogue between the Court of Justice and the Decision maker has not yet found an appropriate and shared balance. Basically, while the former has deemed the guarantees of proportionality and precautionality applicable to the right to privacy in time of emergency⁸⁸ - the recent Directive EU 2017/541 “on combating terrorism” goes in the opposite direction.⁸⁹

Then, conclusively, the constituent process of the Internet is a desirable event, which is nevertheless far from becoming true. However, this does not reduce, but even strengthens, the value of the Boldrini Committee’s Declaration as a political manifesto.

8. Conclusion

The Internet is a powerful instrument of change, with a deep impact on economic, social and political processes. This impact is the reason why the thesis according to which all regulations should be avoided in order that the net may remain totally unfettered cannot be accepted. However, the complex interaction among competing interests make it difficult to strike an effective balance allowing the internet to maintain its full potential of innovation. This essay has been focused on the perspective of the offline constitutional acquis of democratic countries being transported online, in order that a better protection of fundamental rights and liberties be achieved, and equal opportunities for all be provided for.

⁸⁸ We refer to the above-mentioned Court of Justice, *Digital Rights Ireland Ltd and also ID (GRAND CHAMBER)*, *Maximillian Schrems v. Data Protection Commissioner*, 6th October 2015, C-362/14, at <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117it.pdf>.

⁸⁹ The European Parliament and the Council of the European Union, *Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017, on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*; in particular see the article 2. To remain on this dangerous contradiction expressed by the above Directive, let me quote my recent work: ‘La risposta europea al terrorismo del tempo ordinario: il lawmaker e il giudice’, at *Osservatorio sulle Fonti*, (2017), 2, at <https://www.osservatoriosullefonti.it/mobile-saggi/speciali/speciale-the-implementation-of-eu-law-in-member-states-fasc-2-2017/1112-la-risposta-europea-al-terrorismo-del-tempo-ordinario-il-lawmaker-e-il-giudice>.

We must be aware that the same nature of the net as an instrument of global communication fostering participation and spreading information and knowledge is drawing a different answer in those countries where democracy is under pressure. The Freedom of the Net Report 2016 states that internet freedom around the world declined for the sixth consecutive year, while two thirds of internet users live in countries where criticism of the government, military, or ruling family are subject to censorship, and 27% in countries where people have been arrested for publishing, sharing, or merely “liking” content on Facebook⁹⁰.

In such cases an answer is easily found appealing to the values of democracy and acknowledging the pre-eminence of rights and liberties. But it is much more difficult to cope with the shift in public opinion arising from terrorism. One must admit that the internet may be a powerful instrument also in the hands of criminals. Legislators are under pressure to put the internet under stricter regulations in order to fulfil a growing demand of security. The constitutional principles essentially construed by the Courts that we have recalled in this essay should be considered the strongest barrier to be found against a dangerous drift.

It is obvious that political decision-makers cannot easily reject the prevailing views of the public opinion, which will sooner or later be translated into votes. This suggests that rights and freedoms on the net cannot find their defence solely in a Court of Justice, but require that the argument be brought also in politics. Here we find perhaps the most significant value of the Boldrini Commission, which was a step in the right direction, putting together politics and technical expertise.

In all cases, we must answer a preliminary question. Do we believe that the Internet is a great opportunity for a positive change, opening up a real possibility of equal opportunities for all, of social and economic growth? If it is so, the demands arising from new and up to now unforeseen dangers must be met without destroying the essential nature of the net. It is possible, and necessary. We do not have at the moment, and most likely will not have in the foreseeable future, an instrument with a comparable potential to give us a better world.

⁹⁰ FREEDOM HOUSE, *FREEDOM ON THE NET* 2016, <https://freedomhouse.org/report/freedom-net/freedom-net-2016>.