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The Constitutional Dimension of the Internet. Some
Research Paths

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Department of Law

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Abstract

The advent of Internet, as a new super-powered communication technology, has a huge impact on human thinking, therefore, on social relationships and, at the end, on law. Specifically, Internet plays a double interaction with the realm of constitutional law: on the one hand, it is a new powerful *tool* to pursue constitutional aims (a new way to define, control and regulate power); on the other, it is a new *object* of the constitutional law (a new power to be defined, controlled, and regulated). This phenomenon has been acutely defined as the ambivalence of “technocratic paradigm”. The initial hypothesis of the relation Internet-Constitutional Law has been that of a “linear” proportion, that is: the more Internet grows, the more Democracy and Citizenship equally grow. The paper suggests some research paths - both on “Internet-Democracy” and on “Internet-Citizenship” sides - proving the inconsistency of that hypothesis. “Constitutional crowdsourcing” experiments, web tools for participatory democracy; social-media as factors of political mobilization, are all cases showing ambivalent/ambiguous results: technology can be a strong growth factor for democratic advancement and constitutional participation, but it triggers equally strong counter-forces. The rise of the doctrine of “cyber-sovereignty”, as a reaction to the freedom of cyber space, the powerful constitutional resilience of the “classical” representative institutions when challenged by new Internet-based participatory channels (whether through constitutional crowdsourcing or participatory democracy), the compound nature of the new “Right to Internet” and, finally, the shifting role of social media in the political mobilization, are as many good examples of a “non-linear” relation between Internet and Constitutional Law. This ambivalence of technology requires a new reasonable and precautionary regulation, beyond the binary option: absolute prohibition/absolute freedom. The paper claims for a different multidisciplinary research approach, able to combine traditional legal tools with ethical guidelines and moral directions (“normative crescendo”).

Keywords

Internet and Constitutional Law; Law and Technology; Internet and Democracy; Internet and Citizenship; Constitutional crowdsourcing; Internet and political mobilization

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1. The “Internet Revolution”

Trying to evaluate the impact the *Internet*¹ may have on constitutional law is extremely difficult, if not impossible. Since law is a form of social organization, in order to determine the exact legal magnitude of the Internet’s advent it should be first necessary to define and measure the impact it is having on the nature of human thinking, therefore, on social relationships and, eventually, on human anthropology itself. And this effort lies clearly beyond the scope of the present paper.

What we can certainly say is that, beginning in the 1970s, the telecommunication “network of networks” that today is called the “Internet”, has grown at a dizzying rate².

Over the past twenty years, the number of the world’s Internet users rose from 25 million users in 1994 to around 3 billion in 2015³.

Today 40% of the world population uses the Internet with a percentage of users that reaches as high as 78% of the population in developed countries and 30% in so-called developing countries⁴.

Perhaps surprisingly, the language most often used by Internet users is Chinese⁵, and Asia has long been the region of the world where the Internet is most widespread⁶. It is also interesting to note that, the three places in the world with the highest degree of Internet penetration in the population (that is, the percentage of a country’s population having Internet access) include Qatar and Bahrain, where more than 97% of the population has Internet access.

The Internet’s diffusion could not be fully explained, nor the depth of its impacts understood, without taking into account another phenomenon, which has spread at the same wildfire pace: the phenomenon commonly called the “Internet of Things”⁷ (IoT). IoT refers to the fact that many commonly used “items” today are actually computerized devices (or have computerized components), which are connected, or have the ability to connect to the Internet. Consider the most common of these: the mobile or cellular phone. With the advent of so-called “smart phones,” the potential to connect to the Internet, producing and transmitting data, has increased exponentially. In the world today there are 6.9 billion cell phones, a number expected to surpass the world’s population of 7 billion in 2015⁸, and not surprisingly the category of countries with the most internet users match up with those countries that have the most cellular telephones.

¹ According to the Oxford English Dictionary: (originally *internet* with lower-case initial) a computer network comprising or connecting a number of smaller networks, such as two or more local area networks connected by a shared communications protocol. In later use (usually *the Internet*): the global network comprising a loose confederation of interconnected networks using standardized communication protocols, which facilitates various information and communication systems such as the World Wide Web and email. In this paper I will use in a basically equivalent way terms like “*Internet*” - “*ICT*” (acronym for *Information and Communications Technology*) - “*Web*” (contraction for *World Wide Web*) or “*Cyberspace*” - even if each of the four words has a specific technical meaning - as indications of that network of networks allowing people to exchange informations through specific communication technologies.

² M. CASTELLS, *A Network Theory of Power*, in *International Journal of Communication*, no. 5, 2011.

³ *Measuring the Information Society Report 2015*, International Telecommunication Union (Geneva), 2015, p. 15-16. Other data are reported on *Internet Live Stats* (<http://www.internetlivestats.com/internet-users/>).

⁴ *Ibidem*.

⁵ *The World Fact Book - Country Comparison: Internet Users*, CIA Publication, (<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2153rank.html>).

⁶ *Measuring the Information Society Report 2015*, International Telecommunication Union (Geneva), 2015, p. 63-65. Other evidences reported on *Internet Live Stats* (<http://www.internetlivestats.com/internet-users/>).

⁷ R.H. WEBER, R. WEBER, *Internet of Things - Legal Perspectives*, Berlin, Springer, 2010.

⁸ J. POUHTER, *Smartphone Ownership and Internet Usage Continues to Climb in Emerging Economies*, Pew Research Center, February, 2016.

But telephones are not solely responsible for the increase in IoT: myriad other appliances and commonly used instruments are also able to produce data and facilitate its circulation on the Internet (from GPS navigation systems to video surveillance apparatuses, from automobiles to credit cards, from smart parking systems to public Wi-Fi hot spots, and from microchips injected in pets to robots).

This latest Internet evolution has produced the most recent wave of the ICT revolution in which we are living, and which comes under the name “Big Data”⁹.

The diffusion of IoT is producing an unprecedented quantity of data (“Big Data”), both personal and not, that is quickly exceeding our storing and, moreover, processing capacity. Even more importantly, this evolution induces problems of “data mining,” that is, of extracting from “big data mines” information that can be used for decisions. In many cases data are collected and processed with neither knowledge nor consent of the individuals who generated it. The Snowden-PRISM and Assange-WikiLeaks affairs brought this latest evolution into the public domain.

With these few brushstrokes, I wish to merely give a sense of the context surrounding the topic of the “rise of the Internet.”

The impact of the Internet on law in general, and on *constitutional* law in particular, happens as a *reflexwirkung*: the *principal* impact is on the very nature of human thinking and, consequently, on human relationships and, only as a third level causation, it affects the legal systems.

To find an analogous precedent we must probably look back at the very origin of politics¹⁰, when the invention of writing and the extra-somatic extension of the abstract thought transformed the “pre-historic” linguistic communication, in the “historic” creation of the first urban order and therefore the invention of political relations¹¹.

2. The ambivalence of the technocratic paradigm

One insightful category, firstly focused by the seminal work of Zygmunt Bauman, that may help to understand this sweeping technical evolution, is that of “ambivalence”¹².

Post-modernity is characterized by a growing moral and cognitive indetermination as a consequence of our increased technical power. Pope Francis’ recent Encyclical *Laudato Si* is an evocative expression of this *ambivalence*. I refer to this document, obviously, not as the expression of a particular religious vision of the world, but because it seems to me that it represents today a sort of “global ethical awareness” which is shared at a worldwide level.

The Encyclical focuses on the ambivalence of the “technocratic paradigm” that is progressing in our societies.

“Science and technology are wonderful products of a God-given human creativity”. (...) Technology itself “expresses the inner tension that impels man gradually to overcome material limitations”. (...) How can we not feel gratitude and appreciation for this progress, especially in the fields of medicine, engineering and communications? (...)

Yet it must also be recognized that nuclear energy, biotechnology, information technology, knowledge of our DNA, and many other abilities which we have acquired, have given us

⁹ P.A. CHOW-WHITE, S.E. GREEN JR, *Data Mining Difference in the Age of Big Data*, in *International Journal of Communication*, no. 7, 2013.

¹⁰ G.BUCCELLATI, *Alle origini della politica. La formazione e la crescita dello stato in Siro-Mesopotamia*, Milano, Jaca Book, 2013, pp. 35-46;

¹¹ For this analogy, see G.BUCCELLATI, *The Question of Digital Thought*, in *Studies in Linguistics and Semiotics, A Festschrift for Vyacheslav V. Ivanov Nikolaeva*, Moscow, 2010; *Id. Alle origini della politica...cit.*, p. 45.

¹² Z. BAUMAN, *Modernity and Ambivalence*, Cambridge, Polity Press, 1991.

tremendous power. More precisely, they have given those with the knowledge, and especially the economic resources to use them, an impressive dominance over the whole of humanity and the entire world. (...)

Each age tends to have only a meager awareness of its own limitations. (...) “The risk is growing day by day that man will not use his power as he should”; in effect, “power is never considered in terms of the responsibility of choice which is inherent in freedom” since its “only norms are taken from alleged necessity, from either utility or security”¹³.

“Technology’s ambivalence” well captures the impact that information and communications technology has had and is having on human life¹⁴ and, consequently, on constitutional law.

On the one hand, technology is the expression of humanity’s free creative capacity; on the other, it produces a new form of power that, like all (technological) powers, does not in and of itself contain the criteria for its usefulness for humankind.

There is, therefore, a “risk/opportunity” trade-off (in law and economics terms) or one might say a “freedom/power” relationship (in political philosophy terms) that cannot be resolved through either absolute prohibition or absolute freedom, but, echoing the precautionary principle doctrine, it calls for a “reasonable regulation”¹⁵.

Consider, for example, one of the areas in which this trade-off is most evident: that of personal data protection.

Web technology is a great occasion for expanding individual freedom: it entails new opportunities for gathering data on persons and things; new opportunities to view, choose, and purchase items or services; new opportunities to exchange opinions; new opportunities to preserve data; and new opportunities to develop and analyze such data, and all of this at unthinkable speed.

But at the same time these very opportunities can be turned – sometimes involuntarily, but very often intentionally – into unprecedented opportunities to violate the most basic human rights¹⁶.

A clear consequence of that ambivalence, is what we may call a “*crescendo*” in the attempts to set limitations upon the human free choice as far as technology is concerned.

¹³ POPE FRANCIS, *Laudato Sí*, Ch III, 1, 81, 82, 83, 101-103, 104, 105.

¹⁴ It’s impossible to synthesize the debate on the anthropological impact of technology, only for a general view see M. HEIDEGGER, *The question concerning technology, and other essays*, (W. Lovitt, trans.), New York: London, Harper & Row, Publishers, Inc., 1977; H.G. GADAMER, *Reason in the Age of Science*, (F.G. Lawrence, trans.), Cambridge (MA), The MIT Press, 1983. G. AYLESWORTH, *Postmodernism*, in E. N. Zalta (ed.) *Stanford Encyclopedia of Philosophy*, 2015 (<http://plato.stanford.edu/archives/spr2015/entries/postmodernism/>); VON SCHOMBERG, *A vision of Responsible Research and Innovation*, in R. Owen, M. Heintz and J. Bessant (eds.), *Responsible Innovation*, London, John Wiley, 2013.

¹⁵ R. ANDORNO, *The Precautionary Principle: A New Legal Standard for a Technological Age*, in *Journal of international biotechnology law*, vol. 1, Issue 1, 2014, (http://estudijas.lu.lv/pluginfile.php/311686/course/section/28374/Andorno-Precautionary_Principle.pdf); C. SOM, L. M. HILTY, AND T. F. RUDDY, *The Precautionary Principle in the Information Society in Human and Ecological Risk Assessment*, no. 10, 2004, 787–799; A. STIRLING, *Risk, precaution and science: towards a more constructive policy debate*, *European Molecular Biology Organization, EMBO reports*, vol. 8, no. 4, 2007.

¹⁶ O. Pollicino e G. Romeo (eds.), *The Internet and Constitutional Law. The protection of fundamental rights and constitutional adjudication in Europe*, London: New York, Routledge, 2016.

3. *The normative*¹⁷ “*crescendo*”

The normative landscape surrounding technology is multilayered.

First, there is what we may call the *subjective/moral level*.

This level is traditionally out of lawyers’ reach, nevertheless it is critically important and must not be overlooked because, by its very structure, cyberspace is extremely resistant to “classical” regulatory instruments. The most effective way to make the Internet a better place is making Internet-users better, that is to say, the most successful way to affect the cyberspace “code” - in Lessig words¹⁸ - is through the “moral code” of the users¹⁹.

Then there is the “middle-earth” of the *collective-ethical level*, which does not have direct legal or binding force. An increasingly large number of research programs, international conventions, and EU legislation demand for “ethical requirements” or call for the adoption of “ethic codes”, guidelines, best practices and so, on trying to bridge the gap between moral, legal and technological rules. This middle normative level of practical legal reasoning - often carried out through soft-law instruments, self-regulation, voluntary agreements or private (or quasi-private) authorities regulations (such as ICANN) - should be studied more closely.

Finally, there is a third, *public-legal level*, which involves legal regulation in the strict sense, and which materializes in the form of local, national, domestic, constitutional, supranational, international, technical regulations.

This paper will deal mainly with the third level, particularly taking into consideration its *constitutional* subset; however, it would be a very interesting research perspective to study how the borders among the different scales of the “normative crescendo” are becoming less and less stable and certain and more and more permeable and connective.

4. *The constitutional dimension of the Internet: a “linear” hypothesis?*

The advent of a new, super-powered communication tool like the Internet has a deep impact on constitutional law.

Indeed, the purpose of constitutional law lies precisely in its function of imposing limits on power (both individual and social) through law²⁰.

From ancient to modern constitutionalism and up until the contemporary constitutionalism, law has sought to control power by either establishing a set of inalienable and fundamental rights, or by establishing certain rules of organization of the public powers. Constitution as “Bill of Rights” and Constitution as “Rule of Law” are two sides of the same contemporary Constitutional coin.

¹⁷ I use the word “normative” as it sounds familiar to a continental-Europe-trained lawyer, that is, as “related to a legal norm”, thus, not following the anglo-american-social-sciences lexicon.

¹⁸ L. LESSIG, *Code and the other laws of the Cyberspace*, New York, Basic Books, 1999.

¹⁹ N. DOORN, I. VAN DE POEL, *Editors’ Overview: Moral Responsibility in Technology and Engineering in Science and Engineering Ethics*, no 18(1), 2012, 1–11; D. RUGGIU, *Responsibilisation phenomena: the EC code of conduct for responsible nanosciences and nanotechnologies research in European Journal of Law and Technology*, vol. 5, no 3 2014; R. VON SCHOMBERG, *A vision of responsible innovation*, in R. Owen, M. Heintz and J. Bessant (eds.), *Responsible Innovation*, London, John Wiley, 2013.

²⁰ M. FIORAVANTI, *Constitutionalism*, in E. Pattaro (ed.), *A Treatise of Legal Philosophy and General Jurisprudence*, Dordrech: New York, Springer, 2009.

For that reason, it is doubtless that a phenomenon like the Internet plays a double interaction with the realm of constitutional law: on the one hand, it is a new powerful *tool* to pursue the constitutional law aim (a new way to define, control and regulate power); on the other, it is a new *object* of the constitutional law scope (a new power to be defined, controlled, and regulated).

Today, the most extensively explored side of the Internet-Constitutional law interaction is that of fundamental rights, especially from the viewpoint of the freedom of expression and personal data protection (privacy rights)²¹.

Following the prompt of the “ambivalence” of the technocratic paradigm, I would try to outline some possible research paths on another side of the relation between ICT and Constitutional Law: Democracy and Citizenship.

These two fundamental dimensions of Constitutional law have one point in common, as far as Internet is concerned: they both share the same initial theoretical assumption of a *linear* relation.

That is: the more Internet grows, the more Democracy and Citizenship equally grow²².

We have to consider that a key factor in this “linear” description is that technology and ICT are not only social facts but profitable services produced by industrial corporations²³; technology today is one of the most important driver in the global economy. Consequently, market economy has put a strong bias in favor of the ‘linear-proportionality’ hypothesis.

However, as soon as we enlarge and deepen, in space and time, our observation, we must register a lot of *non-linear* inconsistencies or, to follow our “ambivalence” suggestion, a lot of *ambiguous* results.

5. Internet and Democracy

The birth and growth of Internet has been hailed from the outset as a great advance for democracy²⁴. The hope was that Internet be a natural driver and facilitator of democracy. The “digital democracy” project still aims at enabling people from either developed²⁵ or developing²⁶ countries or, generally speaking less favored people (minorities, marginalized and peripheral inhabitants of megalopolis, etc.) to improve their interaction with political institutions.

In most recent times, many observers of the so-called “Arab Spring” pointed to the positive role played, above all, by so-called Web 2.0 and social media providers like Twitter and Facebook, as both triggers and organizational tools in the protests that led to revolt and, in some cases, to the fall of many North African governmental regimes. When web technology increases the possibility for dialogue and communication, it necessarily increases the pluralism and freedom of opinion that make up the foundations of democracy.

And yet, even here we must register the *ambivalence* of technological progress described above.

²¹ See EUROPEAN COURT OF HUMAN RIGHTS, Research Division, *Internet: case-law of the European Court of Human Rights*, June, 2015; O. Pollicino and G. Romeo (eds.) *The Internet and Constitutional Law...cit.*

²² It would be interesting to observe, but I can’t expand on that, how this linear relationship, in philosophical-antropological terms, is nothing other than the application of the broader “linear” law of post-modernity: technology-individual freedom.

²³ In 2016 Alphabet Inc. (ex Google.com) surpassed Apple Inc. as the largest company by market capitalization in US Stock Market; ExxonMobil Co. - oil company - is (at november 2015) only in the third position.

²⁴ M. MARGOLIS, G.MORENO-RIAÑO, *The Prospect of Internet Democracy*, Farnham, Ashgate, 2009.

²⁵ See, UK PARLIAMENT, HOUSE OF COMMONS DIGITAL DEMOCRACY COMMISSION *Open Up! Report on Digital Democracy*, June 2015 (<http://www.parliament.uk/business/commons/the-speaker/speakers-commission-on-digital-democracy/ddc-news/digital-democracy-commission-report-publication/>).

²⁶ See, non profit organizations as: <http://www.digitaldemocracy.org> or <http://www.digital-democracy.org>.

If we consider data concerning internet usage during Egypt's Tahrir Square revolution, from January 25 to 28, 2011²⁷, while we can, on the one hand, acknowledge the positive role played by the web (supported by data showing extremely high network usage²⁸), on the other hand, heavy intervention by Hosni Mubarak's regime is equally clear, shutting the telecommunications networks down to stifle the protest. In addition, during the very same days, the government used the Egyptian branch of the telecommunications company Vodaphone to send text messages to all Egyptians urging people not to join in the revolt and threatening heavy sanctions²⁹.

The Egyptian example is not an isolated case; many countries took steps to shut down the Internet as a form of repression leveled against democratic movements³⁰, and many other countries (for example China and Russia) have recently passed cyber-security laws that allot to their governments greater power to filter communications, censor their contents, and even shut down the network as a defense measure.

How democratic is Cyberspace today? The answer is more dilemmatic than we may think.

In response to the spread of the Internet use, we see the parallel growth of the "cyber-sovereignty" doctrine³¹, an expression that often hides what we should rather call "cyber-totalitarianism".

If we take a look at the indicators of democracy in the world and we compare them with data about the diffusion of the Internet, we see that, contrary to what one might expect, there is no correlation between the two³². Many non-democratic states – according to the indicators commonly used to identify democracies – have high numbers of Internet users.

But, if we turn our attention to democratic states, the situation doesn't look better.

Great public cases - as the "Snowden" affair in the United States - demonstrated that even democratic countries used ICT to violate constitutional and democratic principles.

In most recent times, a growing number of democratic states (England, France, Spain) and EU itself approved "cybersecurity strategies", meaningfully impacting on the freedom on the Internet³³; the dark scenario behind those documents is dominated by two growing "fears": on the one hand,

²⁷ Z. TUFEKCI, C. WILSON, *Social Media and the Decision to Participate in Political Protest: Observations From Tahrir Square*, in *Journal of Communication*, no. 62, 2012; N. ELTANTAWY, J.B. WIEST, *Social Media in the Egyptian Revolution: Reconsidering Resource Mobilization Theory*, in *International Journal of Communication*, no. 5, 2011.

²⁸ *Ibidem*.

²⁹ *Ibidem*.

³⁰ *Freedom on the Net. A Global Assessment of Internet and Digital Media*, Freedom House (Washington) 2009. G. WOLFSFELD, E. SEGEV, T. SHEAFER, *Social Media and the Arab Spring: Politics Come First*, in *The International Journal of Press/Politics*, vol. 18, no. 2, 2013. Other examples of Internet Shutdowns: Lybia Jan. 2011, Sudan Sept. 2013, Syria Nov. 2012, China Jan. 2014, for a deeper analysis of Internet shutdowns in Egypt and Lybia, see Dainotti et al., "Analysis of Country-wide Internet Outages Caused by Censorship", ACM, 2011.

³¹ On the *cybersovereignty* movement, see SCHNEIER B., *Data and Goliath*, New York, 2015, pp. 187-188.

³² Compare - for example - the indicators produced by *Freedom House* (<https://freedomhouse.org/report/freedom-world/freedom-world-2016>) and data from *Internet Live Stats* (<http://www.internetlivestats.com/internet-users/>).

³³ Almost all the European States adopted their own National Cybersecurity Strategy, some examples: UK (2011) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60961/uk-cyber-security-strategy-final.pdf; Germany (2011) <http://www.it-sicherheit-in-der-wirtschaft.de/IT-Sicherheit/Navigation/task-force.html>; France (2015) http://www.ssi.gouv.fr/uploads/2015/10/strategie_nationale_securite_numerique_en.pdf; Spain (2013) https://www.enisa.europa.eu/activities/Resilience-and-CIIP/national-cyber-security-strategies-ncss/NCSS_ESen.pdf. For the EU see *Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace*, JOIN(2013) 1 final, February 2013 (http://eeas.europa.eu/policies/eu-cyber-security/cybsec_comm_en.pdf).

governments' fear of rising global terrorism³⁴, on the other, corporations' fear of rising global cybercrime³⁵.

5.1 From “We the People” to “It the Crowd”: towards the “constitutional crowdsourcing”

Another interesting lens for analyzing the impact of Internet technology on democracy is that of democratic participation in collective decision-making.

Parallel to the growth of the Internet itself, it has been the use of the web in participatory processes and the practice of deliberative democracy. Web is increasingly used in administrative and political decisions, especially at the level of local authorities.

Nevertheless, I would like to highlight the “constitutional” dimension of those practices, given that in recent times the use of web technology has been extended to constitution-making or -amendment processes³⁶.

Let's consider some recent cases as: the Sudanese Initiative for Constitution Making to revise Sudan's Constitution following the 2011 secession of South-Sudan; the amendment of the Irish Constitution through its Constitutional Convention formed in 2012; the proposal to reform the Italian Constitution launched by the Letta Government in 2013 that was followed by an online, public consultation; and the process that led to the approval of the new Tunisian Constitution in 2014, and which earned the so-called “Tunisian quartet” the Nobel Peace Prize in 2015³⁷. But what has probably been the most significant and interesting endeavor, from a constitutional perspective, was the procedure used to amend the Icelandic Constitution, launched in 2010.

Many observers consider Iceland's procedure to be the most advanced model of *web designed* Constitution, as it sought to directly and personally involve citizens in the discussion and decision-making phases of forging the new constitution, especially through web technologies. For this reason, it has been also defined as a *constitutional crowdsourcing* experiment.

The Icelandic law of constitutional amendment provided for the creation of a web site and the activation of ICT tools that made the work of the Constituent Assembly public and favored popular participation. Later, the proposed constitution was drafted by Constitutional Council made up of twenty-five drafters who decided

“to use social media to open up the process to the rest of the citizenry and gather feedback on 12 successive drafts. Anyone interested in the process was able to comment on the text using social media like Facebook and Twitter, or using email. In total, the crowdsourcing moment generated about 3,600 comments for a total of 360 suggestions. Among them was the Facebook proposal to entrench a constitutional right to the Internet, which resulted in Article 14 of the final proposal.”³⁸

The resulting constitutional proposal was approved by two-thirds of voters in an October 2012 referendum.

³⁴ N. LEE, *Counterterrorism and Cybersecurity: Total Information Awareness*, New York, Springer, 2013.

³⁵ HANOVER RESEARCH AND INDIANA UNIVERSITY AT BLOOMINGTON *The Emergence of Cybersecurity Law*, February 2015 (<http://info.law.indiana.edu/faculty-publications/The-Emergence-of-Cybersecurity-Law.pdf>).

³⁶ T. ABBATE, *La e-patecipation e i processi di elaborazione e revisione costituzionale*, in *Ianus*, no. 11, 2014; C. SAUNDERS, *Constitution Making in the 21st Century*, in *International Review of Law*, no. 4, 2012; S. SUTEU, *A New Form of Direct Democracy: Constitutional Conventions in the Digital Era*, in *Research Paper Series*, no. 2014/39, University of Edinburgh, School of Law, 2014; D.M. FARREL, E. O'MALLEY, J. SUITER, *Deliberative Democracy in Action Irish-Style: The 2011 We The Citizens Pilot Citizens' Assembly*, in *Irish Political Studies*, vol. 28, no. 1, 2013; J. GLUCK, B. BALLOU, *New Technologies in Constitution Making*, in *United States Institute of Peace Special Report*, n. 343, 2013.

³⁷ See T. ABBATE, *La e-patecipation...cit.*

³⁸ H. LADEMORE, *Inclusive Constitution-Making: The Icelandic Experiment*, in *The Journal of Political Philosophy*, 2014.

However, the constitutional bill ultimately stalled in Parliament until the new 2013 general elections, which were won by the opponents of the new constitution; therefore, despite such a wide and *crowdsourced* procedure, the proposal is still “frozen” in the Icelandic *Althingi*³⁹ and didn’t gain the political majority necessary to be approved. Again we have a remarkable case of “ambivalence” of the impact of web technology on constitutional procedure.

5.2 EU participatory democracy and the ECI

Along the same line (that is, web technology as facilitator of democratic participation) we find another relevant constitutional innovation, this one coming from within EU Law.

As we know, the democratic principle underlying the framework of the EU Treaties plays out in two ways today: alongside the “classical” dimension of *representative democracy* has grown up the newer dimension of *participatory democracy*⁴⁰.

This second dimension of European democracy has been officially recognized as a constitutional feature of the Union by the Lisbon Treaty, within the Article 11 TEU.

In this article the principle of “participatory democracy” is defined as the possibility for European citizens, associations, and civil society to engage in effective interaction (*an open, transparent and regular dialogue*) with European institutions. This interaction aims either to debate, criticize, and amend proposed European actions, or to stimulate new actions.

Obviously, the very notion of “*open, transparent, and regular dialogue*”, naturally evokes web technology as a dynamic infrastructure of participatory democracy⁴¹.

One of the most innovative applications of the participatory democracy principle within the European system, centered on the use of web technology, is the *European Citizens’ Initiative* (ECI)⁴².

The ECI, enables European citizens to ask the Commission to bring forth legislative proposals supported by at least one million signatures, coming from a significant number of Member States.

As the European Council officially stated on the occasion of the adoption of the regulation implementing the ECI in February 2011⁴³:

“[t]he Treaty of Lisbon introduced a new dimension of participatory democracy, alongside that of representative democracy on which the EU is founded, with the aim of bringing the EU closer to its citizens by encouraging more cross-border debate about EU issues.”

³⁹ The *Althingi* is the national parliament of Iceland; see B.T. Bergsson, P. Blokker, *The Constitutional Experiment in Iceland*, in K. Pocza (ed.), *Verfassunggebung in konsolidierten Demokratien: Neubeginn oder Verfall eines Systems?*, Baden-Baden, 2013.

⁴⁰ On the transformation of European democracy see A. SIMONCINI *Beyond representative democracy: the challenge of participatory democracy and the boundless galaxy of civil society* in M. Cartabia, N. Lupo, A. Simoncini (eds), *Democracy and subsidiarity in the EU. National parliaments, regions and civil society in the decision-making process*, Bologna, Il Mulino, 2013.

⁴¹ M.A.C. DIZON, *Participatory democracy and information and communications technology: A legal pluralist perspective*, *European Journal of Law and Technology*, Vol. 1, Issue 3, 2010.

⁴² See A. SIMONCINI *Beyond representative democracy: cit.*

⁴³ Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011.

Obviously, given the number (at least 1 million), the timeframe (12 months) for the collection of signatures and the variety of Member States required (at least 7), this new constitutional tool for democratic participation wouldn't be practically possible without Internet technology.

So, what are the results of this new participatory procedure? From April 2012 to November 2015, 50 ECI proposals have been officially presented to the Commission⁴⁴.

Around half of those - 26 - were unsuccessful⁴⁵ and, out of the remaining 24, the Commission refused 20 proposals before their registration and only 4 proposals collected the required 1 million signatures⁴⁶. Therefore, 40% of all ECI proposals have been rejected by the Commission⁴⁷ because - as provided by article 4 of the ECI Regulation - they *fell outside the areas of EU competence*⁴⁸.

It will be an interesting study to analyze how correct has been the reasoning of the Commission in those rejections and to deepen the causes of such a low success rate⁴⁹, but in any case, this simple evidence is sufficient to confirm, again, the *ambivalence* of the technological paradigm.

6. Internet and Citizenship

The second perspective I would like to suggest as possible research path focuses on the impact of web technologies on the constitutional regulation of *citizenship*.

Just as it is for democracy, the Internet is considered a powerful agent of transformation of citizenship. If by citizenship we mean, in its most basic definition,⁵⁰ "a certain sort of membership in a political community," associated with the ability to be a holder of rights and duties in a certain legal order, there is no doubt that the Internet network and its spread entail tremendous potential to shore up citizen membership and increase their sense of "ownership of the polity"⁵¹.

⁴⁴ EUROPEAN COMMISSION, *Report on the application of Regulation (EU) No 211/2011 on the citizens' initiative*, 31 March 2015 (COM(2015)145 final, p. 3 (<http://ec.europa.eu/citizens-initiative/public/initiatives/open>) in addition, 3 proposals are still open to signature (november 2015).

⁴⁵ 11 proposals were withdrawn by the organizers and 15 did not gather the required number of statements of support within the 1-year time limit, *ibidem*.

⁴⁶ 3 have been answered by the Commission, 1 is still waiting for the response, *ibidem*.

⁴⁷ Available at: <http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered>.

⁴⁸ It must be pointed out - but I won't expand here on this topic - that a lot of these refusals appear to be highly disputable. One of those decisions (the refusal to register the proposal "*One Million Signatures for a Europe of Solidarity*") has been challenged before the ECJ, but the First Section of the General Court upheld the decision (Judgment in Case T-450/12 Alexios Anagnostakis v Commission).

⁴⁹ For a more detailed analysis, see A. SIMONCINI *Beyond representative democracy* ...cit

⁵⁰ A. SHACHAR, *Citizenship*, in M. Rosenfeld and A. Sajò (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2013.

⁵¹ "Veritable citizenship is not about moving—it is about the ability of citizens to "own" the polity, to gain a real sense that their preferences as expressed through the political process have a meaningful and decisive impact on who governs": G. AMATO, E. GUIGOU, V. VIKE-FREIBERGA, JHH WEILER, *Towards a "New Schuman Declaration"*, in *International Journal of Constitutional Law*, vol. 3, no. 3, 2015.

The Internet, by multiplying the occasions for relationship, knowledge, information access and action (not forgetting that the web has a both a *cognitive* and also a *performative*⁵² value) is a key condition for the “quality of citizenship” and for citizens’ empowerment.

This is the reason why Internet access has become a new “citizens’ right” - to use the definition of the Chapter V of the EU Charter of Fundamental Rights –; a kind of “hybrid right” that sums up the characters of both classic civil liberties (classical “negative freedoms”) and “social rights” (when certain external conditions are required to effectively exercise the right: access to the net, digital education, etc.).

An interesting example of this re-definition of citizenship in connection with digital technologies⁵³ is the recent Italian Law n. 124/2015 on the reform of the Public Administration, Article 1 of which introduces the concept of “*digital citizenship*” which consists of

“(…) guaranteeing to citizens and businesses, including through the use of information and communications technologies, the right of digital access to all data, documents, and services in which they have an interest, for the purpose of guaranteeing the simplification of access to personal services, reducing the need to physically access public offices.”

The Internet is a tool that can undoubtedly change the relationship between citizens and the public administration in a profound way and this area of policies and regulations comes under the definition of “e-government”.

One observation brings us back to the topic of *ambivalence*: it is indisputable that the use of web technologies – or, as they are often called, “smart” technologies – increases the efficiency of the relationship between users and administration services, bringing the public administration closer to citizens.

It is equally true, however, that digitalization of functions is, at the same time, an extremely powerful factor of “centralization” (because of the size required for storing capacity and the necessity of setting common regulation standards). Therefore, in federal or decentralized states, e-government policies, digitalization standards and coordination of telecommunication networks are usually carried out by the central authorities (Federation or National government) to the detriment of States or Local Autonomies.

In any case, viewed through the lens of citizenship, we cannot deny that the Internet is a determinative factor in the effective quality of membership in one’s own community.

6.1 Internet as a (Fundamental) Right

An interesting way to measure the Internet’s “attraction” within the area of citizenship, is to observe the national and international legislation in which Internet is classified as a “right.”

The classification of Internet access as a “civil right” or “right of citizenship,” or as a “fundamental right” or “Human Right” is growing in the sphere of legal tools both at the national and international levels, and is a phenomenon that should be closely studied⁵⁴.

⁵² It allows not only to get information but also to “do things” (consider the acquisition of goods and services via the Internet) according to the famous “performative” idea, expressed by J.L. Austin (*How to do Things with Words: The William James Lectures delivered at Harvard University in 1955*, Oxford, Clarendon Press, 1962).

⁵³ M. SEARSON, M. HANCOCK, N. SOHELL, G. SHEPHERD, *Digital citizenship within a global contexts*, in *Education and Information Technology*, n. 20, 2015.

⁵⁴ On the global idea of a “Internet Bill of Rights” see L. GILL, D. REDEKER, U. GASSER, *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights*, The Berkman Center for Internet & Society at Harvard University, Research Publication No. 2015-15.

The well-known Brazilian “Marco Civil da Internet”, approved in March 2014, regulated access to the Internet as “essential to the exercise of citizenship,” and guaranteed that access as a “civil right.”

Italy saw the recent approval by a Study Commission of the Chamber of Deputies of a proposal published last July entitled “Declaration of Internet Rights”⁵⁵.

This sort of emerging “Transnational Internet Law” bears certain common features that can be summarized as the recognition of the *ambivalent* nature of the “right to Internet”.

The same variability of the definition (be it “fundamental”⁵⁶, “civil”⁵⁷, “human”⁵⁸, “social” or “civic”) well expresses the multiple dimensions of this new right which, in some cases, is considered a “civil liberty” – protecting freedom from external interferences – and in other cases a “social right” – dictating the elimination of the so-called *digital divide*⁵⁹ – or which requires, alongside the “freedom to Internet”, the “freedom from Internet,” including the “right to be forgotten”, so advancing a new dimension of the “freedom of self determination”: the “digital self-determination”, that equally includes the right to *enter* as to *exit* the Internet.

6.2 Internet and political mobilization

Indeed, also theories of citizenship vary, some models being more markedly liberal-individualist, while others are more civic-republican. The first set favor a more self-centered conception of citizenship as the possibility for the person to have direct, stable and transparent interactions with public institutions; the second set are chiefly oriented in favor of the autonomy of self-organizing civil society. Obviously the Internet’s impact is not neutral as far as these theories are concerned⁶⁰.

According to certain political science literature, Internet’s produces a growing emphasis on single-issue politics⁶¹ and more individualistic forms of political engagement⁶². The binary “like/dislike” approach typical of social media, indisputably generates strong polarization of public opinions and a radicalization of extremes in the public square⁶³. This makes the search for areas of “overlapping consensus” (in Rawlsian terms) much more difficult. The history of the most relevant opposition party today in Italy (the “5 Stars Movement”) is a clear example of how important is the Internet in political communication and mobilization for protest parties.

On the other hand, social science literature equally shows that the Internet is actually a key tool of social self-organization, capable of offering citizens the relational empowerment essential in order to

⁵⁵ See M. BASSINI, O. POLLICINO, *Verso un Internet Bill of Rights*, Roma, Aracne, 2015.

⁵⁶ According to a survey promoted by BBC World Service (<http://news.bbc.co.uk/2/hi/technology/8548190.stml>) “Almost four in five people around the world believe that access to the internet is a *fundamental* right”; on Internet and fundamental rights’ protection see O. POLLICINO, G. ROMEO, *Concluding remarks: internet law, protection of fundamental rights and the role of constitutional adjudication* in O. Pollicino and G. Romeo (eds.) *The Internet and Constitutional Law: The protection of fundamental rights and constitutional adjudication in Europe*, New York, Routledge, 2016.

⁵⁷ Internet as a Civil Right, see <https://www.aclu.org/issues/free-speech/internet-speech>.

⁵⁸ According to the Report of the UN Human Rights Council (A/HRC/17/27) Internet has to be considered an “enabler of all the human rights”. P. DE HERT, AND D. KLOZA, *Internet (access) as a new fundamental right. Inflating the current rights framework?* in *European Journal Of Law And Technology*, vol. 3, no. 3 (2012).

⁵⁹ Understood as the socio-economic or educational distance between citizens and the Internet

⁶⁰ P. SCHMITTER, A. TRECHSEL, *The future of democracy in Europe: trends, analyses and reforms*. Strasbourg: Council of Europe Publishing, 2004; A. OLDFIELD, *Citizenship and community: civic republicanism and the modern world*, in G. Shafir (ed.) *The citizenship debates: a reader*, Minneapolis, University of Minnesota Press, 1998.

⁶¹ P. NORRIS, *Democratic phoenix: Reinventing political activism*, Cambridge, Cambridge Univ. Press, 2002.

⁶² P.C. SCHMITTER, A.H. TRECHSEL, *The Future of Democracy in Europe*, Council of Europe, Green Paper 2004.

⁶³ C. SUSNTEIN, *Republic.com 2.0*, Princeton, Princeton University Press, 2009.

keep civil society vital and active. The Internet effectively affects human behavior only when, in addition to online relationships, there are also relationships offline. Virtual “friendship” is not enough to change someone’s mind; a real “friendship” is necessary. While “knowledge” can be digital, “trust” still requires a physical touch.

One among the most relevant scientific studies on this topic has been carried out during the 2010 US midterm elections, using an extremely representative sample of nearly 63 million Facebook users⁶⁴.

The purpose of the study, was to analyze the influence of social media on voting, both in terms of turnout rate and of political preference.

The study concluded as follows:

1. The data “suggest that the Facebook social message increased turnout directly by about 60,000 voters and indirectly through social contagion by another 280,000 voters, for a total of 340,000 additional votes” (that is, the 0,54% of the turnout referred to the sample)

2. Strong ties between friends proved much more influential than weak ties: “Close friends exerted about four times more influence on the total number of validated voters mobilized than the message itself... Online mobilization works because it primarily spreads through strongtie networks that probably exist offline but have an online representation.”⁶⁵

A recent analogous meta-study conducted by the Pew Research Institute in 2015⁶⁶ confirmed that the Internet plays a major role in consolidating local civic engagement more than in election/campaign participation.

The conclusion from these studies seems to be that while Internet *alone*, is a quite weak factor of political mobilization, when it is coupled with a real life relationships, it can play a big role either in terms of turnout rate and of shifting political preferences.

It is clear, again, that we are facing a non-linear result.

The constitutional dimension of the Internet’s impact on citizenship will depend on the intrinsic *ambivalence* of this new technological paradigm (on one side, it can be a tool for enhancing individual participation in the public discussions and decisions or, on the other side, it can reinforce social bonds and collective engagement).

7. Conclusions

We are at the outset of a new era for Constitutional Law. After the first constitutional “wave” of XVIII century liberal constitutions, after the second “wave” of the post-World War II national and supranational constitutionalism, we are entering today a new phase in human history in which the new rising super-power is Technology.

Technology is deeply transforming people’s way of thinking, their daily life and traditional social dynamics, and the *Internet* represents one of the most decisive features of that shift.

In this paper we analysed some of the impacts of the Internet technology on Constitutional law under the dimensions of Democracy and Citizenship, looking for cutting-edge research paths. The

⁶⁴ Aa. Vv., ‘A 61-million-person experiment in social influence and political mobilization’ (2012) *Nature*, n. 489 (<http://www.nature.com/nature/journal/v489/n7415/full/nature11421.html>).

⁶⁵ *Ibidem*.

⁶⁶ A. BOULIANNE, *Social media use and participation: a meta-analysis of current research*, in *Information Communication & Society*, n. 18/5, 2015.

cases examined confirmed the general assumption of the “ambivalent nature” of the technological paradigm, that is, the “non-linear” relation between the rise of the Internet and the growth of Democracy and Citizenship as Constitutional law core dimensions.

Web technology can be a strong growth factor for democratic advancement and constitutional participation, but it triggers equally strong counter-forces.

The rise of the doctrine of “cyber-sovereignty”, as a reaction to the freedom of cyber space, the powerful constitutional resilience showed by the “classical” representative institutions when they are challenged by new Internet-based participatory channels (whether constitutional crowdsourcing or participatory democracy tools), the multiple nature of the new “Right to Internet” and, finally, the shifting role of web social media in the political mobilization, are as many good examples of the “non-linear” relation between Internet and Democracy as interesting research perspectives for Constitutional studies.

What makes these research perspectives even more attractive (and complicated) is that they evoke a “precautionary-like” scenario, that is, a condition in which the players of Global Constitutional Law⁶⁷ have to balance the freedom of the technological evolution with the protection of human fundamental values, in a condition of substantial uncertainty about the possible adverse effects of both technology and regulation; This is a normative dilemma which cannot be solved through either absolute prohibition or absolute freedom. The practical search for a “reasonable” regulation created what I called the “normative crescendo”, that is, on the one hand, a more and more combined use of different levels of “behavioral” tools - starting from the *subjective/moral* level, to the *collective-ethical*, to the *public/legal* - and, on the other, the increasing *permeability* among the margins of the different normative levels.

The distinctive feature of those research efforts, therefore, should be a multidisciplinary approach, meaning, for Constitutional law scholars, a strong invitation to put the “law in its context” again.

⁶⁷ With the expression “*Global Constitutional Law*” I mean that complex of super-legislative regulations and legal doctrine emerging both at international and national level and both from legal acts and (international-national) constitutional courts’ case-law; for a definition, see E.-U. PETERSMANN, *Global constitutional law? : why cosmopolitan 'aggregate public goods' must be protected by cosmopolitan conceptions of international law* in Bassiouni, Gomula, Mengozzi, Merrills, Nieto Navia, Oriolo, Schabas and Vigorito (eds), *The global community yearbook of international law and jurisprudence: global trends*, 2013, pp. 535-562; I. PERNICE *Global Constitutionalism and the Internet. Taking People Seriously*, HIIG Discussion Paper Series, Discussion Paper Number, 2015-01, 2015.

