Presentazione

di Enzo Cheli

I saggi raccolti in questo volume, che presenta i lavori più recenti di Giovanna De Minico, sono dedicati a Internet e alla possibile "costituzionalizzazione" del mondo della rete. Come questo mondo si colloca nel percorso segnato dal costituzionalismo moderno e quali trasformazioni sta introducendo in questo percorso? Quali nuovi diritti e nuovi doveri stanno oggi emergendo attraverso Internet? In altri termini, come la "cittadinanza digitale" sta oggi allargando i confini della cittadinanza tradizionale, introducendo nuovi rapporti tra cittadini e istituzioni governanti?

Le risposte a queste domande si sviluppano attraverso le analisi e le riflessioni che scorrono nelle pagine di questi saggi dedicati a temi diversi, ma strettamente connessi.

Temi che, in primo luogo, investono il campo delle conquiste delle tecnologie della comunicazione maturati nell'arco degli ultimi trenta anni e, in particolare, dopo l'inizio del nuovo millennio; che, in secondo luogo, mettono in luce gli effetti che queste conquiste stanno determinando nel tessuto economico, sociale e politico dei vari paesi e nelle diverse aree del mondo industrialmente evoluto; che, in terzo luogo, inducono a riflettere sulle sfide che questi effetti stanno oggi ponendo al mondo del diritto costituzionale quando lo stesso si impegna a orientare le trasformazioni in atto verso la ricerca di un "bene comune" in grado di favorire la nascita di nuove forme di democrazia più evolute e diffuse.

Partiamo dalla considerazione del dato storico. Su questo terreno resta agevole constatare come la vita contemporanea risulti segnata dal peso crescente della tecnica, in continua trasformazione ed espansione secondo ritmi mai raggiunti in passato. Il discorso vale per tutti i settori della vita associata, ma investe in particolare il campo della comunicazione, che rappresenta il tessuto nervoso del corpo sociale di ciascun paese e del mondo

nel suo complesso. Da qui la nascita, già negli ultimi decenni dello scorso secolo, di una "società dell'informazione" che ha utilizzato per il suo sviluppo due percorsi fondamentali: la digitalizzazione delle reti (informatiche, di telecomunicazione e radiotelevisive) che ha condotto alla "convergenza" tra le stesse ed ad un loro uso "neutrale" rispetto ai contenuti trasmessi; l'affermazione di Internet che, nell'arco di pochi anni, ha assunto dimensioni planetarie ed ha determinato la nascita del più grande "spazio comune" della storia dell'umanità.

In ragione di questi eventi attraversiamo oggi la fase di avvio di una trasformazione epocale che, nella sua dimensione economica e sociale, può essere equiparata al passaggio tra la società agricola dell'età feudale e la società industriale dell'età moderna e, nella sua dimensione politica, al passaggio dallo Stato assoluto alle forme dello Stato di diritto di matrice liberale.

In questo processo di trasformazione che stiamo vivendo prima viene la tecnologia e ultimo il diritto, la cui funzione, peraltro, resta essenziale ove si voglia orientare tale processo verso l'affermazione di interessi comuni fondati sui valori costituzionali della solidarietà e dell'eguaglianza e non verso la tutela di interessi egoistici fondati sul gioco spontaneo della forza dei mercati. Da qui l'esigenza di adottare politiche costituzionali e regole giuridiche appropriate in grado di limitare e indirizzare i mercati verso obbiettivi di interesse pubblico così da proteggere la società contro i rischi sempre più evidenti che l'impiego delle nuove tecniche sta facendo emergere.

Ma quali contenuti assegnare a queste regole? E chi deve porle? E chi deve garantirne il rispetto?

Per rispondere occorre innanzitutto comprendere qual è la vera natura di Internet, quale la sua funzione nel presente e nelle sue possibili proiezioni future, quali i caratteri salienti della "società dell'informazione" che sta crescendo e si sta consolidando intorno a noi.

Nel preambolo della Dichiarazione dei diritti in Internet che la Camera dei deputati ha approvato nell'autunno dello scorso anno il mondo della rete viene qualificato "come uno spazio sempre più importante per l'autorganizzazione delle persone e dei gruppi e come uno strumento essenziale per promuovere la partecipazione individuale e collettiva in processi democratici e l'eguaglianza sostanziale". E questo in ragione del fatto che Internet "ha contribuito in maniera decisiva a ridefinire lo spazio pubblico e privato, a strutturare i rapporti tra le persone e tra queste e le istituzioni"

nonché ad "ampliare la possibilità di intervento diretto delle persone nella sfera pubblica".

Da qui la conseguenza che induce a configurare Internet, per la sua natura, come uno "spazio pubblico" sganciato dalla sfera delle sovranità nazionali, ovvero come un "bene comune", sottratto alla disponibilità incondizionata del potere privato, "spazio" o "bene" attraverso cui oggi si realizzano le nuove forme di partecipazione individuale e collettiva alla vita democratica.

Ed è per questo che in Internet va oggi individuata la nuova "pietra angolare" della democrazia, cioè quella "pietra angolare" che il costituzionalismo storico, alle sue origini, aveva giustamente riferito alla libertà di espressione del pensiero ed alla stampa. Queste sono le ragioni che spiegano la necessità e l'urgenza di avviare oggi, a livello mondiale, un processo di "costituzionalizzazione" di Internet e delle nuove tecnologie della comunicazione in quanto elementi qualificanti delle nuove forme che le democrazie moderne stanno assumendo.

L'impresa della costruzione di una "Costituzione per Internet" presenta ancora, per l'attuale stato delle relazioni mondiali, connotazioni in gran parte utopistiche, ma è stato giusto avviarla come è stata avviata in Italia con la Dichiarazione sopra ricordata. Una Dichiarazione che pone a fondamento di questa costituzione il "pieno riconoscimento di libertà, eguaglianza, dignità e diversità di ogni persona" e che qualifica l'accesso alla rete come un nuovo diritto fondamentale, "condizione per il pieno sviluppo individuale e sociale della persona".

Questa costituzione dovrebbe anche fissare con chiarezza – e sempre nel rispetto dei due principi cardine dello Stato liberale, quali la "riserva di legge" e la "riserva di giurisdizione" – i limiti per l'uso del mezzo connessi alle esigenze di tutela della privacy, dell'onorabilità, dei prodotti dell'ingegno, della sicurezza e degli interessi dotati di protezione penale. Tutte finalità da perseguire attraverso un accorto dosaggio tra eteroregolazione ed autoregolazione e mediante una disciplina che, per la stessa natura del mezzo da regolare, non può essere confinata nello spazio del diritto nazionale, ma va proiettata nello spazio di una legalità sovranazionale fondata, oltre che sui diritti dell'uomo, su valori comuni di civiltà giuridica.

Questo, in estrema sintesi, il quadro dei temi e dei problemi che i saggi contenuti in questo volume pongono all'attenzione del lettore. Temi e problemi che Giovanna De Minico tratta con forte sensibilità verso i processi di innovazione in atto e con una piena padronanza dei fattori tecnici

ed economici che stanno alla base di questi processi e che si rivelano essenziali per disegnare un'appropriata regolazione e per valutarne la compatibilità costituzionale. Tutte qualità, frutto di un impegno appassionato e costante, che collocano questo lavoro ben al di là della finalità didattica che l'Autrice dichiara di voler perseguire e che rendono la sua lettura, oltre che affascinante, utile per chiunque voglia acquisire una conoscenza aggiornata di una materia che, oltre a cambiare i confini della scienza giuridica, appare destinata a segnare il futuro della nostra esperienza di cittadini.

Cosa tiene unito il tutto

Ho riunito in un unico spazio saggi già pubblicati in riviste italiane e straniere perché, andando avanti con i miei studi, ho avuto modo di rafforzarmi in quella che inizialmente era solo un'intuizione: la tecnica da sola non va né verso il bene, né verso il male. Essa è un dato grezzo che si offre alla lettura del decisore politico al quale spetta – per mandato rappresentativo in un sistema democratico – di scegliere tra due prospettive valoriali.

La prima: consentire l'uso della tecnica da parte di chi si trova in posizione dominante al fine di mantenerla e rafforzarla, anche trasferendola su nuovi terreni di gioco. La seconda: declinare la tecnica per offrire alla persona esclusa o marginale un'occasione di effettiva e più ampia partecipazione politica e di crescita individuale, per valorizzarne la piena dimensione costituzionale di individuo.

Celebrare la tecnica come portatrice *ex se* di virtù benefiche, secondo le promesse di una tesi pan-naturalista, consegnerebbe in ultima analisi le chiavi del progresso nelle mani di poteri privati forti, che saprebbero e vorrebbero con piena consapevolezza farne uso per giungere all'assetto più favorevole ai propri interessi economici. Un assetto che solo il caso potrebbe far coincidere con il bene comune. Vedremmo ripetersi per la tecnica non orientata dalla politica quel che abbiamo già visto accadere per il mercato lasciato alle incontrollate forze della domanda e dell'offerta. La deriva egoistica e la spinta alla massimizzazione del profitto a ogni costo non trovano strumenti di autocorrezione, né sono ricondotte alla solidarietà sociale e allo sviluppo sostenibile dalla sopravvenuta, ma tardiva, consapevolezza dei decisori sovranazionali. La tecnica può essere nel nuovo millennio una potente leva di innovazione volta alla libertà e all'eguaglianza, ma non se sottratta al comando politico di riferimento.

Superare il mito dell'autosufficienza della tecnica è il filo rosso che lega

la riflessione da me condotta da punti di vista diversi nei saggi qui raccolti. Una riflessione che assume a premessa un comune fondamento: la strumentalità della tecnica verso lo sviluppo della persona umana e l'esercizio di diritti e libertà.

È immediatamente chiaro il rischio che si corre lasciando l'innovazione tecnologica in una prospettiva puramente mercantilistica. Nelle riflessioni sull'accesso a Internet e sulla *net neutrality* verifico in base a un'analisi casistica che l'assenza di eteronomia ha affidato la qualità e la quantità della capacità trasmissiva alla negoziazione *iure privatorum* tra gli imprenditori che vendono l'accesso e quelli che forniscono i contenuti. In questo caso il diritto di accesso a Internet è stato trattato come una casa di abitazione, e non come un diritto sociale, preordinato all'esercizio di libertà e diritti fondamentali, che come tale invece andrebbe sottratto alla disponibilità tra privati.

Nessuno può dismettere il proprio diritto di accesso a Internet, che è strumento essenziale per la manifestazione del pensiero, per la comunicazione, per la fruizione di servizi pubblici essenziali, non più di quanto possa dismettere quelle stesse libertà.

Un'eccessiva timidezza del legislatore, nazionale e anche comunitario, nel regolare la *net neutrality* potrebbe sembrare di interesse per i soli addetti ai lavori. Ma così non è, perché la neutralità più o meno garantita della rete incide sulla qualità e sulla velocità di trasmissione dei contenuti in rete. Basta questo a rendere evidente che si tocca la chiave di volta del sistema costituzionale fornita dall'art. 21 come diritto a informare ed essere informati. Se il tempo e la qualità dei contenuti dipendono dalla capacità di spesa di chi li fornisce, chi li riceve non potrà valutarli come se fossero tutti sullo stesso piano, perché sarà portato ad apprezzare di più quelli che riceve tecnicamente meglio e ad apprezzare meno quelli che gli perverranno più lentamente o con qualità inferiore. Chi preferirebbe vedere un film a una risoluzione peggiore di quella massima tecnicamente possibile? Più in generale, chi vorrebbe ricevere e inviare più lentamente la posta elettronica, o impiegare un tempo più lungo per una ricerca *online*, o subire interruzioni e pause in una videoconferenza di lavoro, o fruire di un servizio di *e-health* rallentato o qualitativamente insoddisfacente?

Se dunque è vero che la rete può essere strumento di innovazione volta all'eguaglianza, è anche vero che la stessa senza un quadro di regole

appropriate può al contrario consentire ai poteri forti, pubblici o privati, di rendere alcuni più uguali di altri. Ogni ragionamento sulle regole di Internet è in ultima istanza un discorso sulla uguaglianza, non meno di quanto lo siano state le lotte per affermare i diritti e le libertà agli inizi del costituzionalismo moderno. Internet potrebbe moltiplicare simmetrie o accentuare asimmetrie dipendendo il suo esito dalla vocazione prescelta al cui servizio poniamo il progresso tecnico; e siccome la rete è velocità e cambiamento incessante, essa potrebbe accorciare distanze tra territori e genti con una rapidità sconosciuta alla concretezza della realtà materiale, ma anche allontanare e condannare all'esclusione interi popoli in un battere d'ali.

Lo stretto rapporto della rete con lo sviluppo della persona viene colto con particolare chiarezza nella prospettiva della *privacy*. Ciascuno di noi vive oggi in un mondo incommensurabilmente più vasto di quello che ci era familiare ancora pochi anni addietro. Posta elettronica, messaggistica, videoconferenze, *chatrooms*, *social networks* moltiplicano all'infinito la nostra presenza e la nostra capacità di comunicare in modo istantaneo in ogni dove. L'identità della persona fisica, che un tempo avremmo definito come un dato per ciascuno inoppugnabilmente certo, si stempera e si moltiplica all'infinito attraverso i dati che noi stessi mettiamo in rete nel comunicare. Ma questa esaltazione della persona resa possibile dalla rete ha aperto la via a forme inedite e fin qui impossibili di controllo di massa. Vicende come la pesca a strascico avviata dalla *National Security Agency* negli Stati Uniti hanno dimostrato che siamo tutti potenzialmente controllati a distanza, a prescindere dall'essere o meno in odore di terrorismo. Un occhio vigile che ci segue fino nella nostra intimità ha eroso i limiti che avremmo un tempo ritenuto invalicabili di una *privacy* di ottocentesca memoria, esposta a intrusioni generalizzate. Le ripetute e massive aggressioni alla *privacy* chiedono che la rete sia attratta al principio di legalità, ma rimane ancora da capire cosa questo possa significare nella realtà di Internet. Una domanda è già evidente: dinanzi ad aggressioni di massa e permanenti nel tempo è ancora efficace una difesa della riservatezza che si esaurisce nella raccolta di un consenso, spesso inconsapevole e di fatto coartato, ceduto in cambio di servizi di cui non riusciamo a fare a meno? Oppure la *privacy*, ma più in generale ogni libertà fondamentale, col mutare del suo terreno di gioco richiede, se non un radicale cambiamento, almeno un ragionevole ripensamento dello *status* di garanzie che la assistono *off line*?

Da qui alcuni interrogativi su due temi, centrali prima dell'avvento di Internet, ma oggi da ripensare.

Il primo, la RAI: c'è ancora spazio per una *mission* di servizio pubblico della RAI nel mondo di Internet? E, in caso di risposta affermativa, perché allora questa parte qualificante del nuovo volto della RAI è stata quasi dimenticata dal legislatore della riforma? Forse era proprio da Internet che si doveva partire per ridisegnare l'obbligo di servizio pubblico audiovisivo?

Il secondo, il *copyright*, che la nostra Autorità per le garanzie delle comunicazioni si è ostinata regolare con parole nuove ma con una sensibilità giuridica *ante* Internet, senza peraltro osservare i principi cardine della nostra Costituzione, riserva di legge, gerarchia delle fonti e – non ultimo, come la Corte costituzionale ha ricordato – attribuzione espressa del potere regolativo. Possiamo ignorare che l'attributo di diritto a titolarità esclusiva del *copyright* fatalmente si indebolisce in ragione della cultura della condivisione della rete?

Un nuovo mondo, nuove regole, anche costituzionali. Un grande tema, che non si identifica né si esaurisce nel falso bisogno giuridico di aggiungere qualche parola su Internet nella Carta fondamentale italiana. Al regime costituzionale delle libertà digitali ho dedicato alcune riflessioni pubblicate in lingua inglese su una rivista americana, non prima di aver ragionato intorno al se inserire in Costituzione Internet o pensare a un suo *Bill of Rights*.

L'alternativa è la seguente: "la rete nella Costituzione" o "una Costituzione per la rete"?

Il saggio apparso nella *Loyola of Los Angeles International Comparative Law Review* mi auguro possa essere una risposta alla domanda, ovviamente non ho pretesa di assolutezza: è solo la mia ragionata risposta.

Questa raccolta di scritti è pensata anche per i miei studenti, e a loro dedicata. I giovani di oggi vivono la tecnica in modo immediato e spontaneo, da "nativi digitali". Ma proprio per questo la vivono anche in modo inconsapevole, ignari delle potenzialità e dei rischi che il suo uso fatalmente comporta. La tecnica ci offre un mondo che si mostra più aperto, più facile, più interessante. Ma è anche potere, pervasività occulta, persuasione inavvertibile e, per questo, irresistibile e irresponsabile. Vorrei che queste riflessioni servissero ai miei studenti per capire che la tecnica può essere resa piana e più trasparente; che il diritto può essere spiegato con parole

semplici che pure rimandano a concetti densi. Il metodo di un costituzionalista, cioè il dialogo incessante tra le libertà e il potere costituito, è una delle chiavi di lettura del nuovo mondo, utile anche a consentire di vivere la tecnica come elemento di vita quotidiana da cittadini consapevoli e pronti all'esercizio dei diritti fondamentali, e non nella dimensione ridotta di consumatori-utenti distratti dai benefici economici di Internet.

Capitolo 1

*Towards an Internet Bill of Rights**

SUMMARY: 1. Some questions to be answered. – 2. The available alternatives: self-regulation or binding rules? – 3. Why should the constitutionalization of the Internet be necessary? – A) From the "law clause" to the "rule of law" of the international system. – B) From the "jurisdicional clause" to the due process. – 4. From the constitutionalization of the Internet to an Internet Bill of Rights. – 5. What should the architecture of an Internet Bill of Rights be like? – 6. Equality on the Internet: myth or reality?

1. *Some questions to be answered*

This work seeks to spark some questions about what rules might be set up for the Internet and what the goals of these rules should be.

The first question examined is whether a binding regulation of the Internet is required. This debate is mainly propelled by the American doctrine[1], a doctrine divided between the champions of unchecked self-regulation – drawn by the network providers themselves[2] – and those in

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[1] DAWN C. NUNZIATO, *Virtual Freedom*, 97-100 (Redwood City: Stanford Law Books, 2009).

[2] JOHN MATHIASON, *Internet Governance: The New Frontier of Global Institutions*, 70-96 (London: Routledge, 2009); see DAVID R. JOHNSON & DAVID POST, *Law and Borders: The Rise of Law in Cyberspace*, in *48 Stan. L. Rev.*, 1367, 1371-1380 (1996).

favour of an absorbing intervention by an authority [3]. The second question explored is whether a binding regulation would require a formal modification of national Constitutions eschewing any reference to the Internet. This article intends to detail and explore a third alternative: the proposal of a specific and supranational Bill of Rights for the Internet.

This proposal 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 to put in the Bill? Should the Bill give greater weight to fundamental rights than to economic interests? Should supranational case law be a contributing source to the Bill, and if so, to what extent?

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 its 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 [4], 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

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[3] JOHN P. BARLOW, *A Declaration of the Independence of Cyberspace* (February 8th, 1996) available at *http://projects.eff.org/~barlow/Declaration-Final.html*; JOEL REIDENBERG, *Governing Networks and Rule-Making in Cyberspace*, in *45 Emory L.J.*, 911, 913 (1996) (discussing paternalism). For a balanced critique to this approach, see ANDREW MURRAY, *The Regulation of Cyberspace: Control in the Online Environment* (London: Routledge-Cavendish, 2006). Others prefer a transfer of the offline rules to the online universe while others reconsider the necessity of an *ad hoc* regulation in the case of human rights. Compare JULIE E. COHEN, *Cyberspace As/And Space*, in *107 Colum. L. Rev.* 210 (2007) with ROBIN MANSELL, *Human Rights and Equity in Cyberspace*, in *Human Rights in the Digital Age*, 1-10 (ANDREW D. MURRAY & MATTHIAS KLANG eds., Abingdon-on-Thames: Psychology Press, 2004).

[4] GIOVANNA DE MINICO, *New Social Rights and Internet: Which Policies Combine Them*, in *15 Inter. Comm. L. Rev.*, 261 (2013). For a wide overview on specific rights, see MICHAEL BOARDMAN, *Digital Copyright Protection and Graduated Response: A Global Perspective*, in *33 Loy. L.A. Int'l & Comp. L. Rev.*, 223, 235-243 (2011) [*hereinafter Digital Copyright Protection and Graduated Response: A Global Perspective*].

consistent regardless of the variances in different nations. This would also ensure equality of treatment.

National instances have given rise to a fragmented and irregular juridical mosaic. Since national legislations are primarily based on the specific problems of each legal system and tradition, they therefore vary in scope and content. The U.S. juridical tradition, for instance, has given particular relevance to some norms [5] that help set the boundaries for public powers on copyright law. In the U.K., this same problem has been tackled by essentially looking at the relationships between soft law and binding rules in order to affirm the primacy of a binding framework [6], in particular, a new copyright concept well-suited to the digital age [7]. In France, in the absence of more comprehensive rules, the attention of then-President Sarkozy turned toward the publishing interests of record and film companies, which led to a legislation in 2009 that primarily focused on creating a stringent copyright protection [8]. In Italy, a substantial lack of legislative attention on Internet-related issues has been superseded by a very controversial initiative by the competent national Authority [9]. Finally, the European

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[5] S. 968 112th Cong., (2011); see also S. 3261 112th Congress; see ANNEMARIE BRIDY, *Copyright Policymaking as Procedural Democratic Process: A Discourse-Theoretic Perspective on ACTA, SOPA, and PIPA*, in *30 Cardozo Arts & Ent. L.J.*, 105th Congress, *Digital Millennium Copyright Act*, October 28, 1998 (better known as *D.M.C.A.*, this is an example of regulation).

[6] For a discussion of possible relationships between self-regulation and binding rules, see JULIA BLACK, *Constitutionalizing self-regulation*, in *Mod. L. Rev.*, 1, 27 (1996).

[7] JERRY J. HUA, *Toward a More Balanced Approach: Rethinking and Readjusting Copyright Systems in the Digital Network Era*, 141 (Heidelberg: Springer, 2014).

[8] In the doctrine: MICHAEL BOARDMAN, *Digital Copyright Protection and Graduated Response: A Global Perspective*, *supra* note 4, at 228-229. See *Loi 2009-669 du 12 juin 2009* «favorisant la diffusion et la protection de la création sur internet» [*Law 2009-669 of June 12, 2009 in favor of the diffusion and protection of Copyright on the Internet*], Journal Officiel de la République Française [J.O.] [*Official Journal of France*], available at *http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020735432&categorieLien=id*. On this law the Conseil Constitutionnel intervened with the Décision n° 2009-580 DC, June 10th 2009 and declared the unconstitutionality of the provisions 5 and 11, at *http://www.conseil-constitutionnel.fr/decision/2009/2009-580-dc/decision-n-2009-580-dc-du-10-juin-2009.42666.html.*

[9] The Authority for Communication Guarantees of Italy (A.G.Com.) adopted a controversial regulation on Internet copyright. See *Delibera* n. *680/13/CONS* [*Deliberation n.*

Court of Justice has extensively used the European Union Regulation on E-Commerce addressing the issue of Internet Service Providers' accountability [10].

These instances clearly prove the existence of an uneven framework born out of occasional pressures and initiatives. This further underlines 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 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. To outline which choices should be adopted, and how they should be adopted, is the main goal of this article.

2. *The available alternatives: self-regulation or binding rules?*

The first step of the inquiry is to consider whether a heteronomous system of regulation, or self-regulation, should be pursued for the Internet, keeping in mind that self-regulation is an inherently multifaceted notion [11].

680/13/CONS], available at *http://www.agcom.it/default.aspx?DocID=12228.* A closer look will be given to this act in the following pages of this work, *infra* § 3.1.

[10] See Case C-70/10 Scarlet Extended SA *v.* Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), 2011, E.C.R. I-11959 available at *http://curia.europa.eu/juris/document/document.jsf?text=&docid=115202&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=153683*; see also Joined Cases C-236/08 to C-238/08, Google France SARL *v.* Louis Vuitton Malletier SA, 2010 E.C.R. I-2467, available at *http://curia.europa.eu/juris/document/document.jsf?text=&docid=83961&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=154007*. See generally MARIO VIOLA DE AZAVEDO CUNHA, LUISA MARIN & GIOVANNI SARTOR, *Peer-to-peer privacy violations and ISP liability: data protection in the user-generated web*, in *Int'l Data Privacy L.*, 50, 55-58 (2012).

[11] LINDA SENDEN, *Soft Law In European Community Law*, 118-120 (London: Hart Publishing Ltd., 2004).

A direct connection exists between the legal value of self-regulation and its conformity with the relevant legal systems [12]. Acts of self-regulation, if public powers adequately defined their content and if authority is vested onto its authors, deserve a place in the conversation next to binding sources. This is contrary to the case of unfettered self-regulations.

There may be the case of a State leaving all initiative to private bodies, getting involved only when self-regulation is missing. This form of self-regulation takes place within the limits of the freedom of negotiation [13], as long as no problem arises, the State does not directly intervene. Nevertheless, the fact that the state *may* act turns that absence into a potential presence on the assumption that «if nothing is done State action will follow» [14]. 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 partes* negotiation [15]. This is a historically regressive model [16]. Private stakeholders, when left by themselves, have shown time and time again that they pursue only egotistical interests [17].

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[12] See ANTHONY OGUS, *Rethinking Self-Regulation*, in *15 Ox. J.L. Stud.*, 97-108 (1995) [*hereinafter Rethinking Self-Regulation*]; see also ANTHONY OGUS, *Regulatory Paternalism: When is it Justified*, in *Corporate Governance In Context: Corporation, States, And Markets In Europe, Japan, And The Us*, 304-20 (KLAUS J. HOPTET, EDDY WYMEERSCH, HIDEKI KANDA & HARALD BAUM eds., Oxford: Oxford University Press, 2004) [*hereinafter Regulatory Paternalism*].

[13] *Rethinking Self-Regulation*, *supra* note 12, at 101.

[14] ROBERT BALDWIN & MARTIN CAVE, *Understanding Regulation: Theory, Strategy, and Practice*, 126 (Oxford: Oxford University Press, 1999).

[15] GIOVANNA DE MINICO, *A Hard Look at Self-Regulation in the UK*, in *1 Eur. Bus. L. Rev.*, 211 (2006) [*hereinafter A Hard Look*] (I classified this model as "independent" because the term appropriately describes a regulation operating outside of a legal framework, therefore coming close to a *praeter legem* rulemaking); see also LINDA SENDEN, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?*, in *9.1 Elec. J. Comp. L.*, 12 (2005).

[16] *A Hard Look*, *supra* note 15, at 188-89. 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.

[17] See JOHN KAY & JOHN VICKERS, *Regulatory Reform: An Appraisal*, in *Deregulation or Re-regulation?: Regulatory Reform in Europe and the United States*, 239 (GIANDOMENICO

Therefore, the achievement of the common good depends on whenever it, by chance, happens to correspond with private interests.

In a different model, the State entrusts meaningful social tasks to a private body while continuing to regulate the overall legal structure and decision-making process [18]. Without maintaining ultimate authority, there would be no guarantees that the task entrusted to the private body would be successfully fulfilled. In such a case, self-regulation becomes an instrument in the hands of public entities where the involved private body is nothing more than an expression of indirect administration [19].

Despite that, an exchange is nevertheless realized between the private stakeholders and the State; the private stakeholders relinquish in whole, or in part, their regulating and managing autonomy while the State vests in the private stakeholders the total, or partial, enforcing power typically granted by the law.

The question then becomes, what model of regulation would be better suited for the Internet: a self-regulating one independent from the law or a self-regulation model shaped by binding law that functions as part of the legal system?

An answer cannot be wholly in favour of self-regulation or binding law, but should be found in an intermediate position. U.S. scholars [20], mainly

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MAJONE ed., New York City: St. Martin's Press, 1990), («[Private bodies] may claim that their objectives are in line with the public interest, but whether or not this is so will depend on the frameworks in which they operate.»).

[18] ROBERT BALDWIN & MARTIN CAVE, *supra* note 14, 125-126.

[19] Sometimes there might be a definitional rather than substantial difference. For instance, the Italian legal tradition typically refers to a concept of "indirect administration" which comes close to the concourse among the binding sources and self-regulation set forth by ANTHONY OGUS in his article, *Rethinking Self-Regulation*. The author clearly explains the role of the State: to promote the competition between the S.R.A. and «lay down a minimum quality standards which the S.R.A. regimes must presumptively satisfy» *Rethinking Self-Regulation*, *supra* note 12, at 106.

[20] See, e.g., CHARLES D. RAAB & PAUL DE HERT, *Tools for Technology Regulation: Seeking Analytical Approaches Beyond Lessig and Hood*, in *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes*, 236 (ROGER BROWNSWORD & KAREN YEUNG eds., London: Hart Publishing, 2008); JULIE E. COHEN, *Cyberspace as/and Space*, in *107 Colum. L. Rev.*, 216 (2007); JONATHAN ZITTRAIN, *The Future of the Internet and How to Stop It* 125-26 (New Haven: Yale University Press, 2008); ANDREW MURRAY, *Information Technology Law: the Law and Society*, 62-66 (Oxford: Oxford University Press, 2010) [hereinafter MURRAY, *Information Technology Law*].

Lessig [21], have looked for a solution to the regulation issue in four constraints: «the law, social norms, the market and architecture.» A good example of how these constraints should mix is shown by the evolution of piracy in the Internet. Here two values face each other: the copyright holder's right to an adequate revenue, and the right of Internet users to freely access websites [22]. Criminal sanctions alone proved to be largely ineffective, because the illegal download from Internet was not considered socially reprehensible [23]. A turnabout occurred with policies of substantial price reductions for legal purchases, also due to the introduction of creative commons licensing [24], to the construction of which scholars gave an essential support [25]. Creative Commons offers copyright holders a simple way to mark their creative works with the freedoms they intend for it to carry: «[t]hat mark is a license which reserves to the author some rights, while dedicating to the public rights that otherwise would have been held privately. As these licenses are nonexclusive and public, they too effectively build a commons of creative resources that anyone can build upon» [26]. The final outcome was that Internet users deemed that paying a reasonably low price for legal purchases was more convenient than facing the possibility of heavy criminal sanctions.

Creative Commons contributed greatly in preventing criminal behavior since they helped educate the community of web surfers to be lawful by offering them a chance to have their way at a low cost.

In modern societies pluralism is a basic principle, not by chance a cor-

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[21] LAWRENCE LESSIG, *Code: Version 2.0*, 122-32 (2006) [hereinafter *Code: Version 2.0*].

[22] See LAWRENCE LESSIG, *Free Culture*, 78 (2004), available at *http://www.free-culture.cc/freeculture.pdf* («we should be securing income to artists while we allow the market to secure the most efficient way to promote and distribute content […][T]hese changes should be designed to balance the protection of the law against the strong public interest that innovation continue.») [hereinafter *Free Culture*].

[23] ANDREW MURRAY, *Information Technology Law*, *supra* note 19, at 62-64.

[24] CHRISTOPHER T. MARSDEN, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace*, 90-91 (Cambridge: Cambridge University Press, 2011); See generally MIKE GODWIN, *Cyber Rights: Defending Free Speech in the Digital Age*, 186-254 (Cambridge, Massachussets: The Mit Press, 2003).

[25] LAWRENCE LESSIG, *Creative Commons @ 5 Years*, in *Creative Commons*, (October 1st, 2007), *http://creativecommons.org/weblog/entry/7693* [hereinafter *Creative Commons*].

[26] LESSIG, *Code*, *supra* note 18, at 199.

nerstone of the regulatory issue in the Internet. This principle is construed here in the terms of different sources of law, both public and private, concurring in the regulation. But pluralism must be measured against the necessity of a legal system [27], i.e. a coherent and comprehensive set of rules. The compatibility is generally assured in European Civil Law countries through the notion that the sources of law are placed in a hierarchical order [28] specified at a constitutional level. But also the American experience should be read as posing a precise order between heteronomy and private law [29]. The latter may integrate the political decision-making initiated by the former, but is not allowed to totally take its place and initiate that decision-making by itself [30].

A question arises here about which role should be reserved to the State.

It should not be called to act as a regulator in detail of individual behaviour, but rather as an overall system architect, intervening before and after self-regulation. *Ex ante*, the State will define the general rules, the goals to be pursued, the values to be fulfilled. *Ex post*, it will be in the State's responsibility to correct any deviation of private regulations from the rules it has preliminarily set.

More specifically, the relative weight of heteronomy upon self-regulation will grow together with the capacity of the negotiated law to seek *erga omnes* effects extending its application to a wider community than the one which it directly represents [31]. In such a case it will fall up on the State to look into the structure and the organization of the private subjects in order that an adequate representativeness, transparency, and democratic decision-making processes may be insured [32]. The necessity for the State to in-

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[27] See, *for all*, the classic contribution by SANTI ROMANO, *L'ordinamento giuridico* (*The Legal System*), (Firenze: Sansoni, III ed., 1977, first published in 1918), spec. chap. I.

[28] See FEDERICO SORRENTINO, *Le Fonti Del Diritto Italiano* (*The Sources of the Italian Law)*, Cedam, Padova, II ed., 2015, pp. 31-32.

[29] See generally WIDAR CESARINI SFORZA & SALVATORE ROMANO, *Il diritto dei privati* [*The Law of Privates*], in *5 Civiltà del diritto* [*Civilization of Law*] (1963).

[30] See generally GIOVANNA DE MINICO, *A Hard Look*, *supra* note 13, at 197-200 (discussing the relationship between binding and consensual law).

[31] BLACK, *supra* note 6, at 30, 32. With specific reference to the Internet, see JONATHAN CAVE, *Policy and regulatory requirements for a future Internet*, in *Research Handbook on Governance of the Internet*, 161 (2013).

[32] ROLF H. WEBER, *Shaping Internet Governance: Regulatory Challenges*, 105 (Heidel-

tervene is given by the substantial equivalence between private regulation and a properly legal source of law.

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[33]. Self-regulation will absorb a substantial law-making role and will be applied as a fully legal source of law. Damages to the constitutional architecture will be inevitable.

Nevertheless, it may happen that the correct relationship between heteronomy and self-regulation is subverted[34]. France came close to it during Sarkozy's term in office[35] due to the President's belief that self-regulation would be the cure for all the ills of the Internet[36]. If in following such a myth a full control of the Internet should be vested upon private interest governments[37], a corporativistic involution of the net would inevitably ensue. The rules would be shaped in close accordance with those private economic interests.

A reference to net neutrality[38] is also in order. A conflict is under way

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berg: Springer, 2009); see also, JACK GOLDSMITH & TIM WU, *Who Controls the Internet? Illusions of a Borderless World*, 17 (Oxford: Oxford University Press, 2006).

[33] A detailed analysis may be found in a previous work of mine – GIOVANNA DE MINICO, *Regole. Comando e consenso*, 125, Giappichelli, Torino, 2005 (It.). Chapter four of that book is dedicated entirely to this issue.

[34] See MARSDEN, *supra* note 24, at 58.

[35] See, NICOLAS SARKOZY, *Opening of the e G8 Forum: Address by Nicolas Sarkozy, President of the French Republic*, May 24th, 2011, Paris, at *http://www.g8.utoronto.ca/summit/2011deauville/eg8/eg8-sarkozy-en.html*. Among newspapers' articles, see: KIM WILLSHER, *Sarkozy opens 'historic' forum on future of internet in runup to G8*, at *http://www.theguardian.com/technology/2011/may/24/sarkozy-opens-e-g8-summit*; ERIC PFANNER, *G-8 Leaders to Call for Tighter Internet Regulation*, 24, 2011, at *http://www.nytimes.com/2011/05/25/technology/25tech.html?_r=1*.

[36] For contrasting approaches by the U.S. and France, see *G8 Summit, Deauville G8 Declaration Renewed Commitment for Freedom and Democracy* (May 26th-27th, 2011), available at *http://www.whitehouse.gov/sites/default/files/uploads/deauville_declaration_final__eng_8h.pdf*.

[37] See WOLFGANG STREECK & PHILIPPE C. SCHMITTER, *Community, market, state – and associations? The prospective contribution of interest governance to social order*, in *Private Interest Government Beyond Market and State*, 16 (WOLFGANG STREECK & PHILIPPE C. SCHMITTER eds., Beverly Hills: Sage, 1985).

[38] A clear and comprehensive definition of the net neutrality was given by the Federal

between two competing rights. On one hand, the right of Broadband Providers to sell the access to the Internet at different prices; on the other, the consumers' right to choose services, devices, applications and contents in accordance of their taste and regardless of connection speed. This is the basic playground of what is generally defined as net neutrality, and offers a good test for the relationship between heteronomy and self-regulation.

In the U.S. the conflict has fostered two different answers. The first one entrusts a public body, i.e. the Federal Communication Commission (*hereinafter* F.C.C.)[39], with a light regulation requiring Broadband Providers not to block access, degrade, or favor any legal content, applications, services, or non-harmful devices over others. The second one remits to the negotiations between the Broadband Provider and the content provider the quality and speed of the connection. In such a case, the negotiation is incompatible with the consumer's right to a free choice, and therefore, a right to the net in a strict sense does not exist anymore.

On the question of what net neutrality should be, the F.C.C. has repeatedly spoken on, and has recently launched, a rulemaking procedure on how best an open Internet can be protected and promoted[40]. The opening question was: «[w]hat is the right public policy to ensure that the Internet remains open?» Two options were set forth. The first one was to maintain the existing regulatory approach. Under the second one, the cable and phone companies would be required to provide a basic and equal level of

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Communication Commission. See *Preserving the Open Internet Broadband Industry Practices*, 25 F.C.C. Rcd. 17905, 17906 (2010), available at *https://apps.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf* [hereinafter *Preserving the Open Internet*]. For a recent synthesis, see KENNETH C. CREECH, *Electronic Media Law and Regulation*, 351 (London: Routledge, 6th ed. 2014).

[39] See Federal Communications Commission, *Report and Order. Act to Preserve Internet Freedom and Openness*, *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1_Rcd.pdf*; The *Dissenting Statement of Commissioner Robert M. McDowell* may be found at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0822/FCC-12-92A3.pdf*.

[40] See F.C.C., *Fcc Launches Broad Rulemaking on How Best to Protect and Promote the Open Internet* (May 15th, 2014), available at *http://www.fcc.gov/document/protecting-and-promoting-open-internet-nprm.* We can note that the Obama Administration took a cautious stand to this conflict. HALEY SWEETLAND EDWARDS, *Obama Backs Away From Net Neutrality Campaign Promises After FCC Vote*, in *Time* (May 15th, 2014), available at *http://time.com/101794/obama-backs-away-from-net-neutrality-campaign-promises-after-fcc-vote/*.

unfettered Internet service to their broadband subscribers, beyond which they would be allowed to charge different fees for a faster delivery to consumers. It was objected that the second option allowing the distinction between basic and premium offerings would have divided the Internet into the "haves" and the "have-nots".

The first solution has finally prevailed [41]: a really open Internet governed by public rules resistant to the economic interests of Broadband Providers. However, this *querelle* should be considered still open [42].

The examples made so far show a self-regulation secondary to binding law. But they also show a pluralistic environment of which self-regulation is a necessary element. Teubner's theory [43] on porous law may be recalled here. The basic assumption is that the State is unable to keep an effective monopoly of lawmaking. It therefore acknowledges its own limitations, allowing other subjects [44] the power to write rules for individual and collective behaviors which are subsequently taken up as part of the legal system. This is the theory of reflexive law, which correctly describes the experience of modern legal systems, although attention must be paid to avoiding some possible excesses [45]. Reflexive law finds an appropriate structural solution

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[41] See Federal Communications Commission, *Strong, Sustainable Rules to Protect the Open Internet*, February 26th, 2015, at *http://www.arentfox.com/sites/default/files/DOC-302200A1.pdf*.

[42] The F.C.C. decision was taken with a narrow three-two majority and the opposing commissioners made it clear they would keep fighting against the decision. With regards to the matter see: RUDY TAKALA, *Seven Lawsuits Now Pending Against FCC Over 'Net Neutrality' Rule* (April 24th, 2015), at *http://www.cnsnews.com/news/article/rudy-takala/seven-lawsuits-now-pending-against-fcc-over-net-neutrality-rule*; JOSH TAYLOR, *Net neutrality decision 'monumentally flawed': FCC commissioner* (March 4th, 2015), at *http://www.zdnet.com/article/net-neutrality-decision-monumentally-flawed-fcc-commissioner/*.

[43] See GUNTHER TEUBNER ed., *Law As an Autopoietic System*, 100, 139-140 (Anna Bankowska & Ruth Adler trans., Oxford: Blackwell, 1993).

[44] See *A Hard Look*, *supra* note 15 at 198 («Hence, private associations must promote policies adjusting self-regulation from the beginning to social purposes […]. and the State claims "the chance of political decision" though respecting "the organised power" to act of social bodies.»).

[45] See GUNTHER TEUBNER, *Substantive and Reflexive Elements in Modern Law*, in *17 Law & Soc'y Rev.*, 239, 278 (1982-1983) [hereinafter *Substantive and Reflexive Elements in Modern Law*]; see generally GUNTHER TEUBNER & ALBERTO FEBBRAJO, *State, Law, and Economy As Autopoietic Systems* (Milano: Giuffrè, 1992); see also *Dilemmas Of Law In*

in a pluralistic architecture in which a higher-level legal system – the State – encompasses one or more autonomous legal subsystems, which exist and operate within the limits established by the former [46]. In this perspective the subsystems are necessarily secondary to the higher-level legal system, and the role of private subjects may be differently defined as far as scope, procedures, effects are concerned. A French author has depicted the private contribution as limited to the «mise en oeuvre des politiques publiques» (the implementation of public policies) [47]. In any case, the State maintains a full authority [48] and a final word on the system as a whole, although relinquishing the role of exclusive lawmaker.

The circle is now complete: political decision-makers and public powers should keep their leadership in the self-regulating processes, intervening with *ex ante* determination of its goals, and *ex post* control and correction.

A measure of heteronomous regulation is necessary. But a question is open: which should the scope and content of this regulation be?

As far as the Internet is concerned, the starting point is found in the Courts' decisions – both the European Court of Human Rights [49] and the U.S. Supreme Court [50] – affirming that rules should be specifically suited to their object. Therefore, offline media regulations cannot as such be made applicable online [51]. Should this happen, the Internet would lose

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The Welfare State, (GUNTHER TEUBNER ed., Berlin: Walter de Gruyter GmbH, 1986); and see RENATE MAYNYZ, *Steuerung, Steuerungsakteure und Steuerungsinstrumente: Zur Präzisierung des Problems (Control, Control Actors and Steuerungsinstrumente: to Clarify the Problems)*, 24, 70 (Siegen: Universität, Gesamthochschule, 1986).

[46] WALTER L. BÜHL, *Grenzen der Autopoiesis* [*Limits of autopoeiesis*], in *39 Kölner Zeitschrift für Soziologie und Sozialpsychologie* 247 (1987).

[47] CHARLES-ALBERT MORAND, *La contractualisation corporatiste de la formation et de la mise en oeuvre du droit* [*The corporatist contracting training and implementation of the law*], in *L'Etat Propulsif. Contribution à l'Étude des Instruments d'Action d'État* [*State Propulsion Contribution to the Study Instruments Action State*], 207 (CHARLES ALBERT ed., Paris: Publisud, 1991).

[48] *The Regulation of Cyberspace*, *supra* note 3 at 250-251.

[49] Animal Defenders Int. *v.* United Kingdom, App. No. 48876/08, Eur. Ct. H.R. (2013) (*forthcoming*, in *European Human Rights Review*).

[50] Reno *v.* American Civil Liberties Union, 521 U.S. 844 (1997).

[51] The United State Supreme Court has recognized that the «differences in the characteristics of new media justify differences in the First Amendment standards applied to

its uniqueness. Furthermore, an unfettered Internet is essential to the circulation of ideas which is a basic instrument of economic and social growth [52]. As a consequence, regulations should be kept at a minimum level.

Regulation of the Internet is thus faced with the supreme value of the marketplace of ideas [53] resembling a transposition of the economic theory of *laissez-faire* on the ground of an exchange of immaterial goods. Freedom of speech imposes itself as the unique and real cornerstone of democracy. As a result, it is reasonable to assume that «governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it» [54]. As the Supreme Court stated in the A.C.L.U. the assumption that in a democratic society censorship may prove beneficial is «theoretical but unproven» [55].

For the first time in the history of mankind, billions of people can easily communicate and share information through the Internet, and there can be no overwhelming public or private interest justifying the substantial curtailment of the Internet's effectiveness. Therefore, a basic principle can be drawn stating that a regulation of the Internet, even when required should be kept as light and unobtrusive as possible.

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them.» Associates & Aldrich Co. *v.* Times Mirror Co., 440 F.2d 133, 135-36 (9th Cir. 1971) (citation omitted); see, e.g., Red Lion Broad. Co. *v.* FCC, 395 U.S. 367 (1969); Se. Promotions, Ltd. *v.* Conrad, 420 U.S. 546, 557 (1975); FCC *v.* Pacifica Found., 438 U.S. 726 (1978); Turner Broad. Sys. Inc. *v.* FCC, 512 U.S. 622, 637-38 (1994); Sable Commc'ns of Cal., Inc. *v.* FCC, 492 U.S. 115, 128 (1989).

[52] See *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Human Rights Council, U.N. Doc. A/HRC/23/40 (Apr. 17, 2013) (Frank La Rue), available at *http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf*, in which the author exposes serious concerns for the practices adopted by many States aimed at keeping the Internet under close surveillance and control.

[53] Abrams *v.* United States, 250 U.S. 616, 630 (1919) (WENDELL J., dissenting).

[54] *Reno*, 521 U.S. at 885.

[55] *Ibid.*

3. *Why should the constitutionalization of the Internet be necessary?*

With a general framework for the Internet drawn up, one question remains: is it then necessary to update those national Constitutions that do not mention the Internet at all?

As a starting point, three Constitutions – namely the Italian, French 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 websites [56].

More specifically, in the Italian Constitution Art. 15 (freedom of communication) and Art. 21 (freedom of speech) [57] 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 scholars about the necessity of introducing new *ad hoc* provisions [58] through a constitutional reform.

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[56] 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.

[57] See Art. 15 *Costituzione Italiana* [Cost.] («Freedom and confidentiality of correspondence and of every other form of communication is inviolable. Limitations may only be imposed by judicial decision stating the reasons and in accordance with the guarantees provided by the law.»). Article 21, the only article relevant here, states: «Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication.» *Id.*, Art. 21.

[58] Concerning the previous Leg. XVI, see the *Disegno di legge costituzionale*, A.S. n. 2475, 6/12/2010, at *http://www.senato.it/leg/16/BGT/Schede/Ddliter/36202.htm* [*hereinafter* Project of constitutional law 2475/2010]. Among scholars, see STEFANO RODOTÀ, *Il mondo della rete. Quali diritti e quali vincoli* [*The World in the Net. What Rights and What Constraints*] (Roma-Bari: Laterza, 2014).

Concerning the current Leg. XVII, see the *Disegno di legge costituzionale, A.S. 1317*, February 17th 2014, at *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*, July 10th 2014, at *http://www.senato.it/leg/17/BGT/Schede/Ddliter/44665.htm* [hereinafter *Project of constitutional law*, 1561/2014]. In doctrine see: ORESTE POLLICINO, *Esame in sede referente dei d.d.l. 1317 e 1561 (diritto di accesso ad Internet)*, at *http://www.medialaws.eu/esame-in-sede-referente-dei-ddl-1317-e-1561-diritto-di-accesso-ad-internet/* and

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.

This would expose any constitutional innovation to the risk of premature obsolescence: a detailed provision might be useful 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 constitutional provision might not be the right answer.

An alternative is found in adopting a broad interpretation of the existing constitutional provision, in order that they may be applied to the new virtual reality [59].

This approach would be made easier by the inherent flexibility of many Constitutional provisions [60]. This is the case of Art. 15 and 21 of the Italian Constitution, which grant protection to named media, but also refer respectively to «every other form of communication» (Art. 15) and «any other means of communication» (Art. 21) [61].

A similar example is given by the First Amendment of the U.S. Constitution [62], which has been construed in the sense that the Internet is fully

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GIOVANNA DE MINICO, *A proposito dei disegni di legge di revisione costituzionale*, A.S. 1561 e 1317, I Commissione del Senato, XVII Leg., March 10th 2015' (forthcoming).

[59] See LAURENCE H. TRIBE, *The Constitution in Cyberspace: Law and Liberty Beyond the Electronic Frontier*, Electronic Privacy Information Center (1991), at *http://epic.org/free_speech/tribe.html*.

[60] On the issue of the flexible structure of many Constitutional provisions see *Giustizia Costituzionale*, 246 (GUSTAVO ZAGREBELSKY & VALERIA MARCENO eds., Bologna: Il Mulino, 2012).

[61] Arts. 15, 21 *Costituzione* [Cost.] (It.). This is a typical example of a flexible provision. The interpreter should be able to read it as encompassing new forms or means of communication previously unheard of, made available by technological innovation. This text remains unchanged while staying adherent to new conditions.

[62] Among the first 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 deci-

within the constitutional safeguards of the freedom of speech [63]. No reform of the Amendment has been deemed necessary.

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, in the world of virtual reality. As it has been argued previously, this would not be effective and would only undermine the uniqueness of the Internet. 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 in detail. This point will be made clear by a closer look at the Italian and U.S. Constitutions, with different specific provisions but similar problems posed by the new virtual reality.

A) *From the "law clause" to the "rule of law" of the international system*

I shall start by examining the basic safeguards provided by the Italian Constitution for fundamental rights and liberties offline.

In the Italian Constitution a basic guarantee of rights and liberties is found in the law clause ("riserva di legge") [64], by which a primary legislative rule must be adopted first [65], while a secondary rule may be adopted subsequently and only within limits necessarily defined by the former [66]. In

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sions of this Court.» Katzenbach *v.* Morgan, 384 U.S. 641, 669 (1966); see also JONATHAN D. VARAT, VIKRAM AMAR & WILLIAM COHEN, *Constitutional Law: Cases And Materials*, 1184 (Eagan, Minnesota: Foundation Press, 1997).

[63] See *supra* note 51.

[64] G. ZAGREBELSKY, *Il sistema costituzionale delle fonti del diritto*, (*The Constitutional System of the Law Sources*) 84-87 (Torino: Giappichelli, 1984); also: LORENZA CARLASSARE, *I regolamenti dell'esecutivo e principio di legalità* [*The Rules of the Government and the Legality Principle*] 223 (Padova: Cedam, 1966); ENZO CHELI, *Potere regolamentare e struttura costituzionale* [*Regulation Power and Constitutional Structure*] 50 (Milano: Giuffrè, 1977).

[65] A primary source is construed by the Italian doctrine as a regulatory will expressed by a constitutional power specifically vested with political functions. This source has the basic task to define and initiate the policy project that will be developed by the secondary sources (see for all the clear pages written by VEZIO CRISAFULLI, *Lezioni di diritto costituzionale* (*Lessons of Constitutional Law*), 2nd vol., 140-159 (Padova: Cedam, 1993).

[66] Because of this secondary nature, some scholars have stated that in force of the legality principle, a previous provision of law conferring a blank power to the secondary source is not sufficient. The law must intervene indicating the aim, the scope, and the guidelines

matters concerning copyright and the Internet, Legislative Decree n. 44/2010[67] does not comply with this principle, vesting upon the Authority for the Guarantee of Communication[68] a general responsibility, without defining in detail the Authority's powers. In the absence of a specific legislative foundation, the Authority itself (*Deliberation n. 680/13/CONS*)[69] has assumed to have the power of closing websites or requiring that some contents be cancelled, following a summary assessment of their illicit nature. 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[70]. Consequently, the compliance with the law clause and the hierarchy principle of both the Legislative Decree 44/2010 and the Authority's Deliberation may be questioned.

The Italian case may recall the French law Hadopi 1[71], by which a decision-making power upon websites is given to an independent authority[72].

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with which the secondary power is required to comply. So GIUSEPPE U. RESCIGNO, *Sul principio di legalità* [*Around the legality principle*], in 19 *Dir. Pubbl.*, 264-265 (1995).

[67] *Decreto Legislativo 15 marzo 2010, n. 44*, in *G.U.*, n. 73 del 29 marzo 2010 (It.).

[68] From now on: A.G.Com.

[69] *Delibera n. 680/13/CONS* [*Deliberation n. 680/13/CONS*], at *http://www.agcom.it/default.aspx?DocID=12228*.

[70] GIOVANNA DE MINICO, '*Indipendenza delle autorità o indipendenza dei regolamenti? Lettura in parallelo all'esperienza comunitaria*' [*Independence of the Authorities or independence of the regulations? A comparative reading with the European experience*], in *Alle frontiere del diritto costituzionale* [*At the Borders of Constitutional Law. Works in Honour of Valerio Onida*] (MARILISA D'AMICO & BARBARA RANDAZZO eds., Milano: Giuffrè, 2011), 731-733.

[71] *La Protection Pénale de la Propriété Littéraire et Artistique sur Internet* [*The Criminal Protection of Literary and Artistic Property on the Internet*], in *Journal Officiel de la République Francaise* [J.O.] [*Official Gazette of France*], October 28th, 2009, p. 18290, available at *http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021208046&categorieLien=id*.

[72] In the case under examination, the conflict arises between the copyright – the author's right to his intellectual property – and everyone's right to be informed. Clearly unequal values are compared: one financial, and the other, a fundamental right. The latter, which would not be comparable with a value of a different nature in principle, is *de facto* widely sacrificed by both the French and Italian laws in favor of the right to an economic exploitation of intellectual work. Another flaw can be found considering that in this case, the measure of coexistence between conflicting values is a basic political issue. Therefore,

In a comparative context, a safeguard for the protection of human rights substantially equivalent but not identical to the Italian Constitution's "law clause" [73] may be found in the "rule of law" [74]. This means that the discipline of fundamental rights must be prescribed by a law that is «adequately accessible» [75] and «formulated with sufficient precision to enable the citizen to regulate his conduct» [76]. A close scrutiny reveals a notable difference between the international principle and the Italian clause. In the perspective of the "rule of law", the secondary sources are usually allowed a much wider access to regulation [77]. Not only are the Assembly's legislative acts allowed to intervene, but the decisions from the public authority (containing general and abstract provisions) are permitted to as well [78].

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it cannot be wholly entrusted to an authority, Court or I.R.A., and should be vested primarily upon a representative and politically responsible legislator.

[73] See the First Part (Parte I), First Title (Titolo I) of the *Italian Constitution* for the examples of the law clause.

[74] 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; see, among others, FEDERICO FABBRINI, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (1st ed., Oxford: Oxford University Press, 2014); DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, *European Union Law: Cases And Materials*, 256-58 (3d ed., Cambridge: Cambridge University Press 2014); DAVID HARRIS, MICHAEL O'BOYLE, EDWARD BATES & CARLA BUCKLEY, *Law of the European Convention on Human Rights*, 345-349 (Oxford: Oxford University Press, 2009). While for the specific sector of the media freedom see: HELEN FENWICK & GAVIN PHILLIPSON, *Media Freedom Under The Human Rights Act*, 37-311 (Oxford: Oxford University Press, 2006).

[75] Silver *v.* United Kingdom, 5 Eur H.R. Rep. 372 (¶ 87) (1980).

[76] Sunday Times *v.* United Kingdom, 2 Eur. H.R. Rep. 245, 271 (¶ 49) (1980).

[77] Well said by DAVID HARRIS, MICHAEL O'BOYLE & EDWARD BATES, in *Law of the European Convention on Human Rights*, 344 (2d ed. 2009): «the rule need not be a rule of domestic law but may be a rule of international law or Community law so long as it purports to authorize the interference. It may consist of a whole legal regime regulating the area of activity, including rules made by a delegated rule-making authority (*Barthold v FRG* A90 (1985); 7 *EHRR* 383 pages 45-6 (1985) and rules from more than one legal order». See also DANIEL MOECKLI, SANGEETA SHAH, SANDESH SIVAKUMARAN & DAVID HARRIS, *International Human Rights Law*, 111 (Oxford: Oxford University Press, 2010).

[78] Silver, 5 Eur H.R. Rep. at 372. Sunday Times *v.* United Kingdom, 2 Eur. H.R. Rep. 271(§ 47) (1979). For further doctrine examples, See HELEN FENWICK & GAVIN PHILLIPSON, *Media Freedom Under the Human Rights Act*, 47 (2006).

The rule of law can therefore be summarized as upholding fundamental rights against the public powers' arbitrary decisions [79] in spite of its legal form, be it an act issued by the Parliament or by the Government [80]. This principle strengthens the protection of rights, namely in preventing the violation of liberties that may arise from a Parliamentary act, which does not comply with the standards of generality and abstractness [81]. Conversely, the same principle weakens this protection by allowing a secondary source to set out the discipline without any previous legislative intervention.

B) *From the "jurisdictional clause" to the due process*

Fundamental rights and liberties online can find within the Italian Constitution a second basic safeguard in the jurisdictional clause ("riserva di giurisdizione", as explained elsewhere). This "riserva", applying the principle of separation of powers [82], entrusts the power of judicial review solely upon the judiciary.

The Italian Constitution provides a strong protection for the independence of the judiciary. No political or administrative body is allowed to interfere with judicial functions [83], which must be carried on by exclusively

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[79] Kruslin *v.* France (1990) 1 EHRR 562, § 30.

[80] See *Draft charter of Fundamental Rights of the European Union*, Brussel, March 8th 2000 (13.03), a preview of what will then become Art. 53 of the Charter: «According to the European Conventions of Human Rights, the term "law" must be understood in the material not the formal sense. It can cover sub-legislative, customary or case of law standard».

[81] See generally ROBERT S. SUMMERS, *A Formal Theory of the Rule of Law*, in *Ratio Juris* (1993).

[82] For the purpose of this essay, a general definition of the principle of separation of powers will be adequate: 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 supranational analysis beyond specific States, see CHRISTOPH MOELLERS, *The Three Branches: a Comparative Model of Separation of Powers*, 150 (Oxford: Oxford University Press, 2013).

[83] On the guaranteed independence of the judiciary power see, among the others: RICCARDO GUASTINI, *Commento all'art. 101*, at *Commentario della Costituzione. la magistratura*, vol. ist. (GIUSEPPE BRANCA & ALESSANDRO PIZZORUSSO eds., 172, Bologna-Roma: Zanichelli-Società Editrice del Foro Italiano, 1994; SERGIO BARTOLE, *Autonomia e indipendenza dell'ordine giudiziario* (Padova: Cedam, 1964); CARLO MEZZANOTTE, *'Sulla nozione d'indipendenza del giudice'*, at *Magistratura, CSM e principi costituzionali* (BENIAMINO CA-

applying the law. This independence is the basic reason why only a judge is allowed to limit fundamental rights and liberties in compliance with the law. One can see here that the jurisdictional clause and the law clause work in synergy.

For this reason, a strong dissent should be expressed against [84] the Italian Legislative Decree n. 44/2010.

The constitutionality of the Decree can be challenged on several grounds, one of which is found in the lack of compliance with the jurisdictional clause. The power to "clean" the websites, ordering that a specific content be cancelled, is entrusted to an independent regulatory authority. Since such an order inevitably affects the freedom of speech, a constitutionally sound solution would require a court proceeding and a judicial decision. The Decree's provision may recall the French law Hadopi 1, before the decision of the *Conseil Constitutionnel* and the subsequent modifications.

On an international level, the jurisdictional clause is present. In the European Court of Human Rights' decisions, for instance, it is in the weaker form of due process [85]. In fact the European Convention on Human Rights (especially, Articles 5-6) does not force E.U. Member States to confer power, as detailed above, only to a judge [86]. Different authorities may be

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RAVITA DI TORITTO ed., Bari: Laterza, 1994); ALESSANDRO PIZZORUSSO, *La Corte Costituzionale ed il principio di indipendenza del giudice*, at *Scritti su la giustizia costituzionale in onore di vezio crisafulli* (AA.VV., Padova: Cedam, 1985).

[84] GIOVANNA DE MINICO, *Libertà e copyright nella Costituzione e nel Diritto dell'Unione* (January 2014) [*Fundamental Rights and Copyright in Italian Constitution and in the European System*], available at *http://www.associazionedeicostituzionalisti.it/articolorivista/libert-e-copyright-nella-costituzione-e-nel-diritto-dell-unione* (last visited March 4th, 2015) [hereinafter DE MINICO, *Fundamental Rights and Copyright*].

For a sharp critique, see MARANA AVVISATI, *Diritto d'autore in rete e Costituzione: concerto tra le fonti?*, 3 (2014) at *http://www.osservatoriosullefonti.it/component/docman/cat_view/199-note-e-commenti*. Pending the publication of this essay, the Decree was challenged on the grounds illustrated above before the Constitutional Court, see: Tar Lazio, Sez. I n. 10016/2014 and n. 10020/2014, at *http://www.neldiritto.it/appgiurisprudenza.asp?id=10792#.VWYGbc_tmko*.

[85] Being this topic only partially connected to our study it is enough here to refer to the same scholars quoted at note n. 87.

[86] The concept of "judge" or "tribunal" is interpreted by the E.C.H.R. in an autonomous manner. In fact, in the Ringeisen case (E.C.H.R., July 16th 1971, Ringeisen-Austria (Series A-16), §§ 94-95) the Court had to decide whether article six was applicable in an

entrusted with the implementation of legal rules, provided that their decisions are based upon a fair hearing and a reasonable motivation [87].

What matters here is that the act concretely imposing limits will be adopted in an adversarial proceeding, allowing those who must bear those limits to have prompt knowledge of them in order to make their opposing arguments heard. And, should the relevant Authority, after the resolution of the conflicting issues, be convinced of the validity and truth of those limits, it will have to make the *iter* of its decision understandable to all [88]. Therefore, the interference with the peaceful enjoyment of one's assets is accompanied by procedural guarantees ensuring a reasonable opportunity to make one's case before the competent authorities [89].

This approach is considered a somewhat weaker one, as independence, impartiality, and neutrality – essential requisites for a fair assessment of the parties' dispute – are, in principle, more fully ensured by judges, although in different ways in different States.

After examining the essential framework of the constitutional protection of rights and liberties in the Italian legal system, as well as in a comparative perspective, it is necessary to state a point: the underlying assumptions may be deemed valid for any legal system. As Fuller points out, laws

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Austrian dispute concerning the purchase of property. The Court held that the administrative character of the Authority was of little consequence, so it concluded that the body was a "tribunal." In doctrine for all: FRANZ MATSCHER, *La notion de "tribunal" au sens de la Convention européenne des droit de l'homme*, in RENEE KOERING-JOULIN, *Les nouveaux développements du procès équitable au sens de la Convention européenne des droit de l'homme* (Brussels: Bruylant, 1996), 33.

[87] The E.C.H.R. 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 MARTIN KUIJER, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 Echr*, 175 (Nijmegen: Wolf Legal Productions, 2004).

[88] This is the case of the Independent Administrative Authorities. As I noted in a previous essay, although they do not belong to the judiciary power, they must motivate their decisions in order to allow a judicial review be conducted over them. GIOVANNA DE MINICO, *Indipendenza delle Autorità o indipendenza dei regolamenti? Lettura in parallelo all'esperienza comunitaria* [*Independence of the Authorities or independence of the regulations? a comparative reading with the European experience*], 731 (2011).

[89] The case law of the E.C.H.R. is synthesized in the decision of Agosi *v.* United Kingdom, 9 E.C.H.R. (ser. A) at 55 (1986).

must comply with some basic requirements, ensuring at least their legitimacy and efficiency [90]. In this perspective, the existence of a territorial location may not be relevant. It can therefore be argued that the same framework applies to rights and liberties wherever they are exercised. Their nature or scope does not change when they move to the virtual world of the Internet, nor do they become any less fundamental. The basic function of constitutional safeguards, aimed at preventing any breach of those rights, is equally confirmed. For example, freedom of speech in an online blog should be protected against *ex ante* controls as it is the case with the written speech of a book. In both cases the speech is addressed to an indefinite number of people and a similar damage would ensue from curtailing a speaker's freedom. Therefore, no rational foundation may be indicated for a different definition or implementation of the constitutional framework.

4. *From the constitutionalization of the Internet to an Internet Bill of Rights*

I started my discourse by denying the need for a formal modification of the Constitutions in order to encompass the Internet. Significant similarities can be found in a compared reading of the North American and the European systems. It may now be useful to take a further step in stating the necessity of an Internet Bill of Rights [91].

Regulations of the Internet have so far been discussed through underlining some common elements following a comparative perspective. It is this author's argument that a global and rapidly changing reality shows a highly fragmented picture. More specifically, the mosaic of multiple State net regulations, filtered through widely different social, economic, and political conditions in different territories, cannot effectively keep such a fast pace. Even more, the a-territorial nature of the Internet radically clashes

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[90] LON L. FULLER, *The Morality of Law*, 152-184 (New Haven and London: Yale University Press, 1969).

[91] LAWRENCE LESSIG, *Reading the Constitution in Cyberspace*, in *45 Emory L.J.*, 3, 7-18 (1996).

per se with the limitations imposed by State boundaries [92]. This suggests the increasing necessity of a set of basic rules that can be both generally accepted and acknowledged as a primary, binding source of law for all those public or private subjects interacting with the Internet.

There is a number of fundamental rights and liberties that already enjoy a constitutional protection in different legal systems, even in the absence of specific provisions concerning the Internet [93]. But undoubtedly the Internet goes nowadays well beyond freedom of speech and communication, crucial as they may be in a democratic society. The Internet appears more and more as the most powerful tool ever forged for social inclusion and economic growth, which is exactly why the digital divide should be considered a decisive factor of inequality among countries and individuals. Such a scenario suggests that 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.

This 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 legitimated [94] to write the fundamental Charter of the Internet?

It is clear from what I said before that the hypothesis of one or more national States assuming such a role must be rejected [95]. The a-territorial nature of the Internet would be incompatible with an Authority entrusted with powers constrained within State boundaries [96]. 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 such a legislator be an international body through an authori-

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[92] Allow me to refer to my analysis delivered in one of my books: *Internet. Regola o anarchia*, quoted, p. 8.

[93] This issue has already been dealt with at the beginning of this essay, where the only two Constitutions, containing explicit provisions for the Internet have been mentioned see *supra* note 56.

[94] RUDOLF W. RIJGERSBERG, *The State of Interdependence. Globalization, Internet and Constitutional Governance*, 49-68 & 213-30 (Hague: Asser Press, 2010).

[95] See *infra*, in this paragraph.

[96] CHRIS REED, *Making Laws for Cyberspace*, 30-34 (Oxford: Oxford University Press, 2012).

tative hard-law regulation, or should it rather be the community of Internet "surfers" through self-regulation? The former have frequently proven to be unable to build the consensus necessary to condense and shape the common good in a supranational synthesis [97].

Furthermore, they fall easily under the influence of strong national States, the interests of which only occasionally coincide with a broader common good [98]. In brief, international organizations tend to reproduce, albeit on a smaller scale, the basic flaw of world politics, a system of interactions between autonomous nation-States at best. In this framework, international organizations have revealed themselves incapable to replace the culture of nation-States with a new one.

Therefore, the idea of an Internet Bill of Rights written by its own people, entrusting regulation to an endogenous process of self-organization, might gain some ground. Effective examples can be offered by institutions such as I.C.A.N.N. [99], courts of arbitration, or international standardization organizations such as the World Wide Web Consortium. This is a better solution as to the need of effective supra-nationality. New problems, however, arise, since it refers to a plurality of subjects not yet transformed into a body formally vested with authoritative powers [100].

Considering the current situation, the risk of a "corporate constitution-

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[97] See GÜNTHER TEUBNER, *Constitutional Fragments: Societal Constitutionalism and Globalization*, 66 (Oxford: Oxford University Press, 2012).

[98] There is no unanimous definition of the "common good." For example: WOLFGANG STREECK & PHILIPPE C. SCHMITTER, *Community, market, state – and associations? The prospective contribution of interest governance to social order*, quoted, 16, strongly believes in «the public use of private interest governments [...] which are made subservient to general interests by appropriately designed institutions». On the contrary, CHARLES-ALBERT MORAND, *La contractualisation corporatiste de la formation et de la mise en oeuvre du droit*, in *L'État Propulsif. Contribution à l'Étude des Instruments d'Action d'État* 209 (CHARLES-ALBERT MORAND ed., Paris: Publisud, 1991, states that «L'éclatement de l'intérêt général en une multitude d'intérêts particuliers et sectorialisés remet en cause l'une des justifications fondamentale de l'exercise du pouvoir étatique, son orientation vers la réalisation de l'intérêt public.».

[99] About I.C.A.N.N. governance see: MICHAEL HUTTER, *Global regulation of the Internet domaine name system: five lessons from the ICANN Case*, in *Innovationsoffene Regulierung des Internet: Neues Recht für Kommunikationsnetzwerke* (KARL-HEINZ LADEUR ed., Baden-Baden: Nomos, 2003), 39-52.

The French delegation to I.C.A.N.N.'s 50th meeting, taking place in London, recently stated that «U.S.-based I.C.A.N.N. is unfit for "Internet governance"».

[100] CASS SUNSTEIN, *Republic.com*, 69-79 (Princeton: Princeton University Press, 2001).

alism" cannot be overlooked[101]. As Teubner stated, such a risk is inherent whenever well-structured and significantly funded private bodies enter the field[102]. The Internet may very well be the «most prominent case of constitutional law created through multinational corporations private ordering»[103]. And even if all stereotypes should be refused, corporate constitutionalism will undoubtedly be accompanied by «the glimmering of the constitution of multi-national enterprises as an autonomous community of entities that have begun to regulate themselves through the construction of systems of governance independent of the states»[104].

The risk underlined by Teubner should not be underestimated. A private interest government, to use an expression familiar to some scholars[105], is entrusted with social tasks if it enacts regulations affecting not only their associates, but also third parties. This is not the case of a regulatory power bestowed on the decision makers through a contractual obligation where members involved accept the rules. Instead, were a private interest government to enact and enforce those rules applicable to everyone working in the field beyond the relevant social group of stipulating members, a basic issue of democracy arises. In such cases, the consensus within the social group will not give the regulator an adequate and proper basis to adopt acts affecting third parties *per se*. The issues of representativeness and democratic governance are paramount, as they ultimately define the interaction among the conflicting interests underlying the rules to be drawn[106].

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[101] GÜNTHER TEUBNER, *Constitutional Fragments: Societal Constitutionalism and Globalization*, 56 (Oxford: Oxford Scholarship Online, 2012).

[102] *Ibid*.

[103] *Ibid*.

[104] LARRY CATA BACKER, *The Autonomous Global Enterprise: on the Role of Organizational Law Beyond Asset Partitioning and Legal Personality*, in *41 Tulsa L. Rev.*, 541, 567 (2006).

[105] See WOLFGANG STREECK & PHILIPPE C. SCHMITTER, *Community, Market, State – and Associations? The Prospective Contribution of Interest Governance to Social Order*, in *1 Eur. Soc. Rev.*, 119, 127 (1985) available at *http://esr.oxfordjournals.org/content/1/2/119.full.pdf*.

[106] LAURA DENARDIS, *The Global War for Internet Governance*, 230 (New Haven-London: Yale University Press, 2014), focuses on the fact that the multi-stakeholder model isn't good *per se*, unless it is based on the democratic values: amongst them, representativeness and equilibrate balance of powers between public and private actors.

Therefore, I propose a median hypothesis. 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. The basic model could be drawn to resemble the notice and comment procedure, well-known to the American experience in the field of regulations [107]. Opposing stakeholders should discuss basic issues before a public authority, who is able to make the 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 [108].

The model proposed here would answer 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.

The issue of a constituent power for the Internet may currently appear far-fetched, but it is actually something already in agenda, although the attempts to reach a widespread consensus on some basic issues have failed up to now as it has recently happened in Dubai [109] and São Paulo [110].

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[107] *Administrative Procedure Act*, in *Pub. L. No.*, 79-404, 60 Stat. 237 (1946).

[108] See, e.g., STEPHEN G. BREYER, RICHARD B. STEWART & CASS R. SUNSTEIN, *Administrative Law and Regulatory Policy*, 869-881 (Alphen aan den Rijn: Aspen Publishers, 4th ed., 1998); see MARTIN SHAPIRO, *APA: Past, Present, Future*, in *72 Va. L. Rev.*, 447 (1986); see also RICHARD J. PIERCE, JR., *Rulemaking and the Administrative Procedure Act*, in *32 Tulsa L.J.*, 185 (1996); and see BERNARD SCHWARTZ, *Adjudication and the Administrative Procedure Act*, in *32 Tulsa L.J.*, 203 (1996).

[109] Int'l Telecomm. Union [I.T.U.], *Final Acts of the World Conference On International Telecommunications*, I.T.U. 37779 (December 3rd-14th, 2012), available at *http://www.itu.int/en/wcit-12/Documents/final-acts-wcit-12.pdf*.

[110] Global Multistakeholder Meeting on the Future of Internet Governance, *NETmun-*

5. *What should the architecture of an Internet Bill of Rights be like?*

Although the idea of a supranational constitutional legislator for the Internet may appear unrealistic in the current situation, the need for a set of commonly accepted basic rules is clear and immediately present. Therefore, it is reasonable to assume that a number of States can reach an agreement on those basic rules. Several attempts have been and are being made to this purpose [111]. Should such an agreement be reached, a set of substantially constitutional rules, binding each State in force of an international treaty, would be laid down. Therefore, an analysis of the contents of an Internet Bill – however formulated and enacted – deserves to be pursued and is becoming more than a purely speculative exercise.

For the reasons discussed before, such a Bill should tackle two issues.

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dial Draft Outcome Document Public Consultation: final report on comments, (April 22nd, 2014), available at *http://netmundial.br/wp-content/uploads/2014/04/NETmundialPublic Consultation-FinalReport20140421.pdf* [hereinafter *NETmundial Internet Governance Report*].

[111] The recent Internet Governance Forum has moved in this direction, but without reaching any results at the moment, Connecting Continents for Enhanced Multistakeholder Internet Governance, Istanbul-Turk., September 2nd-5th 2014, at *http://www. intgovforum.org/cms/igf-2014.* Concerning the Italian experience, a recent and most significant development is found in the *Draft Declaration of Internet Rights* (*http://www.camera.it/application/xmanager/projects/leg17/attachments/upload_file/upload_files/000/000/189/dichiarazione_dei_diritti_internet_inglese.pdf*) elaborated by a special Committee, appointed by the president of the Chamber of Deputies (on. L. Boldrini *http://www.camera.it/leg17/1177*). The Committee's work is still in progress, and is intended to provide the Italian Government with a technical and political basis for the promotion of promote an International Bill of Rights. The overall results achieved so far can be considered satisfactory, although some provisions may appear to be insufficient and inadequate (see the comments of prof. De Minico, member of the Committee, in meeting n. 3, October 8th, 2014, at *http://www.camera.it/application/xmanager/projects/leg17/attachments/attivita_commissione_internet/files/000/000/003/resoconto_commissione_8ottobre.pdf*, 27-30. While this was being revised for print, the final draft of the Declaration of Internet Rights has been approved on July 28th, 2015: *http://www.camera.it/application/xmanager/projects/leg17/commissione_internet/testodefinitivo_inglese.pdf*. This latest version takes into account the suggestions and proposals, mine included, arising from the debate within the Committee. The results of a wide public consultation have also been considered. Conclusively, the document can be deemed to be a well-balanced compromise among different positions, as a constitutional inspiration should always bear.

Firstly, it should state that the conflict between opposite values must be resolved according to the prevalence of individual rights over economic liberties. Secondly, it should resolve the relationship between the binding sources and self-regulation with the prevalence of the former over the latter. Reference could be made here to the European Convention of Human Rights and European Charter of Fundamental Rights to point out at least three other more specific guarantees aimed at constraining the rulemaking power of policymakers: necessity, indispensability, and proportionality, extensively recalled by the two European Courts (E.C.H.R. and E.C.J.) [112]. The language used by both is not always coincident, but it does not seem necessary to delve into the matter here [113]. I simply want to underline the fact that the discretionary power of the legislator is anything but undefined both in the European and in the International case law [114].

The first limit, i.e. necessity, is a one-way approach, requiring the sacri-

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[112] PAUL CRAIG & GRAINNE DE BURCA, *Eu Law. Texts, Cases and Materials*, 396-400 (Oxford: Oxford University Press, 5th ed. 2008), in which the authors state that «Article 52(1) of the European Charter of Fundamental Rights, which draws on the jurisprudence of both the ECHR and the ECJ, contains a general derogation clause, indicating the nature of restrictions on Charter rights will be acceptable.» For a criticism to this thesis see: DIMITRIS TRIANTAFYLOU, *The European Charter of Fundamental Rights and the "Rule of law". Restricting fundamental rights by reference*, at 39 CMLR, 53 (2002).

[113] On the complex relationship between the E.C.H.R. and the E.C.J. see, from a large literature: GUY HARPAZ, *The European Court of Justice and its relationship with the European Court of Human Rights: the question of enhanced reliance, coherence and legitimacy* 46 MLR, 105 (2009); JOHAN CALLEWAERT, *The European Court Human Rights and European Union law: a long way to harmony* 6 EHRLR, 768-783 (2009).

[114] Concerning the E.C.H.R., it has long accorded to the State Parties a margin of appraisal in making public decisions, which potentially influence E.C.H.R. (see, e.g. Handyside *v*. United Kingdom (1976) 1 EHRR 737 at *http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57499#{"itemid":["001-57499"]}*). The extent of the margin allowed by the court varies according to the policy area in question; for example, it is usually wider in economic or national security issues, and narrow in the area of criminal justice. As to the E.C.J., it has also allowed Member States some discretion on their decision-making, stating that E.U. law does not impose upon the Member States an uniform scale of values as regards the assessment of conduct which may be considered contrary to public policy (Adoui and Cournuaille *v.* Belgium, (Cases 115 e 116/81) [1982] ECR 1665 (§ 8)) *at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0115&from=EN*. For an extensive overview on recent cases see: ELSPETH BERRY, MARTIN J. HOMEWOOD & BARBARA BOGUSZ, *Eu Law* 306 (Oxford: Oxford University Press, 2013).

fice 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 unfettered is viable [115].

The second limit, indispensability, is an instance of common ground between the Italian Constitutional Court [116] and the European Court of Human Rights [117]. The former has defined this limit as the "minimum essential content" for rights, up to the point of inducing part of the doctrine to consider the necessity a "limit to the limit" [118]. Conclusively, no such restriction is allowed as to substantially extinguish the right, no matter how essential the interest pursued by the legislator may be.

The third limit, proportionality [119], 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 [120]. The goal is to prevent limitations to rights, which do not grant any significant and corresponding advantage to the competing interests [121].

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[115] See RICHARD CLAYTON & HUGH TOMLINSON, *The Law of Human Rights*, 339-340 (Oxford: Oxford University Press, 2nd ed. 2009).

[116] Corte cost., February 22nd 1990, No. 67 (It.) available at *http://www.giurcost.org/decisioni/1990/0067s-90.html*.

[117] The determination of the objective pursued by the restriction to a fundamental right may be decisive to answer the question whether the limitation may be considered "necessary in a democratic society", i.e. such a necessity must go beyond the mere need to achieve that aim. (See the leading case: E.C.H.R., plen., Open door and Dublin Well Woman *v.* Ireland, 1992, Series A no. 246-A, § 64, at *http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57789#{"itemid":["001-57789"]}*).

[118] MASSIMO LUCIANI, *I diritti fondamentali come limiti alla revisione della costituzione*, in *Libertà e Giurisprudenza Costituzionale*, 121-129 (VITTORIO ANGIOLINI ed., Torino: Giappichelli, 1992). This expression is also common among Spanish scholars, *ex multis*, see ANTONIO-LUIS MARTÍNEZ-PUJALTE, *La garantía del contenido esencial de los derechos fundamentales*, in *Cuadernos y Debates*, 65, 6 (1997).

[119] JONAS CHRISTOFFERSEN, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden: Brill, 2009); ALASTAIR MOWBRAY, *A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights*, in *2 Human Rights L. Rev.*, 2, 289 (2010).

[120] ALASTAIR MOWBRAY *supra* note 119.

[121] Court of Justice, Case C-360/10, Belgische Verenigingvan Auteurs, Componisten en