

FROM CONSTITUTIONAL FREEDOMS TO THE POWER OF THE  
PLATFORMS: PROTECTING FUNDAMENTAL RIGHTS ONLINE IN THE  
ALGORITHMIC SOCIETY

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*The rise of the algorithmic society has led to a paradigmatic shift where constitutional liberties granted to online platforms have turned into newfound powers. This situation is not only the result of new technological developments but also of the recognition of the online platforms' exclusive role in implementing an online public regulatory framework, as the cases of content management and the right to be forgotten online illustrate. Behind such delegated competences, online intermediaries can exercise sovereign powers over their online spaces through instruments based on private law and technology. In this scenario, the liberal constitutional approach adopted in relation to online platforms has played a crucial role in increasing the possibilities for these actors to affect individuals' fundamental rights. This work will address two potential solutions to limit the extent of such private powers from a (digital) constitutional law perspective. The first will focus on the introduction of new user rights whose aim is to regulate online platforms' decision-making processes and provide new legal remedies against such decisions. The insertion of new procedural rights in the online environment, including, for example, the obligation to explain the reasons behind platforms' decisions, would be appropriate in order to reduce the opacity of automated decision-making processes and foster human awareness in the algorithmic society. The second solution will question the doctrine of horizontal effect in order to establish a mechanism to enforce constitutional rights vis-à-vis online platforms that operate in a global framework.*

**Keywords:** constitutional law, online platforms, fundamental rights, algorithms, digital constitutionalism

TABLE OF CONTENTS

I. INTRODUCTION.....66

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II. FROM PUBLIC TO PRIVATE AS FROM ATOMS TO BITS: THE REASONS FOR A GOVERNANCE SHIFT .....	71
III. DELEGATED EXERCISE OF QUASI-PUBLIC POWERS ONLINE .....	79
1. <i>Online Content Management</i> .....	80
2. <i>The Right to Be Forgotten Online</i> .....	83
IV. AUTONOMOUS EXERCISE OF QUASI-PUBLIC POWERS ONLINE: TOWARDS A PRIVATE CONSTITUTIONAL ORDER OR AN ABSOLUTE REGIME?.....	85
V. SOLUTIONS AND PERSPECTIVES.....	90
1. <i>The Old-School Solution: Nudging Online Platforms to Behave as Public Actors</i>	91
2. <i>The Innovative Solution: Enforcement of Fundamental Rights</i> .....	96
VI. CONCLUSION: DIGITAL HUMANISM V. TECHNO-AUTHORITARIANISM .	101

## I. INTRODUCTION

In recent decades, globalisation has challenged the boundaries of constitutional law by calling traditional legal categories into question.<sup>1</sup> The internet has played a pivotal role in this process.<sup>2</sup> On the one hand, this new protocol of communication has enabled the expanded exercise of individuals' fundamental rights such as freedom of expression.<sup>3</sup> On the other hand, unlike other ground-breaking channels of communication, the cross-border nature of the internet has weakened the power of constitutional states, not only in terms of the territorial application of sovereign powers vis-à-vis other states but also with regard to the protection of fundamental rights in the online environment. It should come as no surprise that, from a transnational constitutional perspective, one of the main concerns of states is the

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<sup>1</sup> Mark Tushnet, 'The Inevitable Globalization of Constitutional Law' (2009) 49 *Virginia Journal of International Law* 985.

<sup>2</sup> Oreste Pollicino and Marco Bassini, 'The Law of the Internet between Globalisation and Localization' in Miguel Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law. Rethinking European Law and Legal Thinking* (Cambridge University Press 2016).

<sup>3</sup> Jack Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *New York University Law Review* 1.

limitations placed on their powers to address global phenomena occurring outside their territory.<sup>4</sup>

The development of the internet has allowed new businesses to exploit the opportunities deriving from the use of a low-cost global communication technology for delivering services without any physical burden, regardless of their location. In particular, the predominant role of online hosting providers, in this work referred to as 'platforms', cannot be neglected.<sup>5</sup> Although the activities of such platforms are based on different business models (e.g. Facebook and Google),<sup>6</sup> they do not produce or create content but instead host and organise their users' content for profit. These platforms should therefore be considered as service providers rather than content providers.<sup>7</sup>

Furthermore, due to the development of new profiling technologies such as pattern recognition mechanisms, platforms can now increasingly rely on more pervasive control over information and data. These algorithm-based technologies allow private actors to process huge amounts of information,<sup>8</sup> with the result that they now know almost everything about individuals and their activities online, as the Cambridge Analytica scandal has indirectly shown.

Even more importantly, however, the processing of data has entrusted these actors with almost exclusive control over online content, transforming their

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<sup>4</sup> Eric C Ip, 'Globalization and the Future of the Law of the Sovereign State' (2010) 8(3) *International Journal of Constitutional Law* 636.

<sup>5</sup> Anne Helmond, 'The Platformization of the Web: Making Web Data Platform Ready' (2015) 1(2) *Social Media + Society* 1.

<sup>6</sup> Geoffrey G Parker, Marshall W Van Alstyne and Sangett P Choudary, *Platform Revolution – How networked markets are transforming the economy – and how to make them work for you* (WW Norton & Company Inc 2017); Nick Srnicek, 'The challenges of platform capitalism: Understanding the logic of a new business model' (2017) 23(4) *Juncture* 254.

<sup>7</sup> For a definition of online platforms, see Parker, Van Alstyne and Choudary (n 6).

<sup>8</sup> Solon Barocas, Sophie Hood and Malte Ziewitz, 'Governing Algorithms: A Provocation Piece' (2013) <<https://ssrn.com/abstract=2245322>> accessed 20 June 2018; Caryn Devins, Teppo Felin, Stuart Kauffman and Roger Koppl, 'The Law and Big Data' (2017) 27 *Cornell Journal of Law and Public Policy* 357.

role into something more than a mere intermediary.<sup>9</sup> The 'information society', which developed at the end of the 1990s, has evolved into the 'algorithmic society' through the emergence of hosting providers such as YouTube and Facebook.<sup>10</sup>

This evolution calls into question the role of online platforms, moving the debate from a private to a public law perspective,<sup>11</sup> more specifically to a digital constitutional one.<sup>12</sup> Indeed, *inter alia*, modern constitutionalism aims to, on the one hand, protect fundamental rights, and, on the other hand, limit the emergence of powers outside constitutional control.<sup>13</sup> A new wave of (digital) constitutionalism is rising as a shield against the discretionary exercise of power by online platforms in the digital environment.

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<sup>9</sup> Jacqueline D Lipton, 'Law of the Intermediated Information Exchange' (2012) 64(5) *Florida Law Review* 1337. See also Georgios N Yannopoulos, 'The Immunity of Internet Intermediaries Reconsidered?' in Mariarosaria Taddeo and Luciano Floridi, *The Responsibilities of Online Service Providers* (Springer 2017).

<sup>10</sup> Jack Balkin, 'Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation' (2018) 51 *University of California Davis* 1151 1.

<sup>11</sup> Recently, scholars have approached the public role of online platforms from different perspectives. See e.g. Natali Helberger, Jo Pierson and Thomas Poell 'Governing Online Platforms: from Contested to Cooperative Responsibility' (2018) 34(1) *The Information Society* 1; Kate Klonick, 'The New Governors: the People, Rules, and Processes Governing Online Speech' (2018) 131 *Harvard Law Review* 1598; Orla Lynskey, 'Regulating Platform Power' (2017) *LSE Legal Studies Working Paper* 1 <[http://eprints.lse.ac.uk/73404/1/WPS2017-01\\_Lynskey.pdf](http://eprints.lse.ac.uk/73404/1/WPS2017-01_Lynskey.pdf)> accessed 1 September 2018; Julia E. Cohen, 'Law for the Platform Economy' (2017) 51 *UC Davis Law Review* 133.

<sup>12</sup> Nicolas Suzor, 'Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms' (2018) 4(3) *Social Media + Society* 1-11; Dennis Redeker, Lex Gill and Urss Gasser, 'Towards digital constitutionalism? Mapping attempts to craft an Internet Bill of Rights' (2018) 80 *International Communication Gazette* 302.

<sup>13</sup> Jeremy Waldron, 'Constitutionalism: A Skeptical View' (2012) *NYU School of Law, Public Law Research Paper No. 10-87* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1722771&rec=1&srcabs=1760963&alg=1&pos=1](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771&rec=1&srcabs=1760963&alg=1&pos=1)> accessed 2 April 2019; Joseph H. H. Weiler and Marlene Wind (eds) *European Constitutionalism Beyond the State* (Cambridge University Press 2003).

Online platforms play a crucial role in addressing the challenges faced by the public enforcement of user rights.<sup>14</sup> The activity of content removal and the enforcement of the right to be forgotten online are only two examples illustrating how public actors have delegated regulatory tasks to private actors in order to ensure the effective implementation of public policies online.<sup>15</sup>

In fact, online platforms enjoy a broad margin of discretion in deciding how to implement such functions. Platforms are free to define and interpret users' fundamental rights according to their legal, economic and ethical framework due to the fact that there are no laws or regulations currently in place to prevent them from doing so. For instance, the decision to remove and consequently delete a video from YouTube is a clear interference with the uploading user's right to freedom of expression but could also preserve other fundamental rights such as their right to privacy. To some extent, this privately driven activity mirrors the exercise of judicial balancing and public enforcement carried out by public authorities.

However, this 'delegation' of responsibilities is not the only concern at stake. By virtue of the algorithmic architecture, online platforms can also perform autonomous quasi-public functions without the need to rely on the oversight of a public authority, such as for the enforcement of their Terms of Services (hereinafter 'ToS'). In both cases, online platforms can set the rules for enforcing and balancing users' fundamental rights by using automated decision-making processes without any constitutional safeguards.<sup>16</sup> This may be problematic from a constitutional standpoint as private actors are not bound to respect fundamental rights due to the lack of regulation translating

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<sup>14</sup> Commission, 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' COM (16) 288 final.

<sup>15</sup> Niva Elkin-Koren and Eldar Haber, 'Governance by Proxy: Cyber Challenges to Civil Liberties' (2017) 82(1) *Brooklyn Law Review* 105.

<sup>16</sup> Regarding technological enforcement, see, in particular, Lawrence Lessig, *Code 2.0: Code and Other Laws of Cyberspace* (Basic Books 2006); Tarleton Gillespie, 'The Relevance of Algorithms' in Tarleton Gillespie, Pablo J Boczkowski and Kirsten A Foot, *Media Technologies: Essays on Communication, Materiality, and Society* (MIT Press 2014); Helen Nissenbaum, 'From Preemption to Circumvention: If Technology Regulates, Why Do We Need Regulation (and Vice Versa)?' (2011) 26 *Berkley Technology Law Journal* 1367.

constitutional principle into binding norms. In other words, the enforcement and balancing of fundamental rights in the algorithmic society is increasingly privatised.

This paper attempts to go beyond the main description of the situation at stake by proposing solutions to limit the extent of private powers online from a constitutional perspective. In order to achieve this objective, the aim of this paper is twofold. Firstly, the paper highlights the reasons why the recognised economic freedoms of online platforms have turned into more extensive forms of private power. In particular, the main claim is that the liberal constitutional approach adopted by the EU and the US during a phase of technological acceleration has allowed online platforms to acquire new areas of power, particularly due to the development of algorithmic technologies. Secondly, having explained this shift from a private to a public law perspective, the paper proposes potential solutions to the problem of how to address the exercise of delegated and autonomous powers by private actors online. This is done by questioning the above-mentioned liberal constitutional approach in order to protect the fundamental rights of individuals against the behaviours of private actors operating in a global framework.

From a transnational constitutional standpoint, this paper analyses the liberal constitutional approach adopted by the EU and the US in regard to online platforms.<sup>17</sup> In the first part of the paper, the shift from the latter's economic freedoms to areas of power is described from an economic, legal (constitutional) and technological perspective. The second part of the paper analyses delegated powers by focusing on the examples of online content management and the right to be forgotten online. Regarding autonomous power, the role of ToS as an instrument of private policy online will be described. Finally, the paper addresses two – potential – cumulative solutions looking at the latest trends in the legal frameworks of the EU and the US. The

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<sup>17</sup> Transnational constitutional law emerges due to the influence of global actors such as online platforms on the application of fundamental rights across the globe. See Peer Zumbansen and Kinnari Bhatt 'Transnational Constitutional Law' (2018) King's College London Dickson Poon School of Law Legal Studies Research Paper Series 5 <<https://repub.eur.nl/pub/106209/TCL-paper-BhattZumb.pdf>> accessed 1 September 2018.

first proposal focuses on regulating online platforms' decision-making processes by introducing procedural safeguards. The second solution focuses on the horizontal effect doctrine and its limits. The aim is to define a mechanism to enforce constitutional rights vis-à-vis online platforms which formally are private actors, but increasingly pursue public tasks.

## II. FROM PUBLIC TO PRIVATE AS FROM ATOMS TO BITS: THE REASONS FOR A GOVERNANCE SHIFT

In the 1990s, Negroponte defined the increasing level of digitisation as the movement from atoms to bits.<sup>18</sup> In general, a bit is only the sum of 0 and 1 but, as in the case of atoms, the interrelations among bits can build increasingly complex structures.<sup>19</sup> Such a dichotomy demonstrates a clear shift from ownership of things to ownership of information.<sup>20</sup> The move from the industrial to the information society is mainly due to the move from rivalrousness to non-rivalrousness of traditional products and services.<sup>21</sup> Put another way, the bits exchanged through the internet have driven the shift from analogue to digital technologies by creating revolutionary models to market and deliver traditional products or services. The result is that the economy is no longer based only on the creation of value through production but through information.

In this hurricane of technological developments,<sup>22</sup> the overwhelming majority of constitutional states has adopted a liberal approach with respect to the regulation of the internet.<sup>23</sup> The rapid expansion of new digital technologies combined with the failure of public actors to promptly address

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<sup>18</sup> Nicholas Negroponte, *Being Digital* (Alfred A Knopf 1995).

<sup>19</sup> Bill Gates, *The Road Ahead* (Viking Press 1995).

<sup>20</sup> John P Barlow, 'The Economy of Ideas: Selling Wine Without Bottles on the Global Net' in P Ludlow (ed), *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* (MIT Press 1999).

<sup>21</sup> Yochai Benkler, *The Wealth of Networks* (Yale University Press 2006); Andrew Murray, *Information Technology Law: The Law and Society* (Oxford University Press 2013).

<sup>22</sup> Rosa Hartmut, *Social Acceleration: A New Theory of Modernity* (Columbia University Press 2013).

<sup>23</sup> John G Palfrey, 'Four Phases of Internet Regulation' (2010) 77(3) *Social Research* 981.

these phenomena are two of the main arguments which have led the first 'cyberspace' libertarian scholars to consider the dimension of the cyberspace as being outside the scope of influence of public actors.<sup>24</sup> In particular, in his 'Declaration of Independence of Cyberspace',<sup>25</sup> Barlow maintains that the digital space is a new world separated from the atomic one. As highlighted by Johnson and Post at the end of the 1990s, '[c]yberspace has no territorially-based boundaries, because the cost and speed of message transmission on the Net is almost entirely independent of physical location'.<sup>26</sup> In their view, the lack of physical boundaries lent support to the claim that cyberspace should constitute an independent jurisdiction separate from that of the state.<sup>27</sup>

The well-known debate about the extraterritorial extension of national jurisdiction as resulting from the case *Licra v. Yahoo France* in 2000 seemed to confirm the reasoning of the two US scholars.<sup>28</sup> Indeed, according to the theories of Johnson and Post, the only effective approach for cyberspace would be a system of free market regulation. By allowing users to choose the rules they find appropriate, new legal institutions would emerge from the digital realm.<sup>29</sup> A 'decentralised and emergent law', resulting from customary or collective private action, would form the basis for creating a democratic set of rules applicable to the digital community.<sup>30</sup> In other words, Johnson

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<sup>24</sup> Among the most relevant scholars, see John Perry Barlow, David Johnson, David Post and Tom W Bell.

<sup>25</sup> John P Barlow, 'A Declaration of Independence of the Cyberspace' (*Electronic Frontier Foundation*, 1996) <[www.eff.org/cyberspace-independence](http://www.eff.org/cyberspace-independence)> accessed 16 June 2018.

<sup>26</sup> David R Johnson and David Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48(5) *Stanford Law Review* 1371.

<sup>27</sup> *Ibid* 1367.

<sup>28</sup> *Licra et UEÿF v. Yahoo Inc and Yahoo France* TGI Paris 22 May 2000. See Joel R Reidenberg, 'Yahoo and Democracy on the Internet' (2001/2002) 42 *Jurimetrics* 261; *Yahoo!, Inc. v La Ligue Contre Le Racisme* 169 F Supp 2d 1181 (ND Cal 2001). See Christine Duh, 'Yahoo Inc. v. LICRA' (2002) 17 *Berkeley Technology Law Journal* 359. Regarding the topic of Internet jurisdiction, see Uta Kohl, *Jurisdiction and the Internet* (Cambridge University Press 2007); Dan J B Svantesson, *Solving the Internet Jurisdiction Puzzle* (Oxford University Press 2017).

<sup>29</sup> Johnson and Post (n 26).

<sup>30</sup> David R Johnson and David Post, 'And How Shall the Net be Governed?' in Brian Kahin and James Keller (eds), *Coordinating the Internet* (MIT Press 1997).

and Post's proposal represents a bottom-up approach: rather than relying on traditional public law-making power to set the rules of cyberspace, every single digital community should be capable of participating in the creation of the new rules governing their own digital world.<sup>31</sup>

However, this scenario is not reality today. Instead of a democratic decentralised society, the potentialities of the internet have created an oligopoly of private entities who both control information and determine how people exchange it.<sup>32</sup> As such, the platform-based regulation of the internet has prevailed over the community-based model.<sup>33</sup>

In the past, public actors traditionally exercised control over the information marketplace through different systems such as public registers of data and ownership of the media. In fact, in some cases, the present news media industry continues to be subject to forms of public control even in those states that recognise a high level of freedom for businesses in conducting economic activities.<sup>34</sup> Because they were the only entities able to exploit the power to gather and store data and information about people from different sources, the monopoly on knowledge was a prerogative of public actors.

In the case of the internet, however, the extension of such public control over information has not been complete for at least three reasons. First, unlike the

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<sup>31</sup> The criticism to the democratic development of a set of rules related to the digital space comes from the absence of a unique community in the digital environment. See Cass Sunstein, *Republic.com 2.0* (Princeton University Press 2009). From another perspective, according to Reed, this element was the 'Cyberspace fallacy'. Reed recognised that, although the interpretation of the digital space by the Cyberlibertarian doctrine is not completely wrong, the weak point depends on the physical substance of the individual that acts in the digital environment, which is located in one precise jurisdiction. See Chris Reed, *Internet Law: Text and Materials* (Cambridge University Press 2007) 174-175.

<sup>32</sup> Robin Mansell and Michele Javary, 'Emerging Internet Oligopolies: A Political Economy Analysis' in Arthur S Miller, Warren J Samuels (eds), *An Institutional Approach to Public Utilities Regulation* (Michigan State University Press 2002); Alex Moazed and Nicholas L Johnson, *Modern Monopolies: What It Takes to Dominate the 21<sup>st</sup> Century Economy* (St Martin's Press 2016).

<sup>33</sup> Orly Lobel, 'The Law of the Platforms' (2016) 101 *Minnesota Law Review* 87.

<sup>34</sup> Simeon Djankov, Caralee Mcliesh, Tatiana Nenova and Andrei Shleifer, 'Who Owns the Media?' (2003) 45 *Journal of Law and Economics* 341.

control over traditional channels of communication bound by scarce resources, the internet offers a quasi-unlimited space, increasing the complexities in monitoring its boundaries and decreasing the need to ensure media pluralism through regulations.<sup>35</sup>

Second, whilst traditional channels of communication are located in a specific territory without the possibility to easily reach the global community, the cross-border nature of the internet has made it difficult for constitutional states to extend their sovereign powers over phenomena occurring outside their territory. In other words, although states are considered the only legitimate authorities to implement binding norms and enforce them, this idea of exclusive control is strongly challenged at the international level where states cannot exercise their sovereign powers externally.<sup>36</sup>

Even more importantly, the marginalisation of constitutional states is also the result of complex internet governance structures, based on the mutual influence of different stakeholders at the international level.<sup>37</sup> Although states have maintained the ability to rely on remedies of last resort such as

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<sup>35</sup> See, however, Robin Mansell, 'New Media Competition and Access: The Scarcity-Abundance Dialectic' 1999 1(2) *New Media and Society* 155.

<sup>36</sup> The above-mentioned US case *Yahoo v Licra* (n 28) has shown the challenges raised by judicial orders with extraterritorial scope. Another example is the *Equustek* case in which the Canadian Supreme Court ordered Google to remove links from its global search engine. According to the Supreme Court: '[t]he interlocutory injunction in this case is necessary to prevent the irreparable harm [to Equustek] that flows from Datalink carrying on business on the Internet, a business which would be commercially impossible without Google's facilitation'. See *Google v Equustek Solutions* [2017] 1 SCR 824. Regarding the issue of unilateralism see Yochai Benkler, 'Internet Regulation: A Case Study in the Problem of Unilateralism' (2000) 11 *European Journal of International Law* 171.

<sup>37</sup> Regarding the debate on Internet governance and the role of ICANN, see Lucia De Nardis, *The Global War for Internet Governance* (Yale University Press 2014); Milton Mueller, *Networks and States: The Global Politics of Internet Governance* (The MIT Press 2010); Jeanette Hoffman, Christian Katzenbach and Kirsten Gollatz, 'Between coordination and regulation: Finding the governance in Internet governance' (2017) 19(9) *New Media & Society* 1406.

Internet shutdowns,<sup>38</sup> the multilevel and decentralised governance of the internet has restricted the power of constitutional states to exercise their sovereignty. In the future, the development of new privately-developed technologies such as Blockchain and artificial intelligence could make this scenario still more complex. Decentralisation would disintermediate and delegate public functions to machines and distributed ledger technologies developed by private actors.<sup>39</sup>

However, such considerations are not sufficient to explain why some governments have followed another path imposing their sovereign powers over online activities within their territory. It is necessary to bear in mind that not all public actors have chosen the same free-market approach concerning the internet. Particularly in countries where forms of surveillance and control over information are diffused, like China and the Arab states,<sup>40</sup> the internet has been subject to public controls leading to the blocking of some online services or the monitoring of data.<sup>41</sup> This possibility seems to confirm the paternalistic theories of those scholars who have criticised the libertarian approach.<sup>42</sup> In particular, according to Lessig, governments can impose their control over the internet through four modalities of regulation based on law, social rules, economic and network architecture.<sup>43</sup> The last of these mechanisms constitutes the most effective way to regulate the internet since the regulator has the power to set the rules of the game online by

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<sup>38</sup> Justin Clark et al., *The Shifting Landscape of Global Internet Censorship*, (2017) Berkman Klein Center for Internet & Society Research Publication <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:33084425>> accessed 4 December 2018; Ronald Deibert et al., *Access Denied: The Practice and Policy of Global Internet Filtering* (MIT Press 2008).

<sup>39</sup> Regarding the role of distributed ledger technology and Blockchain, see, in particular, Primavera De Filippi and Aaron Wright, *Blockchain and the Law* (Harvard University Press 2018).

<sup>40</sup> Barney Warf, 'Geographies of Global Internet Censorship' (2011) 76 *GeoJournal* 1.

<sup>41</sup> Palfrey (n 23); Anupam Chander and Uyen P Le, 'Data Nationalism' (2015) 64(3) *Emory Law Journal* 677.

<sup>42</sup> Jack Goldsmith, 'Against Cyberanarchy' (1998) 65 *The University of Chicago Law Review* 1199; Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford University Press 2006).

<sup>43</sup> Lessig (n 16).

shaping the network structure.<sup>44</sup> In the case of China, the adoption of the 'Great Firewall' is one of the most evident examples of how states can express their sovereign powers over the internet by regulating the network's architectural dimension.<sup>45</sup>

It is possible to observe that this approach has been adopted particularly by those states whose authoritative regimes are not bound by constitutional limits.<sup>46</sup> Put another way, the more authoritarian the state, the more it would be able to regulate the internet and other digital technologies. Indeed, in such cases, internet censorship is merely a political decision to protect a general national interest prevailing over any other fundamental right or conflicting interest with the regime.

In the opposite scenario, constitutional states need to consider the potential impact of regulatory burdens on fundamental rights. Here, the role of constitutional law clearly emerges. Unlike authoritarian regimes, where the level of fundamental rights protection could be absent or low, in constitutional states the need to respect fundamental rights and economic freedoms of businesses has allowed private actors to enjoy broad margins of autonomy. Looking at platforms from an EU constitutional standpoint, such entities are private actors. As a result, they can rely on their freedom to conduct business as recognised by the Charter of Fundamental Rights of the European Union (the 'Charter') together with the EU fundamental freedoms,

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<sup>44</sup> Francesca Musiani, 'Network Architecture as Internet Governance' (2013) 2(4) Internet Policy Review <<https://policyreview.info/node/208/pdf>> accessed 20 June 2018.

<sup>45</sup> Jonathan Zittrain and Benjamin Edelman, 'Empirical Analysis of Internet Filtering in China' (2003) Harvard Law School Public Law Research Paper No. 62.

<sup>46</sup> Justin Clark, Robert Faris, Ryan Morrison-Westphal, Helmi Noman, Casey Tilton and Jonathan Zittrain, 'The Shifting Landscape of Global Internet Censorship' (2017) Berkman Klein Center for Internet & Society Research Publication <<http://nrs.harvard.edu/urn-3:HUL.InstRepos:33084425>> accessed 15 October 2018; Ronald Deibert, Hohn Palfrey, Raphael Rohozinsky, Jonathan Zittrain and Janice Gross Stein, *Access Denied: The Practice and Policy of Global Internet Filtering* (MIT Press 2008).

especially, the freedom to provide services as set out in the Treaties.<sup>47</sup> From a US constitutional perspective, platforms rely on a different constitutional basis to perform their business, in particular their freedom of speech as recognised by the First Amendment.<sup>48</sup> In both cases, platforms enjoy a 'constitutional safe area' whose boundaries can be restricted only by the prominence of other fundamental rights.

These economic and constitutional considerations are not sufficient to explain how the liberal approach to private actors in the online dimension has led to a transformation of their liberties into power. In this *laissez-faire* scenario, data and information have started to be collected globally by private actors through the possibilities derived from new digital technologies, firstly, by the internet and, subsequently, by the development of automated technologies.

Whereas in the information society bits have allowed private actors to gather information and develop their business, today algorithms allow such actors to process it by extracting value from huge amounts of data (referred to as 'Big Data'). Since data and information constitute the new non-rival and non-fungible oil of the algorithmic society,<sup>49</sup> their processing has led to an increase in the power of some private actors in the digital age where the monopoly over knowledge does not belong exclusively to public actors but also to some private businesses.<sup>50</sup>

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<sup>47</sup> Charter art 16 and TFEU arts 56-62. Charter of Fundamental Rights of the European Union [2012] OJ C326/12. Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/12.

<sup>48</sup> US Constitution, First Amendment: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'

<sup>49</sup> 'The World's Most Valuable Resource Is No Longer Oil But Data' *The Economist* (6 May 2017) <[www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data](http://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data)> accessed 28 May 2018. See, also, Michele Loi and Paul-Olivier Dehaye, 'If Data Is The New Oil, When Is The Extraction of Value From Data Unjust?' (2017) 7(2) *Philosophy and Public Issues* 137.

<sup>50</sup> This phenomenon can be described by applying the theory of the 'Nodes and Grades' theorised by Murray. According to such theory, some entities in the network can influence the structure of the cyberspace more than others and this

Online platforms can be defined as gatekeepers who control the flow of information.<sup>51</sup> The possibility to autonomously set the rules according to which data flows and is processed leads to an increase in the discretion of private actors.<sup>52</sup> From a transnational constitutional perspective, this phenomenon can be described as the rise of a civil constitution outside institutionalised politics. According to Teubner, the constitution of a global society cannot result from a unitary and institutionalised effort but emerges from the constitutionalisation of autonomous subsystems of that global society.<sup>53</sup>

This complex framework of new challenges has contributed to marginalising those public actors who have delegated some of their tasks to online platforms instead of imposing their sovereign powers in order to avoid the expansion of new private powers. This shift of power can be interpreted not only as the consequence of economic and technical forces but also as the result of the decreasing influence of constitutional states in the field of internet governance. In particular, the choice to delegate public functions to online platforms is linked to the opportunity to rely on entities whose services are based on the workings of the online environment. Private conglomerates like Alphabet or Facebook enjoy more resources compared to public actors, especially due to their involvement in managing other public interests such as health and education. Indeed, platforms run their business activities by virtue of the internet, which is the channel through which their services operate.

These observations illustrate only some of the developments that have allowed private actors to expand their regulatory influence over the internet.

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peculiarity transforms some actors in the regulators of the cyberspace. See Andrew Murray, 'Nodes and Gravity in Virtual Space' (2011) 5(2) *Legisprudence* 195.

<sup>51</sup> Emily B Laidlaw, 'A Framework for Identifying Internet Information Gatekeepers, in *International Review of Law*' (2012) 24(3) *Internet and Technology* 263; Jonhatan A Zittrain, 'History of Online Gatekeeping' (2006) 19(2) *Harvard Journal of Law and Technology* 253; Scott Burris, Peter Drahos and Clifford Shearing, 'Nodal governance' (2005) 30 *Australian Journal of Legal Philosophy* 30.

<sup>52</sup> Yochai Benkler, 'Degrees of Freedom Dimension and Power' (2016) 145 *Daedalus* 18.

<sup>53</sup> Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization*, (Oxford University Press 2012).

This is why some authors have referred to this phenomenon as the rise of the law of the platforms.<sup>54</sup> In order to understand this situation from a constitutional perspective, the next sections will address the exercise of delegated and autonomous powers by online platforms.

### III. DELEGATED EXERCISE OF QUASI-PUBLIC POWERS ONLINE

Having explained the main economic, technological and constitutional development which led to the shift of power on the internet from public actors to private ones, it is now time to examine the delegation of public functions to online platforms.

More than fifteen years ago, scholars already began to label this phenomenon the 'invisible handshake' according to which public actors would rely on private actors online to pursue their aims.<sup>55</sup> Among such scholars, Reidenberg has defined a set of modalities to ensure the enforcement of legal rules online.<sup>56</sup> In particular, Reidenberg has described three types of enforcement: network intermediaries,<sup>57</sup> network engineering and technological instruments.<sup>58</sup>

Regarding the first approach, Reidenberg has explained how public actors can rely on online platforms in order to ensure the enforcement of public policies online. Due to the diffused nature of the cyberspace, states do not possess the resources to pursue each wrongdoer acting in the digital environment. Examples in this field are peer-to-peer and torrent mechanisms which demonstrate the complexities required to investigate, prosecute and sanction millions of infringers every day. In such situations, online providers

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<sup>54</sup> Luca Belli, Pedro A Francisco and Nicolo Zingales, 'Law of the Land or Law of the Platform? Beware of the Privatisation of Regulation and Police' in Luca Belli and Nicolo Zingales (eds), *How Platforms are Regulated and How They Regulate Us* (FGV Direito Rio 2017).

<sup>55</sup> Micheal D Birnhack and Niva Elkin-Koren, 'The Invisible Handshake: The Reemergence of the State in the Digital Environment' (2003) 8 *Virginia Journal of Law & Technology* 1.

<sup>56</sup> Joel R Reidenberg, 'States and Internet enforcement' (2004) 1 *University of Ottawa Law & Techonology Journal* 213.

<sup>57</sup> *Ibid* 222.

<sup>58</sup> *Ibid* 225.

can function as 'gateways points' (or intermediaries) to identify and block illicit behaviours acting directly on the network structure. According to Reidenberg, the architecture of the cyberspace prescribes its rules constituting the basis of the digital regulation.<sup>59</sup> In this way, this approach allows governments to regain control over the internet using platforms as proxies in order to reaffirm their national sovereignty online.

In the next subsections, the cases of online content management and the right to be forgotten online will provide two examples of how public actors have relied on online platforms as proxies in order to ensure the enforcement of public policy online.

### *1. Online Content Management*

The first example of such delegation is seen in the implicitly recognised role of online platforms in managing online content hosted in their digital spaces. At the end of the last century, by virtue of their 'passive' function, these actors were treated as mere intermediaries of products and services. Both the US and EU approach to online service providers' liability are clear examples. The Communications Decency Act,<sup>60</sup> together with the Digital Millennium Copyright Act<sup>61</sup> and the e-Commerce Directive,<sup>62</sup> have introduced a special regime of exceptions to the liability of online intermediaries, acknowledging, *in abstracto*, their non-involvement in the creation of content.<sup>63</sup>

This allocation of public functions technically consists in imposing obligations to online intermediaries to remove online content once they become aware of its illicit nature ('notice and takedown'). As already mentioned, public actors have generally considered platforms neither

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<sup>59</sup> Joel R Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules through Technology' (1997-1998) 76 *Texas Law Review* 553.

<sup>60</sup> Communications Decency Act, 47 U.S.C. § 230(c)(1) [1996].

<sup>61</sup> Digital Millennium Copyright Act, 17 U.S. Code § 512.

<sup>62</sup> 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') [2000] OJ L 178/1.

<sup>63</sup> Andrej Savin, *European Internet Law* (Edward Elgar Publishing 2017); Mariarosaria Taddeo and Luciano Floridi (eds), *The Responsibilities of Online Service Providers* (Springer 2017).

accountable nor responsible for transmitted or hosted contents (i.e. safe harbour), provided that platforms are unaware of the presence of illicit content in their digital rooms.<sup>64</sup> On the one hand, the liability of online intermediaries in relation to third-party content has always been limited, in order to foster the development of information society services, thus protecting freedom of economic initiative (or free speech in the US framework). On the other hand, this special regime aims to avoid that entities which do not have effective control over third-party hosted content are considered liable for hosting them.<sup>65</sup>

Lacking any procedural obligations, this system of liability has entrusted online intermediaries with the power to autonomously decide whether to remove or block content based on the risk to be held liable. Since online platforms are privately run, these actors would try to avoid the risks to be sanctioned for non-compliance with this duty by removing or blocking even content whose illicit nature is not fully evident.<sup>66</sup> Indeed, platforms will likely focus on minimising this economic risk rather than adopting a fundamental rights-based approach.

As a result, such publicly delegated activity implies, *inter alia*, that platforms can take decisions affecting fundamental rights and, in particular, freedom of expression and privacy.<sup>67</sup> At the same time, this responsibility would also imply that they should implement effective and appropriate safeguards in

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<sup>64</sup> E-Commerce Directive (n 62), arts 12-14; Communications Decency Act (n 60), Section 230.

<sup>65</sup> For the recent developments in the Digital Single Market, see Giancarlo Frosio, 'The Death of "No Monitoring Obligations": A Story of Untameable Monsters' (2017) 8(3) *Journal of Intellectual Property, Information Technology and E-Commerce Law* 212; Giovanni De Gregorio, 'Expression on Platforms: Freedom of Expression and ISP Liability in the Digital Single Market' (2018) 3(2) *European Competition and Regulatory Law Review* 203.

<sup>66</sup> Regarding the risk of collateral censorship, see *Delfi As v Estonia* 62 EHRR 6; *MTE v Hungary* App no 22947/2013 (ECtHR 2 February 2016).

<sup>67</sup> Orla Lynskey, 'Regulation by Platforms: The Impact on Fundamental Rights' in Luca Belli and Nicolo Zingales (eds), *Platform Regulations How Platforms are Regulated and How They Regulate Us* (FGV Direito Rio, 2017); James Grimmelman, 'Speech Engines' (2014) 98 *Minnesota Law Review* 868.

order to ensure the prevention of unintended removal of lawful content and respect the fundamental rights in question.<sup>68</sup>

However, this is not the current situation. Several drawbacks need to be addressed. Firstly, a private actor such as an online platform should not autonomously decide whether content is illicit in the absence of a legal review or a judicial order. If platforms can determine the lawfulness of online content, they are then exercising a function which traditionally belongs to the public authority.<sup>69</sup> When users notify the hosting providers about the presence of alleged illicit content, such actors need to assess the lawfulness of the content in question in order to remove it promptly. Lacking any regulation of this process, online platforms are free to assess whether a certain online content is unlawful and make a decision regarding its consequent removal or block. As a result, this anti-system has led platforms to acquire an increasing influence on the balancing of users' fundamental rights. For example, the choice to remove or block defamatory content or hate speech videos interferes with the right to freedom of expression of the users. At the same time, the decision about the need to protect other conflicting rights such as the protection of minors or human dignity is left to the decision of private actors without any public guarantee.

More importantly, however, the primary issue is the lack of any transparent procedure or redress mechanisms allowing users to appeal against a decision regarding the removal or blocking of the signalled content. For example, platforms are neither obliged to explain the reasoning of the removal or blocking of online content, nor to provide remedies against their decisions. Here, the impact of the platforms' powers on fundamental rights is evident. Lacking any regulation, users cannot rely on any legal remedy in order to complain against a violation of their fundamental rights such as freedom of expression or privacy.

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<sup>68</sup> E-Commerce Directive (n 62) Recital 42.

<sup>69</sup> Recently, the Court of Appeal of Rome has clarified that, in order to consider an online content as defamatory, the platform is obliged to act only according a public order of removal. See Court of Appeal of Rome n 1065/2018. M Bellezza, 'Responsabilità ISP: chi decide se un contenuto è diffamatorio?' (2018) 2 *Rivista di diritto dei media* 377.

## 2. *The Right to Be Forgotten Online*

Similar considerations also apply to the enforcement of the right to be forgotten in the online dimension.<sup>70</sup> Before the adoption of the General Data Protection Regulation (hereinafter 'GDPR')<sup>71</sup> the Court of Justice of the European Union ('CJEU') recognised for the first time at the EU level the right to be forgotten online in the landmark decision *Google Spain* in 2014.<sup>72</sup>

Even without analysing the well-known facts of the case, one can observe that such a decision finds its roots in the necessity to ensure the protection of the fundamental right to privacy in the digital dimension.<sup>73</sup> Indeed, the Court has brought out a new right to be forgotten as a part of the right to privacy in the digital world. In order to achieve this aim, the CJEU, as a public actor, by interpreting the framework of fundamental rights in the EU together with the dispositions of directive 95/46,<sup>74</sup> has *de facto* entrusted private actors (in this case, search engines) to delist online content without removing information on the motion of the individual concerned. Indeed, the search engine is the only actor which can ensure the enforcement of the right to be forgotten online since it can manage those online spaces where the link to be 'forgotten' are published. Hence, the data subject has the right to ask the search engine to obtain the erasure of the link to the information relating to him or her from a list of web results based on his or her name.

It is possible to argue that the interpretation of the CJEU has unveiled a legal basis for data subjects to enforce their rights against private actors. The EU

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<sup>70</sup> Oreste Pollicino and Marco Bassini, 'Reconciling Right to be Forgotten and Freedom of Information in the Digital Age. Past and Future of Personal Data Protection in the EU' (2014) 2 *Diritto pubblico comparato ed europeo* 641; Frank Pasquale, 'Reforming the Law of Reputation' (2015) 47 *Loyola University of Chicago Law Journal* 515.

<sup>71</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC OJ L 119/1, art 17.

<sup>72</sup> Case 131/12 *Google Spain v AEPD* EU:C:2014:317.

<sup>73</sup> *Ibid* 84.

<sup>74</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 31-50.

Court has recognised a right to be forgotten online through the interpretation of directive 95/46, applying horizontally (*de facto*) Articles 7 and 8 of the Charter.<sup>75</sup>

However, unlike in the case of content management, both the CJEU and the Article 29 Working Party have identified some criteria according to which platforms shall assess the request of the data subject.<sup>76</sup> Thus, online platforms do not enjoy an unlimited discretion in balancing data subjects' rights. Moreover, the recent European codification of the right to erasure has contributed to clarifying the criteria to apply the right to delist. These considerations are also relevant for the US environment since the extraterritorial effect of the GDPR will affect US entities.<sup>77</sup> In particular, according to Article 17 GDPR, the data subject has the right to obtain from the controller, without undue delay, the erasure of personal data concerning him or her according to specific grounds,<sup>78</sup> and excluding such rights in other cases,<sup>79</sup> for example when the processing is necessary for exercising the right to freedom of expression and information.

Although the data subject can rely on a legal remedy by lodging a complaint to the public authority in order to have their rights protected, the autonomy of platforms continues to remain a relevant concern. When addressing users' requests for delisting, the balancing of fundamental rights is left to the assessment of the online platforms. Even in this case, the issue is similar to that of the notice and takedown mechanism since search engines enjoy a broad margin of discretion when balancing users' fundamental rights and enforcing their decisions. For example, search engines will continue to decide whether the exception relating to the freedom to impart information applies

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<sup>75</sup> Charter (n 47). According to art 7: 'Everyone has the right to respect for his or her private and family life, home and communications'. According to art 8(1): '1. Everyone has the right to the protection of personal data concerning him or her'.

<sup>76</sup> Working Party 29, 'Working Party on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" C-131/12', <[http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp225\\_en.pdf](http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf)> accessed 25 June 2018.

<sup>77</sup> GDPR (n 71) art 3(2).

<sup>78</sup> Ibid art 17(1).

<sup>79</sup> Ibid art 17(3).

in a specific case. Moreover, search engines conduct the delisting process relying only on their internal assessments based on the facts provided by the data subject and, according to EU law, they are not obliged to provide any reason for their decision or redress mechanism.

Therefore, the online enforcement of the right to be forgotten is another example of the discretionary power that platforms exercise when balancing and enforcing fundamental rights online. As in the case of content management, the impossibility of assessing how private actors decide a specific case due to the low level of transparency of platforms' decision-making processes is one of the main issues at stake.

#### **IV. AUTONOMOUS EXERCISE OF QUASI-PUBLIC POWERS ONLINE: TOWARDS A PRIVATE CONSTITUTIONAL ORDER OR AN ABSOLUTE REGIME?**

These two examples provide a picture of the aforementioned libertarian theories,<sup>80</sup> if only as a romantic memory belonging to an internet which has radically changed its form.

The delegation of public functions is not the only challenging phenomenon for the traditional boundaries of constitutional law. The general autonomy afforded to online platforms in performing their activities has made this situation more complex. The technological evolution together with a liberal constitutional approach has allowed online platforms not only to become proxies of public actors but also to rely on their private autonomy in order to set their own rules of procedures. This is particularly clear by focusing on ToS which are contracts according to which platforms unilaterally establish what users can do in their online rooms and how their data is processed.<sup>81</sup>

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<sup>80</sup> See Section II of this work.

<sup>81</sup> Luca Belli and Jamila Venturini, 'Private Ordering and the Rise of Terms of Service as Cyber-Regulation' (2016) 5(4) *Internet Policy Review* <<https://policyreview.info/node/441/pdf>> accessed 16 June 2018; Edoardo Celeste, 'Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?' (2018) *International Review of Law, Computers & Technology* <<https://www.tandf-online.com/doi/abs/10.1080/13600869.2018.1475898>> accessed 1 December 2018.

From a private law perspective, these agreements can be considered mere boilerplate contracts, where clauses are based on standard contractual terms that are usually included in other agreements.<sup>82</sup> Users cannot exercise any negotiation power but, as an adhering party, may only decide whether or not to accept pre-established conditions.

At first glance, the significance of this situation under a public (or rather constitutional) law perspective may not be evident, both since boilerplate contracts are very common even in the offline world and since online platforms' ToS do not seem to differ from the traditional contractual model.<sup>83</sup>

For the average user, however, there is one main difference which deserves to be taken seriously into consideration. Unlike the parties to a contract in the atomic world, online platforms can enforce contractual clauses provided for in the ToS directly without the need to rely on a public mechanism such as a judicial order. For instance, the removal or blocking of online content is performed directly by online platforms without the involvement of any public body ordering the infringing party to fulfil the related contractual obligations. Here, the code assumes the function of the law.<sup>84</sup> By relying on the network architecture as a modality of regulation, platforms can directly enforce their rights through a quasi-executive function. This private enforcement is the result of an asymmetrical technological position in respect of users. Platforms are the rulers of their digital space since they can manage the activities which occur within their boundaries. Such power, which is not delegated by public authorities but results from the network architecture itself, is of special concern from a constitutional perspective

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<sup>82</sup> Woodrow Hartzog, 'Website Design as Contract' (2011) 60(6) *American University Law Review* 1635.

<sup>83</sup> On the role of private law in governing the internet see Peter Zumbansen, 'The Law of Society: Governance Through Contract' (2007) 14(1) *Indiana Journal of Global Legal Studies* 191; Lee A Bygrave, *Internet Governance by Contract* (Oxford University Press 2015).

<sup>84</sup> Lessig (n 16).

since it represents a form of self-regulation and disintermediation of the role of public actors in ensuring the enforcement of fundamental rights online.<sup>85</sup>

Such functionality is usually defined, but not limited, by the platform's ToS, which, similarly to the law, can be considered as the legal basis according to which platforms exercise their powers. By defining the criteria according to which decisions will be enforced, as well as the procedural and technical tools underpinning their ToS, platforms establish the rules governing their community, exercising a sort of quasi-legislative power. Although this autonomy is limited in some areas, for example data protection,<sup>86</sup> the global application of their services and the lack of any legal rules regulating online content management leave a significant amount of political discretion in the hands of platforms when drafting their ToS.<sup>87</sup>

Behind these normative and executive functions, the two above-mentioned examples have shown how platforms can perform a function which is similar to that of the judiciary, namely the balancing of fundamental rights. When receiving a notice from users asking for content removal or the delisting of online links, in order to render a decision, platforms assess which fundamental rights or interest should prevail in the case at issue. Taking as an example the alleged defamatory content signalled by a user, the platform

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<sup>85</sup> Gunther Teubner, 'Societal Constitutionalism: Alternative to State-Centred Constitutional Theory?' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing 2004); Julia Black, 'Constitutionalising Self-Regulation' (1996) 59(1) *The Modern Law Review* 24.

<sup>86</sup> The case of data protection is one of the main limits to the autonomy of online platforms in setting their community rules. In particular, the adoption of the broad territorial scope of application of the GDPR will also bind those non-resident platforms targeting residents in the EU. See GDPR (n 71) art 3(2). See Paul De Hert and Michal Czerniawski, 'Expanding the European data protection scope beyond territory' (2016) 6(3) *International Data Privacy Law* 230.

<sup>87</sup> The situation is different as long as privacy policies are concerned. E.g. in the EU framework, the GDPR establishes a comprehensive framework of obligations in the field of data processing. In particular, GDPR (n 71) art 12 provides specific rules regarding the information about the processing which should be made available to the data subjects.

could freely decide whether such content is being lawfully protected by right to inform or not.

One of the main issues to be addressed is how platforms exercise legal safeguards. Whilst it may be possible to refer to the law of the notice provider or that established in the ToS, it is not possible to concretely assess the level of compliance with the chosen legal standard due to the lack of transparency in the online platforms' decision-making.<sup>88</sup>

Furthermore, adding another layer of complexity – and concern – is the possibility that these activities can be executed by using automated decision-making technologies. On the one hand, algorithms can be considered as technical instruments facilitating a platform's various functionalities, such as the organisation of online content. But, on the other hand, such technologies can constitute technical self-executing rules, obviating even the need for a human executive or judicial function. In particular, the primary concern is the low level of decision-making transparency<sup>89</sup> which strongly affect users' fundamental rights.<sup>90</sup>

This technological asymmetry constitutes the true difference from traditional boilerplates contracts. Their enforcement is strictly dependent on the role of the public authority in ensuring the respect of the rights and obligations which the parties have agreed upon. This could be considered

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<sup>88</sup> Paul S Berman, 'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation' (2000) 71 *University of Colorado Law Review* 1263.

<sup>89</sup> Algorithms raise serious concerns in terms of transparency due to the unpredictable automated results which limit the diffusion of online contents whose unlawfulness is detected by machines. See Frank Pasquale, *The Black Box Society. The Secret Algorithms that Control Money and Information* (Harvard University Press 2015); Matteo Turilli and Luciano Floridi, 'The Ethics of Information Transparency' (2009) 11(2) *Ethics and Information Technology* 105; Tal Zarsky, 'Transparent Predictions' (2013) 4 *University of Illinois Law Review* 1507.

<sup>90</sup> The outcomes provided by algorithms are based on pre-accepted parameters without the possibility to balance the different fundamental rights at stake. Regarding the impact on freedom of expression see Stuart M Benjamin, 'Algorithms and Speech' (2013) 161 *University of Pennsylvania Law Review* 1445; Bart Custers, Toon Calders, Bart Schermer, and Tal Zarsky (eds), *Discrimination and Privacy in the Information Society* (Springer 2013).

another clue to the exercise of quasi-public power by online platforms. Users, as citizens, are usually subject to the exercise of a legitimate authority which, in the framework of the internet, seems to be exercised by the platforms through instruments of private law mixed with technology (the law of the platforms).

Within this framework, if a quasi-public role of platforms in the online environment is recognised, it would be possible to argue that the power exercised by online platforms mirrors, to some extent, the same discretion which an absolute power can exercise over its community. From a constitutional perspective, it could be observed that, in the case of platforms, the three traditional public powers are centralised; the definition of the rules to assess online contents, the decisions over the users' complaints and their enforcement are practised by the platform without any separation of powers.

Constitutionalism has primarily been based on the idea of the separation of powers, as theorised by Charles De Secondat.<sup>91</sup> In contrast, here it is possible to highlight the rise of a private order whose characteristics do not mirror constitutional provisions but is more similar to an absolute power. In particular, this phenomenon cannot be defined as the rise of a 'private constitutional order' since neither the separation of powers nor the protection of rights are granted in this system.<sup>92</sup> Rather, the above-mentioned framework has shown how the absence of the separation of powers in platform activities is one of the main reasons that explain the strong impact of their activities on users' fundamental rights. Indeed, the internet has allowed the concentration of private powers in the hands of online platforms which exercise them with absolute discretion. This has led some authors to refer to this phenomenon as a return to feudalism,<sup>93</sup> or to the *ancien régime*.<sup>94</sup>

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<sup>91</sup> Charles De Secondat, *L'esprit des lois* (Barrillot & fils 1748).

<sup>92</sup> The French Declaration of the Rights of Man and Citizens art 16 states: 'Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution'. Declaration of the Right of Man and the Citizen, 26 August 1789.

<sup>93</sup> James Grimmelman, 'Virtual World Feudalism' (2009) 118 Yale Law Journal Pocket Part 126.

<sup>94</sup> Belli and Venturini (n 81).

## V. SOLUTIONS AND PERSPECTIVES

The challenges analysed above question not only the role of public actors in regulating the internet, but, more importantly, the possibility that constitutional law is able to limit private powers whose nature is more global than local.<sup>95</sup> In other words, this scenario allows looking at online platforms not only as private actors whose activity is based on their freedom to conduct business or their right to free speech but, in some cases, as entities capable of exercising powers which mirror those of public actors.

In this scenario, constitutional states are faced with a paradoxical situation. On the one hand, in order not to hinder the aforementioned liberties, public actors are encouraged to recognise a high degree of economic freedom allowing private actors to exercise their autonomy. However, as already explained, this approach has led online platforms to enjoy broad margins of autonomy through instruments based on technology and private law. Unlike public actors, platforms are neither obliged to pursue public interest, nor to protect fundamental rights. On the other hand, even if constitutional states intend to establish a system of pervasive public control over online content, the overregulation of private activities could increase the risk of public and private censorship.<sup>96</sup>

Hence, the two main questions are whether and how constitutional states can react to this paradoxical situation and what the role of constitutional law should be when developing a new framework.

Liberal constitutionalism has traditionally been characterised by a vertical dichotomy where private actors claim the respect of their rights vis-à-vis public actors. Historically, the first bills of rights were designed to restrict the power of governments rather than interfere with the private sphere; in fact, at that time, it was thought that the private sphere needed to be protected from the state through the recognition of rights and liberties. As a result, constitutional provisions have been interpreted as either providing a limit to the coercive power of the state or as a source of positive obligation resting on

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<sup>95</sup> Gunther Teubner, 'The Anonymous Matrix: Human Rights Violations by "Private" Transnational Actors' (2006) 69(3) *The Modern Law Review* 327.

<sup>96</sup> Frank Pasquale, 'Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power' (2016) 17 *Theoretical Inquiries in Law* 487.

public actors in order to protect constitutional rights and liberties. From this point of view, the threat to individual rights does not result from the exercise of freedoms by private actors but rather emanates from the state, the only entity which can exercise legitimate power.

Global dynamics and, in particular, the internet have affected this paradigm, allowing private actors to gather power in new and significant areas. In light of this, it is perhaps no coincidence that the number of situations where transnational corporations have violated fundamental rights is on the rise.<sup>97</sup> However, the transnational character of businesses such as online platforms and their inherently private nature should not justify the violation of fundamental rights.

At this point, the distinction between public and private actors acquires a specific relevance. Since only public actors are bound to respect constitutional provisions, two solutions must be considered: on the one hand, the establishment of new safeguards in order to provide legal instruments to reduce the transparency gap and protect users' fundamental rights. On the other hand, the vertical scope of fundamental rights needs to be questioned in order to understand whether it is fit-for-purpose in a globalised world.<sup>98</sup>

Hence, it is time to address the situation by proposing solutions to this complex issue. The following subsections will provide at least two cumulative proposals. The first perspective addresses the regulation of online platforms' decision-making processes. This proposal is a response to the lack of transparency in platforms' decision-making when they perform (delegated or autonomous) quasi-public functions. In contrast, the second proposal questions the vertical structure of constitutionalism and its impact on the protection of fundamental rights in the online environment.

#### *1. The Old-School Solution: Nudging Online Platforms to Behave as Public Actors*

The first solution aims to transcend the dichotomy between public and private actors by proposing new rights for users. The narrative regarding the need to protect platforms' economic freedom (or the right to free speech in

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<sup>97</sup> Teubner (n 95).

<sup>98</sup> Gunther Teubner, 'Horizontal Effects of Constitutional Rights in the Internet: A Legal Case on the Digital Constitution' (2017) 3(1) Italian Law Journal 193.

the US framework) and, consequently, the development of digital services, could be disruptive to users' fundamental rights. Moreover, it could also encourage private actors to acquire even more power due to the opportunities offered by new digital technologies.

In order to reduce such risks, it would be necessary for public actors to become more proactive; although legal remedies are obvious instruments for users to enforce their rights vis-à-vis online platforms, it is necessary to focus not only on reactive measures such as legal remedies but also on proactive ones. The current level of threat to fundamental rights should be decisive for public actors when deciding whether or not to regulate private activities and, consequently, restrict their freedom to conduct business or their right to free speech. As the European Court of Human Rights has explained, there is a positive obligation for public actors to limit risks to violation of fundamental rights.<sup>99</sup> This approach is thus based on the following consideration: if there is a serious risk for fundamental rights, public actors should act within the scope of their role to limit this interference. By regulating private activities, public actors can require online platforms to comply with transparency obligations.

The lack of transparency in algorithmic decision-making processes increases the asymmetry between users and platforms.<sup>100</sup> In order to address this issue, public actors could recognise new user rights whose proactive aim should be to reduce the transparency gap in the decision-making processes of online platforms. The possibility for users to obtain justification for automated outcomes or have access to redress mechanisms would mitigate this situation.<sup>101</sup> Put differently, these new rights would allow users to rely on a

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<sup>99</sup> See, for example, *Von Hannover v Germany* 40 EHRR 1. See Lech Garlicki, 'Relations between Private Actors and the European Convention on Human Rights' in Andra Sajo and Renata Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing 2005); Matthias Klatt, 'Positive Obligations under the European Convention on Human Rights' (2011) 71 *Zao RV* 691.

<sup>100</sup> See Section IV of this work.

<sup>101</sup> Kate Crawford and Jason Schultz, 'Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms' (2014) 55 *Boston College Law Review* 93; Danielle K Citron and Frank Pasquale, 'The Scored Society: Due Process for Automated Predictions' (2014) 89 *Washington Law Review* 1; Maayan

'human translation' of the algorithmic process. Such steps are particularly important since they allow users not only to rely on proactive and reactive measures but also to enhance the human dimension in the algorithmic process. This would help create the basis for the development of a sustainable digital humanism rather than an opaque techno-authoritarianism.

At least within the EU framework, the Commission has recently attempted to follow a soft-law path to adopt this approach. The idea is to nudge platforms to make their activities more transparent without merely focusing on recognising the right of the user to claim damages for violations of their fundamental rights. In particular, the Commission has recently issued, *inter alia*, a Code of conduct on countering illegal hate speech online,<sup>102</sup> as well as a Communication on tackling illegal content online,<sup>103</sup> then implemented in the Recommendation on measures to effectively tackle illegal content online.<sup>104</sup> Taken together, the Code and the Recommendation can be considered a first attempt by the EU to reduce its marginalisation vis-à-vis online platforms by providing a form of 'administrativisation' of platforms' activities. This choice could be interpreted as an acknowledgement of, on the one hand, the role of online platforms in ensuring the enforcement of public

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Perel and Niva Elkin-Koren, 'Accountability in Algorithmic Copyright Enforcement' (2016) 19 *Stanford Technology Law Review* 473. In the EU framework, in the field of personal data, the GDPR (n 71) has introduced a similar mechanism which, however, does not apply to the process of removal obligations. See, in particular, Bryce Goodman and Set Flaxman, 'European Union Regulations on Algorithmic Decision-Making and a "Right to Explanation"' (2017) 38 *AI Magazine* 50; Andrew D Selbst and Julia Powles, 'Meaningful information and the right to explanation' (2017) 7 *International Data Privacy Law* 233; Sandra Wachter, Brent Mittelstadt and Luciano Floridi, 'Why a Right to Explanation of Automated Decision-Making Does Not Exist in the General Data Protection Regulation' (2017) 7 *International Data Privacy Law* 76.

<sup>102</sup> Code of conduct on countering illegal hate speech online, available at <[http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=54300](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300)> accessed on 1 September 2018.

<sup>103</sup> Commission, 'Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms' COM (16) 555 final.

<sup>104</sup> Commission, 'Recommendation of 1 March 2018 on measures to effectively tackle illegal content online' C (18) 1177 final.

policies online and, on the other hand, the need to ensure that, by virtue of their role, such private actors should act responsibly.<sup>105</sup>

According to the Recommendation, platforms are first of all encouraged to publish, in a clear, easily understandable and sufficiently detailed way, the criteria according to which they manage the removal or blocking of access to online contents.<sup>106</sup> This is a clear example of how the Commission is trying to improve the degree of predictability concerning content removal procedures in order to reduce platforms' discretion vis-à-vis users' requests.

Further, the Recommendation provides guidelines regarding the notice and takedown process. Although there are some exceptions,<sup>107</sup> once the notice provider has submitted its request to the hosting provider, the latter should send a confirmation of receipt and inform the former of its decision about the content at stake.<sup>108</sup> Moreover, in the case of removal or blocking of access to the signalled online content, platforms should, without undue delay, inform users about the decision, setting out its reasoning as well as the possibility to contest the decision.<sup>109</sup> This system seems to mirror an administrative process whereby the notice provider, as a citizen, can rely on a specific (public) procedure according to which the hosting provider, as a public body, complies with established rules.

In turn, the content provider should have the possibility to contest the decision by submitting a 'counter-notice' within a 'reasonable period of time'. If the counter-notice provides grounds for considering whether the noticed content was lawful, the hosting provider should review its decision. The provider should also make access to such content available without undue delay and without prejudice to the possibility to define and enforce its ToS.<sup>110</sup> In this process, there could also be the ex-post opposition of the content provider, as a plaintiff/defendant. This latter process seems to mirror a

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<sup>105</sup> Commission, 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' COM (16) 288 final.

<sup>106</sup> C (18) 1177 final (n 104) para 16.

<sup>107</sup> Ibid para 10.

<sup>108</sup> Ibid para 8.

<sup>109</sup> Ibid para 9.

<sup>110</sup> Ibid paras 9-13.

judicial environment where the notice provider, as a plaintiff, lodges a complaint, and the hosting provider, as a judge, upholds it.

Notwithstanding the fact that the Commission has made strides towards a more transparent EU online environment,<sup>111</sup> this soft-law approach has potential drawbacks. In particular, since this approach does not establish mandatory obligations, online platforms can freely choose whether to implement such procedures. Even more importantly, the Commission has not limited the discretion of platforms' decision-making processes, leaving a margin of autonomy similar to that enjoyed by a judge or an administrative authority.

By comparison, since June 2017, Germany has taken a different approach. A new German law, known as NetzDG,<sup>112</sup> was adopted obliging online platforms with more than two million users in Germany to take actions in order to handle illegal content hosted by them within 24 hours after having received a notice.<sup>113</sup>

Compared to the changes that has taken place in the EU framework, it is interesting to observe that the US framework remains much the same. The constitutional predominance of the First Amendment in the US continues to shield these actors from any form of regulation. However, it is worth mentioning the Stop Enabling Sex Traffickers Act (SESTA) and the Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), also known

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<sup>111</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services' COM (18) 238 final.

<sup>112</sup> *Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken* (NetzDG) [2018]. For some comments, see Holger Lutz and Sebastian Schwidessen, 'The New German Hate Speech Law – Introduction and Frequently Asked Questions' (2017) 18(4) *Computer Law Review International* 103; Aleksandra Kuczerawy, 'Phantom Safeguards? Analysis of the German law on Hate Speech NetzDG' (Ku Leven Blog, 30 November 2017) <[www.law.kuleuven.be/citip/blog/phantom-safeguards-analysis-of-the-german-law-on-hate-speech-netzdg](http://www.law.kuleuven.be/citip/blog/phantom-safeguards-analysis-of-the-german-law-on-hate-speech-netzdg)> accessed 20 June 2018.

<sup>113</sup> For content whose illicit nature is not so evident, such German law provisions provide companies with an extra time of seven days to decide whether to eliminate the online content at issue.

as SESTA-FOSTA.<sup>114</sup> Both measures affect the exception established by Section 230 of the Communications Decency Act according to which '[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'.<sup>115</sup> It would be possible to consider this approach as a step towards stricter content management within the US framework.<sup>116</sup>

These developments represent the first indication towards the end of the marginalisation of public actors in the online sphere.<sup>117</sup> Indeed, obliging online platforms to comply with specific procedures – and recognising the possibility for users to rely on clear rules in order to enforce their rights – would constitute the expression of the sovereign powers of the state over online actors.

Within this framework, platforms will continue to enjoy a broad margin of discretion. However, the promotion of transparency in decision-making processes and available redress mechanisms could guarantee more safeguards for users than in the current scenario. On the one hand, the proposed measures mitigate the impact on fundamental rights resulting from the absence of any accountability. On the other hand, they do not burden platforms with *ex-ante* monitoring obligations.

## 2. *The Innovative Solution: Enforcement of Fundamental Rights*

Whereas proposing a regulatory solution to the above-mentioned challenges is a largely traditional approach, the following perspective is more innovative and thus needs further analysis. It would be based on a reconsideration of the

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<sup>114</sup> Allow States and Victims to Fight Online Sex Trafficking Act of 2017 H R 1865.

<sup>115</sup> Communications Decency Act (n 60).

<sup>116</sup> See, also, the Senate bill named 'Algorithmic Accountability Act 2019'. The aim is to require 'the Federal Trade Commission to require entities that use, store, or share personal information to conduct automated decision system impact assessments and data protection impact assessments'.

<sup>117</sup> Among the efforts at the international level, see the Manila principles on intermediary liability <<https://www.manilaprinciples.org/principles>> accessed 3 November 2018; see also the Santa Clara principles on Transparency & Content Moderation <[http://globalnetpolicy.org/wp-content/uploads/2018/05/Santa-Clara-Principles\\_t.pdf](http://globalnetpolicy.org/wp-content/uploads/2018/05/Santa-Clara-Principles_t.pdf)> accessed 3 November 2018.

traditional boundaries of constitutional law and the distinction between private and public actors in exercising public tasks online.

This approach questions the horizontal effect doctrine of fundamental rights regarding the role of online platforms exercising private powers on the internet. As Tushnet has sustained, if the doctrine of horizontal effect is considered 'as a response to the threat to liberty posed by concentrated private power, the solution is to require that all private actors conform to the norms applicable to governmental actors'.<sup>118</sup>

Traditionally, constitutional rules apply vertically only to public actors in order to ensure the liberty and autonomy of private actors. On the contrary, the horizontal doctrine extends constitutional obligations also to private actors. Unlike the liberal spirit of the vertical approach, this theory rejects a rigid separation between public and private actors in constitutional law. Put another way, the horizontal doctrine is concerned with the issue of whether and to what extent constitutional rights can have impact on the relationships between private actors. As observed by Gardbaum, '[t]hese alternatives refer to whether constitutional rights regulate only the conduct of governmental actors in their dealings with private individuals (vertical) or also relations between private individuals (horizontal)'.<sup>119</sup>

The horizontal effect can result from constitutional obligations on private parties to respect fundamental rights (i.e. direct effect) or the application of fundamental rights through judicial interpretation (i.e. indirect effect). Only in the first case would a private entity have the right to rely directly on constitutional provisions to claim the violation of its rights vis-à-vis other private parties.

Within the US framework, the Supreme Court has usually applied the vertical approach where the application of the horizontal approach – known in the US as the 'state action doctrine' – would be considered the

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<sup>118</sup> Mark Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law' 1(1) *International Journal of Constitutional Law* 79.

<sup>119</sup> Stephen Gardbaum, 'The Horizontal Effect of Constitutional Rights' (2003) 102 *Michigan Law Review* 388.

exception.<sup>120</sup> Consequently, US constitutional rights lack horizontal effect not only *in abstracto* but also in relation to online platforms.<sup>121</sup> Only the prohibition on slavery as provided for by the Thirteenth Amendment applies to public and private actors.<sup>122</sup>

The horizontal extension of fundamental rights is less rigid in the EU environment. One possible explanation for such differences could be the impact of social democratic openness of Member States. According to Tushnet, states which provide social welfare rights in their constitutions more readily apply the horizontal effect doctrine.<sup>123</sup>

Within the EU framework, the debate about the horizontal direct effect has not only focused on national constitutions but also on the EU dimension itself.<sup>124</sup> Traditionally, the effects of the rights recognised directly under EU primary law have been capable of horizontal application. In particular, the CJEU has applied both the horizontal effect and the positive obligation doctrines regarding the four fundamental freedoms. In the *Van Gend En Loos*

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<sup>120</sup> See, in particular, *Shelley v Kraemer*, 334 US 1 (1948). Mark Tushnet, 'Shelley v. Kraemer and Theories of Equality' (1988) 33 New York Law School Law Review 383; Gardbaum (n 119); Mattias Kumm and Victor Ferreres Comella, 'What Is So Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Horizontal Effect' in Andras Sajó and Renata Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing 2005).

<sup>121</sup> Jonathan Peters, 'The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application (or Lack Thereof) to Third-Party Platforms' (2018) 32 Berkeley Technology Law Journal 988. Regarding this topic, see also Paul S Berman, 'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation' (2000) 71 University of Colorado Law Review 1263.

<sup>122</sup> Gardbaum (n 119) 388; George Rutherglen, 'State Action, Private Action, and the Thirteenth Amendment' (2008) 24(6) Virginia Law Review 1367.

<sup>123</sup> Tushnet (n 118).

<sup>124</sup> Regarding the horizontal effect of fundamental and human rights in the EU framework, see Sonya Walkila, *Horizontal Effect of Fundamental Rights in EU Law* (European Law Publishing 2016); Dorota Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38(3) European Law Review 479; Elena Gualco and Luisa Lourenço "'Clash of Titans". General Principles of EU Law: Balancing and Horizontal Direct Effect' (2016) 1(2) European Papers 643.

case, the CJEU stated: 'Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'.<sup>125</sup> This definition remained unclear until the Court specified its meaning in the *Walrave* case<sup>126</sup> which, together with *Bosman*<sup>127</sup> and *Deliege*,<sup>128</sup> can be considered the first acknowledgement of the horizontal effect of the EU fundamental freedoms.<sup>129</sup>

However, if this is the case in the context of the EU Treaties, the same judicial activism cannot be seen in the framework of the Charter.<sup>130</sup> Since its entry into legally binding force with the adoption of the Treaty of Lisbon, the Charter has been recognised as having 'the same legal value as the Treaties'.<sup>131</sup> The difference in approach can be explained by looking at Article 51(1) of the Charter which seems to narrow the scope of application of the Charter to EU institutions and to the Member States in their implementation EU law.<sup>132</sup> Although this strict literal interpretation seems to narrow the possibilities of

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<sup>125</sup> Case 26/62 *van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1.

<sup>126</sup> Case 36/74 *Walrave v Association Union cycliste internationale* EU:C:1974:140.

<sup>127</sup> Case C-415/93 *Union royale belge des sociétés de football association v Bosman* EU:C:1995:463.

<sup>128</sup> Case C-51/96 *Deliege v Ligue francophone de judo et disciplines associées* EU:C:2000:199.

<sup>129</sup> Among the other decisions, see Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano* EU:C:2000:296; Case C-103/08 *Gottwald v Bezirkshauptmannschaft Bregenz* EU:C:2009:597; Case C-223/09 *Dijkman v Belgische Staat* EU:C:2010:397.

<sup>130</sup> Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT* EU:C:2014:2; Case C-555/07 *Küçükdeveci v Swedex* EU:C:2010:21; Case C-144/04 *Mangold v. Rüdiger Helm* EU:C:2005:709.

<sup>131</sup> Consolidated version of the Treaty on European Union [2012] OJ C 326/13, art 6(1). Grainne De Burca and Jo B Aschenbrenner, 'The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights' (2003) 9 *Columbia Journal of European Law* 355.

<sup>132</sup> Charter (n 47). According to art 51: '1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective power. 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.'

horizontally enforcing fundamental rights, it is possible to argue that, under the EU constitutional perspective, a more extensive approach to horizontality is less problematic.<sup>133</sup> The horizontal application of fundamental rights could constitute a limitation to the expansion of power by social subsystems.<sup>134</sup> According to Teubner, the emergence of transnational regimes shows the limits of constitutions as means of regulation of the whole society since social sub-systems develop their own constitutional norms.<sup>135</sup> Therefore, the horizontal effects doctrine can be considered a limit to the self-constitutionalising of private regulations by reconducting them to the constitutional framework. As a result, if the horizontal effect of fundamental rights is purely considered a problem of political power within society, an approach which excludes its application would hinder the teleological approach behind the horizontal doctrine, the aim of which is to protect individuals against unreasonable violation of their fundamental rights vis-à-vis private actors.

However, it is necessary to highlight at least one of the main drawbacks of the general horizontal application of fundamental rights. Applying extensively this doctrine could lead to negative effects for legal certainty. Indeed, every private conflict can virtually be represented as a clash between different fundamental rights. The result could lead to the extension of constitutional obligations to every private relationship, thus hindering any possibility to foresee the consequences of a specific action or omission. Fundamental rights can be applied horizontally only *ex post* by courts through the balancing of the rights in question. This process could increase the degree of uncertainty as well as judicial activism, with evident consequences for the separation of powers and the rule of law.

These concerns show the complexities of relying on the horizontal effect doctrine to generally limit the emergence of private powers. The above-

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<sup>133</sup> Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21(5) *European Law Journal* 657.

<sup>134</sup> Teubner (n 53).

<sup>135</sup> Gunther Teubner 'The Project of Constitutional Sociology: Irritating Nation State Constitutionalism' (2013) 4 *Transnational Legal Theory* 44.

mentioned issue can be overcome by limiting the application of this approach to only those cases where private actors exercise their autonomy as a result of a delegation of public functions. In particular, in the examples of platforms, although these entities cannot be considered public actors *per se*, their delegated public functions can be considered equal to those of public actors. In other words, it would be possible to envisage a definition of public law which is not fixed but it is able to extend to those cases where public actors entrust private actors with quasi-public functions through a delegation of powers. Indeed, users have legitimate expectation that if a public actor has entrusted a private one to pursue a public policy, it is necessary that those private actors be held accountable for any violation of users' fundamental rights. This approach would give users the right to bring claims related to violations of, for example, freedom of expression directly against platforms as entities performing delegated public functions. This mechanism would allow fundamental rights to become horizontally effective against the conduct or omission of actors evading their responsibilities and shielding their activities under a narrative based on freedoms and liberties.<sup>136</sup>

Furthermore, where platforms exercise autonomous powers, a broad extension of the horizontal effect doctrine would transform these entities into public actors by default. For this reason, public actors could regulate online platforms' autonomy through due process obligations and accountability mechanisms in order not to leave the development of the digital environment in the hands of actors who enjoy significant power without pursuing any public interest.

## VI. CONCLUSION: DIGITAL HUMANISM V. TECHNO-AUTHORITARIANISM

Infinite scalability, non-rivalrousness and intangibility are the main characteristics of the information found in digital spaces. Although technology has played a crucial part in the evolution of the role of private actors in the online environment, at this point it cannot be denied that public actors have also facilitated the emergence of platforms' powers. Indeed, the

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<sup>136</sup> Rebecca Tushnet, 'Power Without Responsibility: Intermediaries and the First Amendment' (2008) 76 *The George Washington Law Review* 986.

US and EU's choice to adopt a liberal constitutional approach to the internet, especially to online platforms, is one of the main causes of the shift from economic freedoms to new forms of private powers. Both the liberal constitutional approach and the possibilities coming from new digital technologies have resulted in entrusting private actors with regulatory powers over the internet.

Moreover, the adoption of a liberal approach was not the only 'mistake' made by public actors. Constitutional states have entrusted online platforms with public policy tasks without clearly defining the boundaries of such activities. Such a transfer of responsibilities resulted from the recognition of platforms' role in establishing an effective online public regulatory framework. Although the delegation to private actors of public tasks should not be considered a negative phenomenon *per se*, how these actors exercise their 'private sovereignty' should be regulated carefully since at present, unlike public actors in constitutional states, they are not obliged to respect fundamental rights. Whereas constitutional law has traditionally been developed to limit governmental powers, new private forces have emerged threatening the protection of fundamental rights.

Both the case of content management and the right to be forgotten have shown this dynamic. In the first case, both the EU and the US have entrusted platforms with online content management functions. Due to the lack of any limitation, platforms are neither obliged to adopt a fundamental-rights based approach nor provide reasons for their decision or redress mechanisms. This leaves users without any legal remedy against the violation of their fundamental rights such as privacy or freedom of expression. The same consideration applies in the case of the right to be forgotten where, although the GDPR has established more criteria to assess the implementation of this right, search engines can autonomously decide how to assess and deal with users' requests.

Furthermore, delegated powers are not the only source of concern. Behind delegated powers, platforms can exercise sovereign powers over their online spaces through instruments based on private law and technology. The possibility to balance and enforce users' fundamental rights through automated systems is an example of an absolute regime resulting from a mix of constitutional freedoms and technology.

In this scenario, the regulation of platforms' decision-making processes, as well as the horizontal effect doctrine of fundamental rights, can play a crucial role. Regarding the first solution, the establishment of new rights in the online environment such as, for example, the obligation to explain the reasons behind platforms' decision-making, would increase transparency. The same considerations apply to procedural rights such as the obligation to send a notice to the user when a decision of removal or blocking can affect his or her fundamental rights. Moreover, the second solution would lead to recognising the public role of platforms when exercising functions that mirror those of public authorities. The result of this extension would give users the possibility to directly enforce their fundamental rights vis-à-vis private actors.

Through a process of digital humanism, these new rights would aim to enhance the human awareness in the algorithmic process. Importantly, this would reduce the threat of techno-authoritarianism and the possibility for private actors to leave privately developed technologies to determine the standard of protection of fundamental rights online.