FUNDAMENTAL RIGHTS IN THE DIGITAL SOCIETY: TOWARDS A CONSTITUTION FOR THE CYBERSPACE?

DERECHOS FUNDAMENTALES EN LA SOCIEDAD DIGITAL: ¿HACIA UNA CONSTITUCIÓN PARA EL CIBERESPACIO?

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ABSTRACT: This work aims to study the new dimensions of fundamental rights in the digital society and the challenges for its protection. The first part of the paper focuses on the regulation and the governance of the Internet. After that, it analyses the role of fundamental rights in the cyberspace and, in particular, the fundamental rights will be considered as guiding principles of the Internet's architecture. As a final conclusion, the paper addresses the question of whether a constitution of the cyberspace is needed.

Keywords: Digital society, Constitution, fundamental rights.

RESUMEN: Este trabajo pretende estudiar las nuevas dimensiones de los derechos fundamentales en la sociedad digital y los desafíos para su protección. En la primera parte, el estudio se centra en la regulación y gobernanza de Internet. Después, se analiza el rol de los derechos fundamentales y, en el ciberespacio, en particular, los derechos fundamentales serán presentados como principios rectores de la arquitectura de Internet. Como conclusión final, se plantea la cuestión de si el ciberespacio necesita una Constitución.

Palabras clave: Sociedad digital, Constitución, derechos fundamentales.

I. THE TECHNOLOGICAL REVOLUTION AND THE LAW

"We are all neighbours now. There are more phones than there are human beings and close to half of humankind has access to the internet. In our cities, we rub shoulders with strangers from every country, culture and faith. The world is not a global village but a global city, a virtual cosmopolis"; these are the opening words of a recent book by Professor Timothy Garton Ash[2]. I would dare to comment that our societies are facing a change of era; the Era of Information[3] is opening up, or, venturing further, the Digital Era is upon us. The technological revolution of the twentieth century, particularly with regard to the development of the Internet and of other Information and Communication Technologies, has disrupted economic, social, cultural and political structures. Most notably, the emergence of the Internet has not only changed our way of life, but has gone far beyond, giving

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[2] Garton Ash (2016) p. 1.

[3] Castells (1997).

rise to the constitution of a new space. The Internet[4] is, as such, a system of communication that creates a global and decentralised system which enables the interconnection of computers worldwide for instantaneous data exchange. The Internet is also a physical network of technology, but it has become much more than this, having created a new *civic habitat* for the twenty-first century citizen, a virtual and authentic *urbs* in which to develop oneself: a world ruled by ubiquity and instantaneity, which transcends the normal physical categories of time and space, and in which communication will be key[5]. The life that develops in this habitat is real, even though it may be virtual rather than physical; in it are persons that interact[6]. Cyberspace is thus something more than the Internet[7].

As explained by J. Echevarría, a space has been created that encompasses the entire planet and which raises the idea of the Telepolis[8]: a new social space, the third environment, which differs profoundly from the natural and urban environments in which humans have traditionally lived and interacted. This presents a new space for interrelation and interaction between human beings, in which part of productive activity can be developed and in which, as can be expected, the problem of power also arises[9].

To be precise, this is a problem of power in cyberspace, which, in the beginning, was naively sought to be ignored. The Internet was to be the panacea of anarchic society:

> "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. (…) We have no elected government, nor are we likely to have one, so I address you with no greater authority than that with which liberty itself always speaks. I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear. (…) Governments derive their just powers from the consent of the governed. (...) Cyberspace does not lie within your borders. (...) It is an act of nature and it grows itself through our collective actions. (...) We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before."[10]

Cyberspace, it was thought, would remain outside of any need for regulation and any form of governance. As we have just seen, cyberanarchy was postulated and the construction of cyberspace was conceived as "a natural act"; in reality, the spontaneity of technological

[4] On the technological foundations of the Internet, compare with Bia and López-Tarruella (2016) and De Andrés Blasco (2005).

[5] I have stated this in similar terms in Teruel Lozano (2013) p. 39.

[6] Lessig (2009) p. 43-47.

[7] Lessig (2009) p. 43-47.

[8] Echevarría Ezponda (1994).

[9] Echevarría Ezponda (2000) p. 39; and, similarly, Echevarría Ezponda (1999).

[10] "A Declaration of the Independence of Ciberspace", edited by Perry Balow in 1996. Text accessible at: https://www.eff.org/cyberspace-independence. Accessed March 11, 2019.

development was recklessly trusted, and decisions regarding the construction of cyberspace were made as "collective actions" by Internet users. It is true that the design of the Internet, and therefore its governance, was originally a question of a principally technological nature which was overseen by technicians themselves and by Internet users and providers[11].

However, as cyberspace has developed, the result has been precisely the opposite. In this day and age, I believe it is not possible to conclude that it is Internet users who are constructing the virtual space. This, as we will see, is principally in the hands of a group of international organisations lacking democratic legitimacy and, above all, certain multinational corporations[12]. A phenomenon of Internet centralisation around the major technological giants (Google, Apple, Facebook, Amazon and Microsoft) has been effectuated[13]. Moreover, it cannot be concluded that the absence of government has led to a clean space in which Internet users can act freely and without threat. Much to the contrary, the increase in illicit or harmful activities carried out via the Internet appears worrying, along with the impunity with which such activities often happen. It is true that, as predicted by cyber-libertarians, the current architecture of the Internet presents significant difficulties for the establishment of public regulation, as we will have the opportunity of studying. However, the error of this view has been, in my opinion, in the belief that freedom would come from the absence of the State, without meaning to imply a blind trust in the latter[14]. As one of the most respected authors in this field, Professor Lessig, has pointed out, freedom in cyberspace will not emanate from the absence of a State, but will come, as elsewhere, from the existence of a certain type of State; we construct liberty as our founders did, setting society on a particular Constitution[15]. In short, *ubi societas, ibi ius*[16]. But we must not settle for just any *ius*; nor for just any Constitution. The achievements of modern constitutionalism, which has been able to build a model of social coexistence based upon the triad of the social and democratic State of Law, must be brought forward to this new society.

Indeed, it is precisely around this idea that the current study relating to perspectives on fundamental rights in a digital society revolves. There are two issues which I consider relevant to highlight. On one hand, as we have just presented, it is worth questioning the role that fundamental rights should play in the design of the architecture of cyberspace and its efficacy in the human activities that develop in this cyberspace. But, beyond the structure of cyberspace, if we now call our society an "information society", or even a "network

[11] Olmos (2016) p. 344.

[12] As explained in Olmos (2016) p. 345, once the Internet reaches large dimensions, standardisation processes require greater coordination. However, unlike previous technological innovations, responsibility for critical Internet resources was assumed by a number of international organisations. A new model is set, in which the private sector acquires a key role as the main driver of innovation and as a value-creating agent in the network.

[13] Ramonet (2016) p. 21.

[14] Compare the contrast between the cyber-anarchist vision and "non-exceptionalist" vision of the law of the Web in García Mexía (2016) pp. 20 ff.

[15] Lessig (2009) p. 35.

[16] Compare Teruel Lozano (2010) p. 340.

society"[17], it is clear that the new social, political and technological paradigms also open up new perspectives for the development of law and for the reconsideration of fundamental rights. If society evolves, the law must do so with it. Thus, the second issue puts forth the need to face the task of translating and redefining fundamental rights before the new paradigms of the digital society of the twenty-first century, taking into account not only that which encompasses virtual activities, but all human relationships.

Before this, we will begin by pointing out some peculiarities of digital law and the difficulties that, as we have seen, Internet regulation presents. In the conclusion we will discuss the extent to which it may to be appropriate to affirm a Constitution or a Charter of Fundamental Right *of or for* the Internet.

2. INTERNET GOVERNANCE, DIGITAL LAW AND DIFFICULTIES IN INTERNET REGULATION

Cyberspace has been defined as a digital microcosm in which neither borders, distances, nor centralised authority exist[18]. And it is precisely these structural characteristics of the World Wide Web, to which it owes its status as a medium of multifaceted communication[19], that hinder its regulation; however, they are not the sole characteristics responsible. Lessig notes, in relation to the aforementioned, three "imperfections" which impede the regulation of the Internet: there is no way of knowing *who* the person is, *where* he or she is from, nor *what* he or she is doing while using the Internet[20].

That said, the architecture of the Internet is such because it has been desired to be this way. For example, the basic feature of the Internet was, since its conception, the creation of a decentralised structure which would permit the exchange of information without the existence of a sole control centre which would be vulnerable to attacks. This structure, moreover, was required to link computer terminals based far apart; something which has ended up giving rise to the birth of a World Wide Web. But all of this has been the result of technical responses to particular propositions, which have paved the way in defining the architecture of the Internet as we know it today, but which have not necessarily constrained it. The Internet could have been designed and constructed with other objectives and in a different manner, and it is still possible today to redesign its architecture based upon different principles and objectives. As Lessig suggests, we must not let us be carried away by "essentialist" visions of that which is the Internet: for sure, cyberspace takes on a

[17] Highlighting the value of communication, the network society has been defined as a society in which members are or can be permanently conversing or communicating on any topic with others through the resources and facilities provided by the systems or networks of communication and information (Galindo (2013) p. 9). Compare with Van Dick (2012).

[18] Pérez Luño (2005) p. 15.

[19] It must be taken into account that, as a communication system, the Internet has a multifaceted nature insofar as it allows for very varied forms of interpersonal communication and masses, since any element that can be digitized (data, voice, video, image...) can be transmitted through it. Compare with Fernández Esteban (1998) pp. 26 ff.

[20] Lessig (2009) p. 80.

certain form, but it need not be so. There is no single form nor one single architecture that defined the nature of the Web[21]. Ultimately, technology is malleable[22].

Recognising this premise, it must also be warned, following this same author, that within the regulation of cyberspace various sources converge: law, architecture, social norms and the market. Among these, of outstanding importance is that of the architecture (or the code) in determining the space itself and the activities which may be performed in it. The code contains certain values inscribed within it and makes others impossible; in this sense, it also constitutes an element of regulation, in the same way that architecture in real space does[23]. From this stems the importance of the law not only engaging with the conduct and activities carried out via the Internet, but also being able to interact indirectly in predisposing the architecture or the code of the Web itself. The law can also modify architectural regulation and in this way, succeed in giving rise to different conduct[24].

As such, digital law[25] must essentially concern itself with three things (although here we are interested only in the first and the last): firstly, the regulation of the code or the architecture of the Internet, understood as the standards and protocols that configure it; secondly, the regulation of the physical network; and finally, the regulation of the content and the activities that are carried out across the Internet[26].

In this context, the regulation of content is the object of study preferably in that which is known as telecommunications law, a highly specialised branch of law in which fundamental rights have limited scope. This is not the case with the other two topics; with the design of the architecture of the Web, in view of how this may impact the possibilities given to citizens that interact on it; and with the regulation of content and activities that may be carried out. In both areas it is desirable that fundamental rights be deployed effectively, as will be seen. But before this it may be relevant to answer two questions: how and who is assuming the regulation of cyberspace? And, more specifically, who is designing the architecture of the global digital space?

In relation to the content and activities that are carried out on the Internet it seems that the problem is not exactly the absence of regulation, but its overlapping hypertrophy. Various states try to impose their sovereignty when conflicts arise, or when they encounter illicit activities that they want to fight, but they face the difficulties derived from the decentralized and global nature of the Internet and the dispersed, spontaneous and substantially anonymous condition of the activities that are developed through it. This creates inter-jurisdictional conflicts and leads to a set of rules that overlap each other[27], which ends

[21] Lessig (2009) p. 74.

[22] Lessig (2009) p. 74.

[23] Lessig (2009) p. 209.

[24] Lessig (2009) p. 215.

[25] On the appellation, characteristics and evolution of digital law, or the law of the Web, compare with García Mexía (2016): 20 ff.

[26] Cf. García Mexía (2016) pp. 30 ff.

[27] Assumptions such as those in the Yahoo case give evidence of how some States have sought to establish themselves as universal judges in the prosecution of conduct on the Internet. On the specific case, see Cotino Bone and De la Torre Forcadell (2002): 897-917. On general competition between sovereign States, see Lessig (2009) pp. 463 ff.

up determining the "insufficiency of state legislations"[28] to face this objective. A few shortcomings have been attempted to be remedied in a very sectorial way through international cooperation. However, the legislation that would need to be harmonised is very different and it is very difficult to reach common international standards[29]. The establishment of common rules of jurisdiction and the adoption of police and judicial cooperation agreements, in particular extraterritorial enforcement of judgments, may also help, although this would not prevent a sort of *forum shopping* by Internet users seeking to publish content and perform fraudulent activities where legislation is looser. However globalised the Internet is, at least within the respective territory, States have the tools to enforce their law, and technological means exist (and can be further advanced) so that they can order Internet providers and servers to block certain content and activities[30]. Therefore, since the absence of a law is not a viable response, but it is difficult to reach a scenario in which a single law can be applied in cyberspace (there is no state or organisation with the capacity to impose such sovereignty), it can be agreed with Lessig that the most plausible future scenario is precisely to achieve the regulation of contents and activities on the Internet through the concurrence of multiple laws with sufficient technological support to allow the zoning of cyberspace[31].

Similarly, self-regulation and self-control systems are being developed by Internet operators and users themselves. For example, social networks, better known as Facebook or Twitter, have their own codes of conduct and systems to report content that infringes upon these codes. This presents a solution that also raises caution, since it leaves to private powers the answer to conflicts between individuals in areas that may be crucial and, as we shall see, may affect the effective enjoyment of fundamental rights. Ultimately, private companies are motivated by self-interest and their responses to conflicts do not have to meet the criteria of impartiality and public interest that, contrarily, must govern the performance of the State. But, and this is no less important, these codes of ethics are not a democratic source, but rather resemble an "issued charter" from the Rulers of the Internet, which places Internet users in the position of "online subjects"[32]. It is they who decide, in and of themselves, what is allowed and forbidden, and the space of freedom we have as individual Internet users in each of the spaces that dominate in a largely monopolistic and autocratic way.

An intermediate proposal, like that of Professor De Minico, can be made which combines self-regulation and the law, acting to define *ex ante* and *ex post* general rules to avoid deviations from self-regulation: "[the State] should not be called to act as a regulator in detail of individual behaviour, but rather as an overall system architect, intervening before and after self-regulation. Ex ante, the State will define the general rules, the goals to be

[28] Muñoz Machado (2000) p. 42.

[29] One example in this regard would be the Council of Europe Convention on Cybercrime of 23 November 2001. This Convention manages to establish a common denominator in relation to piracy and cybercrime, but it only manages to unify illicit content linked to minimum standards regarding child pornography.

[30] Lessig (2009) pp. 480 ff.

[31] Lessig (2009) pp. 480 ff.

[32] Echevarría Ezponda (2000) p. 47 (original in Spanish).

pursued, the values to be fulfilled. Ex post, it will be in the State's responsibility to correct any deviation of private regulations from the rules it has preliminary set"[33].

This combination of public regulation and self-regulation is what has been seen, for example, with the right to be forgotten following the *Google case*[34]. As a consequence of the European Court of Justice ruling, Google was required to implement a mechanism to safeguard citizens' right to be forgotten according to the guidelines set by the Court itself; meaning that Google's decisions can be monitored in the first instance by the courts or even by data protection authorities.

However, this marriage between State (legislature) and private powers is not always so congenial. Something which strikes as particularly worrying, upon analysis, is the second of our formulated questions: who is designing the architecture of the global digital space? In this respect, we must differentiate two levels within the construction of the Web, without wishing to enter into technical terminology: on one level, the deep structure of the Internet; and on the other, the structure of each community that coexists in it. To maintain the initial metaphor, if cyberspace was a city, within it would exist different neighbourhoods in which, furthermore, different activities would be carried out. One of these neighbourhoods might be the World Wide Web; another may be social networks; search engines, etc.

Indeed, with regards to the design of the deep structure of the Web, signs of progress glimmer. As previously explained, the design of the Internet was originally a highly technical issue which was entrusted to autonomous organisations such as the Internet Architectural Board (IAB), the Internet Engineering Task Force (IETF), the World Wide Web Consortium (W3C) and the Internet Society (ISOC). The management of certain critical resources was taken up by organisations such as the Internet Assigned Number Authority (IANA) or, formerly, the Internet Corporation for Assigned Names and Numbers (ICANN). However, the debate about Internet governance continues towards the recognition of the need to institutionalise forums, or even to create organisations in which governments, the private sector and civil society can participate in the decisions made regarding the principles and rules that ought to determine the evolution and utilisation of the Internet[35]. In this respect, the "Roadmap for the future evolution of the Internet Governance" as reflected in the NETmundial Multistakeholder Statement dated 24 April 2014 may be used for reference, or works developed by the Internet Governance Forum (IGF). The European Union has also shown interest in participating in defining the deep structure of the Web with initiatives such as the European Union's cybersecurity strategy for an open, protected and secure cyberspace, or by means of the Council of Europe, where an Internet Governance Strategy (2016-2019) on democracy, human rights and the rule of law on the Internet has been adopted.

However, events differ regarding the definition of the architecture of each community or neighbourhood of the Internet, in which the dominance of Internet giants can be plainly seen. With certain limits – such as the data protection laws imposed by the

[33] DE MINICO (2015) p. 7.

[34] CJEU 13/05/2014, *DATA PROTECTION AGENCY V. GOOGLE*, C-131/12.

[35] Compare with OLMOS (2016) pp. 344 ff.

European Union and safeguarded by the Court of Justice[36] – these Rulers of the Internet are the ones constructing the neighbourhoods, in which we citizens later interact, to suit their interests. They are the ones deciding the technical features of email services, social networks, how our personal data is handled, and the extent to which we enjoy any authentic privacy. Is there any doubt that Google is currently the most influential company in the world and the one that is determining the changes that we experience?[37]

As Garton Ash indicates, the fight for power is yet more complex online: "A plethora of international organisations, national governments, parliaments, companies, engineers, media outlets, celebrity tweeters and physical and virtual mass campaigns through social networks all now compete in a multilevel, multidimensional game. The outcome often hinges on intricate intersections between business, politics, law, regulation and rapidly developing tecnologies of communication"[38]. This is a complex situation, the explanation for which merits the analogy of dogs, cats and rats. "Governments are the dogs, companies are the cats and we are the mice. The biggest cats are more powerful than all but the very biggest dogs"[39].

And in this fight for power what seems to be clear, at least the way I see it, is that the decisions related to the regulation of activity and content in cyberspace, as well as those relating to its architecture and code, cannot remain in the confines of a supposedly invisible hand, but must be oriented towards the common good[40] and this can only be achieved, at least from the perspective of legitimacy, through organisations and institutions with democratic accountability that guarantee the participation and voice of citizens (or, at least, of Internet users, if the distinction is appropriate); something that is currently not in place. Much to the contrary, the truth is that nowadays there is an "invisible hand" which is building the architecture of cyberspace, spurred on by the State and by business interests; a new architecture which tightens control and produces a highly efficient level of regulation, but of which we are unaware to what point it will safeguard personal liberties[41]. Hence the interest in studying now the function of fundamental rights firstly in relation to the architecture of cyberspace, and secondly in relation to redefining fundamental rights in a digital society.

[36] See, for example, CJUE 6/10/2014, *Schrems v. Data Protection Commissioner,* C-362/14, in which the Court held that Decision 2000/520 was invalid and considered that, in the light of various provisions of the Charter of Fundamental Rights of the European Union, national authorities can monitor whether a third State guarantees an adequate level of protection of the rights of citizens in the processing of their personal data.

[37] Ramonet (2016) p. 114, citing Julian Assange.

[38] Garton Ash (2016) p. 26.

[39] Garton Ash (2016) p. 26.

[40] In this sense, De Minico (2015) p. 3: "all technical issues concerning the Internet cannot be left to the invisible hand of a market-oriented technological development, rather, it should be goal-oriented towards achieving a common good".

[41] Lessig (2009) p. 36.

3. FUNDAMENTAL RIGHTS AS GUIDING PRINCIPLES OF THE ARCHITECTURE OF A DIGITAL SOCIETY AND THEIR PRESERVATION BEFORE PRIVATE POWERS

Any system of protecting modern fundamental rights is founded with the aim of realising the ideals of liberty and equality in relation to human dignity. And it is precisely this orientation towards "respect and advancement of the human person" that has led to recognising a double dimension in fundamental rights as basic objective values and as a human mark of protection in legal situations related to the person[42].

Fundamental rights thus have, on one hand, a dimension related to the individual as rights of defence that can be put forward in principle against the State in a dialectic of authority and freedom. Although, insofar as it is assumed that private powers now constitute a threat to the effective enjoyment of fundamental rights, no less disturbing than that represented by public power[43], it consequently entails that they also have an impact on relations between individuals. As Professor Pérez Luño rightly points out, it is necessary for well-meaning public authorities to "promote the conditions for the freedom and equality of the individual and of the groups in which they are integrated in order that these liberties be real and effective," as well as to "remove obstacles that impede or hinder the realisation of such conditions" according to what is expressly stated in article 9.2 of the Spanish Constitution[44]. On the other hand, in the dimension relating to the substance of the fundamental rights themselves, the latter constitute the presuppositions of the consensus on which any democratic society must be built; in other words, their function is to systematise the objective axiological content of the democratic order to which the majority of citizens give their consent and nurture their duty of obedience to the law. They also carry the essential guarantee of a free and open political process, as an element informing the operation of any pluralistic society[45].

Both dimensions of fundamental rights appear especially relevant to me in their influence on the design of the architecture of cyberspace. If we presume, as we have accepted here following Professor Lessig's thesis, that one of the main determinants of the regulation of this new social space is precisely its architecture (or its code), which is going to be key to determining what is possible or not to develop through it, and if one considers, as has also been suggested, that it is necessary to democratise the environment of cyberspace for it to constitute a true *civic habitat*, a new city in which people interact, then the foundations on which this city ought to be built must be based on the recognition of fundamental rights. Fundamental rights must guide the principles behind the architecture of cyberspace. Because, as has been pointed out, the architecture of cyberspace and its code are not elements pre-defined by any sort of natural or technological law, but have been constructed to satisfy certain demands, primarily military and secondarily commercial. It is now time

[42] Pérez Luño (2011) p. 16.

[43] Bilbao Ubillos (1997) p. 243.

[44] Pérez Luño (2011) p. 19 (original in Spanish).

[45] Pérez Luño (2011) p. 17.

to acknowledge that this architecture must be sustained on the basis of the objective values emanating from the recognition of fundamental rights. This requires political rather than technical decisions; thus renouncing the belief that cyberspace is a spontaneous technical construction. I would go further; I believe that just as with bioethics and laws relating to biological advancements, a need has arisen for ethics and law to guide and regulate certain technological activities, placing moral and legal limits on what is technically possible. It will be necessary to address this legal and philosophical debate in the field of information and communication technologies also. The construction of cyberspace demands that these disciplines, Law and Philosophy, perform their regulatory and guiding function in the field of technological advances. And in this task the fundamental rights recognised as "essential components of an objective order in the community" have an undoubted potentiality. Because precisely what has been created with cyberspace is a new political community; a new city.

Moreover, in their dimension as rights of defence, fundamental rights must continue to display their effectiveness against any State that has demonstrated its harmful power and ability to unleash itself in the face of siren calls in the online sphere. Revelations of mass clandestine surveillance such as those leaked by Edward Snowden or Wikileaks give substantial evidence of this. But it is not only the State that can threaten the freedom and the rights of people in cyberspace. Precisely in this area is where the power of certain private entities, those I have previously called the Rulers of the Internet, is most clearly demonstrated. In cyberspace these Rulers of the Internet are the real Leviathan[46]. As S. Rodotà explains, Google, "for example, is not only one of the most powerful multinational corporations. It is a force unto itself, superior to an infinity of nation States, with which it negotiates, power to power. It is a daily interlocutor with hundreds of millions of people to whom it offers the possibility of entering and interacting in the digital universe"[47].

Can these powers be left unsupervised? Clearly not. This marriage between the State and the Rulers of the Internet, who reign supreme in cyberspace and build it according to their interests, must be subject to the restraints that set fundamental rights as a guarantee of freedom, equality, autonomy and security of the people. And to do this, in the face of this vision of a State threatening citizens' freedoms on the Internet, one must start from the postulates of a social and democratic constitutionalism to affirm the role of democratic States as guarantors and advocates of fundamental rights in cyberspace, even if they must resort to international or supranational collaboration[48] to achieve this, or if new political entities have to be formed with global democratic legitimacy to govern cyberspace. For the moment, as recommended by the Council of Europe, we must trust that it is the States themselves that enforce their obligation to guarantee human rights to all persons within their jurisdiction, applicable in the context of Internet use and which must include the supervision of private companies. This is due to the fact that human rights, which are univer-

[46] Garton Ash (2016) p. 1.

[47] Rodotà (2012) p. 416 (original in Italian).

[48] Compare with Council of Europe. Internet Governance. Strategy 2016-2019. Democracy, human rights and the rule of law in the digital word. Adopted on 30 March 2016.

sal and indivisible, as well as related laws, prevail over the general conditions imposed on Internet users by any private sector actor[49].

4. THE RE-DEFINITION OF FUNDAMENTAL RIGHTS IN THE LIGHT OF NEW TECHNOLOGICAL ENVIRONMENT

The technological revolution has not only generated a need to discipline the newly created space, cyberspace, but also, from what can be seen, has introduced new paradigms in human relationships as much in virtual activities as in physical ones. Those of us who knew life before the expansion of the Internet know that today our way of life is not the same as before. Thus, as stated in the introduction, if society evolves, the law must also do so, and in particular fundamental rights must adapt to new realities and trends to safeguard the freedom and autonomy of the people. In this sense, the new technological environment implies the need to re-define the content and guarantees of fundamental rights to adapt them to the new reality both online and offline. It is a work of translation in which it is necessary to reinterpret the principles that underpin the constitutional protection to guarantee their validity in this new era and in which we must adapt the guarantee of rights to the new threats that have arisen. On some occasions the work will be less innovative and may suffice with minimal mutations of existing categories; on others, at least in my opinion, we will have to face novel situations that call for a creative intervention in relation to the content and the guarantee of rights[50].

The task of translation must be faced at times exclusively from the perspective of the Internet. So, for example, we find ourselves with interesting work such as the Annexe to the Council of Europe Recommendation in 2014[51] which includes a guide to human rights for Internet users, or the *Dichiarazione dei diritti in Internet*[52], which addresses the recognition of new rights related to the Internet (such as the right to be forgotten) and seeks answers to even newer matters that arise in cyberspace which cannot be responded appropriately using traditional charters of rights. But it must also be considered that re-definition of fundamental rights in a digital society will broaden the scope of cyberspace and affect its general perception. In this sense, freedom of expression or privacy will likely not be the same in their content and in the foundations of their recognition as they were before the technological revolution[53].

[49] Council of Europe. Recommendation CM/Rec(2014)6 from the Council of Ministers to member States on a Guide to human rights for Internet users. Adopted on 16 April 2014.

[50] Lessig (2009) pp. 255 ff., referred to the "latent ambiguities" which have arisen in the area of human rights and which call for new responses.

[51] Council of Europe. Recommendation CM/Rec(2014)6 from the Council of Ministers to member States on a Guide to human rights for Internet users. Adopted on 16 April 2014.

[52] Prepared by a commission formed at the request of the President of the Italian Chamber of Deputies, the final version of which was published on 28 July 2015. Text accessible at: http://www.camera.it/application/xmanager/projects/leg17/commissione_internet/dichiarazione_dei_diritti_internet_pubblicata.pdf. Accessed March 11, 2019.

[53] I have already dedicated a previous work to this matter, with ideas which I now draw upon with some innovations. Compare with Teruel Lozano (2013).

5. FINAL THOUGHTS: IS IT NECESSARY TO HAVE A CONSTITUTION FOR CYBERSPACE?

As a conclusion of the present work, it may be emphasised that the technological advances and the new social, economic, cultural and political paradigms that characterise the present network society demand a reaffirmation of a "digital constitutionalism"[54], and in particular to reinforce the fundamental rights in two ways. Firstly, the efficacy of fundamental rights should be reclaimed as objective values in the design of Internet architecture, as an exemplar that guides the construction of cyberspace to make it a space in which the freedom, equality and autonomy of citizens can be fully realized. Secondly, we must accept the need to adapt the content and assurances of fundamental rights in the face of new patterns of human relations and the threats that have arisen as a consequence of the new technological environment.

From both considerations, the need to constitutionalise cyberspace is almost immediately apparent. The construction of cyberspace and new perspectives in the recognition and protection of fundamental rights call for an adaptation of the conceptualisation that existed thus far. This is a task for which it does not appear sufficient to introduce reforms in national constitutions that point out the new technological reality, nor would it be appropriate to attempt this task by broadly interpreting constitutional texts[55]. It seems imperative to face the proclamation of a Charter of Rights for the Internet in the supranational sphere or, further still, to undertake a truly constituent process in this sphere that culminates in developing a constitutional text. If cyberspace forms a global political community in which citizens from all over the world interact, communicate and carry out ordinary activities, the basic structure of this community corresponds to a constitution which establishes as its guiding principle the full development of citizens in the new environment with respect to the values of freedom, equality, justice and pluralism.

This presents classic problems and raises obvious doubts: who would assume that constituent power and promulgate the constitution? With what legitimacy? How effective would this constitution be and whom would it be directed at? Which content should be incorporated? In this regard, starting with the latter questions, some of which have already been partially answered in this study, I understand that this Internet Constitution would have to incorporate a charter of rights adapted to the new virtual reality, in the manner of the *Dichiariazione dei Diritti*; furthermore, an institutional model, a form of governance for cyberspace that responds to the demands of the democratic principle, should be established[56]. As expressed in the NETmundial Multistakeholder Declaration adopted in Brazil on April 24, 2014: "Internet governance should be built on democratic, multistakeholder processes, ensuring the meaningful and accountable participation of all stakeholders, in-

[54] Redeker *et al.* (2018).

[55] Thus, De Minico (2015) pp. 12 ff.

[56] Regarding this, Rodotà (2012) p. 415 indicates how "non si può accettare una privatizzazione del governo di Internet, ed è indispensabile far sì che una pluralità di attori, ai livelli più diversi, possa dialogare e mettere a punto regole comuni. Il tema della democrazia promossa da Internet esige che si affronti anche la questioni della democrazia di Internet".

cluding government, the private sector, civil society, the technical community, the academic community and users". It would be a constitution that would be effective against the powers that act on the Internet, public or private, and that would engage all users of the Web. Because if there is something that has been demonstrated is that "we must rethink the declaration of human rights, which was not signed in vain by States and our rulers from above. Demanding that online multinational corporations respect the basic rights of the citizens of the E3 (digital environment), starting with the right to privacy and universal access, is one of the primary tasks to accomplish in order to civilise and democratise E3."[57]

Lastly, it is more difficult to define what can be the constituent power that legitimises this process of constitutionalisation of cyberspace. It is possible to consider such a power being led by the UN itself, perhaps as a first step towards the construction of a "Network State"[58]. A reflection that, although today may seem science-fiction, may have future value. Ultimately, "engaging with the problem of the "Constitution of the Internet", and with the complex way in which technology meets freedom and institutes the political space, requires deep considerations. Technologically determined transformations can be understood and governed only by putting in place "prospective" instruments, and, if this happens, by then redefining the foundational principles of individual and collective liberties"[59].

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[57] Echevarría Ezponda (2000) p. 56.

[58] Compare with Rodotà (2012) p. 421, following M. Castells in this matter.

[59] Rodotà (2012): 423 (original in Italian).

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