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Internet Bills of Rights: Generalisation and Re-specification Towards a Digital Constitution

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ABSTRACT

Scholars have advocated the need for a "digital constitution," including the idea of drafting an "internet bill of rights." Numerous civil society groups have crafted decalogues of digital rights, giving rise to a movement advocating a form of digital constitutionalism. This paper investigates the added value of these texts is in the constitutional ecosystem. These declarations highlight the transformative potential of societal constitutionalism well. By adopting the language of constitutions, they seek to be part of the current conversation on how to translate the core values of contemporary constitutionalism in the context of the digital society through a process of generalisation and re-specification of principles. Internet bills of rights are not legally binding sources, yet represent a ductile instrument whereby their promoters are free to experiment with new legal solutions in a gradual way and in a more democratic manner. This includes actors beyond the worlds of politics and business.

INTRODUCTION

We need a "digital constitution." This is a claim that has frequently resonated in the words of various digital literati, academics, politicians, and civil society groups. The digital revolution has significantly affected the constitutional ecosystem. Private multinational companies producing, managing, and selling digital products and services have emerged as new dominant actors alongside nation states. Using digital technology, both states and big technology companies restrict individual fundamental rights in multifarious ways. A series of intrinsically "constitutional" questions emerge on how to generalise and re-specify the key principles of contemporary constitutionalism in the novel context of the digital society. Scholars have advocated the need for a digital constitution, including the idea of drafting an "internet bill of rights," a written document on the model of the ancient declarations of rights of the eighteenth century. Following this appeal, many civil society groups have crafted their own decalogue of digital rights, giving rise to a movement advocating a new form of "digital constitutionalism."[1]

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[1] *See* EDOARDO CELESTE, DIGITAL CONSTITUTIONALISM: THE ROLE OF INTERNET BILLS OF RIGHTS (2022).

This paper investigates whether these internet bills of rights add value in the constitutional ecosystem. In particular, this paper reconstructs the genealogy of the idea of an internet bill of rights among the scholarly models advocated for a digital constitution (I), and illustrates the extent to which the declarations of rights emerged in the last few years can play a compensatory and stimulatory role in the current process of constitutionalisation of the digital society (II). This paper will posit that these declarations will highlight the transformative potential of societal constitutionalism. By adopting the typical language of constitutions, they seek to be part of the current conversation on how to translate the core values of contemporary constitutionalism in a digital society. However, in contrast to other constitutional instruments, internet bills of rights are not legally binding sources nor the output of institutionalised processes of deliberation. Thus, they appear as a more ductile instrument whereby their promoters are free to experiment with new legal solutions in a gradual way, through a multitude of initiatives, and in a more democratic manner. This includes actors beyond the worlds of politics and business.

I. FROM THE DECLARATION OF INDEPENDENCE OF CYBERSPACE TO THE DIGITAL CONSTITUTION

Early internet literati considered cyberspace as a recently discovered, uninhabited island and a place where a new beginning was possible.[2] In 1994, Esther Dyson, George Gilder, George Keyworth, and Alvin Toffler published an article solemnly titled "Cyberspace and the American Dream: A Magna Carta for the Knowledge Age."[3] Cyberspace was celebrated as the "land of knowledge" whose exploration would represent "civilization's truest, highest calling."[4] The border between the physical and virtual worlds was considered as the "electronic frontier" delimiting a new prosperous Far West.[5] In 1996, John Perry Barlow wrote the famous "Declaration of the Independence of Cyberspace."[6] This text reiterated the idea of cyberspace as the "home of mind," a "global social space" where anyone "may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity."[7] As its title clearly evokes, the aim of the declaration was to assert the independence of cyberspace from the physical jurisdiction of nation-states, defined as "weary giants of flesh and steel," on the basis of its "natural" autarky.[8]

This worldview, subsequently dubbed "cyberlibertarianism," posited that cyberspace was a "speech-dominated" world where no physical harm was conceivable.[9] This assumption would have justified the argument of internet exceptionalism, (i.e., that nation-states do not have the right to apply their rules to cyberspace; conversely, the digital world could find its very own system of governance).[10]

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[2] *See* ANDREW D. MURRAY, THE REGULATION OF CYBERSPACE: CONTROL IN THE ONLINE ENVIRONMENT 5 (2006); DAVID J. BELL ET AL., CYBERCULTURE: THE KEY CONCEPTS 35 (2004).

[3] Esther Dyson et al., *Cyberspace and the American Dream: A Magna Carta for the Knowledge Age*, FUTURE INSIGHT: THE PROGRESS & FREEDOM FOUNDATION, (Aug. 1994), http://www.pff.org/issues-pubs/futureinsights/fi1.2magnacarta.html.

[4] *Id.*

[5] *Id.*

[6] John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION (Feb. 8, 1996), https://www.eff.org/cyberspace-independence.

[7] *Id.*

[8] *Id.*

[9] *See* James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 UNIV. CIN. L. REV. 177 (1997) (provides a critical reconstruction of the cyberlibertarian account).

[10] *See* David R. Johnson & David G. Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); *see also* Barlow, *supra* note 5.

A second group of scholars, at their turn dubbed "cyberpaternalists," strongly rejected this vision of cyberspace as an intrinsically distinct world of pure speech, capable of self-regulation.[11] They argued that purely cyberlibertarian and cyberanarchist views were utopian: these ideals would be destined to surrender to the supremacy of the feral law of the internet environment. In cyberspace, the "invisible hand" would not be guided by democratic and egalitarian archetypes but by the dominant pair of government and commerce.[12] The internet would degenerate from the ideal "home of mind" into a space of commercial profit and government surveillance.[13] For this reason, cyberspace cannot be considered as an autonomous space, fully distinct from the physical world, and should be subject to regulation.[14] As stated by the German Federal Constitutional Court, "even the Internet cannot create a legal vacuum."[15]

Unfortunately, over the past few years, a series of events has inexorably infringed two central tenets of the cyberlibertarian vision. It suffices to recall the mass surveillance programmes unveiled by Edward Snowden in 2013 and the recent Cambridge Analytica scandal involving Facebook, to understand that cyberspace is not the utopian, self-regulating realm of the mind advocated by the cyberlibertarians.[16] Moreover, today it is apparent that cyberspace is not a remote island: it is a distinct, autonomous, and watertight environment separable from the physical reality theorised by those early internet thinkers. Recent technological developments have contributed to bind physical and virtual existence together in a way that, today, for many, these two are complementary and inseparable. The use of digital technology has become an integral part of our daily life, even more after the recent COVID-19 pandemic.[17] Reading news, communicating, searching for a job, and professing one's own political or religious faith are all examples of activities that many individuals habitually perform online. Today, digital technology does not merely represent one of the many instruments available to exercise a broad range of fundamental rights rotating around the exchange of information, but has even become one of the most important catalysts of these rights.[18]

The internet environment is not a *terra nullius*, and does not lie anymore at the peripheries of our lives. It is a context where nation-states will exercise their sovereignty, albeit in a complex way, due to the emergence of other dominant transnational private actors.[19] It is an ecosystem that plays a central role in determining the extent to which we can exercise a broad array of our

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[11] *See* MURRAY, *supra* note 2; *see, e.g.*, Jack L. Goldsmith, *Against Cyberanarchy*, 65 UNIV. CHI. L. REV. 1199 (1998); *see, e.g.*, LAWRENCE LESSIG, CODE: AND OTHER LAWS OF CYBERSPACE, VERSION 2.0 (2006); *see, e.g.*, Boyle, *supra* note 8; *see, e.g.*, Joel R Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS 251 (2002).

[12] LESSIG, *supra* note 10 at 4.

[13] *See* LESSIG, *supra* note 10; *see also* Boyle, *supra* note 8.

[14] *See* MURRAY, *supra* note 2.

[15] Vorratsdatenspeicherung [Data Retention], 260 (Ger.), https://germanlawarchive.iuscomp.org/?p=1200.

[16] *See* DAVID LYON, SURVEILLANCE AFTER SNOWDEN (2015) (provides an example on the Snowden revelations); *see also* Patrick Greenfield, *The Cambridge Analytica files: the story so far*, THE GUARDIAN (Mar. 25, 2018), https://www.theguardian.com/news/2018/mar/26/the-cambridge-analytica-files-the-story-so-far (provides an example of the Cambridge Analytica scandals).

[17] *See* TERO Karppi, Disconnect (2018); Gilles Dowek, Vivre Aimer, Voter En Ligne Et Autres Chroniques Numériques (2017); *see also* Sherry Turkle, Life on the Screen (1995); *see also* Annette N. Markham, Life Online: Researching Real Experiences in Virtual Space (1998).

[18] *See* Packingham v. N.C., 137 S. Ct. 1730, 1734 (2017).

[19] *See e.g.*, Edoardo Celeste, *Digital Sovereignty in the EU: Challenges and Future Perspectives*, *in* DATA PROTECTION BEYOND BORDERS: TRANSATLANTIC PERSPECTIVES ON EXTRATERRITORIALITY AND SOVEREIGNTY 211 (Federico Fabbrini, et al. eds., 2021); *see also e.g.*, Stephane Couture & Sophie Toupin, *What does the notion of "sovereignty" mean when referring to the digital?*, 21 NEW MEDIA & SOCIETY 2305 (2019) (provide examples on the concept of digital sovereignty).

fundamental freedoms. On the one hand, the virtual world has increased the standard to which we are accustomed to exercise our rights. Digital technology offers unprecedented opportunities that are not equated by other existing media. On the other hand, contrary to what the cyberlibertarians argued, it is not true that "bytes can never hurt me."[20] Cyberspace can indeed be an instrument to perpetrate crimes with direct repercussions in the physical world.[21]

The internet environment has not only acquired legal relevance, but also an apparent constitutional relevance. Protecting fundamental rights and regulating the exercise of power in the digital environment have become major challenges of contemporary constitutionalism.[22] Everyone should have the right to exercise their rights according to the standard that new technology allows and be protected against potential fundamental rights infringements. This need is informing a multilevel process of constitutionalisation involving multiple normative counteractions, ranging from the adoption of more traditional constitutional instruments to more innovative tools emerging even beyond the state dimension.[23] This paper will focus on one peculiar solution: the appeal to adopt a digital constitution. An ambitious demand, as we will explore in the next few sections, which was originally advocated at the academic level following different models.

A. Lessig: The Constitution in the Internet

In his seminal book *Code*, Lawrence Lessig highlights the role of the internet architecture as a powerful and effective regulatory mechanism.[24] Technology companies would have the ability to directly shape the code of software determining how users can interact in the digital world. Joel Reidenberg had already analysed this form of private rulemaking through technical solutions under the name of *lex informatica*.[25] Lessig uses the slogan "code is law."[26] The legal norm somehow becomes invisible, embedded in the structure of the internet. Internet users are no longer offered the possibility to infringe the law because respecting it is the only action still available to them.

The code, as a form of physical constraint, nullifies the space between law and law enforcement. Code is law in action and, as highlighted by Lessig, could also be a constitution in action.[27] The internet architecture enshrines constitutional values, in principle those determined by technology companies. Code would represent the internet's material constitution, its factual constitutional order.

However, Lessig rejects the idea of code's determinism. The internet architecture should not remain that which is shaped by technology companies, completely subject to their economic interests. Code—he argues—would be malleable. He warns against the "fallacy of 'is-ism.'"[28]

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[20] James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 University of Cincinnati Law Review 177 (1997).
[21] *See generally* Goldsmith, *supra* note 10 (demonstrates this was already evident in the initial phases of cyberspace).
[22] *See generally* ORESTE POLLICINO, JUDICIAL PROTECTION OF FUNDAMENTAL RIGHTS ON THE INTERNET: A ROAD TOWARDS DIGITAL CONSTITUTIONALISM? (2021).
[23] Edorardo Celeste, *The Constitutionalisation of the Digital Ecosystem: Lessons from International Law* (June 23, 2021), in 16 MAX PLANCK INST. FOR COMPAR. PUB. L.& INT'L. L. RSCH. PAPER SERIES (2021).
[24] *See* LESSIG, *supra* note 10.
[25] *See generally* Joel Reidenberg, *Lex Informatica: The Formation of Information Policy Rules through Technology*, 76 Tex. L. Rev. 552 (1998).
[26] *See* LESSIG, *supra* note 10.
[27] *See id.* at 4.
[28] *Id.* at 25.

One should not think that how the internet is now corresponds to how it should be.[29] In contrast to the views of cyberlibertarianism, Lessig mistrusts the capability of cyberspace to self-regulate. In order to protect fundamental rights in the digital environment, he proposes to correct code by incorporating the values of the constitution, in his case, the US Constitution.[30] Rather than praising the existing constitution *of* the internet, Lessig advocates a constitution *in* the internet.[31]

B. Teubner: Civil Constitutions

Lessig wisely recognised that instilling the constitution in the code is not a straightforward task. It implies a complex work of "translating" constitutional values, a problematic process of selection, interpretation, and transformation of principles entrusted both to the legislator and to the judiciary.[32] The issue of translation of traditional constitutional values in the context of the digital society is also pivotal in the works of Gunther Teubner. The German scholar generally questions the effectiveness of national constitutional law vis-à-vis three major trends of the twenty-first century: digitisation, privatization, and globalisation.[33] The challenge of constitutional theory would be to "generalise its nation-state tradition in contemporary terms and re-specify it."[34] This operation, according to Teubner, would necessarily imply to disconnect constitutional law from the state dimension and eventually theorise a constitutionalism without the state.

Teubner, therefore, moves a step forward in comparison with Lessig. He shares the view that the *lex electronica*, what in the previous section was called the internet's material constitution, is "corrupted" by the economic interests of technology companies.[35] The *lex electronica* is for Teubner the heir of the *lex mercatoria* in the context of the cyberspace. He argues that "it is here that the constitutional question of the Internet arises."[36] The set of constitutional rules self-produced by dominant societal actors, such as technology companies, would suffer from a structural bias. They would only be of a "constitutive," and not "limitative," nature.[37] This structural corruption would in turn trigger a reaction from what Teubner calls the "spontaneous sectors" of society, such as governmental agencies, civil society groups, trade unions, consumer protection organisations, and the like. The interaction between dominant players and this category of actors would engender a process of constitutionalisation and, ultimately, the emergence of new constitutional norms.[38]

Given the transnational nature of the digital society, for Teubner, the digital constitution cannot derive from classical political processes of constitutionalisation. The alternative he proposes is a "societal constitutionalism," in which subsectors of society would autonomously produce

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[29] *Id.* at 31
[30] *Id.* at 4.
[31] *Cf.* LAUREN H. TRIBE, THE CONSTITUTION IN CYBERSPACE: LAW AND LIBERTY BEYOND THE ELECTRONIC FRONTIER (1991).
[32] LESSIG, *supra* note 10, at 157, 315, and 325.
[33] *See* Gunther Teubner, *Societal Constitutionalism; Alternatives to State-Centered Constitutional Theory?*, in Transnational Governance and Constitutionalism. International Studies in the Theory of Private Law 3 (2004).
[34] *Id.* at 4.
[35] *Id.* at 21.
[36] *Id.* at 20.
[37] See GUNTHER TEUBNER, Constitutional Fragments: Societal Constitutionalism and Globalization 75 (2012); *see* also Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOB. L. STUD. 617 (2011); *cf.* NICOLAS SUZOR, Lawless. The Secret Rules that Govern Our Digital Lives (2019).
[38] *See* TEUBNER, *supra* note 37 at 94.

constitutional norms that would subsequently be absorbed by the legal system in a process of mutual influence.[39] Therefore, in contrast to Lessig, Teubner does not advocate a direct translation of constitutional principles drawn from national constitution into the internet code, but rather theorises a complementary constitutional process: the emergence of a multiplicity of "civil constitutions."

Even if one could argue that for Teubner the ultimate mission of a digital constitution remains the same—the protection of fundamental rights in the digital society—its intrinsic characteristics would be very different from Lessig's archetype of constitution *in* the internet. Teubner's digital constitution emerges beyond the state. It is potentially plural, resulting from a multiplicity of societal interactions. It is civil, in the sense that it is issued by the civil society, and it is not the result of institutionalised political processes. It is crowd-sourced, since its elaboration involves a variety of different actors. And, lastly, it is characterised by an unconventional nature, being something between a "legal text" and a "de facto structure of social systems."[40] All peculiarities that we will interestingly find again in the phenomenon of the emergence of internet bills of rights, which will be examined in the second part of this paper.

C. Pernice: The Constitution of the Internet Society

Pernice shares one of the fundamental premises of Teubner's thought: the insufficiency of state-centred constitutionalism to address the challenges of contemporary society. A series of global issues, such as international terrorism, climate change, global financial regulation, internet governance, and world peace-keeping, cannot be efficiently addressed at a national or regional level.[41] Policies concerning these problems, when developed at local levels, unavoidably produce external effects, structurally lack democratic legitimacy, and are capable of undermining people's self-determination.[42] The power architecture no longer exclusively pivots on the states, but is more similar to a "constellation" of dominant actors, including private entities acting across a multiplicity of national territories.[43] In order to preserve our fundamental constitutional values in this mutated societal scenario, a global model of constitutional governance is needed.[44]

Pernice analyses existing paradigms of regulation beyond the state, such as the EU, the UN, the WTO, the so-called Rio Process on sustainable development, and internet governance, concluding that none of them, taken singularly, provide a universal remedy for all the challenges of contemporary society.[45] For Pernice, the solution consists in a form of multilevel global constitutionalism, a complex architecture where all these partial legal systems would complement each other in order to shape a "global constitutional framework."[46] In such a setting, state constitutionalism is not absent. In contrast to Teubner's vision, it crucially lies at

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[39] *See* TEUBNER, *supra* note 37.
[40] TEUBNER, *supra* note 37 at 19.
[41] *See* Ingolf Pernice, *Global constitutionalism and the Internet. Taking people seriously.*, *in* LAW BEYOND THE STATE: PASTS AND FUTURES 151 (2016), http://ssrn.com/abstract=2576697.
[42] *See id.*
[43] INGOLF PERNICE, *Risk Management in the Digital Constellation – A Constitutional Perspective*, (2017), https://papers.ssrn.com/abstract=3051124 (last visited Oct 18, 2018). *Cf.* JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS (2001).
[44] Pernice, *supra* note 39.
[45] See *id.*
[46] See *id.*; *see also* Ingolf Pernice, *Die Verfassung der Internetgesellschaft: Zur Rolle von Staat und Verfassung im Zuge der digitalen Revolution*, *in* DEN VERFASSUNGSSTAAT NACHDENKEN. EINE GEBURTSTAGSGABE 171, 33 (2014), https://papers.ssrn.com/abstract=2964926 (last visited Aug 28, 2018); *see also* CELESTE, *supra* note 18.

the basis of this fragmented and pluralistic construction, and, to this end, it is necessarily rethought. Pernice interprets the constitution in a "postnational" sense, no longer uniquely anchored to the state, but opened up to the participation of individuals, recognising the important co-regulatory role of private actors.[47]

Pernice's recent works highlight the twofold role that the internet plays in this scenario. The digital revolution is seen both as one of the transformative elements of contemporary society and as a unique opportunity to achieve a global constitutional framework. The internet is not only a source of threat to our fundamental rights, but it is also pivotal in allowing individuals to share information and participate in democratic life and in enhancing transparency within the polity. For Pernice, the current impact of the digital revolution is so significant that he denotes contemporary society as the "Internet society."[48] Digital technologies create a "global community" of individuals and shape a "global public sphere" of political interaction.[49] In this way, the internet becomes the driver of the new global constitutional framework, what Pernice also calls "the constitution of the Internet society."[50]

However, in this context, the internet is not only the catalyst to a form of multilevel global constitutionalism, but, as said before, it is also the object of a global model of governance. Pernice, therefore, adopts the expression "constitution of the Internet" to specifically denote the basic legal order of internet governance.[51] Such a constitution would emerge through an autonomous process of self-constitutionalisation carried out by a plurality of actors beyond the state.[52] The emerging constitution of the internet would represent one of several partial constitutions composing the multilevel mosaic of the global constitutional framework. In contrast to the broader notion of the "constitution for the Internet society," its mission would therefore be to preserve the open, free, and interoperable character of the internet, its variegated institutional framework, and the multi-stakeholder character of the processes of deliberation characterising its governance.

According to Pernice, the constitution of the internet will not be realistically enshrined in an international treaty.[53] As with Lessig and Teubner, it could embody a basic legal order without being expressed in a written text.[54] Echoing Teubner, Pernice argues that the constitution of the internet could remain fragmentary, thus very dissimilar from the traditional idea of a constitution.[55] Nevertheless, these characteristics do not diminish the role of the internet constitution in a broader context. In contrast to Teubner, Pernice offers a wider vision. The constitution of internet governance can provide useful examples to understand how to craft constitutional norms for the global society.[56] He considers the constitution of the internet as one of the many "interwoven partial constitutions" whose elements, be they principles or institutional mechanisms, can be successfully harnessed to build the global constitutional framework of the internet society.[57]

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[47] Pernice, *supra* note 44.
[48] *Id.*
[49] Pernice, *supra* note 39 at 6.
[50] Pernice, *supra* note 41.
[51] *Id.*
[52] *Id.* at 22.
[53] Ingolf Pernice, *Vom Völkerrecht des Netzes zur Verfassung des Internets: Privacy und Digitale Sicherheit im Zeichen eines schrittweisen Paradigmenwechsels'* [From International Law of the Net to the Constitution of the Internet: Privacy and Digital Security in the Sign of a Gradual Paradigm Shift] (2017) https://papers.ssrn.com/abstract=2959257 (last visited Oct. 18, 2018).
[54] *See id*. at 23.
[55] *Id.*
[56] *See* Pernice, *supra* note 39.
[57] *See* Pernice, *supra* note 41 at 26.

D. Rodotà: A Charter of Rights for the Internet

While Teubner theorises the progressive emergence of a digital constitution from the societal substratum through a complex process of interactions occurring outside traditional political processes, Stefano Rodotà directly advocates a cooperation of all the relevant stakeholders to draft a digital constitution.[58]

In 2005, the Italian legal scholar first wrote about the need to draft a "Charter of Rights" to harness the development of the internet.[59] Both states and powerful corporations would threaten fundamental rights online. The internet would become an instrument to control, monetise, and discriminate individuals to reduce their specificity and autonomy. As the Parisians (re)discovered the importance of Mona Lisa when the famous Da Vinci painting was stolen from the Louvre museum in 1911, so too would these series of new threats allow us to perceive the lack of guarantees for the digital society.[60] Therefore, at the moment, what would be most needed for Rodotà is a series of guiding principles. In his words:

> Time is come to affirm the principles of the new global people: freedom of access, freedom of use, right to knowledge, right to privacy, protection of the commons. Time is come to recognise these principles in a new Charter of Rights.[61]

Rodotà does not believe in a spontaneous natural reaction of the internet. Invoking the original libertarian nature of cyberspace to reject the possibility to craft a charter of rights for the internet would represent a "position of rearguard"—writes Rodotà in another article.[62] It would be short-sighted not to take into account the multifarious situations in which, today, our fundamental rights are restricted in the online sphere by both nation-states and private corporations, as in the early cyberlibertarian charters. For the Italian scholar, elaborating a charter of rights for the internet does not mean caging the freedom of the digital environment; conversely, charters and declarations have traditionally been the basis for an expansion of rights.[63] The formal recognition of rights in a written document would never be the end of the story—the (written) rights are instruments to fight for the (real) rights.[64]

Rodotà therefore abandons the innovative schemes proposed by Lessig, Teubner, and Pernice to stress the crucial role that a classical constitutional instrument, such as a charter of rights, could play in the digital society. For Rodotà, the idea of a digital constitution reacquires its traditional meaning of a written document—it neither refers to the code nor to a constitution as is intended in the common law systems—as normative "architecture" resulting from the combination of various legal sources.[65]

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[58] *See* Stefano Rodotà, *Una costituzione per Internet?* [A Constitution for the Internet], POLITICA DEL DIRITTO 337 (2010).

[59] Stefano Rodotà, *L'uomo nuovo di Internet*, LA REPUBBLICA, October 28, 2005, https://ricerca.repubblica.it/repubblica/archivio/repubblica/2005/10/28/uomo-nuovo-di-internet.html.

[60] *See* STEFANO RODOTÀ, IL DIRITTO DI AVERE DIRITTI 16 (2012); (drawing from Dominique Rousseas's example in, *La démocratie ou le vol de La Joconde*, *in* NOUVELLES QUESTIONS SUR LA DÉMOCRATIE 145 (Bertrand Mathieu et al. eds., 2010)).

[61] Rodotà, *supra* note 56 (specifically, the author's translation).

[62] *See* Stefano Rodotà, *Perché Internet ha bisogno di una Carta dei diritti*, LA REPUBBLICA, November 14, 2006, http://www.repubblica.it/2006/11/sezioni/scienza_e_tecnologia/internet-30-milioni/carta-diritti-internet/carta-diritti-internet.html (last visited May 2, 2019).

[63] *Id.*

[64] RODOTÀ, *supra* note 58 at 32.

[65] *See* Lessig, *supra* note 10 (for the first sense); *see* Henry H Perritt, *The Internet at 20: Evolution of a Constitution for Cyberspace*, 20 WM.& MARY BILL OF RTS. J. 1115 (2012)(for the second sense).

Declarations of rights are texts that have marked epochal revolutions in the history of human rights. Rodotà rediscovers their power. He decides to exploit the evocative value that they have progressively acquired over the past few centuries to convey the new message of digital rights. In an article written in English and published in 2008, Rodotà employs for the first time the term "Internet Bill of Rights," and explains: "The choice of the old formula of the Bill of Rights has a symbolic force, it underlines that the aim is not to restrict freedom on the web but, on the contrary, to maintain the conditions for letting it continue to prosper. To do so, 'constitutional' guarantees are required."[66]

The identification of a suitable instrument to promote fundamental rights in the digital environment is central for Rodotà. Like Lessig, Teubner, and Pernice, Rodotà understands that the current major challenges of the online world directly affect the constitutional dimension of the protection of individual rights. Therefore, Rodotà's solution seems to be the most conventional: he proposes to use a classical constitutional instrument to solve a constitutional problem.[67] Nevertheless, the idea of a charter of rights for the internet, even though it appears at first sight in line with the constitutional tradition, presents some original aspects.

Rodotà clarifies that the use of the descriptors "charter" or "bill of rights" does not imply that the digital constitution should be the output of elaborate processes similar to those that have brought about the adoption of those documents in the past. For the Italian scholar, the charter of rights for the internet should not be the result of top-down processes analogous to those that led to the so-called "constitutions octroyées." Nor to the charters graciously granted by enlightened princes in the nineteenth century, or to the constitutions deliberated by constituent assemblies in the twentieth century.[68] Sharing Pernice's scepticism, Rodotà contends that the digital constitution cannot derive from traditional processes of international lawmaking, which would require the participation of all the relevant stakeholders: therefore not only states, but also corporations, and—especially—citizens.[69] Only in this way could the digital constitution reflect the participatory and open nature of the internet, "the largest public space that the humankind has ever known."[70]

Consequently, for Rodotà, the charter of rights for the internet should be necessarily global. In his book "Il diritto di avere diritti" (The right to have rights) he wrote:

> Landless rights wander in the global world in search of a constitutionalism that, being it global as well, could offer them a safe mooring. Today, rights are orphans of a land where they had their roots: national sovereignty once offered them a solid protection. Today, rights are dissolved in a world without borders, dominated by unrestrained power.[71]

Rodotà reports the legend of a man who owned a mill in Sanssouci, very close to the royal residence of Frederick the Great. The German king, disturbed by the proximity of the building, threatened to seize the miller's property using his royal prerogatives.[72] However, the humble

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[66] Stefano Rodotà, *A Bill of Rights for the Internet Universe*, 21 THE FEDERALIST DEBATE (2008).

[67] *Cf.* Gaetano Azzariti, *Internet e costituzione* 367 (2011) (the author argues that using the descriptor "Internet bill of rights" is legitimate in so far as it evokes the symbolic values of this concept, but cannot lead to think that such a document has the same qualities of traditional constitutions).

[68] Rodotà, *supra* note 57.

[69] *Id.*; *see also* Rodotà, *supra* note 56 (Rodotà in particular praises the model of the "dynamic coalitions" of the Internet Governance Forum); *Cf.* PERNICE, *supra* note 41.

[70] Rodotà, *supra* note 56 (use author's translation).

[71] RODOTÀ, *supra* note 58 at 3, (use author's translation).

[72] *See* Wikipedia, *Historische Mühle von Sanssouci*, (2019), https://de.wikipedia.org/w/index.php?title=Historische_M%C3%BChle_von_Sanssouci&oldid=185619946 (last visited May 3, 2019).

man politely reminded the king of the existence of a high court in Berlin, which had the power to assess the justness of the royal order. Rodotà draws a comparison between the current global context in which rights and individuals have lost their reference points, and wonders "who is the king and where are the judges today?"[73]

For Rodotà, we now live in a global society where we do not know what our guiding principles are and, even less, where we can obtain judicial redress. He argues that a global charter of rights for the internet presupposes a rethinking of the relationship between public and private. He favours an overtaking of strategies of pure "vertical domestication," where supra-national norms are in turn incorporated and implemented at lower levels. He advocates a "horizontal," expanding construction of norms, stressing in particular the future role that judges will have to interpret the general principles of the charter.[74]

E. Following Rodotà's Model

Rodotà's idea of a charter of rights for the internet attracted a significant following among the scholarship. The model of an internet bill of rights was considered as a suitable solution to limit the powers of predominant players in the digital environment, and to protect the fundamental rights of individuals, in particular by updating or re-contextualising existing principles.[75] A few scholars further stressed that this instrument should also create new institutions.[76]

Giovanna De Minico considered the question of which "legislative body" or "constituent power" should draft the internet bill of rights.[77] After having rejected the idea of a charter drafted by one single state or by a coalition of states, she concluded that the best solution would be to create a "public supranational authoritative body." This entity, according to De Minico, should legislate in a way that resembles the American "notice and comment" procedure (i.e., by preliminary gathering the opinions of all the stakeholders involved before making its final decision).

Kinfe Micheal Yilma made a case for a declaration of internet rights adopted by the UN General Assembly.[78] The structure of the existing UN organs would suitably fit the process of elaboration of a similar document. In particular, he praised the potential input the General Assembly could receive from existing crowd-sourced mechanisms headed by the Office of the High Commissioner for Human Rights in the phase of drafting. Furthermore, a similar declaration would have a strong normative impact, while at the same time avoiding hard legislation.

However, in the scholarship there is no consensus on the role of states in drafting the charter of rights for the internet. De Minico and Yilma, while recognising the global dimension of the digital environment, entrusted a central role to states and intergovernmental organisations.

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[73] RODOTÀ, *supra* note 58 at 3 (use author's translation).
[74] Rodotà, *supra* note 56.
[75] *See* David Casacuberta, Max Senges & Josep-Maria Duart, *Privacy and the Need for an Internet Bill of Rights: Are There New Rights in Cyberspace?* (2007), https://papers.ssrn.com/abstract=2798298 (last visited May 3, 2019); Francesca Musiani, *The Internet Bill of Rights: A Way to Reconcile Natural Freedoms and Regulatory Needs?*, 6 SCRIPTed 504 (2009); Azzariti, *supra* note 62; Giovanna De Minico, *Towards an Internet Bill of Rights*, 37 LOYOLA OF LOS ANGELES INT'L. AND COMPARATIVE L. REV. 1 (2015); Andreas Fischer-Lescano, *Struggles for a global Internet constitution: protecting global communication structures against surveillance measures*, 5 GLOB. CONSTITUTIONALISM 145 (2016); Kinfe Micheal Yilma, *Digital privacy and virtues of multilateral digital constitutionalism—preliminary thoughts*, 25 INT'L. J. L. INFO. TECH. 115 (2017).
[76] *See* Casacuberta, Senges, and Duart, *supra* note 73; Musiani, *supra* note 73; De Minico, *supra* note 73.
[77] De Minico, *supra* note 73.
[78] Yilma, *supra* note 73.

Conversely, Andreas Fischer-Lescano, echoing Teubner, stated that the peculiarities of the digital environment impose a constitutional solution that necessarily overtakes the traditional nation-state dimension.[79]

Lastly, it is interesting to report Gaetano Azzariti's development of the idea of a charter of rights for the internet.[80] Azzariti recognised that an effective response to the issue of the protection of fundamental rights on the internet should have a global nature. Nevertheless, he argued that a digital constitution should not necessarily be conceived as a single, "cosmopolitan" document addressing all of humankind. This would amount to a deplorable form of "constitutional colonialism."[81] For Azzariti, the route to follow is longer and more complex. He supports the slow process of elaboration of a multiplicity of charters and declarations by a variety of actors, including the civil society. This multitude of charters would persuade, influence, and create a dialogue. Only in this way, the definition of the fundamental rights for the digital society could be achieved in a democratic and participatory way. Though criticising Teubner, Azzariti eventually theorises a pluralisation of the idea and the process of elaborating an internet constitution, somehow echoing the archetype of civil constitutions proposed by the German scholar and merging it with Rodotà's model of digital constitution.

II. THE ROLE OF INTERNET BILLS OF RIGHTS

A. Digital constitutionalism

Azzariti's idea of a multiplicity of charters of rights for the internet emerging simultaneously is not a purely academic proposal, or a utopian theoretical abstraction.[82] When suggesting plural processes of elaborating fundamental principles for the digital society, he probably drew his inspiration from reality. The idea of a written charter of rights for the internet, indeed, did not remain a theoretical prototype, subject of discussion for academics and internet literati. It was translated into practice and interestingly, we can identify only one or few single texts that attempted to translate this idea of an internet constitution. We observe a significant phenomenon, the emergence of numerous charters of rights for the internet, very similarly to what Azzariti preconized: what we could define as a *movement* of "digital constitutionalism" characterizing an intense constitutional *moment*.[83]

Over the past few years, many civil society groups have published their proposal for a charter of digital rights. To mention some recent examples, in 2014, the African Declaration Group

[79] Fischer-Lescano, *supra* note 73; *cf.* LESSIG, *supra* note 10 (who opts for a residual role of states, which would be called to intervene only when the risk of adverse public consequences emerges); *see also* Teubner, *supra* note 31.
[80] Azzariti, *supra* note 65.
[81] *See id.*
[82] *See id.*
[83] *See* CELESTE, *supra* note 1; Edoardo Celeste, *Digital constitutionalism: a new systematic theorisation*, 33 INTERNATIONAL REV. L. COMPUTERS & TECH. 76 (2019); CELESTE, *supra* note 18; Dennis Redeker, Lex Gill & Urs Gasser, *Towards digital constitutionalism? Mapping attempts to craft an Internet Bill of Rights*, 80 INT'L COMMC'N GAZETTE 302 (2018) (in my previous works, I defined "digital constitutionalism" as an ideology informing an ongoing process of constitutionalisation that is seeking to adapt the core values of contemporary constitutionalism to address the challenges of the digital age. Such a process is of such relevance and scale that I spoke of a "constitutional moment." At the same time, scholarship from cognate disciplines, such as political science and communication studies, have highlighted the impact of the initiatives leading to adoption of charter of rights for the Internet as a group: hence I propose here to speak also of a 'movement' of digital constitutionalism).

issued the "African Declaration on Internet Rights and Freedoms"[84] and the Just Net Coalition promoted the "Delhi Declaration for a Just and Equitable Internet."[85] In 2015, Rodotà himself chaired a commission composed of politicians, academics, and representatives of private companies and NGOs, and issued a "Declaration of Internet Rights," subsequently endorsed by the Italian Chamber of Deputies.[86] In 2016, a German working group supported by the Zeit-Stiftung proposed a "Charter of Digital Fundamental Rights of the European Union."[87]

A significant number of individuals, including academics, politicians, and technology experts, also proposed their own draft of an internet bill of rights. Robert Gelman published his "Declaration of Human Rights in Cyberspace" back in 1997.[88] In 2010, Andrew Murray advanced "A Bill of Rights for the Internet."[89] In 2015, Mike Godwin wrote "The Great Charter for Cambodian Internet Freedom."[90] Interestingly, there have been discussions at the national level too on the need to incorporate a charter of internet rights into domestic legislation.[91] In 2014, the Brazilian parliament was the first to approve a statute establishing "principles, guarantees, rights and obligations for the use of Internet."[92] In 2019, the Nigerian national assembly voted in favour of a "Digital Rights and Freedom Bill," which was, however, not signed into law by the president.[93] Even international organisations have issued a series of declarations proclaiming rights and principles for the digital society. The EU Commission has recently announced its intention to promote the adoption of a solemn declaration on digital rights and principles.[94] One can also mention the Recommendation of the Committee of

[84] African Declaration Group, *African Declaration on Internet Rights and Freedoms*, https://africaninternetrights.org/sites/default/files/African-Declaration-English-FINAL.pdf.
[85] JUST NET COALITION, *The Delhi Declaration for a Just and Equitable Internet*, https://justnetcoalition.org/delhi-declaration (last visited May 7, 2019).
[86] Camera dei Deputati, *Mozione concernente iniziative per la promozione di una carta dei diritti in Internet e per la governance della rete*, http://www.camera.it/leg17/995?sezione=documenti&tipoDoc=assemblea_allegato_odg&idlegislatura=17&anno=2015&mese=11&giorno=03 (last visited May 7, 2019).
[87] WIR FORDEN DIGUTALE GRUNDRECHTE, Charta der Digitalen Grundrechte der Europäischen Union, https://digitalcharta.eu/ (last visited May 7, 2019).
[88] Robert Gelman, *Draft Proposal-Declaration of Human Rights in Cyberspace*, (Nov. 12, 1997) http://www.be-in.com/10/rightsdec.html (last visited Jun 17, 2019).
[89] Andrew Murray, *A Bill of Rights for the Internet*, http://theitlawyer.blogspot.com/2010/10/bill-of-rights-for-internet.html (last visited Jan. 26, 2023).
[90] Mike Godwin, *The Great Charter for Cambodian Internet Freedom*, https://www.linkedin.com/pulse/great-charter-cambodian-internet-freedom-mike-godwin (last visited May 21, 2019).
[91] GREEN PARTY (NEW ZEALAND), *Internet Rights and Freedoms Bill* (2014); LIBERAL DEMOCRATS, *Creating a 'Digital Bill of Rights': Why do we need it, and what should we include?*, (2015), https://d3n8a8pro7vhmx.cloudfront.net/libdems/pages/8730/attachments/original/1428513286/Digital_Bill_of_Rights_Consultation_Paper_FINAL.pdf?1428513286.
[92] Lei n. 12.965, de 23 de Abril de 2014, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 4.23.2014 (Braz.), http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm (last visited May 7, 2019).
[93] *See* Ujam Chukwuemeka, *Digital Rights and Freedom Bill*, (2016), http://eie.ng/wp-content/uploads/2016/06/Digital-Rights-and-Freedom-Bill-2016.pdf; *see also* Nigeria's President Refused to Sign its Digital Rights Bill, What Happens Now?, TECHPOINT.AFRICA (2019), https://techpoint.africa/2019/03/27/nigerian-president-declines-digital-rights-bill-assent/ (last visited Jun 17, 2019).
[94] *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Establishing a European Declaration on Digital Rights and Principles: Shaping Europe's Digital Future*, Com (2022) 14 Final (Jan. 1, 2022) https://digital-strategy.ec.europa.eu/en/library/declaration-european-digital-rights-and-principles.

Ministers of the Council of Europe on Internet freedom of 2016,[95] and the Code of Ethics for the Information Society, adopted by the UNESCO in 2011.[96]

As one can notice from the examples mentioned above, these documents have different names. Mass media generally refer to these initiatives with a variety of denominations, such as "Internet bill of rights," "online Magna Carta," or "Internet constitution."[97] This article reflects the use established by some scholars to adopt the descriptor the "internet bills of rights."

B. Generalisation and respecification

The emergence of a multiplicity of internet bills of rights does not represent an isolated phenomenon in the contemporary constitutional landscape. We are currently witnessing a new constitutional moment. The digital revolution generates a series of changes at a societal level, which ultimately ferment under a vault of constitutional norms shaped for an analogue society. The constitutional ecosystem is gradually reacting to face the challenges created by the advent of digital technology. The core values of contemporary constitutionalism are progressively translated in the context of the digital society. However, the constitutional discourse is no longer uniform. It resembles a normative conglomerate. It is fragmented, and acts on multiple, intersecting levels. It involves public and private, dominant and weak actors. Constitutional norms flow beyond the state dimension to reflect societal dynamics occurring in a transnational and virtual space.

This paper argues that internet bills of rights are an integral part of the constitutional response to the challenges of digital technology. The emergence of these texts is a component of the process of constitutionalisation that, at multiple levels, is adapting the main principles and values of contemporary constitutionalism to the needs of the digital society. However, their role in such a dynamic is generally neglected, and the reason for this disregard can be easily explained by looking at the legal value of these texts. Despite the constitutional "tone" that they formally adopt, not only do they not have any binding legal value from a formal perspective but they can hardly be regarded as presently exercising any legal influence from a substantial point of view.[98]

Most of the scholarship exclusively saw the value of internet bills of rights in their future legal transformation, codification, or incorporation into a (more) binding legal source. Some authors, for example, emphasise the role that international institutions, such as the United Nations, could play in this regard by formally including an internet bill of rights within their body of

[95] Eur. Consult. Ass., *Recommendation of the Committee of Ministers to member States on Internet Freedom* 123d Sess., (Apr. 13, 2016), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415fa.

[96] *See Code of Ethics for the Information Society proposed by the Intergovernmental Council of the Information for All Programme (IFAP)*,UNESCO (2011), https://unesdoc.unesco.org/ark:/48223/pf0000212696 (last visited Jun 17, 2019).

[97] *See* Alex Howard, *We the People need our existing Bill of Rights to apply in the digital domain*, RADAR (2012), http://radar.oreilly.com/2012/07/digital-bill-of-rights-internet-freedom.html (last visited May 7, 2019); *see also* Tim Berners-Lee, *We Need a Magna Carta for the Internet*, THE HUFFINGTON POST, June 5, 2014, https://www.huffpost.com/entry/internet-magna-carta_b_5274261?guccounter=1 (last visited May 7, 2019); Jenima Kiss, *An online Magna Carta: Berners-Lee calls for bill of rights for web*, THE GUARDIAN, March 12, 2014, https://www.theguardian.com/technology/2014/mar/12/online-magna-carta-berners-lee-web (last visited May 7, 2019); Pedro Abramovay, *Brazil's Internet Constitution*, THE HUFFINGTON POST, June 5, 2014, https://www.huffpost.com/entry/brazils-internet-constitution_b_5274633 (last visited May 7, 2019).

[98] *See* VERSO UN INTERNET BILL OF RIGHTS, (2015) (for a discussion of the Italian Declaration of Internet Rights, in particular the chapters by Belli, Melzi d'Eril and Vigevani, and Nannipieri).

rules.[99] Interestingly, Luca Belli, commenting on the Italian Declaration of Internet Rights, proposed to integrate it within the Italian Constitution as a separate instrument, taking as a prototype the French "Charte de l'environnement," a document enshrining a series of rights and principles related to the protection of the environment that was formally incorporated into French constitutional law in 2005.[100] Only a few scholars highlighted their utility as an intermediary step to enhance consensus and promote discussion in view of the adoption of an international normative framework on the topic or, more generally, as an instrument with a "cultural and political" value, yet always underlining their lack of binding legal force.[101]

It is true, realistically speaking, internet bills of rights might hardly be directly elevated in the future to the rank of soft or hard law by the judiciary or the legislature but could certainly be used as a source of inspiration for judicial decisions and legislative initiatives. Internet bills of rights do not generally have a legally binding *value* at present but possess a legal *status* as they play a constitutional role. They contribute to build and shape the *narrative* that forms the societal background where legal actors draw inspiration to interpret the analogue *nomos* that is currently struggling to address the challenges of the digital revolution and help make it evolve.[102]

It is precisely in their present, non-legally binding value—this paper argues—that the "force" of internet bills of rights lies.[103] It is their flexibility and ductility that enhance their capacity to experiment and represent the avant-garde of the constitutional discourse that is translating our core fundamental rights and principles in the new context of the digital society. And this translation, building on Teubner's theory of societal constitutionalism, consists in a twofold process of "generalisation" of the principles of contemporary constitutionalism followed by their "re-specification" to specifically address the challenges of the digital society.[104]

Internet bills of rights can, therefore, be seen as *proto*-constitutional discourses because, by linking society and law, they translate societal needs in the language of constitutional norms and transmit such impulses to the other components of the constitutional dimension.[105] They are *proto*-constitutional because they advance the elaboration of constitutional principles for the digital society, and, as a part of a porous constitutional conglomerate of norms, they allow

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[99] *See* Luca Belli, *Dichiarazione dei diritti in Internet. Cuius Regio eius Religio?*, *in* VERSO UN INTERNET BILL OF RIGHTS 37 (2015); *see also* Monica Alessia Senor, *La forma della Dichiarazione dei diritti in Internet*, *in* VERSO UN INTENET BILL OF RIGHTS 69 (2015); Yilma, *supra* note 73; *cf.* De Minico, *supra* note 73 (provides a theoretical perspective, suggests the idea of a supranational legislator).

[100] Belli, *supra* note 97; *see* Michel Prieur, *La Charte de l'environnement et la Constitution française*, 35 ENVIRONMENTAL POLICY AND LAW 134 (2005) (discussing the legal status of the Charte de l'environment in France); *see also* Marie-Anne Cohendet & Marine Fleury, *Chronique de droit constitutionnel sur la Charte de l'environnement*, 43 REVUE JURIDIQUE DE L'ENVIRONNEMENT 749 (2018).

[101] *See* Nicolò Zingales, *Mettiamo la Dichiarazione dei Diritti in Internet in prospettiva*, *in* VERSO UN INTERNET BILL OF RIGHTS 73–79 (2015) (comparing the Italian Declaration of Internet Rights with atypical sources of international law with exhortatory value, such as the reports of the UN Special Rapporteurs); *see* Marco Bassini & Oreste Pollicino, *Carta dei diritti in Internet verso una missione culturale. Né costituzione né legge.*, *in* VERSO UN INTERNET BILL OF RIGHTS 129–134 (2015) (stressing the "cultural and political value" of the Italian Declaration of Internet Rights in "guiding" the future choices of the Italian legislator); *see also* Claudia Padovani & Mauro Santaniello, *Digital constitutionalism: Fundamental rights and power limitation in the Internet eco-system*, 80 INT'L COMMC'N GAZETTE 295–301 (2018) (highlighting the political mission of Internet bills of rights).

[102] *See* Robert M Cover, *The Supreme Court, 1982 Term -- Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

[103] *Cf.* Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, *in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE (1992).

[104] *See* TEUBNER, *supra* note 37; CELESTE, *supra* note 18.

[105] *Cf.* TEUBNER, *supra* note 37 at 94 (describing the process of "self-constitutionalisation of corporations" as a "translation process" of supra-national soft law into the normative dynamics of corporations).

new formulations of values and ideals to flow between constitutional layers, as between communicating vessels.

In this way, in the following sections, the same characteristics of internet bills of rights that have often been criticised, such as the fact that they lack binding legal value because they are issued from civil society, are non-institutionalised processes, adopt a constitutional tone without having any formal constitutional value within national legal systems, and their significant number, will be read as a source of force of these declarations.[106]

i. Experimentalism

From a cursory look at the examples of internet bills of rights listed above, it is easily detectable that most of them are not issued from institutional processes, but are rather the output of civil society organisations or even single individuals. Even when they are adopted in the form of a recommendation or declaration by international institutions, such as the OECD or the Council of Europe, these documents do not have any binding legal value. At first sight, internet bills of rights appear as a weak instrument within the mosaic of norms that address constitutional issues in the digital society. There is no doubt that, if contrasted to the internal rules of private actors or to state law, for instance, these documents cannot bear the comparison in terms of enforceability.

However, this view takes the legal force as a unique parameter to assess the role of these documents within the constitutional ecosystem. In this way, one would neglect the very reason as to why internet bills of rights are emerging. We have seen that these documents are not the only ones seeking to translate our fundamental values and principles to address the challenges of digital technology. internet bills of rights are part of a conglomerate of norms emerging at multiple levels. Therefore, it is not unreasonable to posit that their peculiarity—their lack of legal force—is also one of the main factors at the basis of their emergence.

In contrast to the other normative instruments which are currently conveying constitutional counteractions against the challenges of digital technology, internet bills of rights, being non-legally binding, appear to be particularly ductile, plastic, and malleable. These texts are unaffected by the formalisms and constraints that would ensue from an institutional adoption. Internet bills of rights, as other normative instruments are currently doing, aim to translate our constitutional values and principles in the context of the digital society, but, in contrast to them, they are freer to experiment and innovate.[107]

For example, these texts enshrine innovative rights and principles on which there is no consensus and that have not been incorporated into other constitutional instruments yet. In this way, internet bills of rights are advancing the discourse of constitutionalism in the digital age. Like the declarations of rights of the eighteenth century, they are proclaiming new principles, a necessary step to nourish the conversation on their content and shape, which, in the longer term, will lead to their factual enforcement. Indeed, as Rodotà wrote, even the mere action of declaring rights is a first move towards their substantial recognition.[108]

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[106] *See* VERSO UN INTERNET BILL OF RIGHTS, *supra* note 96 (providing a critical account on the Internet Bill of Rights); *see also* Yilma, *supra* note 73.

[107] *Cf.* Gráinne de Búrca, *Human Rights Experimentalism* (2017) 111 AMERICAN J. INT'L L. 277 (describing the emergence of an experimentalist approach in the context of international human rights law and institutions); *see also* Günter Frankenberg, *Comparative Constitutional Studies: Between Magic and Deceit* (2019) 156 (for an account of the concept of constitutional experimentation, author describes Nineteenth century constitutions as a 'laboratory' of constitutionalism).

[108] RODOTÀ, *supra* note 58 at 32, 75.

Beyond enhancing their experimentalist character, the lack of binding legal force of internet bills of rights also allows a higher level of plasticity in their processes of elaboration and deliberation. Internet bills of rights are the output of innovative procedures involving a plurality of actors. Not only traditional institutional players, but also representatives from the technology industry, NGOs, civil society groups, and single individuals. Advancing the discourse of constitutionalism in the digital age through non-legally binding instruments allows for the adoption of more inclusive processes of deliberation, which may not be offered through traditional political channels. The procedures which lead to internet bills of rights are tailored to reflect a global, transnational society in which, as seen in the first part of this work, private corporations managing the access to digital technology have emerged as new dominant actors beside states.

Internet bills of rights offer a way to convey the instances of what Teubner calls the "spontaneous" sphere of the society, such as NGOs and advocacy groups, and, as we will see in the next section, to put them in dialogue with the powerful actors of politics and the economy.[109] The elaboration of these documents recreates a political dimension, "le politique*"*, in a global context, where the traditional political world, "la politique*"*, anchored to the state dimension, could no longer be of help.[110] Internet bills of rights bring the conversation on constitutionalism in the digital age closer to the civil society. Bespoke and innovative processes of deliberation enhance the proximity of this discussion to the people and ensure greater inclusiveness. In this way, these documents emerge as a counteraction to the progressive phenomenon of privatisation of the law in the digital society.[111] Internet bills of rights ultimately aim to foster democracy in a context dominated by the *lex digitalis* of powerful multinational corporations and by a declining, distant politics.[112]

ii. Communicability

Internet bills of rights explicitly evoke the constitutional dimension by adopting a constitutional tone. The denominations of these texts refer to traditional constitutional instruments: the charters and declarations of rights. They reproduce the structure of constitutional texts; they employ their typical jargon and rhetoric. Yet, as we have seen, internet bills of rights do not exercise any legal force. They do not have the typical superior value of constitutional texts within the hierarchy of legal sources.

However, once again, in line with what has been argued in the previous section, one cannot overlook such a clear reference to the constitutional dimension, simply because the form of internet bills of rights is not reflected in their legal force. These documents adopt a

[109] *See* TEUBNER, *supra* note 37 at 91; *see also* Christoph B. Graber, *Bottom-up Constitutionalism: The Case of Net Neutrality*, 7 TRANSNT'L L. THEORY 524, 546 (2016).

[110] *See generally* TEUBNER, *supra* note 37 at 114 (providing an analysis of the dichotomy "la politique versus le politique" in the context of societal constitutionalism); *see* also, OLIVER MARCHART, POST-FOUNDATIONAL POLITICAL THOUGHT: POLITICAL DIFFERENCE IN NANCY, LEFORT, BADIOU AND LACLAU (2007); *cf.* NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 487 (2004), (author provides an argument that "the structural coupling of the political system and the legal system through constitutions does not have an equivalent at the level of global society"); *see also* Graber, *supra* note 107 at 529 (providing a commentary on Luhmann's position).

[111] *See generally* Gunther Teubner & Andreas Fischer-Lescano, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004) (accounting the phenomenon of privatisation of law in the digital society); *see also* SUZOR, *supra* note 32; Brian Fitzgerald, *Software as Discourse? The Challenge for Information Law*, 22 EUR. INTELL. PROP. R. 47 (2000); Rikke Frank Jørgensen & Anja Møller Pedersen, *Online Service Providers as Human Rights Arbiters*, *in* THE RESPONSIBILITIES OF ONLINE SERVICE PROVIDERS 179 (Mariarosaria Taddeo & Luciano Floridi eds. 2017).

[112] *See* TEUBNER, *supra* note 37; *see also* Lee A. Bygrave, *Lex Facebook*, *in* INTERNET GOVERNANCE BY CONTRACT (2015).

constitutional tone to become part of a specific conversation. Internet bills of rights tend to evoke the normative style of constitutional texts because their message is intrinsically constitutional. By adopting a constitutional tone, internet bills of rights aim to make visible the ongoing process of defining constitutional values of the digital society that would otherwise risk remaining concealed in the complex meanders of corporate policies, in the impenetrability of the code of software, and in recondite conclaves of national and international politics.[113] These documents strive to bring the conversation on digital rights and principles to the attention of global citizens. The language of constitutions is traditionally closer to civil society than the obscure jargon of ordinary legislation and corporate terms.[114] Embracing a constitutional tone is therefore a way to enhance the communicability of a message.[115]

At the same time, internet bills of rights adopt the *lingua franca* of constitutional rights and principles to nourish a debate on a specific topic and to address a particular audience. These documents convey through a common language a series of societal instances, ultimately unifying a discourse otherwise fragmented in the multiplicity of normative dialects of corporations and institutions.[116] The objective of internet bills of rights is to foster a conversation on how to generalise and respecify core constitutional values in the context of the digital society and the language of constitutions offers a fertile field of exchange to this end, allowing the interlocutors to reflect and react by using the same language.[117]

In a time when the digital revolution generates a climate of legal incertitude and axiological dilemmas in relation to core constitutional aspects, internet bills of rights aim to develop orienting principles.[118] Traditionally, constitutions are created to transmit foundational societal values from generation-to-generation. Internet bills of rights similarly seek to articulate lasting guidelines that could work as reference points in the future: the most valuable normative contribution in this fast-changing digital society.[119]

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[113] *Cf.* TEUBNER, *supra* note 37, (author highlights the latent character of the process of emergence of civil constitutions in comparison with the "blinding glare" of political constitutions. Reflecting on Teubner's point, we could argue that the Internet bills of rights, by evoking the dimension of political constitutions, would indirectly reflect part of this glare, becoming more visible than the concealed processes of definition of constitutional norms of private corporations, for example).

[114] *See generally* Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853 (1962) (discussing the positive meaning that the notion of constitution has in our minds).

[115] *Cf.* EUROPEAN CONSTITUTIONALISM BEYOND THE STATE, 2 (J. H. H. Weiler & Marlene Wind eds., 2003) (explaining that the idea of a Constitution for Europe became suddenly popular because the constitutional language was "a fashionable code work, like 'governance', for the need to engage in a more profound institutional reform in view of enlargement.")

[116] See Evgeny Morozov, *The Case for Publicly Enforced Online Rights*, FINANCIAL TIMES (2018), https://www.ft.com/content/5e62186c-c1a5-11e8-84cd-9e601db069b8 (last visited May 22, 2019) (arguing that digital rights would not be expressed in the texts of our constitutions, but would rather be the result of a "bundle of permissions of technology platforms.")

[117] *See* Jason Pielemeier, *AI & Global Governance: The Advantages of Applying the International Human Rights Framework to Artificial Intelligence*, CENTRE FOR POLICY RESEARCH AT UNITED NATIONS UNIVERSITY, https://cpr.unu.edu/ai-global-governance-the-advantages-of-applying-the-international-human-rights-framework-to-artificial-intelligence.html (last visited May 22, 2019) (providing a similar idea).

[118] *See* LESSIG, *supra* note 10 (for a discussion of the "latent ambiguity" of constitutional texts); *see also* Casacuberta, Senges & Duart, *supra* note 73 (for an analysis the problem of rights clashes in the context of the digital society).

[119] *See* RODOTÀ, *supra* note 58 at 60 (discussing the necessity to establish orienting principles instead of detailed norms that could not follow the pace of societal changes in the digital society); *cf.* Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEOR. INQ. L. 9, 13 (2006) (for a discussion of "deformalization" as the process whereby the law retreats solely to the provision of procedures or broadly formulated directives to experts and decision-makers for the purpose of administering international problems by means of functionally effective solutions and 'balancing interests.'')

Lastly, the language of constitutions purveys a rich cultural baggage. Internet bills of rights can benefit from concepts, terminology, ideals, values, and mechanisms that have been developed over centuries to address issues of the protection of individual rights and the balancing of power.[120] Evoking this conceptual universe means that the conversation of internet bills of rights posits itself in a precise scenario instead of starting from scratch. It aims to continue an old discourse relating to rights and powers, and this time involving more people, addressing a more composite audience and speaking to global actors.

iii. Gradualism

Internet bills of rights, of course, are not printed texts or manuscripts signed with ink and sealed with wax. These modern declarations of rights are simply published online, a practice so easy and accessible today, that really everyone, from civil society groups to single individuals, can draft one's own charter and spread it on the web. It is, therefore, not surprising to see a broad array of non-institutional actors involved in initiatives seeking to draft these documents. Nor is it unexpected to observe a high number of internet bills of rights. The "parchment" of these declarations is largely available and affordable, and this partially explains why so many internet bills of rights have emerged over the past few years.

Part of the scholarship has criticized such a "fragmented" and "uncoordinated" way in which the discourse on digital constitutionalism is conveyed by Internet bills of rights.[121] However, in light of the experimentalist value of these documents that has been emphasised in the previous sections, considering their purpose of nourishing a discussion on rights and principles for the digital age through an accessible and normative language, it is possible to read the multiplicity of internet bills of rights as a positive form of gradualism. These declarations are progressively advancing the discourse on constitutional values for the digital society. They are testing new solutions and contributing to a debate; they are dialoguing and generating dialogue.

Teubner, developing his theory of societal constitutionalism, wrote:

> Civil constitutions will not be produced by some sort of big bang, a spectacular revolutionary act of the constituent assembly on the American or French model. Nor do the global regimes of economy, research, health, education, the professions have a single great original text embodied as a codification in a special constitutional document. Instead, civil constitutions are formed in underground evolutionary processes of long duration in which the juridification of social sectors also incrementally develops constitutional norms, although they remain as it were embedded in the whole set of legal norms.[122]

Internet bills of rights are halfway between political constitutions and Teubner's civil constitutions. On the one hand, they adopt the language of political constitutions and evoke the constitutional dimension to become a visible discussion on how to translate constitutional principles in the digital society. On the other hand, internet bills of rights emerge outside institutionalised political processes, as they are issued from novel combinations of institutional actors, civil society, corporations, and single individuals. In a similar way to Teubner's civil constitutions, internet bills of rights do not boastfully claim their primacy as if they were *the* unique charter of rights for the internet. There is no single, solemn constituent assembly in

[120] *See* TEUBNER, *supra* note 37, (for a recognition of the significance of political constitutions as "historical model for civil constitutions". Teubner however warns against the risks of "over-hastily" transposing the "stock of historical experience" of political constitutions, overlooking the peculiarities of the global society.)
[121] Yilma, *supra* note 73 at 126.
[122] Teubner, *supra* note 31.

charge of drafting the internet constitution. Internet bills of rights emerge with the awareness to add, each one singularly, a small brick to the conversation on digital rights and principles. There is no doubt that the level of visibility, be it economic or social, of the promoters of these initiatives may affect their specific weight in such a debate. Yet, one could argue that, if comprehensively regarded, every internet bill of rights increments and nourishes this dialogue, without pretending to declare the final word.[123]

As briefly outlined above, Azzariti advocated for a similar pluralism of initiatives in order to reach a consensus on a constitution for the digital society.[124] He criticised the idea of creating, in the present phase, a legally binding constitutional text articulating digital rights and principles. Such a global *lex superior* would risk becoming a form of "cultural colonialism" and would tend to weaken the power of existing constitutional instruments.[125] Conversely, the appropriate route to follow is, for Azzariti, a "laborious and slow" process of defining foundational principles for the digital society through the elaboration of non-binding international charters, promoted by a multiplicity of stakeholders and having a persuasive value. In this way, he rightly observes, "building a virtual democracy could come back to be a political objective of real citizens."[126] Indeed, the multiplicity of internet bills of rights is not only a positive factor in allowing for experimentalism and gradualism in the discourse on digital rights and principles, but also because such pluralism implies a higher level of involvement by civil society and, ultimately, greater democracy.

Gradualism, of course, naturally entails time. Internet bills of rights do not generate a coherent and immediately-applicable set of principles, as—borrowing Teubner's words—in a sort of normative "big bang."[127] They slowly advance a reflection, offering stakeholders involved the possibility to cogitate about the most appropriate way to translate core values and principles of contemporary constitutionalism in the context of the digital society. Internet bills of rights are not the output of a multiplicity of Solon, the Athenian lawmaker who drafted a new constitution for his city and then voluntarily went into exile to avoid the modification of his own laws. The authors of internet bills of rights propose their own declarations to partake in a dialogue; they do not leave the constitutional agora. The emergence of each of these texts does not singularly represent a transient constitutional moment. Internet bills of rights are part of an unfinished, continuous phenomenon of cogitation about digital rights and principles. A Sisyphean labour—one could say—but not in a pessimistic sense. The journey that leads to the definition of the constitutional principles for the digital age is certainly more relevant than the ephemeral instant of their solemn proclamation. In this context too, the lesson taught by Albert Camus in *The Myth of Sisyphus* is true: "[t]he struggle itself toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy."[128]

The extended temporality of the phenomenon of emergence of internet bills of rights not only allows for gradual experimentalism and enhances the level of cogitation, but it is also a necessary ingredient to generate far-sighted constitutional principles. The declarations of internet rights aim to translate the core values and ideals of contemporary constitutionalism in

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[123] *Cf. About the People's Communication Charter*, http://www.pccharter.net/about.html (last visited Oct 6, 2019) ("The People's Communication Charter is a first step in the development of a permanent movement concerned with the quality of our communication environment. [...] The Charter is not an end in itself. It provides the basis for a permanent critical reflection on those world-wide trends that determine the quality of our lives in the third millennium.")

[124] Azzariti, *supra* note 62.

[125] *Id.*

[126] *Id.* at 378.

[127] *Cf.* Teubner, *supra* note 28.

[128] ALBERT CAMUS, THE MYTH OF SISYPHUS 111 (Justin O'Brien tran., 2000).

a way that they can speak and last in the context of a fast-changing digital society. It would be of scarce utility to elaborate a series of principles exclusively tailored to the current societal scenario. The speed of digital years no longer seems to reflect the Gregorian Calendar's units, but it is somehow similar to a cat's age. In one calendar year, the digital society moves forward six times. However, we do not have any crystal ball to foresee how our society will appear in the coming decades. It is then crucial to craft future-proof constitutional rules. They do not have to last forever. It would be naive to think it possible to do as Solon did in Athens: to establish our law and go into exile to never modify it. However, taking time to understand what the core principles of contemporary constitutionalism are and how to re-specify them in the context of the digital society is a good strategy to elaborate a farsighted and future-proof set of norms.

Espousing this perspective, the gradual process of emergence of internet bills of rights is not necessarily disoriented or disorganised. It is running a long "slow and steady" race, in the hope of achieving a better and long-lasting result. If history can teach us something, it is worth remembering Cicero's words:

> Cato used to say that our constitution was superior to those of other States on account of the fact that almost every one of these other commonwealths has been established by one man, the author of their laws and institutions; for example, Minos in Crete, Lycurgus in Sparta, […]; on the other hand, our own commonwealth was based upon the genius, not of one man, but of many; it was founded, not in one generation, but in a long period of several centuries and many ages of men.[129]

CONCLUSION

By highlighting the peculiar features in which the force of internet bills of rights lies, we gain a better understanding of the role these declarations play within the constitutional ecosystem. Internet bills of rights do not emerge in a legal vacuum, but are an integral part of a conglomerate of constitutional mechanisms that are seeking to translate our constitutional values and principles in the context of the digital society. In contrast to most other constitutional instruments, often caged in rigid institutional processes or subject to the influence of a single societal actor, these declarations represent a ductile instrument allowing a multiplicity of stakeholders to participate in a reasoned conversation on digital rights and principles. Internet bills of rights adopt the *lingua franca* of constitutions to foster a debate, gradually experimenting new ideas through a cogitated process of generalisation and re-specification.

Anne Peters regarded the emergence of transnational constitutional instruments as an expression of "compensatory constitutionalisation on the international plane."[130] Similarly, in light of what has been argued in the previous sections, one could posit that internet bills of rights emerge to play a "compensatory" role within the constitutional ecosystem.[131] Freed from institutional constraints, they aim to complement the lack of plasticity, the slow and rigid institutional processes of deliberation, the innate caution and absence of experimentalist tendency of other constitutional mechanisms by courageously promoting the conversation on digital rights and principles. Internet bills of rights surface to counterbalance a static and

[129] MARCUS TULLIUS CICERO, DE RE PUBLICA (Clinton Walker Keys tran., 1928), Book II, I, 2; 110-113.
[130] Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. OF INT'L L. 579, 580 (2006).
[131] Edoardo Celeste, *Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?*, 33 INT'L REV. L., COMP. & TECH. 122 (2019)(for the first discussion of this theory).

conservatory tendency within the constitutional ecosystem. They represent—one could say—the most innovative layer of the process of constitutionalisation of the digital society.

However, compensation should not be intended as implying that internet bills of rights and other instruments composing the constitutional conglomerate are *de facto* airtight containers. As previously seen, the constitutional ecosystem is more similar to a porous material which allows its internal fluids to circulate as in a system of communicating vessels.[132] The relationship between internet bills of rights and other constitutional instruments is therefore not only compensatory, but—one could add—"stimulatory" at the same time. The tissue of the other constitutional mechanisms, such as national and supranational constitutions, judicial decisions and laws or internal rules of private actors, is permeable and, although partially soaked, it reacts when it comes in contact with the innovative fluids synthetized in the internet bills of rights' conversation.

These declarations are pushing forward the debate on how to shape the digital constitution by translating the core principles of contemporary constitutionalism in the context of the digital society. The ideas that emerge from this exchange unavoidably come in contact and, potentially, persuade other societal layers, such as politics or the economy, that the time has come and sufficient consensus has been reached to incorporate them in their own constitutional mechanisms. Internet bills of rights can therefore play a litmus test function within the constitutional ecosystem.[133] When compared to other constitutional instruments, these declarations allow for the measurement of its health. They highlight areas of constitutional "anaemia,"[134] in which the discrepancy between legal rules and social reality has reached its apex, and consequently stimulate the emergence of constitutional counteractions in other parts of the constitutional ecosystem.

[132] *See* Graber, *supra* note 103 at 551, (for an argument that the formal and social constitution should be regarded as two "interconnected vessels"); *see also* Celeste, *supra* note 81; *cf.* Teubner's conception of porous law in GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (1993).
[133] *See* CELESTE, *supra* note 1.
[134] *See id.* at 13.