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INTERNET: RULES AND ANARCHY.

THE TEST OF ALGORITHMS

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Giovanna De Minico Internet: Rules and Anarchy. The test of algorithms*

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1. *The terms of the discussion*

This essay aims to address the following basic question, namely whether the Internet should remain the reign of anarchy¹ or the field of a new regulatory approach. The second option raises the question as to the sources of the rules designed to regulate the Net.

Preliminarily, the focus will be concentrated on the necessity to constitutionalize the Internet. Subsequently, we will proceed to identify the most suitable regulation, which could take the form of a supranational “Bill of Rights” for the Internet.

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

To answer these questions, I will not simply tackle a single freedom concerning netizens. This article’s analysis will instead focus on the basic need that fundamental rights, normally protected by national constitutions, should receive universal protection regardless of territorial boundaries, in accordance with the a-territorial nature of the Internet. Therefore, rather than focusing on specific rights, whether they be freedom of expression, communication, or the right to access the Internet², this article intends to propose the essentials of a statute for fundamental rights, one that is sufficiently general to encompass every freedom, regardless of its specific features. This statute should also be supranational so that every freedom is consistently protected regardless of the variances in national legal systems. This would also ensure equality of treatment.

The above questions refer to the necessity of general regulations that ex-tend 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 good³. Should this happen, the Internet would finally be a unique and effective opportunity for everyone to pursue personal growth and participation in the virtual political process. Such an outcome, however, can only be ensured through clear choices made by policymakers and netizens. If this outcome has already occurred or is going to happen, we can’t anticipate now but we will look at it later.

¹ J. P. BARLOW, [A Declaration of the Independence of Cyberspace](#), 1996, February 8. See R. RADU, *Negotiating Internet Governance*, Oxford, Oxford University Press, 2019, 45.

² Let me allow to refer to G. DE MINICO, [New Social Rights and Internet: Which Policies Combine Them](#), in *International Community Law Review*, 2013, 15(3). For a wide overview on specific rights, see M. BOARDMAN, *Digital Copyright Protection and Graduated Response: A Global Perspective*, in [Loyola of Los Angeles International and Comparative Law Review](#), 2011, 33(2), 235-243.

³ Concerning Internet as a ‘global public good’, see M. R. CANAZZA, *The Internet as a global public good and the role of governments and multilateral organizations in global internet governance*, in *Meridiano* 47, 2018, 19, 2-3.

2. A constitutional basis for the Internet?

The fact that Internet is not expressly envisaged in most Constitutional texts poses the issue whether it would be necessary to update those Constitutions that ignore the Net at all⁴.

As a starting point, two Constitutions - namely the Italian and American ones - will be discussed, as they already entail norms protecting traditional media - radio, television, and newspapers - yet at the same time lack specific rules for online media such as Internet blogs and social network websites⁵.

More specifically, art. 15 and 21 of the Italian Constitution (freedom of communication and speech, respectively⁶) 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 scholars⁷ and decision makers about the necessity of introducing new *ad hoc* constitutional provisions⁸.

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 development.

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

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

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

A similar example is given by the First Amendment of the U.S. Constitution⁹. In fact, the Supreme Court has encompassed the defense of the Internet within the constitutional safeguards of freedom of speech, and no reform of the Amendment has been deemed necessary¹⁰.

To avoid any misunderstanding, it is important to clarify that the extension of the same

⁴ Concerning the transformations that Internet brings in Constitutions E. CELESTE, *Digital constitutionalism: a New Systematic Theorisation*, in *International Review of Law. Computers & Technology*, 2019, 33(1), 76-99.

⁵ Only two Constitutions dealt with new media through explicit provisions, see *Syntagma* [SYN.][Constitution] 5a, co. 2 (Greece) and *Constitucion de República del Ecuador* [C.R.] art. 16. Concerning freedom of expression in the two Constitutions O. POLLICINO, *Judicial Protection of Fundamental Rights in the Transition from the World of Atoms to the World of Bits: The Case of Freedom of Speech*, in *European Law Journal*, 2020, 25, 156-157.

⁶ On the connection between free speech and the Internet F. MOSTERT, *Free speech and internet regulation*, in *Journal of Intellectual Property Law & Practice*, 2019, 14(8), 607-612.

⁷ S. RODOTÀ, *Il mondo della rete. Quali diritti e quali vincoli* [*The word in the net. What rights and what constraints*], Bari, Editori Laterza, 2014.

⁸ See for what concerns the Leg. VXII the ‘[disegno di legge costituzionale, A.S. 1317, 17/2/2014, modifica all’articolo 21 della Costituzione](#), [hereinafter Project of constitutional law 1317/2014]’ and also the ‘[disegno di legge costituzionale, A.S. 1561, 10/7/2014, introduzione dell’articolo 34 bis della Costituzione](#), [hereinafter Project of constitutional law 1561/2014]’. In doctrine, see O. POLLICINO, *Esame in sede referente dei DDL 1317 e 1561 (diritto di accesso ad Internet)*, 2015, March 13, and G. DE MINICO, *A proposito dei disegni di legge di revisione costituzionale, A.S. 1561 e 1317, I Commissione del Senato, Leg. XVII, 10/3/2015*.

⁹ On the elasticity of the text and the discretionary power Justice Harlan stated: “I do not see why Congress should not be able as well to exercise its ‘discretion’ by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court.”, in *Katzenbach v. Moran*, 384 U.S. 641, 669 (1966). See also J. VARAT, V. AMAR, *Constitutional law: cases and materials*, New York, Foundation Press, 2016, 1184.

¹⁰ Supreme Court, *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

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

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

3. *The guarantees of modern constitutionalism in lieu of an ad hoc constitutional basis*

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

In the Italian Constitution these measures consist in both the “riserva di legge”¹¹ and the “riserva di giurisdizione”¹².

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

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

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

In the matters concerning the copyright and Internet, the legislative Decree n. 44/2010¹³ doesn't seem to comply with this principle. In fact, the Decree says little about online copyright, leaving the regulatory onus on the competent Independent Authority (Authority for the Guarantee of Communications). In the absence of a specific legislative foundation¹⁴, the Authority has assumed the power of closing websites or requiring that some contents be cancelled, following a summary assessment of their illicit nature¹⁵. A strong doubt arises, because the Authority's decision is a secondary source, and therefore in virtue of the “law clause” is not allowed to introduce an original innovation in the legal system without an adequate foundation in a primary source.

Consequently, the compliance of the Legislative Decree 44/2010 with the law clause and the hierarchy principle was challenged before our Constitutional Court. Although the Supreme Judge,

¹¹ For the purpose of this essay, it will be sufficient to make reference to G. ZAGREBELSKY, *Il sistema costituzionale delle fonti del diritto* [The constitutional system of the law sources], Torino, Giappichelli, 1984, 84-87; also L. CARLASSARE, *I regolamenti dell'Esecutivo e principio di legalità* [The rules of the Government and the legality principle], Padova, Cedam, 1966, 223; and E. CHELI, 1977. *Potere regolamentare e struttura costituzionale* [Regulation power and Constitutional structure], Milano, Giuffrè, 1977, 50.

¹² To our purpose we just quote V. ANGIOLINI, *Riserva di giurisdizione e libertà costituzionali*, Padova, Cedam, 1992, 176 ff.; A. PACE, *Problematiche delle libertà costituzionali. Parte generale*, Padova, Cedam, 2003, 176 ff.; F. SORRENTINO, *Le garanzie costituzionali dei diritti*, Torino, Giappichelli, 1998.

¹³ See the Legislative Decree, March 15th, 2010, n. 44, at *G.U.* 29 March 2010, n. 73.

¹⁴ In more general terms for what concerns the specific title of regulatory power entrusted to the Independent Authorities see P. CARETTI P. (edited by), *I poteri normativi delle autorità indipendenti, Osservatorio sulle fonti. 2003-2004*, Torino, Giappichelli, 2005; M. MANETTI, *Poteri neutrali e Costituzione*, Milano, Giuffrè, 1994, 61; G. DE MINICO, *Regole. Comando e consenso*, Torino, Giappichelli, 2005; P. BILANCIA P. (edited by), *La regolazione dei mercati di settore tra autorità indipendenti nazionali e organismi europei*, Milano, Giuffrè, 2012; F. LUCIANI, *Le autorità indipendenti come istituzioni pubbliche di garanzia*, Napoli, Edizioni scientifiche italiane, 2011; R. TITOMANLIO, *Potestà normativa e funzione di regolazione. La potestà regolamentare delle autorità amministrative indipendenti*, Torino, Giappichelli, 2012.

¹⁵ [Deliberation n. 680/13/CONS.](#)

having adopted a formal judgment of inadmissibility, didn't define the merit of the issue, he did affirm a very important principle useful to my aim, namely that: "Occorre preliminarmente osservare che le disposizioni censurate non attribuiscono espressamente ad AGCOM un potere regolamentare in materia di tutela del diritto d'autore sulle reti di comunicazione elettronica"¹⁶ [Preliminarily it must be noted that the challenged norms do not explicitly give to the AGCOM a regulatory power concerning the topic of copyright on the electronic communications network]. From my point of view¹⁷, the Court's statement would not in principle exclude that the lack of lawful basis of the Authority's regulatory power could determine the invalidation by the hand of the administrative judge of the Deliberation 680 for breach of the law clause. However it must be noted that recently the administrative Judge has deemed this De- liberation valid despite the lack of a legal basis¹⁸.

At the supra-national level – including both the Court of Justice and the European Court of Human Rights, whose understanding of the rule of law doesn't entirely overlap –¹⁹ the "rule of law"²⁰ concept corresponds to the Italian law clause, albeit with some differences. In the perspective of the rule of law the secondary normative sources of EU law are usually allowed a much wider discretionary power

in comparison with the room acknowledged to the Italian secondary sources. Consequently, the decisions from a public authority (containing general and abstract provisions) are allowed to intervene, and not only the Assembly's legislative acts²¹.

¹⁶ See [Constitutional Court, decision n. 247/2017](#), in part. Cons. 4.2. For an in depth analysis of the case before the Constitutional Court see M. AVVISATI, *Diritto d'autore in rete e Costituzione: concerto tra le fonti?*, in [Osservatorio sulle fonti](#), 2014, 3,1-24. For a lively debate among scholars on the Court's decision one can listen to the program "Presi per il web", on Radio Radicale, at 19.30, on December 6th, 2015, with interventions of I. ADINOLFI, G. DE MINICO, A. GAMBINO, M. OROFINO and O. POLLICINO.

¹⁷ Scholars have drawn opposite conclusions from the ruling of the decision. For some of them, the Court would have held, by way of an obiter dictum, that the norms under review were not attributing to the Authority a regulatory power on the subject matter. Hence the Administrative Tribunal could have annulled the regulation because of the lack by the Authority of the necessary power. On this point see G. DE MINICO, *Diritto di accesso e copyright: la parola va al Tar*, in [Il Sole 24 Ore](#), 2015, December 6; A. GAMBINO, *Regolamento Agcom, diritto d'autore e Corte costituzionale*, 2015, December 8, and F. SARZANA, *Corte Costituzionale ed AGCOM: inammissibile la richiesta del TAR, ma l'AGCOM non ha poteri regolamentari sul diritto d'autore*, in [Nòva Il Sole 24 Ore](#), 2015, December 4. Others believe on the contrary that the Court would have found a basis for the regulatory power of the Authority by means of a systematic interpretation of the provisions O. POLLICINO, M. BASSINI, *Le parole contano*, ovvero "tanto rumore per nulla". *Sulla (prevista) inammissibilità della questione di legittimità costituzionale della base giuridica del Regolamento AGCOM#ddaonline*, in [MediaLaws](#), 2015, December 4; P. COSTANZO, *Quale tutela del diritto d'autore in internet? (Osservazioni a margine della sentenza n. 247 del 2015 della corte costituzionale)*, in *Giurisprudenza Costituzionale*, 2015, 2343 ff.

¹⁸ Tar Lazio (Administrative Tribunal Lazio), [Decision. n. 04101/2017](#).

¹⁹ On the well known different opinions of the two judges see R. LAWSON, *Confusion and conflict? Diverging interpretation of the ECHR in Strasbourg and Luxembourg?*, in *The Dynamics of the protection of human rights in Europe: essays in Honour of Henry G. Schermers*, edited by R. Lawson, M. De Bloijs, Netherlands, Kluwer, 1994; P. VAN DIJK, F. VAN HOOF, *Theory and practice of the European Convention on human rights*, Netherlands, Kluwer, 1998, 21; A. ROSAS, *The European Court of Justice in context: forms and patterns of Judicial dialogue*, in *European Journal of Legal Studies*, 2007, 1(2).

²⁰ The literature concerning the "rule of law" is unlimited. For present comparative purposes, it is sufficient to refer to scholarly contributions based on recent case law developments; with regard to the European Charter of Fundamental rights see, among others: F. FABBRINI, *Fundamental rights in Europe: challenges and transformations in comparative perspective*, Oxford: Oxford University Press, 2014; D. CHALMERS, G. DAVIES, G. MONTI, *European Union law: Text and materials*, Cambridge, Cambridge University Press, 2014, 256-258; S. PEERS, *Taking Rights away? Derogations and limitations*, in *The EU Charter of fundamental rights: politics, law and policy*, edited by S. Peers, A. Ward, Oxford and Portland: Hart Publishing, 2004, 141; and D. TRIANTAFYLLOU, *The European charter of fundamental rights and the "rule of law": restriction in fundamental rights by reference*, in *Common Market Law Review*, 2002, 39(1), 53-64.

As for the European Convention on Human Rights see D. HARRIS, M. O'BOYLE, E. BATES, C. BUCKLEY, *Law of the European Convention on Human Rights*, Oxford, Oxford University Press, 2009, 345-349; W. A. SCHABAS, *The European Convention on Human Rights*, Oxford, Oxford University Press, 2015, 402 ff.

²¹ *Silver v. United Kingdom*, 5 Eur H.R. Rep. at 372. *Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. 271(47) (1979). For a wide case law survey of the Court of Justice referring to the content of the "provide for by law" requirement (art. 52, par. 1, CH) see *The EU Charter of fundamental rights: politics, law and policy*, edited by S. Peers, A. Ward, quoted.

Therefore, at the supra-national level the form of the normative act (whether parliamentary or governmental) is not as important as “how” the act is expressed. It is requested to be at least “adequately accessible”²² and “formulated with sufficient precision to enable the citizen to regulate his conduct.”²³

In addition to the first limit, the previous legislative intervention, the rule of law entails further substantial limits to the policymaker: namely the parameters of necessity and proportionality. The respect of both these criteria doesn’t constitute an incontrovertible issue with certain and objective outcomes; instead the binding contents of the above criteria depend on the margin of discretionary appreciation of the European judge²⁴.

The second limit (necessity) is a one-way approach, requiring the sacrifice of a right to be accepted only if it cannot be avoided. Conversely, the sacrifice cannot be accepted if an alternative in which that same right remains uncompromised is viable²⁵.

To clearly explain what the necessity consists of we can refer to a famous Court of Justice Decision, known as *Digital Rights Ireland*²⁶, which invalidated the entire Directive 2006/24 on Data retention. In order to prevent terrorism, the Directive allowed a massive collection of data of all persons using electronic communications services, including those persons who were not, even indirectly, in a situation liable to give rise to criminal prosecutions.

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

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

The third limit, proportionality, is the real test for the reasonableness of any legal provision. Costs and benefits must be assessed in order to check that a proper balance has been found between the interests embodied in the protected rights and those on which the legislative restriction is founded. The goal is to prevent limitations to those which do not grant any significant and corresponding advantage to the competing interests²⁷.

²² See ECHR, *Silver v. United Kingdom*, 5 Eur. H.R. Rep. 372 (87) (1980).

²³ See ECHR, *Sunday Times v. United Kingdom*, 2 Eur. H.R. Rep. 245, 271 (49) (1980).

²⁴ On this issue, see, with further references Y. ARAI-TAKAHASHI, *The margin of appreciation doctrine and the principle of proportionality in the Jurisprudence of the ECHR*, Cambridge, Intersentia, 2002, and A. LEGG, *The margin of appreciation doctrine in international human rights law: deference and proportionality*, Oxford, Oxford University Press, 2012

²⁵ The distinction between the necessity and the proportionality principles is easy to be drawn at the conceptual level, but it gives rise to difficulties in practice, also because “the case law often makes no clear attempt to separate them”, see *The EU Charter of fundamental rights: politics, law and policy*, quoted, 1480.

²⁶ Court of Justice (Grand Chamber), 8 April 2014, in C-293/12 and C-594/12, at interesting reflections on this issue can be found in O. LYNKEY, *The foundations of EU data protection law*, Oxford, Oxford University Press, 2015, 65. Lastly, the content of this decision was adopted in Advocate General’s Opinions in Case C-623/17 *Privacy International*, Joined Cases C-511/18 *La Quadrature du Net and Others* and C-512/18 *French Data Network and Others*; and Case C-520/18 *Ordre des barreaux francophones et germanophone and Others*.

²⁷ Court of Justice, Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v Netlog NV* (16 February 2012), para. 51. For a specific reference to data retention and electronic communications see the above quoted Court of Justice (Grand Chamber) (8 April 2014), in particular, the paragraphs n. 46, 69 e 70, in which the Court recalls its previous decisions and finds in the violation of proportionality one of the conclusive reasons for the invalidity of Data Retention Directive (2002/58). Just some scholars T. TRIDIMAS, *The general principles of EU law*, Oxford, Oxford European Union Law Library, 2007, chapters 3-5. This principle shouldn’t be confused with the limit concerning the “essential core” of the fundamental rights. This road map requires the legislator to respect the untouchable core of the right as his first duty. Only after having complied with it, the legislator would be able to shrink the residual part of the liberties in coherence with the proportionality mandates. As noted by P. CRAIG, *The Lisbon Treaty: law, politics, and*

An example of regulation which does not comply with the aforesaid principles may be found in the French Law Hadopi 2²⁸, which prevents internet users who visit websites suspected to infringe copyright laws from accessing the net. The law fails on at least three different grounds. Firstly, it balances heterogeneous values: a fundamental right (to access the net) vs. an economic interest (copyright). Secondly, it charges the former (the fundamental right) with excessive and disproportionate bounds. Finally, the restrictions applied were not proved to be necessary.

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

Turning now to the second constitutional safeguard we find the jurisdictional clause – known in the Italian doctrine as “riserva di giurisdizione”²⁹ – which is an expression of the principle of divided powers³⁰ which entrusts the power of judicial review solely upon the judiciary.

It means that limitations of constitutional rights and liberties require an authoritative act adopted by an independent judge deciding according to a due process of law.³¹

The jurisdictional clause is present also at the international level. In the European Court of Human Rights’ decisions, for instance, it is found in the weaker form of due process.³² In fact the European Convention on Human Rights (especially, Articles. 5-6) does not require EU Member States to confer power, as detailed above, only to a judge, allowing that it be entrusted also to different authorities,

provided that their decisions are based upon a fair hearing and an adequate motivation.

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

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

treaty reform, Oxford, Oxford University Press, 2010, 224, the Court has often merged the doctrine of proportionality with that of the “essential core”.

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

²⁹ For the references see note 9.

³⁰ This concept indicates a more or less rigid division of power between the Legislative, the Executive and the Judiciary aimed at the essential checks and balances required by democracy. For a supra-national analysis beyond specific States, see C. MOELLERS, *The three branches: a comparative model of separation of powers*, Oxford, Oxford University Press, 2013, 150.

³¹ The constitutionality of the Italian Legislative Decree 44/2010, above quoted, was challenged, not only for its alleged infringement of the law clause, but also upon the allegation that it did not comply with the “riserva di giurisdizione”. As we have said the Constitutional Court did not decide the case on the merits, so this controversial point is still open and could be represented before the Court in the future.

³² The ECHR has developed its own substantive requirements for a “tribunal.” In particular, the body must have the power of decision; operate on the basis of rules of law and after proceedings conducted in a prescribed manner; determine matters within its competence; motivate its decisions and be independent and impartial. See M. KUIJER, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR*, Nijmegen, Wolf Legal Productions, 2004, 175.

independent from those intended for *broadcast*.³³

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

4. *The debate on the best regulation of the Internet*

The forgoing remarks have reached the medium conclusion that there is no necessity for a formal modification of the Constitutions; at the same time they don't rule out a different need, namely that of an "Internet Bill of Rights"³⁴.

A conclusive and satisfactory answer cannot be found in the interpretation broad as it may be of some constitutional provisions written at a time when there was no awareness of this new reality.

The global situation does indeed urge a proper "Internet Bill of Rights". In doing so, another question is then raised: who is the constituent power of the Internet? In other words: which Authority shall be legitimated³⁵ to write the fundamental Charter of the Internet?

The hypothesis of one or more national States assuming such a role must be rejected because the a-territorial nature of the Internet would be incompatible with an Authority entrusted with powers constrained within State boundaries³⁶.

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

A) In this former model a State leaves all initiative to private bodies, and gets involved only when self-regulation, although necessary, is missing. This form of self-regulation takes place within the limits of the freedom of negotiation. As long as no problem arises, the State does not directly intervene. Nevertheless, the fact itself that the public authority may act turns its absence in-to a potential presence, on the assumption that 'if nothing is done State action will follow'³⁷.

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* negotiation³⁸. It appears to be a historically regressive model³⁹. That is because private stakeholders, left by themselves, have shown time and again

³³ Just to sum up: in that case the heart of the matter was represented by the transferability to the net of the content limitations enforced on television in protected time slots so as to safeguard juvenile public. Such limitations would result in an unjustified and disproportionate restriction of the right of adults to access the so-called hard content of the net. This is because the structure of the net does not lend itself to time-differentiated access, as it is the case with television. Therefore, the provisions of the Communications Decency Act 1996 banning patently offensive speeches (Lipschultz, 2008) on the net were deemed unconstitutional.

³⁴ Among the most significant voices, see L. LESSIG, *Reading the Constitution in Cyber-space*, in *Emory Law Journal*, 1996, 45(3), 7-18.

³⁵ R. W. RIJGERSBERD, *The State of Interdependence. Globalization, Internet and Constitutional Governance*, Hague, Asser Press, 2019, 49-68 and 213-230.

³⁶ C. REED, *Making laws for cyberspace*, Oxford, Oxford University Press, 2012, 30-34.

³⁷ See R. BALDWIN, M. CAVE, *Understanding Regulation*, Oxford, Oxford University, 1999, 126.

³⁸ The name "independent" was my intellectual creation launched in my previous work G. DE MINICO, *A Hard Look at Self-Regulation in the UK*, in *European Business Law Review*, 2006, 17(1), 211, in order to stress it to operate out of a legal framework like a *use prater legem*.

³⁹ 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.

that they pursue only egotistical interests⁴⁰. Therefore, the achievement of the common good depends on chance, whenever it happens to correspond with private interests and it has frequently proven to be unable to build the consensus necessary to condense and shape the common good in a supranational synthesis⁴¹.

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

Therefore, I propose a median hypothesis coherent with the order which links binding sources and self-regulation. First, the legislative power should be vested in a public supranational authoritative body, based on legal and binding provisions, which also defines the nature and scope of its powers.

“Some scholars have suggested that this new form of law should receive a new name: ‘cosmopolitan law’ or ‘world law’”⁴².

Second, the decision-making process of such a body should encompass a strong representation of private interests concerning the Internet such as entrepreneurs, web surfers, and consumers. Opposing stakeholders should discuss basic issues before a public authority, which is able to make a final decision after the different views have been listened to and fully taken into account. The problems of standing and those concerning the choice of interests to be admitted to such a procedure have been extensively explored by the American doctrine, which could be a reference on this point⁴³.

We find a complex relationship between binding law and consensual law.⁴⁴ A binding framework should be set defining the respective roles of law and self-regulation. Not only will the former have to give a foundation to the competence of the latter, but the law will also have to provide guidelines for the substantive regulation to be adopted, and to outline the structural features⁴⁵ of the private regulator so that adequate representativeness and the democratic nature of its decision-making processes remain assured⁴⁶. These restrictions are especially justified when self-regulation tends to bind a wider community than the one strictly represented by the self-regulator, i.e. whenever private self-regulation aims towards *erga omnes* effectiveness⁴⁷.

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

Nevertheless, it may happen that the correct relationship between heteronomy and autonomy⁴⁸ may

⁴⁰ J. KAY, J. VICKERS, *Regulatory reform: an appraisal*, in *Deregulation or reregulation? Regulatory reform in Europe and the United States*, edited by G. Majone, London, Pinter, 1990, 239, where the authors underline that the private bodies “may claim that their objective are in line with the public interest, but whether or not this is so will depend on the frameworks in which they operate”.

⁴¹ See G. TEUBNER, *Constitutional fragments. Social constitutionalism and globalization*, Oxford, Oxford University Press, 2012, 66.

⁴² J. KU, J. YOO J., *Globalization and Sovereignty*, *Berkeley Journal of International Law*, 31, 2013, 212.

⁴³ See, e.g. S.G. BREYER, R. B. STEWART, C. R. SUNSTEIN, A. VERMEULE, M. E. HERZ, *Administrative law and regulatory policy*, Alphen aan den Rijn, Wolters Kluwer, 2017, 869-881; M. SHAPIRO, *Past, Present, Future*, in *Virginia Law Review*, 1986, 72, 447; see also R. J. PIERCE Jr., *Rulemaking and the Administrative Procedure Act*, in *Tulsa Law Review*, 1996, 32, 185; and see B. SCHWARTZ, *Adjudication and the Administrative Procedure Act*, *ibid.*, 203.

⁴⁴ G. DE MINICO, *A hard look at self-regulation in the UK*, quoted, 197-200.

⁴⁵ L. B. SOLUM, *Models of Internet Governance*, in *Internet governance*, edited by L. A. Bygrave, J. Bing, Oxford, Oxford University Press, 2011, 61-69; S. BEATTIE, *Community, space and online censorship*, Burlington, Ashgate, 2009, chapter 5.

⁴⁶ R. H. WEBER, *Shaping Internet governance: regulatory challenges*, Heidelberg, Springer, 2009, 105. Also J. GOLDSMITH, T. WU, *Who controls the Internet?*, Oxford, Oxford University Press, 2006, 17.

⁴⁷ J. BLACK, *Constitutionalizing self-regulation*, quoted, 26. With specific reference to the Internet topic see J. CAVE, *Policy and regulatory requirements for a future internet*, in *Research Handbook on governance of the Internet*, edited by I. Brown, Cheltenham, Edward Elgar, 2013, 161.

⁴⁸ See C. MARSDEN, *Internet co-regulation*, Cambridge, Cambridge University Press, 2011, 58.

be found. But such an order does not seem to be wholly accepted in every State.⁴⁹ From such an approach could follow the entrusting of the rules on fundamental freedoms on line to the economic powers operating on Internet, that is to say by an uncontrolled self-regulation by the "management of private interest"⁵⁰. This kind of outcome would expose the net to the danger of a neo-corporative and selfish involution, given the absence of a heteronomous guide towards the common good.

5. The algorithms between rules and anarchy

The 'algorithm'⁵¹ object is the floor to verify which of the two regulatory alternatives previously examined, self-regulation or binding regulation, is more suitable and well tailored to the equality end.

A few lines just to highlight the relationship law/algorithms: the latter are tools to predict the future developments of human behaviours, and they have as fuel the ongoing bulk collection of data, Big

⁴⁹ For opposite approaches consult G8 Summit, [G8 Declaration renewed commitment for freedom and democracy](#), May 26-27, 2011, Deauville, France.

⁵⁰ The expression belongs to W. STREECK, P. C. SCHMITTER, *Community, market, State and associations? The prospective contribution of interest governance to social order*, in *Private interest government*, edited by W. Streeck, P.C. Schmitter, London, Sage, 1985, 16.

⁵¹ Assuming the impossibility to synthesize in a footnote the vast literature concerning the algorithms, we shall only recall the more outstanding voices: MAYER-SCHONBERGER, V., CUKIER, K. 2013. *Big Data*, Hartcourt Publishing Company; CITRON DK. 2008. 'Technological Due Process'. *Wash. U. L. Rev.* 85(6),1249; CITRON DK, PASQUALE F. 2014. 'The Scored Society: Due Process for Automated Predictions'. *Wash. L. Rev.* 89,1; CRAWFORD K, SCHULTZ J. 2014. 'Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms'. *B.C. L. Rev.* 55,93; BYGRAVE LA. 2001. 'Minding the Machine: Article 15 of the EC Data Protection Directive and Automated Profiling'. *Computer L. & Security Rep.* 17(1),17; ANANNY M, CRAWFORD K. 2016. 'Seeing without Knowing: Limitations of the Transparency Ideal and its Application to Algorithmic Accountability'. *New Media & Soc.* 1; DESAI DR, KROLL JA. 2017. 'Trust But Verify: A Guide to Algorithms and the Law'. *Harv. J.L. & Tech.* 31,1; HILDEBRANDT M. 2012. 'The Dawn of a Critical Transparency Right for the Profiling Era'. In *Digital Enlightenment Yearbook*, edited by J. Bus (ed.), 41; RICHARDS NM, KING JH. 2014. 'Big Data Ethics'. *Wake Forest L. Rev.* 49,393; KROLL JA, HUEY J, BAROCAS S, FELTEN EW, REIDENBERG JR, ROBINSON DG, YU H. 2017. 'Accountable Algorithms'. *U. Pa. L. Rev.* 165, 633; KIM P. 2017. 'Auditing Algorithms for Discrimination'. *U. Pa. L. Rev. Online* 166,189; NICHOLSON PRICE II W. 2017. 'Regulating Black Box Medicine'. *Mich. L. Rev.* 116,421; SCHWARTZ P. 1992. 'Data Processing and Government Administration: The Failure of the American Legal Response to the Computer'. *Hastings L.J.* 43,1321.

In the Italian doctrine, see S. GAETANO, *La decisione amministrativa tra vincolatezza, discrezionalità ed intelligenza artificiale: la prospettiva per la pubblica amministrazione di una responsabilità da «algoritmo»*, in *Rivista elettronica di Diritto, Economia, Management*, 2018, 2, 44; A.I. NICOTRA, V. VARONE, *L'algoritmo, intelligente ma non troppo*, in [Rivista AIC](#), 2019, 4; L. VIOLA, *L'intelligenza artificiale nel procedimento e nel processo amministrativo: lo stato dell'arte*, in *Il Foro Amministrativo*. 2018, 1598; G. AVANZINI, *Decisioni amministrative e algoritmi informatici*, Napoli, Editoriale scientifica, 2019; G. PESCE, *Il Consiglio di Stato ed il vizio della opacità dell'algoritmo tra diritto interno e diritto sovranazionale*, al sito della [Giustizia amministrativa](#); 2020; L. VIOLA, *Attività amministrativa e intelligenza artificiale [Administrative activity and Artificial Intelligence]*, in *Cyberspazio e Diritto*, 2019, 65; M. BASSINI, G. DE GREGORIO, M. MACCHIA, A. PAJNO, *AI: profili giuridici. Intelligenza Artificiale: criticità emergenti e sfide per il giurista [Artificial Intelligence: emerging problems and challenges for the jurist]*, in [BioLaw Journal](#), 2019, 205; I. M. DELGADO, *Automazione, intelligenza artificiale e pubblica amministrazione: vecchie categorie concettuali per nuovi problemi? [Automation, Artificial Intelligence and Public Administration: Old Conceptual Categories for Solving New Problems?]*, in *Istituzioni del Federalismo*, 2019, 643; D.U. GALETTA, J.C. CORVALAN, *Intelligenza artificiale per una pubblica amministrazione 4.0.? Potenzialità, rischi e sfide della rivoluzione tecnologica in atto*, in [Federalismi.it](#), 2019, 60; B. BOSCHETTI, *La de-strutturazione del procedimento amministrativo Nuove forme adattative tra settori e sistemi*, Pisa, Edizioni ETS, 2018; A. SIMONCINI, *L'algoritmo incostituzionale: intelligenza artificiale e il futuro delle libertà*, in [BioLaw Journal](#), 2019, 1; M. BASSINI, L. LIGUORI, O. POLLICINO, *Sistemi di intelligenza artificiale, responsabilità, accountability. Verso nuovi paradigmi?*, in *Intelligenza artificiale, protezione dei dati personali e regolazione*, edited by F. Pizzetti, Torino, Giappichelli, 2018; and G. RESTA, *Governare l'innovazione tecnologica: decisioni algoritmiche, diritti digitali e principio di uguaglianza*. In *Politica del Diritto*, 2019, 2; F. DONATI, *Intelligenza artificiale e giustizia*, in [Rivista AIC](#), 2020, 1.

Data⁵². We unknowingly leave our data during our negotiations, querying the search engines or participating to virtual meetings on the net. Therefore the algorithms work on increasing quantities of raw data which are interpreted by virtue of parameters assigned by men to the machine. These data are processed according to their specific logic and are expected to anticipate the predictive assessments on which conducts could likely occur.

The most common use of algorithms is to make decisions about credit, employment, education, police investigations and other fields⁵³. So it will be a machine, the algorithm, to decide whether a mortgage can be allowed or denied, or to quantify the price of insurance, and to drive the consumers' purchasing attitudes. Among the advantages of the algorithms, one can underline their power of enhancing overall government and public service efficiency, "of optimizing bureaucratic processes and providing real-time feedback and predicting outcomes"⁵⁴.

The European Union law has addressed the algorithms with the EU Regulation 2016/679⁵⁵ from the perspective of the individuals, i.e. the recipients of the automated algorithmic decision-making. In fact, the GDPR has delivered a catalogue of individual rights especially in the articles 12, 13 and 22.

With the algorithm, the perennial clash between antagonist values is at stake: on the one side, the privacy of the data subject and on the opposite, the human ambition to let future conducts be regulated by a machine⁵⁶. Now this debate can entail the prevalence of one or the other, or better a measure of balanced coexistence, which is the solution selected by the GDPR.

To understand what is at stake, it is worth to briefly pinpoint the changing identity of the right to privacy.

Born as a right to be left alone⁵⁷, the technological evolution translated it in the digital scenario as the right of the data subject to monitor and control one's data in order that the virtual image be brought to match one's internal forum: i.e a right to digital self-determination⁵⁸.

This right has now put off its old cloth for a new one when it has faced the algorithm. To give an idea of its actual *status*, we have to think about it in terms of the right of the individual to take part in the procedure of prognosis *ex ante*. This fundamental right is no longer based on the informed consent, because it would provide an insufficient protection; on the contrary privacy appears as the individual's claim to play as chief-actor in the procedure leading to the predictive analysis of his conduct, so that he will be able to verify the algorithm's outcomes.

Then this right, if compared to a geometric figure, composes now a triangle: at one corner there is the data subject, on the other the data controller and at the top a new subject intervening into the relation, the community.

Looking beyond the individual right, we face a collective liberty. This feature is not meant to refer to the different nature of the owner, but rather to a different play field: the collective ground. The effects of the predictive analyses are widespread over the entire social category involved by the algorithmic decision-making, and the predictive outcomes become the basis of future public policies

⁵² Let us recall our recent essay for deep analysis between the BD and the legal categories *Big Data e la debole resistenza delle categorie giuridiche*, in *Diritto Pubblico*, 2019, 89-117.

⁵³ G. MALGIERI, G. COMANDÉ, *Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation*, in *International Data Privacy Law* 2017, 7(4), 243-244.

⁵⁴ B. LEPRI, N. OLIVER, E. F. LETOUZE, A.P. PENTLAND, P. VINCK, *Fair, Transparent, and Accountable Algorithmic Decision-Making Processes*, in *Philosophy & Technology*, 2018, 31,611-612.

⁵⁵ [REGULATION \(EU\) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC](#) (from here GDPR).

⁵⁶ M.E. KAMINSKI, *The right to explanation, explained*, in *Berkeley Tech Law Journal*, 2019, 34, 189.

⁵⁷ Clearly see S.D. WARREN, L.D. BRANDEIS, [The Right to Privacy](#), in *Harvard Law Review*, 1890, 5, 193-220, also at.

⁵⁸ The necessary reference is to an Italian Scholar, S. RODOTÀ, *Tecnologia e diritti*, Bologna, Il Mulino, 1995, chapters 2 and 3, for his anticipation of a privacy moving towards the digital landscape.

affecting it. In short, privacy has left the individual dimension to drift into a collective landscape ⁵⁹. We argue this process only partially corresponds to how the GDPR was intended to work.

6. *The Regulation 2016/679: sufficient framework for the Algorithms?*

The GDPR is based on two legs: the first constituted by the new fundamental rights of the data subject, the other by the accountability regime. The answer of GDPR does not appear totally satisfying because it is sufficiently well set on the side of rights, less on the side of accountability⁶⁰.

It is time to delve into the European Regulation.

The fact that a binding discipline has been adopted scores a point for the regulatory thesis rather than the anarchy. Actually the European legislator has chosen to roll out a list of rights which may be activated by the data subject instead of leaving this issue to the self-regulation of the private bodies. As every law it presents lights and shadows. It is easy to note that in some part the text is not remarkable in clearness; it creates loopholes denying *de facto* the effectiveness of the rights, and it leaves too much room to Member States' discretionary power. At the same time the GDPR is an undeniable cornerstone in the direction of the new privacy if compared with the previous EU's Data Protection Directive (DPD)⁶¹.

The underlying fear is that the machine may decide instead of the human mind. We are running the serious risk of a new capitalism, moving from the dominance of the profit concentrated in few hands, to the dominance of the obscure technology, unfettered by any democratic control. This eventuality has attracted the European attention, in fact the GDPR, art. 22, par.1, has been keen to place narrow limits to employ of algorithms. So we can affirm that a new category of the algorithmic based act has arisen which complies with a legal framework. These limits refer to a precise relationship between the individual and the machine, aiming to avoid the dominance of the machine over the human mind. If an "automated individual decision-making" is allowed, art. 22 provides a caveat, setting out a series of rights for the data subject.

Firstly he has the right not to be submitted to a decision "solely based on an automated processing". This wording could mean either a right to object to such decisions, or a general prohibition of a decision-making only algorithmic based. To this regard the 29 WP⁶² has chosen the latter interpretation giving a preferential protection to the data subject. So the authority utilizing the algorithms will have to justify in which one of the three exceptional situations provided by art. 22 the case *de quo* falls.

We have given only an example of a legal gap remedied by the soft law of 29WP to the advantage of human rights; this is not the sole omission since the GDPR is not so prescriptive as it should be. In fact its text resembles more to a Directive than to a Regulation.

Coming back to the features of art. 22, it composes the new statute of the privacy, as illustrated below. It is a *minimum* standard which cannot be downgraded, but only upgraded, by the State. To be more precise, art. 22 - joined with articles 13 and 14 - recognizes the core right: to be immediately informed about "the *existence* of automated decision-making". Nevertheless, this provision sets out just a mere declaration of the right without specifying its content.

After having been notified about the start of an algorithmic procedure, the data subject should have the right to open the black box of the algorithm. At least he should have access to the information

⁵⁹ M.F. De Tullio, *Uguaglianza sostanziale e nuove dimensioni della partecipazione politica*, Napoli, Editoriale scientifica, 2020, 139-140.

⁶⁰ The accountability profile will not be dealt with in this essay because it falls out of the present investigation.

⁶¹ See for all L. EDWARDS, M. VEALE, *Slave to the Algorithm? Why a 'right to an Explanation' is Probably not the Remedy you are Looking for*, in *Duke L. & Tech. Rev.*, 2017, 16,17, 44.

⁶² A29 WP, GUIDELINES ON AUTOMATED INDIVIDUAL DECISION-MAKING AND PROFILING, 17/EN. WP 251rev.01 (Feb. 6, 2018), 20.

concerning the kind of input uploaded in the machine, the score assigned to each component, the criteria of evaluation, “the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject” (art. 13, par. 2, lett. f). He should be informed about the “factors taken into account for the decision-making process, and [...] their respective ‘weight’ in an aggregate level.”⁶³ He should be told how a profile used in the algorithmic decision-making is built, “including any statistics used in the analysis”⁶⁴. In other words he is entitled to such a disclosure that lets him retrace the path of the algorithm and reconstruct the final decision affecting him.

Art. 22 further provides the right of the data subject to human involvement in the algorithmic decision-making. This means that a person must be present, in order that the objections of the data subject may be listened to and taken into account, for the purpose of modifying the initial automated decision if it was unfair, biased or wrong. In other words, a decision-maker, both public and private, utilizing the algorithm doesn’t satisfy this requirement by having a human rubber-stamp on algorithmic decisions; but “it must do more, for example, with a human oversight who has the authority to modify substantially the decision”⁶⁵. So the right to be heard excludes that the human intervention could be reduced to a contact by email; it must consist at least in a person to whom the data subject could expose in an adversary way his point of view.

In the attempt to normalize this bundle of rights, the GDPR puts the rights relating to the privacy of the data subject in the same field of other antagonistic values, for example, trade secrets. No *a priori* superiority⁶⁶ is accorded to one to the prejudice of another. The reason of the equivalence is to be found in the compliance of GDPR with the European Charter, that has denied the existence of a legal hierarchy of fundamental rights.

It follows that one can deduce useful suggestions to solve the said conflict also from the part of the GDPR which is not binding. The Recital 63 could offer a tool when it indicates that the trade secret may not extend so far as to justify the refusal of any information about the algorithms. On the other hand, the right to disclosure cannot reach the source code, but only the features and the specific logic of the employed algorithms. In this balancing *querelle* a wide discretion is vested upon the INAs, who are charged to define an equilibrate measure of coexistence without useless sacrifice of one right to the advantage of the opposite one, as claimed by the former European Data Protection Supervisor⁶⁷. To delve deeper, the right to access the algorithmic logic must be guaranteed as much as possible, but its extension is variable: it shortens or lengthens according to the recipient of the explanation. If the information is addressed to the data subject, the communication will extend to the logic of the algorithm functioning, but without reaching the source code. On the contrary, if the conflict of rights arises in court, the judge will have the authority to open the source code and conduct the judicial review over it. This enlargement of powers takes place because the trade secret is a weaker value than the correct functioning of justice and therefore it must step back.

In this clash of rights there is a clear distance between a regulated object and an unregulated one. In USA the matter falls under FOIA⁶⁸ that includes trade secrets among several exceptions to transparency. Consequently, the companies can oppose this secret as a binding bar to disclosure requested by the claimer, regardless its private or public nature.

We believe this issue should be analyzed from the perspective of the basic assumptions of a legal

⁶³ A29WP, GUIDELINES ON AUTOMATED INDIVIDUAL DECISION-MAKING, at 31.

⁶⁴ ID.

⁶⁵ M.E. KAMINSKI, *The right to explanation, explained*, quoted, 201.

⁶⁶ G. MALGIERI, G. COMANDÉ, *Why a Right to Legibility of Automated Decision-Making Exists in the General Data Protection Regulation*, quoted, 23.

⁶⁷ See P. HUSTINX, *Additional EDPS Comments on Data Protection Reform Package*, Bruxelles, 15 March, 2013, 21-22, in which the author reminds us that the European Data Protection Supervisor suggested that a more concise balance rule should be adopted, “taking into account that there are many situations that cannot be foreseen and that need to be assessed in concreto on a case-by-case basis”.

⁶⁸ [Freedom of Information Act, 5 U.S.C.](#) § 552, as amended by public law no. 104-231, 110 STAT. 3048, (b) (2012), exemption at n. 4.

order. First of all, according to a common rule of legal interpretation, in case of doubt transparency should prevail. Furthermore, it must be taken into account that a system requirement mandates openness as a tool to hold the government accountable to its citizens.

Some USA Scholars⁶⁹ have reasoned that the consequence of this regulatory uncertainty has entailed that trade secret protection prevails over the right to knowledge. If the code, although belonging to a private owner, is used to perform a public function, it should be attracted into the public discipline: “[t]his governmental function requires that companies submit to the same transparency requirements as other government agencies, ensuring transparency”⁷⁰.

Unfortunately, this statement has remained a scholarly position; indeed, the absence of a rule has played in favour of private companies, which have hidden their decisions affecting people behind the alibi of trade secrets.

By contrast, in the EU the GDPR, shadows apart, has offered a key for a correct interpretation: the trade secret cannot be an alibi to refuse any information to the data subject or to the judge. One can say that the GDPR could have done more, affirming the superiority of fundamental rights over economic liberties. However, in this case the GDPR would have illegally overcome the equivalence stated in the Charter of Fundamental Rights of the European Union, as said before.

Further ambiguities may be found in the GPDR as to the existence of the right to explanation, which is not so certain as it should be. Some Scholars⁷¹ have denied this right because the GDPR does not explicitly mention it in the text, relegating it in the Recital 71. Others have not hesitated to qualify this reasoning as wrong because Recital 71 states that “suitable safeguards [...] should include specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision”⁷².

From our point of view three reasons could support the existence of the right in discussion.

The first reason is related to the value of the recitals, which offer an helpful tool to the judge in front of unclear provisions. Dismissing the right to explanation because the recitals do not have a binding nature would be too formalistic, and “less attentive to the Court of Justice case law which regularly uses recitals as an interpretative aid”⁷³ before provisions too much vague. It is just the case of the right to explanation.

The second reason is found in the consideration that the right to explanation is the final benefit of the rights previously and explicitly accorded by the text. Therefore, the right of the data subject to contest or state his point of view could not be fully exercised without a broad and clear motivation on which the automated decision-making has been adopted⁷⁴.

⁶⁹ We refer to D.S. LEVINE, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, in *Fla. L. Rev.*, 2007, 59, 135 “When private firms provide public infrastructure, commercial trade secrecy should be discarded (at least in its pure form) and give way to more transparency and accountability.”, at 140; see also D.K. CITRON, F. PASQUALE, *The Scored Society: Due Process for Automated Predictions*, in *Wash. L. Rev.*, 2014, 89(1),26.

⁷⁰ AM. CARLSON AM., *The Need for Transparency in the Age of Predictive Sentencing Algorithms*, 2017, in *Iowa L. Rev.* 103,329.

⁷¹ S. WACHTE, B. MITTELSTADT, L. FLORIDI, *Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation*, in *International Data Privacy Law*, 2017, 7(2), 76.

⁷² M.E. KAMINSKI, *The right to explanation, explained*, quoted, 13.

⁷³ M. BRKAN, *Do Algorithms Rule the World? Algorithmic Decision-making in the Framework of the GDPR and Beyond*, in *SSRN Electronic Journal*, 2017, 16.

⁷⁴ As clearly stated by the french Constitutional Court in its decision no. 2018-765 DC, § 70-71: “la décision administrative individuelle doit mentionner explicitement qu’elle a été adoptée sur le fondement d’un algorithme et les principales caractéristiques de mise en œuvre de ce dernier doivent être communiquées à la personne intéressée, à sa demande. Il en résulte que, lorsque les principes de fonctionnement d’un algorithme ne peuvent être communiqués sans porter atteinte à l’un des secrets ou intérêts énoncés au 2° de l’article L. 311-5 du code des relations entre le public et l’administration, aucune décision individuelle ne peut être prise sur le fondement exclusif de cet algorithme. D’autre part, la décision administrative individuelle doit pouvoir faire l’objet de recours administratifs, conformément au chapitre premier du titre premier du livre quatrième du code des relations entre le public et l’administration. L’administration sollicitée à l’occasion de ces recours est alors tenue de se prononcer sans pouvoir se fonder exclusivement sur

Among these rights, there is the right to challenge an automated decision before a judge. Hence the issue of how much we are entitled to know about any automated system is strictly connected to the final access to a court: “[h]iding the inner workings of an algorithm from public view might seem preferable, to avoid anyone gaming the system. But without transparency, how can decisions be probed and challenged?”⁷⁵.

The third and key reason is grounded on a fundamental principle: the democratic roots of the entire European architecture. This entails that every public power, not only the representative one, must be at the service of the will of the citizens; consequently, in order to comply with this requirement the power must always remain in plain sight, so as to submit itself to the ongoing citizens’ control. The lack of motivation prevents the data subject to check how the public power has used the algorithms having effects on him. Should this case occur, we would have an updated version of the arbitrary and unmotivated oppression of individual rights and liberties of which the history of modern democracies delivers many examples.

As mentioned above, the algorithmic decision-making in Europe can be complex, subject to error, bias and discrimination, in addition to triggering dignity concerns. It is however a welcoming kick off if it is compared with the lack or regulatory uncertainty in the American system, where the policy maker’s silence or opacity is already expression of a precise policy: leave the conflict between men and the machine to the private interest government.⁷⁶ Consequently, the satisfaction of the common good is unlikely, depending on its remote and occasional coincidence with the private interests⁷⁷.

7. Fair and biased algorithms?

Another unregulated or less regulated aspect of the algorithms is their use in the police trial or predictive analysis, during which the algorithmic-based risk tools serve to “support inform decisions on managing offenders according to their risk profiles”. The algorithm allows shorter terms of jail if public safety is safeguarded. But there is an undeniable con, namely, the danger to influence in an

l’algorithme. La décision administrative est en outre, en cas de recours contentieux, placée sous le contrôle du juge, qui est susceptible d’exiger de l’administration la communication des caractéristiques de l’algorithme. [...] En dernier lieu, le responsable du traitement doit s’assurer de la maîtrise du traitement algorithmique et de ses évolutions afin de pouvoir expliquer, en détail et sous une forme intelligible, à la personne concernée la manière dont le traitement a été mis en œuvre à son égard. Il en résulte que ne peuvent être utilisés, comme fondement exclusif d’une décision administrative individuelle, des algorithmes susceptibles de réviser eux-mêmes les règles qu’ils appliquent, sans le contrôle et la validation du responsable du traitement”. [“an individual administrative decision must explicitly mention that it has been adopted on the basis of an algorithm and the main characteristics of implementing the latter must be communicated to the person in question, upon their request. It follows that, when the principles of the functioning of an algorithm cannot be communicated without infringing on one of the secrets or interests set out under Section 2° of Article L. 311-5 of the Code of the Relationship Between the Public and the Administration, no individual decision shall be made on the exclusive basis of this algorithm. On the other hand, the individual administrative decision must be subject to administrative recourse, in compliance with the first chapter of the first title of the fourth book of the Code of the Relationship Between the Public and the Administration. The administration sought for this recourse is then required to decide without being exclusively based on the algorithm. Furthermore, the administrative decision, in the event of a dispute, is placed under the judge’s review, who may require the administration to disclose the characteristics of the algorithm. [...] Lastly, the data processor must ensure managing the algorithmic processing and its changes in order to be able to explain, in detail and in an intelligible format, to the person in question how the data processing has been implemented to him/her. It results that, as an exclusive basis for an individual administrative decision, algorithms likely to revise by themselves the rules to which they apply cannot be used, without the oversight and validation of the data processor.”].

⁷⁵ S. OLHEDE, P.J. WOLFE, *When Algorithms go Wrong, Who is Liable?*, in *Significance*, 2017, 14, 8-9.

⁷⁶ Just to use a definition due to W. STREECK, P.C. SCHIMTTER, *Community, market, state and associations? The prospective contribution of interest governance to social order*, in *Private interest government: beyond market and state*, edited by W. Streeck, P.C. Schimtter, London, Sage, 1985.

⁷⁷ J. KAY, J. VIKERS, *Regulatory reform: an appraisal*, in *Deregulation or re-regulation? Regulatory reform in Europe and the United States*, edited by G. Majone, London, Thomson Learning, 2019, 239.

unequal direction the predictive evaluations if based on biased and discriminatory algorithmics.

A good kickstart to improve the fairness and effectiveness of risk tools is a reference to the famous case, *Loomis*, held in the American courts.⁷⁸

The COMPAS software is the focus of this case; it was used to assess the risk of recidivism of the petitioner, L. Eric Loomis, in order to assist the judge in determining the alternative measures to criminal punishment.

We can synthesize the defense of *Loomis* as follows: the algorithm was based on biased assumptions; it violated the defendant's right to be sentenced upon accurate information, because the proprietary nature of COMPAS prevented him from assessing its accuracy⁷⁹ and it was nevertheless *de facto* employed to determine his punishment.

The judge rejected the first ground of appeal, not because he recognized *Compass*'s fairness, but because he claimed the decision was taken as if *Compass* had never entered the courtroom.

In response to the second ground of appeal, the judge stated that COMPAS didn't violate the defendant's right to due process, because the proprietary nature of COMPAS didn't prevent defendant to see inside COMPAS at least up to certain operating level of the algorithm. The Court denied the incidence of COMPAS on the final decision, because it would have reached the same conviction and quantum of punishment also without COMPAS.

We believe that the ruling is more meaningful for its indications of judicial policy than for the concrete reasoning which is instead exposed to critics. The judge opens a space to the algorithm in the proceedings, but with heavy caveats. The fundamental condition is that the algorithm can help only to determine the alternative penalties to imprisonment; it must not intervene in the guilty/not guilty judgment, but only in the evaluation of the danger of recidivism. It must apply only to minor crimes.

And the last condition is that: "Providing information to sentencing courts on the limitations and cautions attendant with the use of COMPAS risk assessments will enable courts to better assess the accuracy of the assessment and the appropriate weight to be given to the risk score".⁸⁰

The dark points of this reasoning emerge in the comparison with a similar case of another Supreme Court, which is more consistent between premises and conclusions than the Supreme Court of Wisconsin.

For scientific clarity it must be said that COMPAS is just one of the many algorithms used in pretrial to predict recidivism. It was passed under the X-rays by a Study of *ProPublica*.⁸¹ The study concluded that COMPAS discriminated against Blacks because its algorithm produced a much higher false positive rate for Blacks than Whites, meaning that it overpredicted high risk for Blacks⁸².

What had COMPAS done to deserve such a negative opinion? *Compass* had underestimated the recidivism of Whites and overestimated that of Blacks, which instead proved to be wrong because of the evidence that Blacks had committed fewer crimes than the Whites.

This prediction error was due to the fact that Blacks are over-represented in the criminal rankings and therefore their data are more present as raw material on which the algorithmic machine works to deduce future behavioral predictions.

In force of the COMPAS assessment tool the Blacks are almost twice as likely as Whites to be labeled a higher risk but they actually do not re-offend. It makes the opposite mistake regarding Whites: they are much more likely than blacks to be labeled lower risk but go on to commit more crimes.

⁷⁸ Supreme Court of Wisconsin, *State of Wisconsin v. Eric L. Loomis*, Case no. 2015AP157-CR, 5 April – 13 July 2016.

⁷⁹ *Id.*, para. 34, 13.

⁸⁰ *Id.* para. 66, 28.

⁸¹ J. ANGWIN, J. LARSON, S. MATTU, L. KIRCHNER, *Machine Bias*, in *ProPublica*, 2016, May 23.

⁸² M. HAMILTON, *The biased algorithm evidence of disparate impact of Hispanics*, in *American Criminal Law Review*, 2019, 56(4), 1557.

The basic flaw is in the gathering of data concerning people who have already committed crimes. Among them, black people are a majority. Therefore, a result of excessive recidivism against black people is consequential. This architecture could be defined 'a vicious circle' and be visualized as a dog biting its tail, because it continues to condemn those who have already made mistakes extending to the future a presumption of guilt. While those who have not made a mistake are out of COMPAS, which chooses for this category a presumption of innocence, excluding any later wrongdoing.

The case based on COMPAS is useful for us to reflect in more general terms on how to design an algorithm in such a way that its result could be fair and balanced. Two reliable considerations arise from COMPAS: a) even though an algorithm is not based on discriminatory assumptions, it cannot be excluded that it may lead to discriminatory outcomes; b) if an algorithm moves from a discriminatory basis, its outcome will be inevitably unequal and unfair.

We are interested in a closer look at the first hypothesis.

It occurs when the elements included in the algorithm arise from questionnaires that are inherently more suitable for the white population rather than the black people, because they assume the postal code, friendships, eating habits, faith, education received, family environment as detrimental elements. A high score is given as a symptom of recidivism, only because it is not taken into account that their meaning changes according to the ethnic group to which they refer.

In the Propublica report it is said that "Northpointe's core product is a set of scores derived from 137 questions that are either answered by defendants or pulled from criminal records. Race is not one of the questions. The survey asks defendants such things as: 'Was one of your parents even sent to jail or prison?' 'How many of your friends/acquaintances are taking drugs illegally?' and 'How often did you get in fights while at school?' The questionnaire also asks people to agree or disagree with statements such as 'A hungry person has a right to steal' and 'If people make me angry or lose my temper, I can be dangerous'⁸³.

Thus these absolute and static models are automatically used regardless of the person to whom they are applied, and with an automatic transfer they end up assigning typical labels and legal assessments which will then result to be prejudicial.

We have to add one further consideration: minority groups, such as Black people, do not receive the levels of representation in validation studies typically granted to White populations. Moreover, some studies have shown that specific instruments demonstrate for particular minority samples a predictive accuracy which is recurrently poorer compared with White populations.

Therefore, whereas a particular tool has performed well on its training sample, it doesn't necessarily work well on another sample lacking a validation *ad hoc*. Its good performance is menaced by the potential for risk-relevant differences in offenders and in the features of the study design.

As to the relation between the algorithm and its use in a process, we can argue that in the absence of rules that impose validation of the algorithm and prescribe construction architectures modulated according to the characteristics of the social or ethnic group to which they apply, the judicial system is faced with an alternative.

a) The entrance of the algorithms in the process is allowed provided that they have been previously validated, i.e. tested to a changing social sample, as the Canadian Court did. In this event both parties should be allowed to see inside the machine, open to a full-court adversarial proceeding. In other words, we affirm that the key remedy to the black box discrimination is transparency, as some Scholars say: "[A] system whose workings are mysterious; we can observe its inputs and outputs, but we cannot tell how one becomes the other". If the problem of algorithmic discrimination is likely to lay in manipulations, then indeed peering inside the black box seems the answer⁸⁴.

⁸³ J. ANGWIN, J. LARSON, S. MATTU, L. KIRCHNER, [Machine Bias](#), quoted.

⁸⁴ F. PASQUALE, *The Black Box Society: The Secret Algorithms That Control Money and Information*, Cambridge and London, Harvard University Press, 2015, 3. His thought has been retaken by A. CHANDER, *The Racist Algorithm?*, in *Michigan Law Review*, 115, 2017, 1023-1039.

b) If the algorithms are taken in the process as non-opening black boxes, they will function as insidious evidence of danger and guilt, because they assign these labels on the basis of the absolute presumption that ‘what happened will continue to occur in the future’.

This second hypothesis is a shortcut that sends the justice system centuries back, relegating it in a medieval darkness. Indeed, this kind of algorithm non governed by a binding discipline determines an algorithmic anarchy. It involves the reproduction of injustices, already heavy on minorities, with the aggravating circumstance that discrimination does not reveal itself, because it is hidden under a ‘patina of fairness’⁸⁵.

The algorithmic anarchy has replaced the intuitive predictive investigation because it prides itself of being based on mathematical models, which are claimed to be immune from all-too-human bias. But we are arguing that this assumption is unwarranted.

In fact the algorithmic predictions boasting their ‘patina of legality’ may be more dangerous for fundamental freedoms than the old predictive analyses based on the convictions of the judge. This is because the appearance of objectivity of modern predictions could generate a presumption of fairness difficult to overcome. If the correctness of the algorithmic outcome is assumed as a starting point, the judge will hardly have any evidence to the contrary.

Similarly, it is not comforting to say that the judge might not stick to the algorithm, taking it as any other factor in the trial, because *de facto* once the algorithm comes into the trial it exercises a decisive influence on the judge’s conviction. In order not to follow it the judge should rely on a contrary evidence supported by scientific authority as the algorithm pretends to have. We could draw a parallel between two forms of ‘capture’: the judges are captured by algorithms like the Independent Authorities have been captured by the regulated.

For example, in the Loomis case the judge stated that regardless of the algorithmic outcome, he would have pronounced the same decision against Loomis. But nobody can demonstrate that this statement is true; the entrance of COMPAS into the courtrooms remains an undeniable fact and no one can behave as COMPAS had been left out.

Certainly more correct and respectful of the presumption of innocence is the attitude held by the Canadian Supreme Court which in the Ewert case decided for the unreliability of algorithms, whose validity had not been previously tested⁸⁶. The Court ruled out their use for judicial purposes unless the algorithms were accompanied by the evidence excluding their unfairness, otherwise they should be *tamquam non esset*. The Canadian Supreme Court, ruling in Ewert’s favor, determined that without evidence of the algorithm being free of cultural bias, it was unjust to use this tool on indigenous inmates.

In sum, to be fair and equal, the algorithms must be regulated, and the crucial rule is that equal situations deserve the same treatment, and different situations must receive a differentiated discipline. “Substantive equality requires more than simply equal treatment” as treating groups identically may itself produce inequalities⁸⁷.

Given a regulatory anarchy, algorithms supported by a claim of universality, objectivity and neutrality will be more unfair in substance than medieval prejudices and beliefs. In a political environment which claims to pay attention to social policies, these machines will perpetuate the age-old injustices already afflicting the weaker classes and minority ethnic groups. The sole but aggravating difference would be that the algorithm will hide behind an apparent legality.

8. *The new approach of the Italian Boldrini Committee*

It is time now to analyze the Italian experience of the Boldrini Committee with the view to assess whether its proposal, the Declaration of Internet Rights, may represent a regulatory

⁸⁵ F. PASQUALE, *The Black Box Society: The Secret Algorithms That Control Money and Information*, quoted, 15.

⁸⁶ Ewert v. Canada, 2018 S.C.R. 30, para. 66 (S.C.C. June 13, 2018).

⁸⁷ Ewert v. Canada, 2018 S.C.R. 30, para. 54.

framework complying with the indispensable requirements of equality and legality. The satisfaction of such requirements constitutes the conditions for an effective exercise of fundamental rights in the Net.

On July 28th, 2014 the President of the Italian Chamber of Deputies, Laura Boldrini, opened the works of the Committee she had established to draw a Declaration of Internet Rights⁸⁸.

Preliminarily, one must note that neither the law nor the Regulation of the Chamber of Deputies gave to the President the power to nominate a Committee of study in a composition of both Deputies and experts. However, it was the exercise of a legitimate faculty aimed at soliciting from the decision-maker a future regulation of the Internet oriented towards the normative framework laid down in the Declaration⁸⁹.

For this reason, we cannot agree with the criticism⁹⁰ made against the legitimacy of the Committee's work, which was not intended to compete with the Parliamentary committees, lacking the correspondent legal powers. Its power was merely one of moral suasion towards the Legislator.

It was the first time in Italy⁹¹ that in a Parliamentary framework a Committee was given the task to elaborate a Declaration of Rights for the Internet⁹². This is true but we have to remember that the Committee was able to rely on and refer back to previous proposals which the Berkman Centre at Harvard University counted to a total of 87⁹³.

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

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

The author despite having a national character didn't write the Charter following the model of Bills of national origin. Instead, it shared with the Charters originating from international subjects contents which went much beyond narrow national borders⁹⁴. Proof of this is the entire set of values and rights which followed the corpus of principles shared by the international community on the theme of fundamental rights. This was of course also necessary because of the borderless nature of Internet.

The mixed origin of the author, public and private, meant the Charter did not draw a framework in

⁸⁸ The [whole documentation](#) and official meetings of this Committee are found in the [website of Chamber of Deputies](#).

⁸⁹ See the speech given by the President L. Boldrini during the first meeting of the Committee on July 28th, 2014: "Certo, si tratterebbe di forme di regolamentazione diverse dal canonico modello normativo, costituito esclusivamente da regole e sanzioni; si tratterebbe invece, a mio avviso - ma è un aspetto su cui vorrei aprire un confronto - di favorire, alla luce delle caratteristiche proprie della materia, un approccio più orientato ad individuare principi generali entro i quali bilanciare i diversi diritti in gioco". ["These should be, in my opinion, forms of regulation which are different from the usual normative model based exclusively on rules and penalties. They should favor instead - but I want to open a discussion on this - an approach, taking into account the characteristics of the subject, more directed at determining the general principles within which to balance the various rights that are in play."] (*My translation*).

⁹⁰ For them see L. NANNIPIERI, *Sulla Dichiarazione dei diritti in Internet. Alcune notazioni critiche*, in *Informatica e diritto*, 2014, 23(2), 127-128.

⁹¹ So it was underlined during, the 10th annual meeting of the IGF on the theme "Evolution of Internet Governance: Empowering Sustainable Development", in João Pessoa, Brazil, on November 10 to 13, 2015, where the Italian proposal for an Internet Bill of Rights was presented as topic of an entire workshop session, whose I took part with a [speech](#).

⁹² For the final English version of this Document look at the [official website](#).

⁹³ L. GILL, D. REDEKER, U. GASSER, *Towards Digital Constitutionalism? Mapping attempts to craft an Internet Bill of Rights*, [Berkman Center Research Publication](#), 2015, November 9: in this study the Bills are classified according to their author, content, and their value, the latter is meant whether the bill was binding or not.

⁹⁴ Just to give the most significant examples: Council Of Europe, [Declaration by the Committee of Ministers on Internet governance principles](#); Civil Society and the Trade Union Advisory Committee to the OECD, [Seoul Declaration to the OECD Ministerial Conference on the future of the Internet economy](#); Internet Governance Forum (United Nations), [Internet Rights & Principles Dynamic Coalition](#)..

which private interests would prevail. Examples of the latter model⁹⁵ are those Charters focused mainly on the rights of the users or of the Over the Top, while the Italian Bill focuses on the fundamental rights of the citizens and addresses the indispensable limits of the public powers to safeguard the essential content of liberties.

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

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

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

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

We can say that the *iter* of the Italian Bill presents its own uniqueness: indeed, it has not followed the steps of the *Marco Civil*; which has anticipated our bill in time because the latter, born from public consultation, has already been turned into a formal legislative act⁹⁶.

8.1. *Contents of the Committee’s Declaration*

In adopting a constituent approach⁹⁷, the Declaration provides a ‘frame-work regulation’ regarding the Internet Governance and the digital Liberties. So, its structure imitates a real Constitution, even if there is no reference to a territorial State, in accordance with the a-territorial nature of the Internet, and if the document lacks a binding value, due to the a-parliamentary nature of its Author, as seen above. Indeed, the act stands on the very two pillars of French post-revolutionary constitutionalism (1789): powers and freedoms. The focus of the Declaration is concentrated on the subordination of the powers to the rights, because the powers exist if and to the extent that they recognize the fundamental freedoms and implement the social rights. Therefore, these two entities, powers and rights, are not aligned on the same playing field: the former may not be conceived as *legibus soluti*, being susceptible of constraints in order to protect the liberties. This special relation encompasses the hard core of the modern

⁹⁵ L. GILL, D. REDEKER, U. GASSER, *Towards Digital Constitutionalism? Mapping attempts to craft an Internet Bill of Rights*, quoted, 11: “These documents identify corporations as the central locus of power and users—rather than citizens or another constituent community—as primary rights-holders. We see this in examples such as the *Bill of Rights for Users of the Social Web*, presented at the 2007 Data Sharing Summit in the 2010 Social Network Users’ Bill of Rights, a document triggered by major privacy policy changes at Facebook and Google that year”.

⁹⁶ Law No. 12.965, April 23rd 2014, establishes the principles, guarantees, rights and obligations for the use of Internet in Brazil ([preliminary works](#)).

⁹⁷ Concerning this particular aspect let me refer to [my speech](#) during the presentation of the final test of the Declaration to the public on July 28th, 2015; on that occasion I talked about the “constitutional spirit” of the Declaration in order to distinguish its constitutional substantive value from its incontestable soft law status.

Constitutionalism⁹⁸.

As to the powers: the Declaration dictates that the Internet governance – however shaped – shall obey to the principles of democracy and representation. These ones shall be specified – in accordance with Teubner’s scientific heritage⁹⁹ – through the imposition of a multistakeholder composition and a representative legitimation for economic actors and online social subjects.¹⁰⁰ Therefore it would be useless to look in the Declaration for further details concerning both the concepts of multistakeholderism and the standing of legitimation. The act has preferred not to chill the ongoing international debate, leaving to it the task to achieve the widest possible consent on the subject. At the moment, though, this appears still far in the future¹⁰¹.

On the contrary, the pillar of liberties is the one to which the Declaration devotes almost all its articles. These ones can be classified in two categories: general rules, applicable to every right at stake, and specific rules, concerning the single subjective entitlements. The dispositions of the first category are not perfectly in line with the rule of law and the due process principle, illustrated before. Indeed, there is no general statement requiring that freedoms are only limited in favor of an equally ranked value and in accordance with the necessity and proportionality principles. Instead, this balancing test is provided only for some liberties on separate basis. We have already criticized this drafting technique, focused on single cases rather than on general rules; indeed, we have voiced our remarks both in the Commission and in scientific contexts¹⁰².

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

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

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

The ‘equality-legality’ pair has become the cornerstone of the whole architecture of the Bill, as explained in the very preamble of the Declaration¹⁰³. Such choice was only viable because the Bill

⁹⁸ See G. AZZARITI, *Contro il revisionismo costituzionale*, Roma-Bari, Editori Laterza, 2016, 248, where the Author states that “il costituzionalismo democratico nasce per dividere il potere e assicurare i diritti”.

⁹⁹ See G. TEUBNER, *Constitutional fragments. Social constitutionalism and globalization*, quoted, 56.

¹⁰⁰ It is not a coincidence that the [Internet Governance Forum of Joao Pessoa](#), that had to draw the governance of the net, hadn’t gone beyond very promising but non concluding debates on this topic.

¹⁰¹ On the different models of multistakeholderism see A. DORIA, *Use [and Abuse] of Multistakeholderism in the Internet*, in *The Evolution of Global Internet Governance. Principles and Policies in the Making*, edited by R. Roxana, J. M. Chenou, R. H. Weber., Berlin, Springer, 2014, 116. For the Author these models can be reduced into two: “(1) those that uphold the belief in a structure with equivalent stakeholders who participate on an equal footing; and (2) those that uphold the belief that one stakeholder is more equal than the other stakeholders and that the primary stakeholder discharges their duty by consulting the other stakeholders before making decisions.” On the contrary, from the point of view of J. WAZ e P. WEISER, *Internet governance: the role of multistakeholder organizations*, in [Journal of Telecommunication & High Technology Law](#), (10)2 2012, 336: “The term does not lend itself to simple definition, and its application will vary from case to case, but one would generally expect to see at least two things in a “multistakeholder” organization: (i) representation (or, at a minimum, openness to representation) from a diversity of economic and social interests (and not limited to a single economic perspective), and (ii) a representational role for civil society, generally defined as relevant stakeholders other than government and industry”.

¹⁰² Let me refer to [my intervention](#) during the Committee’s meeting, October 8th, 2014.

¹⁰³ Its preamble states: “This Declaration of Internet Rights is founded on the full recognition of the liberty, equality, dignity and unique diversity of each individual. Preserving these rights is crucial to ensuring the democratic functioning

had refused to entrust its own genesis to the private powers. Indeed, these ones would have acted in an egoistic way, bending the rules to their individual and lucrative interests. This does not mean that its rules are the best possible ones. Rather, more simply, the Author of the Bill has managed to avoid being ‘captured’ by the strongest stakeholders.

One could think about how the right to net neutrality has been designed (art. 4). This one has been endowed with the dignity of a fundamental right¹⁰⁴, while even the EU Regulation on the Digital Single Market¹⁰⁵ had fallen short traditional economic vocation to a new one, belonging to the field of individual liberties. In other words, what is served by the equal access is not the ISPs’ freedom of economic enterprise, but the enjoyment of everyone’s right to be informed. Indeed, the latter would suffer an excessive upstream constraint if some contents arrived to us with better quality and speed, because we would be forced to choose these privileged contents over the slower ones¹⁰⁶.

It would be superfluous to recall here what already set out above, we will limit to add only some reflections concerning the regulatory source of this right. Its source was not identified in the self-regulation negotiated between the ISPs and the ICPs. Indeed, entrusting the regulation to a contract would downgrade the web from a common good to a commodity, tradable in exchange of the highest market price. In that case, those who already dominate the online band market would be able to attract the largest flow of byte and impede the access to newcomers, who cannot afford to pay the same price¹⁰⁷. Concerning this point, the Declaration has not been as clear as it has been in the statement of the right to net neutrality. Indeed, it has not mandated a public act to be the source of every operator’s right to non-discrimination – in comparison with its competitor – as to the breadth and quality of the band, regardless of everyone’s capability. Here the Declaration has lost its occasion to state a principle of equal treatment oriented towards the fundamental rights¹⁰⁸.

Also, the reference to another liberty in the Declaration, the right to access (art. 2)¹⁰⁹, confirms the centrality of the aforementioned pair. Here the Declaration has not limited itself to acknowledge this right. Indeed, the Bill has made its content near to a social right, which is to say that it has compelled the State to be proactive and lay down the broadband on the whole national territory, regardless of the digital citizen’s residence and spending capability. Therefore, the band shall also cover the white zones,

of institutions and avoiding the predominance of public and private powers that may lead to a society of surveillance, control and social selection”.

¹⁰⁴ Art. 4 (*Net neutrality*) - 1. Every person has the right that the data he/she transmits and receives over the Internet be not subject to discrimination, restrictions or interference based upon the sender, recipient, type or content of the data, the device used, applications or, in general, the legitimate choices of individuals.

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

¹⁰⁵ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union. The act dedicates to this topic the art. 3 “Safeguarding of open internet access”, that doesn’t explicitly refer to the concept of net neutrality.

¹⁰⁶ D.C. NUNZIATO, *Virtual freedom: net neutrality and free speech in the Internet age*, Stanford, Stanford University Press, 2009, 136 ff., identified the main focus of the net neutrality regulation in the free speech, rather than in competitive concerns. On the relationship between constitutional law and competition law, see G. PITRUZZELLA, *Diritto costituzionale e diritto della concorrenza*, in *Quaderni costituzionali*, 2019, 605 ff.

¹⁰⁷ The question is much debated in the juridical literature, and twists with the issue of the legitimacy of the zero rating. There are disagreeing claims about its admissibility T. WU. *Preface*, in *Net Neutrality Reloaded: Zero Rating, Specialized Service, Ad Blocking and Traffic Management. Annual Report of the UN IGF Dynamic Coalition on Net Neutrality*, edited by L. Belli, Rio de Janeiro, FGV Direito Rio, 2016; D. BRAKE, *Mobile Zero Rating: The Economic and Innovation Behind Free Data*, May, 2016, at. Among the Italian scholars, it is possible to call to M. Avvisati, *Autorità indipendenti, vigilanza e procedimento amministrativo. Il caso zero rating*, in *Politica del Diritto*, 2017, 505-542.

¹⁰⁸ Allow me to refer to my book G. DE MINICO, *Antiche libertà e Nuova frontiera digitale [Ancient freedoms and New digital frontier]*, Torino, Giappichelli, 2016, 195 ff.

¹⁰⁹ Let’s reflect in particular on the 5 para. of the article 2: “Public institutions shall take the necessary measures to overcome all forms of digital divide, including those created by gender, economic condition or a situation of personal vulnerability or disability”.

the ones where market fails, where the private hand will never be able to arrive because of economic disutility. Now, this means that the actualization of the right to access is instrumental to the exercise of fundamental liberties, but, to be concrete, needs the State to promptly fulfil its duty of service. The essential content of this right is the entitlement to an action coming from the State. And its connection with the substantial equality principle is evident since the rule includes among the beneficiaries of this right all those who experience conditions of digital divide, “including those created by gender, economic condition or a situation of personal vulnerability or disability”. So, the access becomes a tool for substantial equality, because it is a lever for the public power to move the flow of wealth from the ‘haves’ to the ‘have nots’. It becomes a booster which multiplies wealth¹¹⁰: those who are excluded from digitalisation won’t have to bear the burdens of the access, but will be entitled to receive it as a social service, which is necessary because it allows them to fill the distance between the digital included and them.

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

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

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

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

8.2. Legal status of the Declaration

To remove any doubt as to the legal status of the Declaration let me clarify immediately that this document does not have legally binding effects, it has merely the same value of a political act.

Even more it is an act entailing a political engagement, since it has been approved on November 23rd, 2015, with a [motion](#) voted by a transversal majority in the Chamber of Deputies of the Italian Parliament.

¹¹⁰ Clearly said by L. WAVERMAN, [Economic Impact of Broadband: An Empirical Study](#), LEGC, London, 2009, February 22, 9: «The results from our study show that broadband – the ultimate melding of the telephone line [...] can have significant payoffs in terms of increasing productivity and economic growth».

As every motion¹¹¹, it has to be properly taken into account by the Executive power in its concrete political-administrative activity. Yet, being a political act, the Declaration will only stand until its political sponsors will maintain their support. As to its juridical value, it cannot be enforced judicially, neither against a public subject, nor against a private one. Indeed, it does not generate any juridical obligation to be fulfilled.

At this point, it seems appropriate to mention that also the European Union Charter of fundamental rights used to have the same value as our Declaration, before being incorporated in the Lisbon Treaties. Indeed, many national¹¹² and European judges¹¹³ kept nevertheless assuming it as a criterion to interpret other binding juridical sources¹¹⁴.

In sum: despite the Declaration does not have a direct juridical relevance, an indirect and implicit legal value is not to be excluded. We are denying a legal *status* to the Declaration, but at the same time we may expect that it will be taken into account “in transparency” by those who will have to take legally binding decisions.

The Declaration as point of reference of a new culture of the Internet, as the Advocate general Mischo stated in referring to the value of E.C. “I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order”¹¹⁵.

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

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

Among its disadvantages, we cannot include the scarce prescriptiveness of the language, even if such criticism was expressed during the press conference following the presentation of the

¹¹¹ Although the concept of motion is out of my analysis, suffice it to affirm that the discussion on its natura is still open among the Italian scholars. For those who identify its nature in the control function see V. DI CIOLLO, L. CIAURRO, *Il diritto parlamentare nella teoria e nella prassi*, Milan, Giuffrè, 2012, 786; on the opposite side, there are those who stress the ability of the motion to define political directives, see for all L. GIANNITI, N. LUPO, *Corso di diritto parlamentare*, Bologna, Il Mulino, 2008, 168.

¹¹² In the Italian system we have to remember, among others, some basic decisions of our [Constitutional Court nn. 135 e 445 /2002](#) and [393 e 394/2006](#). In particular, in the former the Supreme Judge underlined that the Charter had significance for “il suo carattere espressivo di principi costituzionali comuni” (for its feature able to express common constitutional principles). It is worthy to be mentioned also the Tribunal Constitucional Português, [Acórdão n. 275/02](#).

¹¹³ At first the Court of Justice refused to refer to the Charter, despite of the several recalls its favour of the Advocate Generals; only in the 2006 the Court broke this silence, 27 June 2006, C-540/03, [European Parliament v. Council of E.U.](#). On the contrary, the European Court of Human Rights, case of [Christine Goodwin v. The United Kingdom](#) (Application no. 28957/95), 11 July 2012, in Cons. 100 didn’t hesitate to refer to the Charter clearly: “The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women”. Sul tema più in generale, see P. COSTANZO, [L’uso fatto della Carta dei diritti dell’Unione nella giurisprudenza della Corte EDU](#), in [Consulta OnLine, 2016/I](#), 10 ff.

¹¹⁴ In the Italian doctrine about its value of parameter of interpretation, before its incorporation in the Lisbon Treaty, see A. SPADARO, *La Carta europea dei diritti fra identità e diversità e fra tradizione e secolarizzazione*, in *Dir. pubbl. comp. eur.*, 2002, 621; ID., *Sulla “giuridicità” della Carta europea dei diritti: c’è (ma per molti) non si vede*, in *I diritti fondamentali dopo la Carta di Nizza. Il costituzionalismo dei diritti*, edited by G. F. Ferrari, Milano, Giuffrè, 2001, 257 ff.; L. LANZONI, *Tutela e limitazioni dei diritti dell’uomo nell’art. 52 della Carta dei diritti fondamentali dell’Unione europea*, in *Corti costituzionali e Corti europee dopo il Trattato di Lisbona*, edited by M. Pedrazza Gorlero, Napoli, ESI, 2010, 369 ff.; C. SALAZAR, *Lisbon story: la Carta dei diritti fondamentali dell’Unione europea da un tormentato passato... a un incerto presente?*, in [Rivista del Gruppo di Pisa](#), 2011, December 21

¹¹⁵ Opinion of Advocate General Mischo, delivered on September 20th, 2001, in Joined Cases C- 20/00 and C-64/00, [Booker Aquaculture Ltd trading as Marine Harvest McConnell and Hydro Sea- food GSP Ltd, v. The Scottish Ministers](#), in Cons. 126.

Declaration¹¹⁶. Indeed, it would be contradictory of the Declaration to pursue a constituent intent while stating strict obligations and prohibitions. Conversely, just as any constitutional Charter, it has to be elastic enough to account for future situations, which may be unpredictable. This is especially true given that the Declaration is addressed to an ever-evolving reality: Internet.

However, we do find some drawbacks. Firstly, the one we have already mentioned while illustrating the single parts of the Declaration: namely, the due process and the rule of law are inadequately safeguarded. Nevertheless, the true defect does not lie in the Chart itself; it is rather to be found in the lack of attention to it by the political decision-maker. Indeed, some subsequent normative acts, which should have been consistent with the Declaration, have been drafted as if the Declaration had never existed. We can consider the recent law on cyberbullying¹¹⁷ or the previous anti-terrorist legislation¹¹⁸. This is not the place for an in-depth analysis of such acts, we will be satisfied with stating just one conclusion. In few words, the Declaration, which conditions the limitation of freedoms to a necessity principle, is not coherent with the counter-terrorism legislation, which allows derogations to liberties in consequence of an abstract danger (when necessity is still absent). Similarly, the Declaration, stating that liberties can only be restricted by a public and impartial authority, is in contradiction with the Law on cyberbullying. The latter unconditionally delegates this power to ISPs, which are allowed to obscure, delete or block the personal data without any adversary procedure and on a very short notice. Indeed, ISPs are *ex parte* subjects that have nothing in common with a public and impartial authority.

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

Moreover, this contradiction is not an isolated and only national case. At the European level this contrast is clearly visible as to the safeguards of online fundamental rights. The adversarial dialogue between the Court of Justice and the Decision maker has not yet found an appropriate and shared balance. Basically, while the former has deemed the guarantees of proportionality and precautionarily applicable to the right to privacy in time of emergency¹¹⁹ - the recent Directive EU 2017/541 “on combating terrorism” goes in the opposite direction¹²⁰.

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

9. Concluding remarks

The opinion according to which the net may remain totally unfettered cannot be accepted. We have

¹¹⁶ At Sala del Mappamondo-Palazzo Montecitorio (webtv) July 28th, 2015 the print conference was held with the topic of “*Declaration of Internet Rights*” in the presence of the President of the Chamber of Deputy, on. le Laura Boldrini, professor Stefano Rodotà and other components of the Committee of study, among who the author of this essay.

¹¹⁷ Law n. 71, 29th May 2017, *Disposizioni a tutela dei minori per la prevenzione ed il contrasto del fenomeno del cyberbullismo*, at *G.U.* n. 127 del 03-06-2017.

¹¹⁸ Law Decree n. 7, 18th February 2015, coordinated with the Converted Law, 43, 17th April 2015, n. 43 at *G.U.* n. 91 del 20-04-2015). See in particular the art. 2. For what concerns the aspects related to terrorism allow me to refer to my book G. DE MINICO, *Costituzione. Emergenza e Terrorismo [Constitution. Emergency and Terrorism]*, Jovene, Napoli, 2016, in part. chapter 2, § IV.

¹¹⁹ We refer to the above-mentioned Court of Justice, [Digital Rights Ireland Ltd](#) and also (Grand Chamber) [Maximilian Schrems v. Data Protection Commissioner](#), 6th October 2015, C- 362/14.

¹²⁰ The European Parliament and the Council of the European Union, Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017, on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA; in particular see the article 2. To remain on this dangerous contradiction expressed by the above Directive, let me quote my recent work [La risposta europea al terrorismo del tempo ordinario: il lawmaker e il giudice](#), in [Osservatorio sulle fonti](#), 2017, 2. at. See also G. DE MINICO, *Every Day’s Terrorism*, in *Virtual Freedoms - Terrorism - The Law*, edited by G. De Minico, O. Pollicino, London-Turin, Routledge-Giappichelli, 2014, 10-14.

explained the reasons for which a “Bill of Rights” tailored to the Internet and entrusted to a supranational legislator needs to be put in place.

However, the complex interaction among competing interests make it difficult to strike an effective balance allowing the internet to maintain its full potential of innovation. This essay has been focused on the perspective of the offline constitutional *acquis* of democratic countries being transported online, in order that a better protection of fundamental rights and liberties be achieved, and equal opportunities for all be provided for.

We must be aware that the same nature of the net as an instrument of global communication fostering participation and spreading information and knowledge is drawing a different answer in those countries where democracy is under pressure.

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

It is obvious that political decision-makers cannot easily reject the prevailing views of the public opinion, which will sooner or later be translated into votes. This suggests that rights and freedoms on the net cannot find their defense solely in a Court of Justice, but require that the argument be brought also in politics.

The algorithm has offered a case study to test the regulatory alternatives, self-regulation or binding regulation. Which of them has proved to be more suitable and well tailored to reach the equality objective? Our reasoning has shown that the algorithmic anarchy reproduces the already heavy injustices on minorities, with the aggravating circumstance that discrimination does not appear as such, being hidden behind a ‘patina of fairness’. On the opposite side, the algorithm, kept under the policy-maker control, could level the different fortunes of who is ahead and who is left behind in the social competition. Therefore, a binding discipline, although held to a *minimum*, will be able to guide technology towards a fair and widespread common good in compliance with a democratic institutional framework.