INTERNET: FUNDAMENTAL RIGHTS IN A NEW DEMOCRACY

of
GIOVANNA DE MINICO[1]

Sommary: Introduction. – First part. - A regulation suited to the fundamental rights in Internet.
Second part. - 1. Regulations suitable to Internet. - 2. Objectives addressed to Internet. – 3. Conclusion.

Introduction

It may be useful to illustrate ex ante how our opinions will be presented: for the most part they will touch two areas.

The first one will involve those regulatory models concerning the net's freedoms. Just to reveal in advance something that will be explained afterwards, two alternatives are present: either the automatic implementation of the rules concerning off line rights or the creation of rules "tailored" to the technical features of the internet.

The second issue represents a challenge to investigate "whether" and "how" to regulate the Internet.

The *fil rouge* between the two parts is represented by the fundamental values shared by the International community; in other words we interrogate the question of whether a framework exists which could embrace an *ad hoc* regulation to be drawn for the Internet, suited to the freedoms exercised on the net.

Perhaps we can contextualize the topic by stating that American doctrine on this issue is currently divided into two blocks.

Those who are faithful to the idea that the Internet must remain the reign of total regulatory anarchy[2]. On the contrary the others support the thesis of the Internet encompassed in a regulatory framework. In the latter case we

---

[1] Professor of Constitutional Law and of Information and Communication law, Law Department, University of Naples, Federico II; consultant of the Civil Liberties, Justice and Home Affairs Commission of the European Parliament.

This work is fortcoming in T.E. FROSINI E G. DE VERGOTTINI (eds), *Percorsi costituzionali*, Jovene, 1/2014.

[2] P. BARLOW, *A Declaration of the Independence of Cyberspace*, at https://projects.eff.org/~barlow/Declaration-Final.html; D.R. JOHNSON – D. POST, *Law and Borders. The Rise of Law in Cyberspace*, at *Standford L. Rev.*, 1996, 48, 1367-1402; J. MATHIASON, *Internet Governance. The new frontier of global institutions*, Abingdon-New York, Routledge, 2009, 70-96, have argued, in different ways, for the independence of the cyberspace from the real world, and consequently its being allergic to any regulation (Cyberlibertarianism). The opinions of the supporters of self–regulation will be examined later.

claim a light touch of regulation which does not mean the absence of rules is necessary[3].

We intend to focus not on an absence of rules, nor on new ones, but instead to ask questions of the existing constitutional rules. Are they sufficient or must they be updated to take account of the Internet?

Finally, a comprehensive view of the possible answers will lead us to assert that all technical issues concerning the Internet cannot be left to the invisible hand of a market-oriented technological development, but should be goal-oriented when concerning common good instead. The latter option, which I termed objective equality, will not happen spontaneously or by accident; rather it may only be ensured by the effect of those policymakers choices shared with the netizens.

Should this happen, the Internet will finally be a unique and effective opportunity for everyone to pursue their personal growth and collective participation in the virtual political process.

First Part

1. A regulation suited to the fundamental rights in Internet

Moving on to the first part, we will delve here into the matter of whether the Internet should be regulated and in case of an affirmative answer, how.

As we said before, our starting point is represented by the national Constitutions, firstly of Italy, but also taking into consideration those of France and of U.S.A.

They already encompass norms protecting traditional means for the expression of thought, i.e. radio, television and newspapers.

Meanwhile, they lack specific rules for on line means, such as blogs, websites, chat lines, and social networks, barring a few exceptions, the Greek and the Ecuadorian ones.

It's against this background that I'd like to begin by looking closer to our home and examine the Italian legal system which has a base option. We can immediately note the absence of any reference to the Internet in articles 15 and 21 of the Italian Constitution.

What does this mean?

---

[3] The Cyberpaternalism (J. REIDENBERG, *Governing networks and rule-making in cyberspace*, *Emory. L. Jour.*, 1996, 45, 911) answered to the above mentioned theories with a new regulatory approach: the network architecture. A balanced critique to this approach can be read in A. MURRAY, *The regulation cyberspace: control in the outline environment*, New York, Routledge-Cavendish, 2006, who opens instead to new hypotheses of rules.

Others prefer a transfer of the offline rules, as they are, to the online universe (J.E. COHEN, *Cyberspace as/and places*, *Col. L. Rev.*, 2007, 107, 210-256. While R. MANSELL, *Introduction - human rights and equity in cyberspace*, in A. D. MURRAY – M. KLANG (eds), *Human rights in the digital age*, London, GlassHouse Press, 2005, 1-10, reconsiders the necessity of an *ad hoc* regulation, in case it refers to the human rights. The positions of the supporters of a multi stakeholder vision will be examined later.

Does article 21 require the insertion of an *ad hoc* provision standardizing the means and even a principle of discipline?[4] Or may it suffice to leave the text unmodified while stretching through interpretation the constitutional fabric so as to encompass the new virtual reality, although it is not explicitly mentioned?

It must be pointed out that textual modification may prove unable to cover future technological developments which at the moment cannot be foreseen. An evolutionary interpretation of the Italian Constitution, instead, may allow us to adapt the text to the changes of technology, while leaving its literal expression intact.

Such an operation would be made easier by the elastic structure of many constitutional provisions, among which articles 15 and 21 of the Italian Constitution. They grant protection, not only to named Media, but also to "any other form of communication" (art. 15).

We wouldn't be the first to test the elasticity of constitutional rules either. American constitutionalism did not find the formal revision of the I amendment of the United States Constitution to be necessary[5].

It offered a valid argument to the Supreme Court for the defense of the freedom of speech on line. The constitutional protection is construed through a broad interpretation of the provisions guaranteeing that same freedom off line.

This kind of equalization, between on line and off line freedom seen in the United States, allows us to suggest how, for the Italian constitution, we could extend guarantees already provided for offline communication in articles 15 and 21 of the Constitution to online communication.

In general terms, two basic safeguards are provided for fundamental rights off line, valid also for liberties online.

First of all what do they consist of ?

A) The first, named the law clause is a binding way of allocating regulatory work between primary and secondary rules. Because of this, the Constitution entrusts in whole or in part the regulation concerning topic matters to the law adopted by Parliament. As a consequence the Government will be able to adopt a more specific secondary regulation only after the legislator has enacted the general norms and steering guidelines.

These latter ones will have to be followed and developed by the Governmental secondary rules.

From what we are saying so far the first thing to do is: to test the constitutional compatibility of the rules enacted by the legislator. This compatibility will depend on the completeness of the legislator's intervention, which in turn will determine the scope of the secondary rules.

An example can be found in legislative decree n. 44/2010[6], which says little about online copyright, leaving the regulating onus on the Authority of

[4] XVI Leg., A.S. [Senate's act] n. 2485, Disegno di legge costituzionale [Project of constitutional law].

[5] D.C. NUNZIATO, *Virtual freedom* , Stanford, Stanford University Press, 2009, 97-100.

[6] Decreto Legislativo 15 marzo 2010, n. 44 (Legislative Decree, 15th March 2010, n.44), at *Gazzetta ufficiale* (*U.G.*), 29 th March 2010, n. 73.

the field, Authority for the Guarantee of Communications. We can't now explore it deeply, but we can sketch out the main concerns[7].

B) Turning to the second safeguard: the jurisdictional clause – well known in the Italian doctrine as "riserva di giurisdizione" – is a typical expression of the powers' principle. It means that only a judge is allowed to adopt authoritative acts, limiting individual rights and liberties covered by the first constitutional safeguard because only the independence of the judge and the due process deserve the confidence of the citizens.

What is the concern if these same rights are exercised online?

We want to clear up all misunderstandings: the equivalence of guarantees between rights off and on line does not mean the automatic extension to the latter of specific regulations enacted for the former. Italian Constitutional Court[8] has noted the "in eliminable technical differences" between print, radio, and television in order to highlight the necessity to keep the relative regulations distinct. As a consequence of this, one rule, although suitable for one of those media, may be unreasonable, and inappropriate, if it is transferred to another. Therefore, the net is somewhat allergic to the automatic transfer of current offline rules to itself. For instance, the responsibility of Internet service providers[9] for illicit content on line could not possibly be subject to the same rules applicable to the responsibility of an editor in chief off line. Neither would it seem appropriate to automatically broaden the generalized and unwarranted exemption from responsibility, provided to ISPs by the E-commerce Directive[10].

Therefore, the Italian Constitutional Court's argument appears notable in asserting the principle that "to each means its own regulations", though the Court never touched upon the universe of the Internet. A similar rationale can be found in the U.S. Supreme Court decisions. I am referring primarily to *ACLU v Reno*[11], in which Justice Stevens, [12]delivering the opinion of the Court, clearly acknowledged the Internet's "uniqueness". In that case the focus was on the transferability to the net of the content limitations enforced on other media

---

[7] You could find a deep examination concerning this issue in G. DE MINICO, *Libertà e* copyright *nella Costituzione e nel diritto dell'Unione*, at (2014) http://www.associazionedeicostituzionalisti.it/articolorivista/libert-e-copyright-nella-costituzione-e-nel-diritto-dell-unione.

[8]Constitutional Court, 7th May 2002, n. 155, at *http://www.giurcost.org/decisioni/index.html*.

[9] Hereon in: ISP.

[10] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), in *OJ L* 178, 17.7.2000, 1–16.

[11] Reno *v* ACLU, 521 U.S. 844 (1997).

[12] Reno *v* ACLU, quoted above, in part. J. STEVENS, 'Opinion of the Court', at http://www.law.cornell.edu/supct/search/display.html?terms=aclu%20v%20reno%20&url=/supct/html/historics/USSC_CR_0521_0844_ZO.html.

for the purpose of safeguarding minors, as for instance through the enforcement of protected time slots in television broadcasts.

Such limitations would result in an unjustified and disproportionate restriction in 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 is the case with television.

Therefore, as all know, the Communications Decency Act 1996 was deemed unconstitutional for its part in banning patently offensive speeches on the net because it abridge the freedom of speech protected by the First Amendment.

Why have I quoted this, so long after the event?

Because the rule of law suggests an apt intuition[13]: the necessity to envisage regulations of means of diffusion "tailored to the specific technicalities of the instrument".

A recent decision of the ECtHR[14] has upheld the impossibility of applying *a priori* to the Internet the same discipline reserved to traditional Media. In essence, the Court has evaluated that the prohibition of paid political advertisements (section 320(2) of the Communication Act 2003) is compatible with the art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, because this limitation pursues "the aim of preserving the impartiality of broadcasting on public interest matters and, thereby, of protecting the democratic process".

We think that we can draw from the sentence this core idea: the necessity to maintain the regulations at a *minimum* level, because the net is an irreplaceable instrument for individual growth and the fostering of informative fluxes. This entitles it to claim protection against heavy authoritative intervention.

This *per se* entitles it to claim protection against heavy authoritative intervention: "the most participatory form of mass speech yet developed it entitled to the highest protection from governmental intrusion".[15] We may recall on this point the speech of the Secretary of State, Hillary Clinton, who, in the wake of Julian Assange's revelations on the net, while denouncing the infringement of state secrets, did not in the least criticize the wide diffusion of the news on the net or in print, since the circulation of ideas remained a prevailing interest even when compared with diplomatic secrecy.[16]

---

[13] Red Lion Broadcasting Co. *v*. FCC, 395 U.S. 367 (1969); Southeastern Promotions, Ltd. *v*. Conrad, 420 U.S. 546, 557 (1975); FCC *v*. Pacifica Foundation, 438 U.S. 726 (1978); Turner Broadcasting System, Inc. *v*. FCC, 512 U.S. 622, 637-638 (1994); Sable Communications of Cal., Inc. *v*. FCC, 492 U.S. 115, 128 (1989).

[14] Animal defenders international *v* the United Kingdom, 48876/08, Grand Chamber, 22th April 2013, in http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-119244#{"itemid":["001-119244"]} forthcoming in *EHRR*.

[15] Still J. STEVENS, n. 11 above.

[16] G. DE MINICO, *Privacy e segreto di Stato. Il paradosso Americano* [*Privacy and State secret. The US paradox*], at *Il Riformista* Newspaper (Rome), 5 th February 2011, 4.

It should be noted that in North-American culture freedom of speech even prevails over the danger that the net be used as an instrument of terrorist aims.[17] It is a fact that the US has never enacted legislation in order to treat the incitement of terrorism as a serious criminal offence. [18]The First Amendment, as interpreted in *Brandenburg v Ohio*,[19] would not have allowed it, as the majority of terrorist propaganda lacked "the potential to produce imminent lawless action, as required under the *Brandenburg* exception".[20]

The strict interpretation of the appropriate balance between the two above mentioned values may have increased the risk of an improper use of the net, preventing that websites be censored or the individual right to access the Internet be blocked.[21] The basic assumption is very clear: when the option lies between constraining dangerous ideas or leaving their circulation unhindered, the latter choice is best, since it encompasses the antibodies to produce a reaction against terrorist threats, hard content, offensive[22] or even hateful speeches.[23]

Just like a Rossini crescendo freedom of speech imposes itself as the unique and real cornerstone of democracy. We are faced with the supreme value of the marketplace of ideas,[24] resembling a transposition of the economic theory of the *laissez-faire* [25] on the ground of an exchange of immaterial goods. At the same time, it is a reasonable assumption that "governmental regulation of the content of speech is more likely to interfere

---

[17] Recently: M. BODIE - S. ESTREICHER (eds), *Workplace discrimination, privacy and security in an age of terrorism*, Alphen an den Rijn, Kluwer Law International, 2007, for the contributions of S. F. COLB, D. M. MALIN, D. M. ROSOFF and J. STUMPF.

In a more general prospective: P. KELLER, *Sovereignty and Liberty in the Internet Era*, (2013) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213706.

[18] R. A. POSNER, *Not a suicide Pact*, Oxford, Oxford University Press, 2006, 121.

[19] Brandenburg *v* Ohio, 395 U.S. 444 (1969), in*http://supreme.justia.com/cases/federal/us/395/444/case.html*

[20] So K. ROACH, *The 9/11 effect*, Cambridge, Cambridge University Press, 2011, 227.

[21] H. CLINTON, *Internet Rights and wrongs: choices & challenges in a networked word*, 15th February 2011, at http://www.state.gov/secretary/rm/2011/02/156619.htm.

[22] CASS R. SUNSTEIN, *Believing False Rumors*, at S. LEVMORE - M. C. NUSSBAUM (eds), *The offensive Internet*, Cambridge, Harvard University Press, 2010, 91-139.

[23] Snyder *v* Phelps, 751 U.S. 562 (2011) http://www.supremecourt.gov/opinions/10pdf/09-751.pdf.; D. CUCEREANU, *Aspects of regulation freedom of expression on the Internet*, Oxford, Intersenzia, 2008, 203-208.

[24] Justice OLIVER WENDELL HOLMES speaks clearly in his dissenting opinion (Justice Brandeis concurring): 250 U.S. 616 (1919), *Abrams* v. *United States*, at *http://www.law.cornell.edu/supct/html/historics/USSC_CR_0250_0616_ZD.html*.

[25] D. W VICK, *Regulating hatred*, in M. KLAN – A. MURRAY (eds), *Human rights in the digital age*, quote n. 3 above, 53.

with the free exchange of ideas than to encourage it". And – as the Supreme Court stated in *ACLU* quoted above – the benefits of censorship in a democratic society remain "theoretical but unproven". For the first time in the history of mankind billions of people can easily communicate and share information through the internet. There can be no overwhelming public or private interest justifying that the effectiveness of the internet be substantially curbed in this respect. Therefore, a basic principle can be drawn stating that a regulation of the internet, if strictly necessary, should in any case be maintained as light and unobtrusive as possible.

Second part

1. Regulations suitable to Internet

Moving on now to the second part of our paper, which concerns how to regulate the net, we could give a hasty answer with Lessig's[26] unsurpassable lesson. The author resorts to four instruments: law, self-regulation, market and architecture.

Lessig's starting point was the conflict between copyright on the net, whose revenues generally fall short of expectations due to piracy, and the citizens' right to freely access websites.

In the case examined by American scholars, relying on the law would not work because criminal sanctions for individual illegal downloads would not serve as a deterrent for what had become a mass custom. Downloading music through peer to peer systems was not felt by collective consciousness as a socially reprehensible act. And when a diminishing trend in piracy emerged, Lessig found out that it did not come as an effect of a punitive legislation.

In fact, websites have adopted a new price policy in order to favor and promote legal purchases. As a consequence it has become convenient for users to pay a reasonably low price rather than face the danger of a criminal charge. So, in this case the deterrent capacity of the sanction was preceded and strengthened by the force of what Lessig calls *lex mercatoria*.

But a further element should be mentioned: legal scholars were construing new forms of collective licensing, that is general and standardized content licenses which allowed net users to exercise some rights of use of online works for non-commercial purposes, against payment of a lump sum to the Internet provider with the stipulation of the access

[26] With diversity of approaches see: C. D. RAAB - P. DE HERT, *Tools for technology regulation: seeking analytical approaches beyond Lessig and Hood*, in R. BROWNSWORD & K. YEUNG (eds) *Regulating technologies*, Oregon, Hart publishing, 2008, 236; E. COHEN, Cyberspace as/and Space, at *Colum. L. Rev.*, 2007, 107, 216 and J. ZITTRAIN, *The future of the Internet*, London, Penguin Books, 2008, 125-126 and A. MURRAY, *Information technology law*, Oxford, Oxford University Press, 2010, 62-66.

contract. They are well known today as creative commons,[27] in the birth of which Lessig himself played a considerable role.[28] They provide a substantial contribution to prevent criminal behavior because they help to educate the community of web surfers to lawfulness by giving them a chance to 'get off' at a low cost.

From his example - the piracy on line - we can assume that the better regulation is nothing but the eventual outcome of the combination of many factors combined: law, self-regulation and the market.

The plurality of regulative instruments opens up to the question of the existence of an order among them: who should intervene first and who at a later moment?

Self-regulation[29] can integrate and complete the regulatory framework started at legislative level, but it cannot start *ex novo*, otherwise it becomes secondary to the law would not be verified and with it so does the accountability principle[30].

This means that if the danger of a selfish degradation of the Internet is to be reduced, self regulation cannot operate as an exclusive source, or even as a source independent of law. It must be construed instead as secondary to political decisions and the laws[31] in which they are embodied. Such a relation is suitable to ensure the construction of public policies, at the service of which self-regulation must place itself.

On this point the doctrine according to which public powers are not able to define human behavior exhaustively and without external contributions, cannot be disregarded. Indeed, Teubner's words on porous law[32] come to mind: a legal universe sensible, permeable to *extra-ordinem* sources. But the excesses of a certain way of reading the "autopoietic scheme" of the legal system should be avoided.[33] In Teubner's thinking, the State is inadequate as

---

[27] M. GODWIN, *Cyber rights*, Cambridge, MIT Press, 2003, 186-254; C.T. MARSDEN, *Internet co-regulation*, Cambridge, Cambridge University Press, 2001, 89.

[28] L. LESSIG, *Creative Commons @5Years*, 2007, at www.Creativecommons.org, already anticipated in *Code and other laws of Cyberspace*, NY, Basic Books, 1999.

[29] J. BLACK, Constitutionalising self-regulation, *Mod. L. Rev*., 1996, 59, 24, 27-28.

[30] G. DE MINICO, *A hard look at self-regulation in the UK*, at *Eur. Bus. L. Rev*., 2006,17, 1, 183 ss.

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

[32] G. TEUBNER, *The law as an autopoietic system*, Oxford, Blackwell, 1993, 100 and 140.

[33] G. TEUBNER, *Substantive and reflexive elements in modern law*, at *Law and society review*, 1993, 17, 239; G. TEUBNER - FEBBRAJO (eds), *State, law, and economy as autopoietic systems*, Milan, Giuffrè, 1992; G. TEUBNER (ed), *Dilemmas of law in the welfare State*, Berlin, De Gruyter, 1986; R. MAYNYZ, *Steuerung, steuerungsakteure und steurengsinstrumente: zur präzisierung des problems*, Siegen, Universität Gesamthochschule, 1986, 70 and 24.

the exclusive author of law, and as a consequence, private subjects should share the construction of lawfulness. Quite differently, claiming that "reflexive law"[34] extends to cover the renunciation by politics to control private interest government, goes well beyond the German scholar's theory. Reflexivity certainly admits a State aware of its own inadequacy to resolve exclusively within its structure the law-making capacity of the entire legal system. But it cannot be construed in terms of a public subject completely divested of sovereignty.[35]

An intermediate conclusion can be drawn at this point. In the presence of a self-regulation left adrift, and a State renouncing to its role of architect of the legal system, the attainment of the *common good* becomes an occasional and uncertain event. It is left to the unlikely coincidence of the common good itself with the aims of private interest governments.[36]

If the private bodies will be subordinate to the public intervention, an auxiliary relation will be established. A French author has correctly depicted the private contribution as limited to the "*mise en oeuvre des politiques publiques"* (implementation of the public policies).[37]

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

2. Objectives addressed to Internet

One reason only allows us to speak of a hierarchy among values and of subsidiary among sources as regards the Internet: the attraction of the net to constitutional system and it is at this point that we rejoin with out initial reflections. We have denied the necessity of a formal modification of our Constitution to encompass Internet but at the same time We want to affirm a "Constitution for Internet".

A Supranational legislator should be charged to write its Constitution in accordance with the non-territorial nature of the Internet.

Such a Constitution will allow us to solve the following questions: pinpointing a criterion to balance opposite values (freedom of expression and the protection of personal data), and recommending a preferential order in the concourse of binding sources and self-regulation. By virtue of this hierarchy of values the Hadopi 2[38], although the intervention of the Conseil

---

[34] W. BÜHL, *Grenzen der Autopoiesis*, at *Kölner Zeitschrift für Soziologie und Sozialpsychologie*, 1987, 39, 247.

[35] A. D. MURRAY, *The regulation of cyberspace*, quoted n.4 above, 244-251.

[36] J. KAY - J. VICKERS, *Regulatory reform: an appraisal*, at G. MAJONE (ed), *Deregulation or re-regulation? Regulatory reform in Europe and the United States*, London, Pinter, 1990, 239.

[37] C. A. MORAND *La contractualisation corporatiste de la formation et de la mise en oeuvre du droit*, in C. A. MORAND (ed), *L'Etat propulsif. Contribution à l'étude des instruments d'action d'Etat*, Paris, PUF, 1991, 207.

Constitutionell, has remained illegal because it grants prevalence to the copyright, economic liberty, to detriment of the right to access, fundamental liberties A report on the implementation of Hadopi 2-shows the failure of the policy of repression, which is unable to restore the rule of law: Internet surfers persist in the acts of piracy[39].

At the international level - European Convention of Human Rights and other Charters – the legal principle not only embraces what We have already said, but at least two other guarantees directed to contain the legislator's political power: the limits of necessity and of proportionality[40].

Thanks to the ECHR only indispensable sacrifices are admissible, not differently avoidable, to the fundamental freedoms; thanks to this, the advantage caused to the limiting good would have to be at least equal to the damage caused to the limited good.

In light of these yardsticks only by walking a tightrope could we hope to put the Hadopi 2 on the sound footing. It forces upon freedom of speech an unjustified sacrifice, as the failure of repressive politics has proved.

For similar reasons the new regulation of Italian Authority[41] is censurable: it does not comply with the jurisdictional clause, entrusting to the Authority the repressive power against websites[42]. A flaw, this one, which in the French law has been corrected by the *Conseil Constitutionnel*.

Finally, the Constitution to Internet also poses a new problem: the identify of this authority legitimate to dictate a new international legal system and the effectiveness of the latter, in view of the weakness of the system of enforcement[43].

---

[38] Loi n. 2009-1311 du 28 Octobre 2009 relative à la protection pénale de la propriété littéraire et artistique sur internet 8 (Law 2009-1311 October 2009, concerning the criminal protection of copyright on the Internet) , in *http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021208046&categorieLien=id*.

[39] P. LESCURRE, *Mission 'Acte II de l'exception culturelle? Contribution aux politiques cuklturewlles à l'èere numérique*, Mai, Paris, 2013, 421: "les coûts et délais de mise en oeuvre; les effets négatifs sur la performance des réseaux; les possibilités de contournement, notamment à travers la création de «sites miroirs »; les risques de sur-blocage, c'est-à-dire de blocage non désiré de sites non concernés par la mesure; la persistance des contenus filtrés ou bloqués".

[40] In a more general prospective: P. KELLER, *Sovereignty and Liberty in the Internet Era*, (2013) at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213706.

[41] A.G.Com., *Regolamento in materia di tutela del diritto d'autore sulle reti di comunicazione elettronica e procedure attuative ai sensi del decreto legislativo 9 aprile 2003, n.70* [Regulation on copyright and electronic communications in implementation of the legislative decree 9 th April 2003, n. 70] at *http://www.agcom.it/Default.aspx?DocID=12229*.

[42] See G. DE MINICO, *Libertà e* copyright *nella Costituzione e nel diritto dell'Unione*, at http://www.associazionedeicostituzionalisti.it/articolorivista/libert-e-copyright-nella-costituzione-e-nel-diritto-dell-unione.

[43] See G. DE MINICO, *Towards an Internet Bill of Rights*, forthcoming.

3. Conclusion

We started by challenging the erroneous assumption that a formal modification of State Constitutions is necessary to encompass the Internet, for the purpose of protecting fundamental rights and liberties on line. We have underlined instead the real need for a "Constitution" tailored to the Internet. In order to achieve this goal we have indicated that only a supranational legislator can be entrusted with the task of writing a Bill of Rights[44] for the Internet. This solution is made necessary by the a-territorial nature of the net. Finally, we have outlined the nature and scope of this future regulation for the Internet.

Now we face a final question: is there a set of values, which the legislator will have to accept and enforce in drawing up a discipline well suited to the network?

In our opinion, this set of values does exist: it is composed of all the principles of modern constitutionalism, commonly shared in the European and Anglo-American experience. It is clear that these principles will provide effective guidelines to future regulation only if they are rethought with reference to the peculiarities of the network. The basic values may well be the same, but the specific rule should reflect the place where the needs arise and in which those values must be applied.

Therefore, the content of the rules must respect the ultimate function of the network: invest in a discipline aimed at implementing the principle of substantive equality on a ground different from the factual reality. The virtual world is - no less than the real one - marked by strong inequalities, to be compensated with asymmetric regulation *in bonam partem*.[45] This concept leads to rules intended to promote weaker social categories in need of an additional protection in order that a greater equality may be effectively pursued.

This is the challenge of the Internet.

Substantive equality, as I have said before, should therefore be the keystone of a regulatory framework for the Internet. The infinite possibilities of a better quality of life, better services, greater knowledge generated by the network must represent a chance for social redemption for those who so far have not been allowed to share economic prosperity and social inclusion. This is even more important because - in a world marked by increasing inequalities, which are a serious threat to the future of us all - the network proposes itself as the only tool potentially able to reverse the trend, even offering a new model of peaceful coexistence. In this sense, Internet can become the cornerstones of modern democracies, and no less so than it has already been in the past the freedom of the

[44] For a reading aimed at analysing the contents of this Bill of Rights see: A. MURRAY, *A bill of rights for the Internet*, at http://theitlawyer.blogspot.co.uk/2010/10/bill-of-rights-for-internet.html#!/2010/10/bill-of-rights-for-internet.html.

[45] Among several, see: G. DE MINICO, *The 2002 EC Directives telecommunications: regime up to the 2008 ongoing revision. Have the goals been reached?*, at *Eur. Bus. L. Rev.*, 2008, 658-659.

press and the freedom of speech.

The goal is clear: equality. This means that the Internet must be redeemed from the narrow image of a 'land' populated only by selfish myths of liberalism, to be defended as the largest public space that humanity has ever had to gain experience of civic virtues and policies.

In another my works[46] I have reflected widely on the specific issue of equality, whose results I will only summarize here: the right of citizens' access to the Internet; the same right of operators to next generation networks and, ultimately, of consumers to services.

Concerning the right of citizens' access, this consists in the universal provision of fast connection, regardless of location or income of the net-citizens. Concerning the right of operators, this aims to assure that network architecture is easily accessible to the non-owner operators. Concerning the right of the consumers to services, this meets the need to provide consumers with a broad choice between plural information products offered by different economically independent entrepreneurs, in opposition to the substantial monopoly of the giants of the network, who are allergic to net neutrality.

But the pivotal reflection reveals that the objective of equality should be pursued, overcoming obstacles and fighting powerful enemies. Above all, we must be clear that its achievement is not a natural and predictable outcome of technical progress, which is not inherently oriented in a unique and predetermined direction. We are disputing the argument that the so called *Lex Informatica*[47] could be a primary and automatic source of a rule-making oriented *per se* and by default to the common good. I believe that such a result may be obtained only if the policymaker has pursued equality as a specific goal, and has consequently provided effective means to achieve it. The technique is not good or bad in itself. So the preliminary choice of the goal that the technique should achieve belongs to the author of the rule, together with the accountability for the choice itself.

The alternative, as advocated here, focuses on the recipient of the benefit provided by the technique: the weak subject, worthy of favourable legislation, or for those already strong, who therefore receive a *surplus* of benefits? In the first case, the technique has been the driving force for socially well-distributed growth; in the second case, the same will be the multiplier of well-being in favour of those who are already advantaged *per se*.

I can offer several examples, although it will not be possible to explore them in detail here: access to the broadband, not yet promoted as a universal service; the architecture of the Next generation networks designed in favour of the ex-incumbent; or even the absence of regulation to guarantee net neutrality. These precedents underline the

---

[46] G. DE MINICO, *Internet. Regola e anarchia* [*Internet. Rules and anarchy*], Naples, Jovene, 2012, chapters II and III.

[47] J. REIDENBERG, *Lex Informatica: the formation of information policy rules through technology*, at *Texas L. Rev*., 1998, 76, 553.

need to reset the existing rules and to deliver to the supranational legislator a blank sheet to be filled freely. The examination of national legislation and implementation measures is disappointing, because it shows that the conflict between the under-protected categories - new operators, net-citizens - and the economic interests of communication enterprises has been basically resolved in favour of the latter.

The law of the market has finally won. As an effect, the weaker party does not receive the additional protection that it would deserve in accordance with the network promoted as the new lever of modern constitutionalism. To this end, what should the supranational legislator do?

Essentially, it should return each actor, public and private, to his own domain. And as far as its own rulemaking is concerned, it should resort to self-defining concepts rather than to general clauses, and to substantive regulation instead of uncertain and general principles inevitably in need of broad interpretations. In all cases, it should pursue the purpose of resolving the conflict between the categories in need of protection and Internet entrepreneurs in favour of the former.

This settlement of boundaries would have the effect of returning political choice to the policy maker, and wresting it back from Independent Authorities and private powers, to which it has been entrusted through a broad delegation by policy-makers. Authorities would be dedicated instead to tasks more appropriate to their institutional position, which entails no political responsibility. At the same time, the judicial power would be involved in the interpretation of rules sufficiently defined in their content, in such a way that the political project, sketched out by the Legislator, could not be started ex novo by the judge.

Such a division of labour should be completed at the regulatory level assuming the priority of creating asymmetrical rules with the purpose of reversing the current trend in favour of adult users, operators in dominant position, citizens already provided with a connection. The regulatory focus should be re-oriented in favour of children, neo-entrants entrepreneurs and citizens who cannot afford a connection at market prices.

These, as weak categories, are entitled to receive additional support from a properly asymmetric regulation in order to re-equalize the inequality of their condition the unbalanced relationship now in existence between the weak categories and communication enterprises is to be overturned. This would also be in accordance with the social mission to which the enterprise should in principle already obey. The point is that the communication enterprise has been detached from the common good following an incorrect conception of the market economy that reduces public intervention to ultra-minimal standards. We face nowadays a poor imitation of the Smithian chimera of an automatic harmony between public and individual interests: a myth to which not even Smith - at least according to my readings - seemed to believe fully.

New concepts are required if the Internet is to be regulated in coherence with the values of equality and individual rights. These values are the only ones able to ensure that technological progress ends up in a chance of growth for all, not just for those already enjoying a dominant position in economic competition or political participation.