The Irish Constitution and the Challenges of the Digital Age
Is It Time for a Bunreacht na hÉireann 2.0?

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Abstract: The last twenty years have witnessed the advent of an era of ceaseless technological progress. The eightieth anniversary of the Irish Constitution represents a good opportunity to operate a 'health check' to test the resilience of the Irish fundamental law vis-à-vis the challenges of the digital age. The first part of this paper examines to what extent the Bunreacht na hÉireann protects digital rights, and identifies three principles that currently lie outside the constitutional reach: namely, freedom of expression, data protection and informational self-determination, and Internet access. Even if in the Irish legal system they are recognised only at statutory or regulatory level, a series of evidences are provided to show that these three principles have now acquired a constitutional status. As a therapy against potential degeneration of the Constitution's clinical conditions, the article proposes to incorporate these new constitutional principles in a Bunreacht na hÉireann 2.0. To justify this solution, the second part of this paper will examine why an expansion of the constitutional reach should be preferred to a technique of evolutionary interpretation, what the utility of amending a national constitution is in a context of multilevel constitutionalism, and what the role of an updated constitution could be, considering Ireland's key role in the European digital economy.

Keywords: Irish Constitution, digital rights, constitutional change, multilevel constitutionalism.

Introduction

In 2017 the Irish Constitution celebrates its eightieth anniversary, a round number that represents a good opportunity to operate a 'health check' on the Irish fundamental law. For human beings eighty years represent today the threshold of the old age. However, constitutional texts are certainly more long-lived. If one compares the age of the Bunreacht na hÉireann with – to mention other European examples – its Norwegian, Dutch, or Belgian colleagues, all adopted in the first half of the XIX century[1], it is possible to contend that an eighty-years-old constitutional text is rather middle-aged.

Nevertheless, the last twenty years have witnessed a ceaseless technological progress whose speed is unprecedented in the human history. It is not a novelty to hear that the law lags behind societal changes. However, it seems that the conversion of digital years in Gregorian calendar's units has somehow become similar to the one performed to calculate cats' age. Worrisomely, in this way,

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[1] The Constitution of Norway was adopted in 1814, the Dutch Constitution in 1815, the Constitution of Belgium in 1831.

twenty years in the digital age would correspond to more than a century. Therefore, in the light of these considerations, a 'health check' of the Bunreacht na hÉireann appears to be even more justified. However, what is in fact a constitutional 'health check'?

Unfortunately, there is no medico-legal manual to provide a univocal answer to this question. However, it is possible to reach a satisfactory definition, by starting from the meaning of the concept of 'constitutional health'. A healthy constitution is certainly a constitution which, over the years, still performs its main function of establishing the fundamental rules of a society. A key characteristic of constitutional texts is therefore their longevity. Constitutions should last over time to allow societies to develop and progress. To this end, constitutions are called to perform two tasks at the same time: on the one hand, to protect the fundamental principles of a society, and, on the other hand, to allow its development[2]. A healthy constitution is therefore the one that, over time, still reflects the key values and the needs of the society it regulates.

For this reason, constitutions are generally modifiable. A healthy fundamental law is a living instrument; it cannot be merely seen as a series of constraints imposed by previous generations on the present ones[3]. When a distance between constitutional norms and current societal values is perceived, or when even a friction between the two occurs, a society experiences the phenomenon that Paul Blokker defines as constitutional 'anomie'[4]. Citizens feel that the existing constitutional framework is obsolete, and that they no longer understand what their guiding principles are. Moreover, at the same time, this condition could be combined with a state of constitutional 'anaemia' because when societal lymph no longer circulates in the veins of the constitutional text, its centrality consequently fades.

In sum, a constitutional 'health check' aims at assessing whether the principles enshrined in a constitution still reflect societal values and needs. How is then possible to perform such an assessment? We could resort to a fiction. If we imagined to be the new constitutional framers, which principles would we include in the constitution today? In this way, drawing a comparison between our imaginative exercise and the content of the Constitution, it would be possible to understand if: a) the two perfectly overlap, and therefore the content of the Constitution is in line with the current societal conditions; b) the Constitution include principles which are no longer considered of constitutional relevance; or c) the Constitution, conversely, does not include principles today perceived as constitutionally relevant.

Nevertheless, such an exercise would certainly go beyond my knowledge and possibilities. Firstly, the study of societal perceptions would require competences in disciplines other than law, such as sociology and anthropology. Secondly, the scope of this investigation, covering the entire range of constitutional principles, would be too broad. For this reason, the ambitions of this paper are by far more limited. Drawing inspiration from the experiment of constitutional 'health check', it will assess to what extent the Irish constitution protects the so-called 'digital rights', i.e. the rights of the citizens related to the digital dimension.

The first part of this paper will identify three principles that currently lie outside the constitutional reach: namely, freedom of expression, data protection and informational self-determination, and Internet access. Even if in the Irish legal system they are recognised only at statutory or regulatory level, a series of evidences are provided to show that these three principles have now acquired a constitutional status. As a therapy against potential degeneration of the Constitution's clinical

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[2] Cf. David Rothkopf, 'Rights 2.0. Is unrestricted Internet access a modern human right?' *Foreign Policy*, January-February 2014, 66, who talks about a 'sustainable' constitution.

[3] See Jeremy Waldron, 'Constitutionalism: A Skeptical View', Philip A. Hart Memorial Lecture, 17 March 2010, http://scholarship.law.georgetown.edu/hartlecture/4 accessed 7 November 2017.

[4] Paul Blokker, 'Grassroots Constitutional Politics in Iceland' (2012) available at SSRN: https://ssrn.com/abstract=1990463 accessed 7 November 2017.

conditions, the article proposes to incorporate these new constitutional principles in a Bunreacht na hÉireann 2.0. To justify this solution, the second part of this paper will examine why an expansion of the constitutional reach should be preferred to a technique of evolutionary interpretation, what the utility of amending a national constitution is in a context of multilevel constitutionalism, and what the role of an updated constitution could be, considering Ireland's key role in the European digital economy. The article will conclude with a 'medical report' highlighting prognoses and suggested treatments for the Constitution's clinical conditions.

1. Digital rights at the frontier: a limited constitutional reach

The digital age witnessed an expansion of the field of human action: the virtual dimension has become an environment where individuals spend a considerable amount of their daily life. Consequently, the size of the constitutional environment has increased accordingly. It is not possible to imagine, indeed, that human action, by simply crossing the threshold of the virtual world, loses its constitutional protection. Constitutions affect human behaviour in general, and therefore still exercise their functions in the digital ecosystem.

The main problem is another. It is possible to tautologically argue that the expansion of the field of human action generates new possibilities of action. In other words, it means that constitutional actors in the virtual dimension interact *also* in a different manner from like they do in the physical world. The adverb 'also' should be stressed because it is not true that the digital world determines a radical upheaval of human behaviour: online conduct could be of the same nature than the one performed in the physical world, but, in addition, new possibilities of interaction emerge. Constitutions are still effective in the virtual dimension in so far as they cover the portion of human behaviour that symmetrically finds its equivalent in the physical world. Conversely, when constitutional rules apply to new forms of interactions, two options arise: either the constitutional rule succeeds in regulating the new behaviour, or the latter remains substantially unaffected by the constitution.

In the digital ecosystem a part of human behaviour could therefore not be covered by constitutional law. This is also the case of the Bunreacht na hÉireann, and the reason behind this phenomenon is not disputed: constitutional framers did not have any crystal ball to gaze into. In 1937 it was impossible to foresee the digital revolution, and the new forms of interactions originating from it. However, it is important to highlight that the phenomenon at the basis of *constitutional* 'anomie', i.e. the lack of constitutional norms regulating a portion of human action, does not imply *legal* or *normative* 'anomie'. The new forms of interactions proper to the digital dimension could indeed have been regulated by other legal sources, or could have witnessed the conceptualisation at theoretical level of norms that are not yet binding.

This is the case of the three principles that this section will analyse. Indeed, freedom of information, data protection and informational self-determination, and Internet access are principles that are not codified in the text of the Constitution, but that are recognised at statutory or regulatory level. However, at the same time, these principles are also very close to the constitutional frontier: indeed, they originate from recognised constitutional rights, and are often included in other national or supranational constitutional instruments. The following paragraphs will provide evidences to demonstrate the constitutional status acquired by these principles, and will investigate to what extent the Bunreacht already protects them.

1.1 Freedom of information: sheltering a new articulation of powers

In the relationship between constitutional dimension and digital ecosystem the right to freedom of expression undoubtedly plays a central role. The Internet has proven to be an unprecedented tool to substantiate the text of Article 19 of the Universal Declaration of Human Rights that recognises the

possibility of individuals to *seek*, *receive*, and *impart* information. Back in 1997, Justice Stevens of the U.S. Supreme Court, delivering the opinion of the Court in the seminal case *Reno v. American Civil Liberties Union*, compared the Internet to "a vast library"[5], and lyrically recognised that through it "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox"[6]. In a recent case decided in June 2017, *Packingham v. North Carolina*, the U.S. Supreme Court even affirmed that today the cyberspace, and in particular social media, can be easily identified as "the most important places […] for the exchange of views"[7].

Freedom of information is the label adopted to denominate the right to access information held by public bodies, and undoubtedly represents the core of the right to *seek* information established by Article 19 of the Universal Declaration of Human Rights. It derives its name from the U.S. Freedom of Information Act 1966, the first modern example of statute allowing access to governmental documents[8]. Therefore, the principle of freedom of information is not a direct result of the digital revolution: the first example of law on freedom of information is indeed the 'Gracious Ordinance Regarding the Freedom of Writing and of the Press' enacted in 1766 by the Swedish King Adolphus Frederick[9]. The concept of access to information is linked to the idea that state action should be transparent, and that all public institutions should be accountable to their citizens. Nevertheless, it is possible to contend that the advent of the Internet, and ICT in general, in the 90's has undoubtedly provided a boost for the implementation of the principle of freedom of information. Indeed, these new technologies have offered for the first time the technical possibility to instantaneously give access to an unprecedented amount of governmental information at lower costs. This circumstance has in parallel increased the expectation of transparency in relation to the activities of all public institutions.

However, the extent to which the digital revolution has affected the possibility to access information is such that it is even possible to claim that these new technologies have altered the traditional articulation of powers between states and citizens. Through the use of new technologies, indeed, citizens have acquired new means to control state actions. The concept of 'democracy in public' proposed by the Italian philosopher Norberto Bobbio has eventually found the technical instruments to be substantiated[10]. The necessity to guarantee this new equilibrium in the articulation of powers therefore represents an additional reason to protect this right at constitutional level. Article 42 of the Charter of Fundamental Rights of the EU, and other provisions of national constitutions could be mentioned to demonstrate the validity of this choice[11].

In relation to the Irish legal system, the principle of freedom of information lie outside the reach of the Bunreacht. Article 40.6.1°i enshrines the right to freely express convictions and opinions. Furthermore, a right of citizens to communicate with each other has been recognised in *Att. Gen. v. Paperlink Ltd.* as one of the unenumerated rights originating from the letter of Article 40.3[12]. Article 40.6.1°i does not limit its scope to any specific medium of communication. The wording of the Constitution is generic. In the same provision there is a reference to the radio, the press, and the

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[5] *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), 853.

[6] *Reno* (n 5), 870.

[7] *Packingham v. North Carolina*, 582 U.S. ___ (2017), No. 15-1194, 5.

[8] See Herbert N. Foerstel, *Freedom of Infromation and the Right to Know – The Origins and Applications of the Freedom of Information Act* (Greenwood Press 1999).

[9] Juha Mustonen (ed), *The World'd First Freedom of Information Act – Andres Chydenius' Legacy Today*' (2006) Anders Chydenius Foundation, http://www.chydenius.net/pdf/worlds_first_foia.pdf accessed 7 November 2017.

[10] Norberto Bobbio, Richard Bellamy (ed) and Roger Griffin (tr), *The Future of Democracy* (Minneapolis: University of Minnesota Press 1991).

[11] Limiting our examples to Europe, see Article 32 of the Belgian constitution, Article 38 of the Croatian constitution, Section 12 of the Finnish constitution, Article 5A of the Greek constitution, Article 110 of the Dutch constitution, Article 100 of the Norwegian constitution, and Article 61 of the Polish constitution.

[12] *Att. Gen. v. Paperlink Ltd.* [1984] I.L.R.M. 373.

cinema, when establishing a qualification of the principle of freedom of expression. However, this list cannot be considered exhaustive given the presence of the preposition 'such as'. Therefore, such a neutral wording of the Irish Constitution could certainly be able to shelter the right to freedom of expression also in the digital ecosystem. Nevertheless, the scope of this right appears to be limited: if, indeed, it directly covers the possibility to *impart* information, and, indirectly, to *receive* information, it does not offer any protection to the right to *seek* information.

In *Cullen v. Toibín* a right to be informed was recognised under the form of a right to receive information from the media[13]. However, it has not been before 1997, with the introduction of the Freedom of Information Act 1997, that the Irish tradition of 'reticence' and 'secrecy' at administrative level made significant progress towards more openness and transparency[14].

Therefore, in Ireland the right to freedom of information is recognised only at statutory level. However, a decisive factor in favour of the addition of this principle within the Bunreacht could be the synergy between such a value and the current political and legal frameworks. Indeed, from a political point of view, Ireland has witnessed an increasing trend towards transparency in the recent years. The abolition, or in certain case the reduction, of the fees to pay to access public documents promoted by the Freedom of Information Act 2014 could be mentioned as an example. On the other hand, a constitutional right to freedom of information not only suits, but even better substantiates one of the key principles of the Bunreacht. Indeed, Article 6.1 provides the right of the people to 'decide all questions of national policy' in final appeal: how could people exercise this right without preliminary having the possibility to be informed?

1.2 Beyond the right to privacy: data protection and informational self-determination

One of the most debated aspects of the relationship between fundamental rights and digital ecosystem, besides freedom of expression, is undoubtedly the right to privacy. The concept of privacy originated as a negative right, the 'right to be let alone' as famously defined by Warren and Brandeis[15]. The right to privacy, intended as the right to respect for private life, was indeed tightly connected with the idea of 'independence' from external interference[16]. The advent of computing technologies from the 60's engendered a conceptual evolution of this right. The notion of privacy, indeed, originally only covered the physical dimension. The possibility to create vast databases, and to easily transfer data generated new concerns regarding the immaterial aspects of private life. Human action entered for the first time a virtual dimension under the form of data. To the extent these data referred to a specific individual, they were perceived as falling within her private sphere, and consequently worth protecting. In this way, the concepts of data privacy, and data protection emerged.

The right to data protection conceptually represents a direct filiation from the right to privacy, but, as demonstrated by the wave of data protection laws adopted in Europe from the 70's, it is a notion originating from the new challenges engendered by the advent of computing technologies. This also explains why the right to data protection is not present in constitutional texts dating before the 70's, and is quite rarely made explicit in subsequent texts[17]. If one looks at the principles enshrined in the different data protection laws, it is possible to understand that the expression 'right to data protection' is a label adopted to cover a variety of rights. More precisely, the concept of 'data protection' can be linked to the series of principles establishing obligations on controllers of personal data. However, it is possible to identify another group of rights, such as for instance the right to access, amend and

[13] *Cullen v. Toibín* [1984] ILRM 577; see James P. Casey, *Constitutional Law in Ireland* (Round Hall 2000).

[14] Basil Chubb, *The government and politics of Ireland* (Longman 1992).

[15] Samuel Warren, and Louis Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.

[16] See Peter Blume, 'Data Protection and Privacy - Basic Concepts in a Changing World' (2010) 56 *Scandinavian Studies in* Law 151.

[17] Blume (n 16).

remove personal data, that is more connected with the idea that individuals should be able to control their data. It is possible to gather these principles under the denomination of 'informational self-determination'[18]. This notion is even rarer than the one of data protection, still being in place the tendency to refer to all these rights under the concept of 'privacy'. Moreover, from a practical point of view, the texts distinguishing between the right to data protection and the right to informational self-determination are not many, and even in those cases the two rights are framed in a way that they tend to overlap from a conceptual point of view[19].

The Charter of Fundamental Rights of the EU can be mentioned as an avant-garde text enshrining in two different articles the right to respect for private and family life (Article 7), and the protection of personal data (Article 8). This evidence can be used to claim that, even if still a limited number of constitutional texts explicitly include these principles[20], their constitutional status is apparent today. Personal data represent the projections of human beings in the digital ecosystem. In fact, there is no neat distinction between physical and virtual dimension: human action does not differ depending on where it takes place, and consequently deserves equal protection in both dimensions. For this reason, it is possible to contend that the two mentioned principles are of tremendous relevance not only in the digital ecosystem, but also in the physical dimension, given the consequences that their infringements can generate. Indeed, the risks connected with a wrongful management of personal data, especially if of sensible nature, have very tangible effects on the life of all individuals. Therefore, the need to impose obligations on those actors who process personal data, and, in parallel, to empower individuals to control their projections in the digital ecosystem manifestly requires a constitutional answer.

In the Irish Constitution there is no equivalent of Article 8 of the European Convention of Human Rights: Article 40.5 exclusively protects the inviolability of the dwelling of every citizen from a physical point of view. This principle has not been enlarged to the immaterial extension of one individual's dwelling, such as the private life of the individual. Conversely, a right to privacy has been identified, as in the case of the right to communicate, as one of the unenumerated rights stemming from the wording of Article 40.3[21]. As a consequence, the protection of the right to privacy is the result of a patchwork of decisions that over time defined several aspects of this right[22].

The protection of the principles of data protection and informational self-determination lies outside the constitutional reach instead. They are not explicitly incorporated in the text of the Bunreacht, but their guarantee is entrusted to a specific set of legislations, whose main texts are the Data Protection Act 1988 as amended in 2003, and the ePrivacy Regulations 2011.

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[18] The principle to information self-determination originated from the German context with the name of 'informationelle Selbstbestimmung', and gained prominence after a decision of the German Constitutional Court in 1983. See BVerfG, Urteil vom 15 Dezember 1983, Entscheidungen des Bundesverfassungsgerichts, vol. 65, 1.

[19] It is possible to mention the example of the Declaration of Internet Rights adopted by a special committee of the Italian Chamber of Deputies on 28th July 2015, http://www.camera.it/application/xmanager/projects/leg17/commissione_internet/testo_definitivo_inglese.pdf accessed 7 November 2017.

[20] Examples of European constitutional texts enshrining a right to data protection separate from the right to privacy include Article 37 of the Croatian constitution; Article 10(3) of the Charter of Fundamental Rights and Basic Freedoms of the Czech Republic; Article 9A of the Greek constitution; Article VI of the Hungarian constitution; Article 38 of the Slovenian constitution; Article 13(2) of the Swiss constitution.

[21] Casey (n 13).

[22] See Hilary Delany, and Eoin Carolan, *The Right to Privacy* (Thomson Round Hall 2008); Denis Kelleher, *Privacy and Data Protection in Ireland* (Tottel Publishing 2006); Casey (n 13).

1.3 Right to Internet access: a new constitutional gateway

Differently from other media that represented epochal inventions in the past, such as the radio or the television, digital technologies do not only perform an instrumental role in the physical life of individuals, but it is possible to argue that they have even expanded the field of human action, by creating a new space where individuals can act. However, the digital ecosystem does not allow our physical bodies to enter, circulate and act within its boundaries as human beings do in the physical world: individuals act in the virtual dimension under the form of *data*. For this reason, as the two previous sections have highlighted, the main fundamental rights affected in the digital world are those that most involve data: data to communicate, to access, as in the case of freedom of expression and of information, and data to protect, and to control, as in the case of the rights to data protection and informational self-determination.

Following this line of argumentation, it is possible to detect other fundamental rights that can entail the use of data in order to be exercised. In this way, digital technologies emerge as a new constitutional gateway to a series of fundamental rights, ranging from freedom of assembly to freedom of religion, and encompassing a series of political rights. It is clear that human beings, when exercising these rights in the digital ecosystem, do not avail themselves of their physical bodies; their action take place through an interaction of data instead. Today, however, the distinction between physical and digital dimension no longer seems to be regarded as an alternative choice between the two: physical life of individuals is so deeply intertwined with the digital ecosystem, that sometimes their physical existence cannot be considered as such without all the series of possibilities offered by the digital dimension. In other words, digital technologies, and in particular the Internet, in fact appear to be a *sine qua non* of the enjoyment of a vast array of fundamental rights. For this reason, a debate on the appropriateness of establishing a right to Internet access recently emerged[23].

Undoubtedly, the inclusion of this principle among the fundamental rights of some countries represents an evidence of its constitutional relevance. Greece, amending its constitution in 2001, added a right 'to participate in the Information Society', entailing an obligation of the State to facilitate the access, production, exchange, and diffusion of electronically transmitted information[24]. The Ecuadorian constitution of 2008 at Article 16.2 enshrines a right to 'universal access to information and communication technologies'[25]. Moreover, it is possible to mention two seminal decisions, respectively from the French *Conseil constitutionnel* and the Costa Rican *Sala Constitucional* that affirmed a right to connect to the Internet as springing from their respective constitutional frameworks[26].

Of course, dating 1937, the Irish Constitution does not mention a right to Internet access. However, it is possible to argue that the letter of the Bunreacht already includes the majority of the rights that the Internet enables, and of which the latter now represents an indispensable access gateway. For instance, Article 40.6.1°I, as seen before, establishes the right to freely express convictions and opinions, Article 40.6.1°ii the right to peacefully assemble, Article 40.6.1°iii freedom of association,

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[23] See Stephen Tully, 'A Human Right to Access the Internet? Problems and Prospects' (2014) 14 *Human Rights Law Review* 175; Paul De Hert, and Dariusz Kloza, 'Internet (access) as a new fundamental right. Inflating the current rights framework?' (2012) 3(3) *European Journal of Law and Technology*; Tommaso Edoardo Frosini, 'The Internet access as a fundamental right' (2013) 25 *federalismi.it*; see also Edoardo Celeste, 'Packingham v. North Carolina: a Constitutional Right to Social Media?' *Cork Online Law Review* (forthcoming).

[24] Article 5A of the Greek constitution, http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf accessed 8 November 2017.

[25] http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html accessed 8 November 2017.

[26] See, respectively, Conseil constitutionnel, decision n° 2009-580 DC du 10 juin 2009, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2009580dc.pdf accessed 8 November 2017, and Sala Constitucional de la Corte Suprema de Justicia, sentencia n° 12790 de 30 de Julio de 2010, https://www.poder-judicial.go.cr/salaconstitucional/index.php/servicios-publicos/759-10-012790 accessed 8 November 2017; cf. the more cautious approach adopted by the U.S. Supreme Court in *Reno* (n 5) and *Packingham* (n 7).

Article 44 freedom of religion, Article 6.1 the right of people to designate their rulers and decide in final appeal all questions of national policy. All the mentioned provisions do not impose any restrictions in relation to the particular instrument or modality to exercise their related rights: it would be therefore possible to argue that a right to Internet access is already protected by the Constitution in so far as the aim of such access pertains to one of the rights listed above. This argument appears to be substantially valid, and, in addition, it is in line with one of the main streams of criticisms against the appropriateness to establish a right to Internet access. The latter, indeed, considers technologies as a mere tool, an enabler of rights, and not as a right itself[27]. Nevertheless, further examining the debate surrounding the right to Internet access, it emerges that in reality this denomination is a label that gathers under its name also other interrelated rights, rights that, this time, are not directly enshrined in the text of the Bunreacht.

Firstly, the right to Internet access is not only intended as a classical negative freedom, i.e. as a freedom from external interference, but also as a right entailing the imposition of a series of positive obligations on the state[28]. In this sense, the right to Internet access is interpreted as a social right[29]. From a practical point of view, this would imply the right to pretend from the State an adequate Internet connection, and the necessary devices to access the Internet[30]. A similar social right is not present in the text of the Constitution, but a debate on the inclusion of these rights at statutory or regulatory level is currently ongoing in Ireland. The core of the issue turns around the long expected extension of fast Internet access to the whole country in order to fill the digital divide between cities and countryside. In 2012 the Irish Department of Communications adopted the National Broadband Plan defining a roadmap to deliver fast broadband services across the whole Irish territory[31]. Interestingly, in June 2016 the communications minister Denis Naughten announced the government's willingness to enshrine fast Internet access in the Irish Universal Service Obligation (USO), and therefore to make it an "enforceable right"[32]. Other countries have moved in a direction similar to the one Ireland is pursuing at the moment, i.e. towards the introduction of a more limited right to have an Internet connection at statutory or regulatory level. In Europe, Estonia and Finland can be mentioned as two exemplary cases[33].

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[27] See Vinton G. Cerf, 'Internet Access Is Not a Human Right', *The New York Times*, 4 January 2012, http://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html accessed 8 November 2017.

[28] Andrea Simoncini, 'The Constitutional Dimension of the Internet. Some Research Paths' *EUI Working Paper LAW* 2016/16, http://cadmus.eui.eu/bitstream/handle/1814/40886/LAW_2016_16.pdf?sequence=1 accessed 7 November 2017.

[29] Frosini (n 23).

[30] Cf. Celeste (n 23).

[31] http://www.dccae.gov.ie/documents/National%20Broadband%20Plan.pdf. In September 2017 65% of all premises were connected to fast Internet, and the Department took further steps towards the finalisation of the procurement process concerning the realisation of a high-speed network in remote parts of Ireland, see http://www.dccae.gov.ie/en-ie/communications/topics/Broadband/national-broadband-plan/latest-news/Pages/Latest-News.aspx accessed 8 November 2017.

[32] John Kennedy, 'Ireland to make access to high-speed broadband a legal right' *Siliconrepublic*, 2 June 2016, https://www.siliconrepublic.com/comms/national-broadband-plan-right-ireland accessed 8 November 2017; Micheal J. Coren, 'Ireland plans to make high-speed broadband a right for every citizen' *Quarz*, 3 June 2016, https://qz.com/699067/ireland-plans-to-make-high-speed-broadband-a-right-for-every-citizen/ accessed 8 November 2017.

[33] See, respectively, Telekommunikatsiooniseadus (Tecommunications Act) of 9 February 200 (R T I 2000, 18, 116), https://www.riigiteataja.ee/akt/71844.pdf accessed 8 November 2017, and Liikenne- ja viestintäministeriön asetus tarkoituksenmukaisen internet-yhtyeden vähimmäisnopeudesta yleispalvelussa (Decree of the Ministry of Transport and Communications on the minimum rate of a functional Internet access as a universal service) no. 732/2009, http://www.finlex.fi/en/laki/kaannokset/2009/en20090732.pdf accessed 8 November 2017.

Secondly, the right to Internet access implies that all users can benefit from this resource without discrimination. This is essentially the principle at the core of the concept of 'net neutrality'[34]. In this sense, obligations should be imposed on all sorts of Internet providers to refrain them from discriminating users. A principle of non-discrimination is recognised in the text of the Irish Constitution only in relation to freedom of assembly and association (Article 40.6.2°), and freedom of religion (Article 44.2.3° and 44.2.4°). However, this principle exclusively addresses state action, while in the context of net neutrality the main actors concerned are private companies.

Thirdly, and lastly, a right to Internet access entails the right of individuals to have the skills to use the technologies that are necessary to enjoy the digital ecosystem, and, at the same, the right to be aware of the risks connected to the use of these technologies. More succinctly: a right to Internet literacy[35]. Article 42.4 of the Bunreacht imposes on the State the duty to provide free primary education, but a provision detailing the content of such education is not present.

Nevertheless, should a right to Internet access be enshrined in the Irish Constitution, a preliminary delimitation of the boundaries of this principle would be necessary. This operation of definition is essential in order to avoid potential fallacies, misunderstandings, and paradoxes. In this sense, the option to incorporate in the Constitution a social right to have an Internet connection does not seem to be appropriate. The main risks related to this eventuality are essentially two. Firstly, there is a danger of entering a paradoxical vicious circle: if a right to Internet connection is established, should a right to electricity be guaranteed as well?[36] Secondly, it is probable that a legal provision enshrining such a principle will not be resilient and future-proof over the years: indeed, technologies change rapidly, and already in the medium term the digital environment could be radically different.

This circumstance necessarily leads the scholar to reflect also on the scope of the right to Internet access. What is indeed the 'space', or more generally the 'entity', one wants to establish a right to access to? There is no univocal definition of the Internet[37]. Inevitably, in the light of this consideration, also the opportunity to enshrine a right to net neutrality, and to Internet literacy should be reconsidered. In fact, both these principles require a preliminary definition of their object, i.e. the (Inter)net: what will happen if in the next future the notions underlying these principles will be completely overtaken by the technological development?

These considerations persuade to opt for a different solution: introducing a more wide-ranging, technology-neutral, and, consequently, future-poof provision in the Constitution. The right to Internet access could be transformed in a more general right to social inclusion. The American economist Jeremy Rifkin argues that today the Internet, and in general all new information and communication technologies, allow to access a vast range of information, services, and places that represent an

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[34] See Luca Belli, 'End-to-End, Net Neutrality and Human Rights' in Luca Belli, Primavera De Filippi (eds), *Net Neutrality Compendium* (Springer: 2016); Christopher T. Marsden, *Net Neutrality. Towards a co-regulatory solution* (Bloomsbury 2010); Milton Mueller et al., 'Net Neutrality as Global Principle for Internet Governance' (2007) GigaNet: Global Internet Governance Academic Network, Annual Symposium 2007, available at SSRN: https://ssrn.com/abstract=2798314 accessed 8 November 2017; cf. Christoph B. Graber, 'Bottom-Up Constitutionalism: The Case of Net Neutrality' *University of Zurich i-call Working Paper* No. 2017/01, http://www.zora.uzh.ch/id/eprint/136370/ accessed 8 November 2017, who examines the possibility to consider net neutrality as an emerging fundamental right.

[35] See Council of Europe, 'Guide to human rights for Internet users', Recommendation CM/Rec(2014)6, https://rm.coe.int/16804d5b31 accessed 8 November 2017.

[36] See Rothkopf (n 2).

[37] See Robert E. Kahn, and Vinton G. Cerf, 'What Is The Internet (And What Makes It Work)' (1999) http://www.policyscience.net/cerf.pdf accessed 8 November 2017; Paolo Passaglia, 'Internet nella Costituzione italiana: considerazioni introduttive' (2012) *Consulta Online*, www.giurcost.org/studi/passaglia5.pdf accessed 8 November 2017; Edoardo Celeste, 'The scope of application of digital constitutionalism. Output from an empirical research', https://nexa.polito.it/2017/10/eceleste accessed 8 November 2017.

integral part of our social life[38]. For this reason, from a conceptual point of view, the right to Internet access can be regarded as a right not to be excluded from the society. Such a right would imply the duty of the state to promote all necessary measures, be they of technical, economical, or social nature, to ensure an adequate level of inclusiveness. The former president of the Italian data protection authority Franco Pizzetti proposed the idea of a right to digital citizenship[39]. However, I think that such a constitutional principle could be framed in a more general way, even bypassing the reference to the 'digital' dimension.

The proposal for a right to social inclusion, in my opinion, could satisfy all these requirements. Nowadays it is clear that social inclusiveness also, or maybe primarily, means being integrated in the digital ecosystem. However, still not having any crystal ball to foresee what will happen in the future, it is crucial to maintain the constitutional provisions open to any other forthcoming developments[40]. Today, the right to Internet access emerges as the right to pretend from the state all the necessary support not to be excluded from the broad universe of digital possibilities. Which place would then be more suitable to enshrine this right than the directive principles of social policy of the Irish Constitution?[41]

2. Suggested therapy: a Bunreacht na hÉireann 2.0

The 80-years-old Bunreacht does not encompass a series of principles that in this moment are crucial to face the challenges of the digital revolution. The principles of freedom of information, data protection and informational self-determination, and Internet access lie outside the frontier of the constitutional reach. The previous sections have provided evidences to demonstrate that today these principles have acquired a constitutional status, and have highlighted to what extent the current text of the Constitution can protect them.

In order to prevent a degeneration of the Constitution's clinical conditions in a state of anomie combined with constitutional anaemia, the second part of this paper illustrates why the solution to create a Bunreacht na hÉireann 2.0 incorporating the principles analysed in the previous sections should be considered the best to address the challenges of the digital age. In particular, three normative arguments will be used to support this claim: firstly, that an expansion of the constitutional reach should be preferred to an evolutionary interpretation of the letter of the Bunreacht because, in this way, the educative value of the Constitution could be preserved (2.1); secondly, that an expanded constitutional reach would safeguard the limitative function that the Constitution should play especially in a globalised environment where multiple constitutional levels interact (2.2); and thirdly that, considering Ireland's key role in the European digital economy, an updated Irish Constitution could, and should provide guidance to all the actors, be they Irish authorities or Irish-based private companies, that today have huge responsibilities in protecting the fundamental rights of millions of European citizens (2.3).

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[38] Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism. Where All of Life is Paid-For* (Tarcher/Putnam 2000); cf. *Packingham* (n 7).

[39] Franco Pizzetti, 'La *governance* di Internet e i diritti fondamentali: uno sguardo sul futuro in una prospettiva di "diritto pubblico mondiale"' in Oreste Pollicino, Elisa Bertolini, and Valerio Lubello, *Internet: regole e tutela dei diritti fondamentali* (Aracne 2013); Cf. Francesco Amoretti, and Enrico Gargiulo, 'Dall'appartenza materiale all'appartenenza virtuale? La cittadinanza elettronica fra processi di costitutuzionalizzazione della rete e dinamiche di esclusione' (2010) 3 *Politica del diritto* 353.

[40] See *Packingham* (n 7).

[41] Article 45 of the Bunreacht na hÉireann.

2.1 Constitutional expansion vs evolutionary interpretation: the educative value of the Constitution

The first argument advanced to support the proposal of a Bunreacht na hÉireann 2.0 is that an expansion of the reach of the existing Constitution will preserve its educative value[42]. It could be possible to argue that it is not necessary to expand the constitutional reach because Irish judges, as they have done so far, could continue to interpret the existing constitutional principles in the light of the most recent technical and societal developments.

Certainly, the evolutionary interpretation of the Constitution benefits from all the advantages of maintaining the same text of the Bunreacht: no extenuating discussions in parliament, no political tensions, no risks connected to the popular vote by referendum. Last, but not least, the choice not to update their own constitutional texts appears to be the option adopted by the majority of countries around the world. All these argumentations are perfectly valid. However, in this way, the educative value of the Constitution would be neglected. Why should citizens always wait for judicial intervention to be aware of the whole extent of their fundamental rules? Why should the text of the Bunreacht not directly speak to them?

The American constitutionalist Lawrence Lessig was once asked by one of his students: "constitution in the sense of just one tool among many, one simple flashlight that keeps us from fumbling in the dark, or, alternatively… more like a lighthouse that we constantly call upon?" He answered: "I mean constitution as in lighthouse – a guide that helps anchor fundamental values"[43]. I do agree with Professor Lessig: a constitution preserves its educative value in so far as it is regarded as a lighthouse for existing and future generations, an instrument that highlights the road ahead, a constant reference point.

All these functions cannot be performed by a generic and laconic text. In the current constitutional framework fundamental rules are the result of a puzzle of written rules, judicial interpretations, and consolidated practices. An Irish Constitution incorporating the principles that today play a crucial role to face the challenges of the digital age would make the basic rules, the foundational values of Ireland more transparent and accessible. In this way, the unqualified reader of the Constitution, be he a citizen or an Irish-based company, could immediately get an idea of the fundamental rights and duties in force in the Republic.

Moreover, this interpretation of the function of the Constitution would be in line with the legacy inherited by the constitutional framers. Article 46 of the Bunreacht, indeed, provides for the possibility to amend any sections of the Constitution. Such a circumstance confers a flexibility to the Bunreacht that is not common to all constitutional texts[44]. This aspect demonstrates that the constitutional framers were aware of the potential caducity of the norms enshrined in the Bunreacht. Moreover, if one compares the relatively easy amendment procedure prescribed by the Bunreacht with those of other constitutional texts, it is possible to understand that the intention of the constitutional framers was certainly not to hinder any future modifications of the text. Conversely, as the history has showed, the Irish Constitution has been modified several times, and nothing excludes that new amendments could be proposed in order to face the challenges of the digital age.

Lastly, in *Finn v. Att. Gen.* Barrington J. affirmed that the possibility to amend the Bunreacht "includes a power to clarify or make more explicit anything already in the constitution"[45]. This would certainly be the case if the digital rights identified in the previous sections were constitutionalised. The expansion of the constitutional reach advocated in this paper, indeed, would not amount to an upheaval of existing principles. Conversely, as the previous sections have shown, the principles that

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[42] See John Kenny, 'The Advantages of a Written Constitution Incorporating A Bill of Rights' (1979) 30 *Northern Ireland Legal Quarterly* 189, who lists other advantages of a broader constitutional reach.

[43] Lawrence Lessig, *Code. Version 2.0* (Basic Books 2006) 4.

[44] Casey (n 13).

[45] *Finn v. Att. Gen.* [1983] IR 154.

would be incorporated in the Constitution directly stem from quintessential rights already enshrined in the Bunreacht. In this way, a Bunreacht na hÉireann 2.0 would represent an evolution, rather than a revolution of the current constitutional framework.

2.2 Multilevel constitutionalism and the limitative function of national constitutions

The second argument advanced to support the proposal of a Bunreacht na hÉireann 2.0 is that an expansion of the constitutional reach will preserve the limitative function that the Constitution should play especially in a context of multilevel constitutionalism.

The investigation conducted so far to a certain extent presumed that the Bunreacht enjoys a position of *de facto* monopoly in the protection of fundamental rights in Ireland. In reality, this is not the case. Today, it would be more appropriate to talk about a situation of 'constitutional pluralism'[46], or, better, of 'multilevel constitutionalism'[47]. Both these concepts emerged to illustrate the competition between EU and national constitutional norms within the European framework. In this paper the expression 'multilevel constitutionalism' is borrowed to designate a similar phenomenon: the structured interaction within the Irish framework between national and supranational norms in relation to the protection of fundamental rights. This second denomination is preferred to 'constitutional pluralism' because it highlights a sense of ordered interplay between the different legal sources.

From a cursory look at the stratification of normative sources in the field of fundamental rights, this multilevel interaction of norms is apparent. Firstly, within the scope of application of EU law, Ireland is bound by the Charter of Fundamental Rights of the European Union that, after the Lisbon Treaty, has acquired the status of primary law of the EU. Secondly, Ireland is one of the signatories of the European Convention of Human Rights, which has been given effect in the Irish legal system by the European Convention of Human Rights Act 2003, subsequently amended in 2014. This statute, indeed, requires the judiciary to interpret any statutory provision in a manner compatible with the Convention. Thirdly, Ireland is a signatory to international treaties generally protecting human rights, such as the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, as well as to a series of issue-specific international treaties like the Council of Europe Convention no. 108/1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data.

In the light of this multilevel framework of normative sources, and especially considered the fact that the digital age is an era characterised by phenomena of global dimensions, one could question why the text of the Irish Constitution should be amended, and not of other binding supranational instruments instead. This paragraph will argue that, by incorporating the new principles that today play a critical role in facing the challenges of the digital age, the limitative function of the Constitution could be preserved. To illustrate this position, it is again necessary to analyse from a normative point of view what the role of national constitutions should be.

In the previous section, the image of the lighthouse has been employed to describe the function of constitutions as guides for present and future generations. This paragraph focuses on a different role

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[46] See Klemen Jaklic, *Constitutional Pluralism in the EU* (OUP 2014); Matej Avbelj, and Jan Komárek (eds), 'Four Visions of Constitutional Pluralism' EUI Working Paper LAW No. 2008/21 http://cadmus.eui.eu/bitstream/handle/1814/9372/LAW_2008_21.pdf?sequence=1&isAllowed=y accessed 2 November 2017.

[47] See, seminally, Ingolf Pernice, and Ralf Kanitz, 'Fundamental Rights and Multilevel Constitutionalism in Europe" Walter Hallstein-Institut Paper 7/2004 http://www.whi-berlin.eu/tl_files/WHI-paper%20bis%202010/whi-paper0704.pdf accessed 2 November 2017; Neil Walker, 'Multilevel Constitutionalism: Looking Beyond the German Debate' LSE Europe in Question Discussion Paper Series No. 08/2009 http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper8Walker.pdf accessed 2 November 2017.

of constitutions, this time borrowing a metaphor used by Niccolò Machiavelli in chapter XXV of *The Prince*[48]. In order to describe how human beings can withstand Fortune, the Florentine humanist compares Fortune with a river, and suggests that men should build barriers and dams to prevent its unexpected floods. Readapting such an image, it is possible to contend that another function of constitutions is to be as those dams and barriers that are built to prevent the damages of floods. Constitutions, in the same way, represent limitative norms, setting the boundaries that should not be overtaken by any other legal source, be it internal or external.

As a concrete example, it is possible to mention the crucial role that the German constitution played in relation to the transposition of Directive 2006/24/EC on data retention. In 2010 the German Federal Constitutional Court ruled that the national act implementing the directive was unconstitutional[49]. As a consequence, in 2012 the European Commission initiated an infringement procedure against Germany[50]. However, two years later, the ECJ invalidated the data retention directive in the case *Digital Rights Ireland*[51], and the Commission was compelled to withdraw its claim[52]. From this example it is apparent that, did Germany not have its constitutional principles, a directive infringing fundamental rights would have been transposed in the country.

However, in the Irish context, such a limitative function is paradoxically restricted by the Bunreacht itself. Indeed, with regard to international law, Ireland is in principle a dualist state: Article 29.6 of the Constitution requires to incorporate all international agreements through an act of the Oireachtas in order to be effective at domestic level. In this way, any external legal source is, at least theoretically, subject to the scrutiny of the Parliament[53], and, consequently, to the principles of the Constitution. Nonetheless, in the Irish context, EU law appears to be an exception to this principle[54]. Article 29.4.6°, indeed, explicitly excludes the possibility to invalidate a provision of EU law on the basis of an internal constitutional principle[55]. Certainly, this circumstance is partially balanced by the fact that in Ireland any substantial modification to the primary law of the EU entailing a transfer of sovereignty from the state requires to be approved by a popular referendum.

It is by far beyond the scope of this paper to analyse the relationship between EU law and national constitutional law. However, it is interesting to notice that, differently from Ireland, other member states have been more reluctant to affirm an absolute primacy of EU law on their national legal order.

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[48] Niccolò Machiavelli, *The Prince*, Ch. XXV in *Collected Works of Niccolò Machiavelli* (Delphi Classics 2017).

[49] BVerfG, Urteil des Ersten Senats vom 02. März 2010 - 1 BvR 256/08 - Rn. (1-345), http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/03/rs20100302_1bvr025608en.html accessed 8 November 2017.

[50] Case C-329/2012 *Commission v Germany*, Application by the Commission, 11 July 2012, http://curia.europa.eu/juris/document/document.jsf?text=&docid=126495&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1624748 accessed 8 November 2017.

[51] Case C293/12 *Digital Rights Ireland v Minister for Communications* [2014] ECLI:EU:C:2014:238.

[52] Case C-329/2012 *Commission v Germany* [2014] ECLI:EU:C:2014:2034.

[53] Cf. Article 29.5 of the Irish Constitution that establishes which international agreeements must be preliminary approved by the Parliament.

[54] See Elaine Fahey, 'The primacy of EU law in Ireland' in *EU Law in Ireland* (Clarus Press 2010).

[55] See *Lawlor v. Minister for Agricolture* [1990] 1 I.R. 356.

For instance, in France[56], Italy[57], and Germany[58], the respective national constitutions maintain – at least theoretically – a predominant role on EU law, notwithstanding the resoluteness of the ECJ in affirming the opposite[59]. In these jurisdictions, a residual, and, I would say, quiescent power of national constitutions as ultimate source of protection of fundamental rights has been maintained[60]. Their function is to provide a *noyau dur* (literally 'hard kernel') of principles working as a dam protecting against unexpected floods.

It should therefore be of the utmost importance to maintain the core of constitutional principles that cannot be overtaken by any other external legal sources in good condition. Following this line of argumentation, it is possible to contend that the role of national constitutions as ultimate dam protecting fundamental rights entails that their content should reflect the challenges of the present age. Moreover, by enshrining the principles that today play a critical role in facing the challenges of the digital age, national constitutions would renovate the social pact with their people, a pact otherwise loosened, not to say lost in the stratification of multiple legal sources.

The current configuration of the Bunreacht partially precludes the exercise of this role of ultimate barrier protecting fundamental rights, at least in relation to EU law. Such a circumstance, however, leads to consider whether this transfer of national sovereignty ultimately favours the protection of fundamental rights or it is only dictated by an absolute interpretation of EU law supremacy[61].

2.3 The relevance of the Irish Constitution in a transnational environment

The last argument advanced to support the proposal of a Bunreacht na hÉireann 2.0 is that, considering Ireland's key role in the European digital economy, an updated Constitution could provide guidance to all the actors, be they Irish authorities or Irish-based private companies, that today have huge responsibilities in protecting the fundamental rights of millions of European citizens.

Ireland is no longer a country at the periphery of Europe. It represents the hearth of European digital economy, with a concentration of headquarters of American tech giants established in its territory[62]. Over the last twenty years, Ireland has affirmed its leading role as European digital hub. Irish chill temperatures, that kept even the Romans away from its coasts, are now one of the main pretexts used by tech companies to settle in the modern Hibernia[63]. However, these undertakings do not only save

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[56] Jean Rossetto, 'La primauté du droit communautaire selon les juridictions françaises : A propos des relations entre le droit communautaire et le droit constitutionnel national' in Jean Rossetto, and Abdelkhaleq Berramdane (eds), *Regards sur le droit de l'Union européenne après l'échec du Traité constitutionnel* (Presses universitaires François-Rabelais 2007).

[57] See the theory of 'counter-limits' in Giuseppe Ugo Rescigno, *Corso di diritto pubblico* (Zanichelli 2014); or in English, Maria Dicosola, 'The Interaction between EU and National Law in Italy. The Theory of "limits" and "counter-limits"', Summer School on Comparative Interpretation of European Constitutional Jurisprudence, Trento, 2007, http://www.jus.unitn.it/cocoa/papers/PAPERS%202nd%20PDF/Interaction/Italy-interaction.pdf accessed 2 November 2017.

[58] See the *Solange* case in Juliane Kokott, 'Report on Germany' in Anne Marie Slaughter, Alec Stone Sweet, Joseph Weiler, *The European Court and National Courts. Doctrine & Jurisprudence: Legal Change in its Social Context* (Hart Publishing 1997).

[59] Paul Craig, Gráinne de Búrca, *EU Law. Text, Cases, and Materials* (OUP 2015).

[60] See (n 56), (n 57), (n 58).

[61] See Asteris Pliakos, and Georgios Anagnostaras, 'Fundamental Rights and the New Battle over Legal and Judicial Supremacy: Lessons from *Melloni*' (2015) 34(1) *Yearbook of European Law* 97.

[62] See 'The Irish Times Top 1000 – Our Guide to Irish Business' at http://www.top1000.ie/industries/technology accessed 3 November 2017.

[63] Rachel Clynes, '5 reasons why Ireland is Europe's data centre hub', 7 November 2016, *Siliconrepublic,* https://www.siliconrepublic.com/enterprise/ireland-europe-data-centre-hub accessed 3 November 2017.

money in cooling down their computing equipment: the Republic also offers one of the most advantageous corporate tax systems in Europe[64].

An unimaginable amount of data transits every day from all Europe to Ireland, and subsequently from Ireland to the U.S., and vice versa. Ireland is at the crossroads of this modern silk road. However, data, the new 'oil' of the digital age, are not only of great importance from a commercial point of view, but also in relation to the protection of fundamental rights. As the first part of this paper has shown, information transmitted online can be expression of individual freedoms, or can be subject to specific constitutional guarantees. All these data are in the hands of Irish-based companies, and, consequently, Irish authorities are responsible to protect them.

In this context, the Irish Constitution is called to play a critical role. It should set the fundamental rules that these corporations ought to respect, and it should guide the action of Irish authorities in monitoring such a compliance. Moreover, this function is crucial not only with regard to the Irish population, but to all European citizens. The recent case *Schrems* represents an emblematic example[65]. In this case, referred for a preliminary ruling by the Irish High Court, the European Court of Justice (ECJ) invalidated the Safe Harbour Agreement, i.e. the mechanism allowing the transfer of personal data between the EU and the U.S. This judgment affirmed that the Safe Harbor Agreement violated EU data protection principles: this circumstance compelled the European Commission to negotiate a second agreement that is currently in force under the name of Privacy Shield[66].

Similarly, in October 2017 the Irish High Court referred a question to the ECJ to rule on the validity of standard contractual clauses, which are the legal mechanisms allowing the Irish subsidiary of Facebook to transfer personal data to its mother company in the U.S.[67] In the light of these two examples, it is apparent that the Irish judiciary is playing a crucial role in relation to the protection of fundamental rights of European citizens. Indeed, it not only hears and decides cases which unavoidably have extraterritorial effects across Europe, but it also acts as a 'doorkeeper' with a discretionary power to select the questions to refer to the ECJ.

Last, but not least, the General Data Protection Regulation (GDPR) that will enter into force in May 2018 establishes a mechanism of 'one-stop-shop' in relation to cases of cross-border data processing[68]. According to Article 56 GDPR, the supervisory authority of the state in which the data controller or the processor are established should act as 'lead' authority. This means, in the case of Ireland, that the Irish Data Protection Commissioner will be the 'sole interlocutor' of the majority of tech giants processing personal data across the EU[69].

In conclusion, Ireland's leading position at the forefront of European digital economy bestows new powers and new responsibilities on the Irish authorities. The issues at stake have an unprecedented reach: they involve the protection of fundamental rights of millions of European citizens. For these

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[64] See KPMG, 'Corporate Tax Rates Table' at https://home.kpmg.com/xx/en/home/services/tax/tax-tools-and-resources/tax-rates-online/corporate-tax-rates-table.html accessed 3 November 2017.

[65] Case 362/14 *Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650.

[66] See Nora Ni Loidean, 'The End of Safe Harbor: Implications for EU Digital Privacy and Data Protection Law' (2016) 19(8) *Internet Law* 1; Martin A. Weiss, Kristin Archick, U.S.-EU Data Privacy: From Safe Harbor to Privacy Shield' (2016) Congressional Research Service Report, https://fas.org/sgp/crs/misc/R44257.pdf accessed 3 November 2017.

[67] See Mary Carolan, Elaine Edwards, 'High Court asks ECJ to examine Facebook case', 3 October 2017, *The Irish Times*, https://www.irishtimes.com/business/technology/high-court-asks-ecj-to-examine-facebook-case-1.3242468 accessed 3 November 2017.

[68] Articles 56 and 60 of Regulation (EU) 2016/679 (General Data Protection Regulation); Article 29 Data Protection Working Party, 'Guidelines for identifying a controller or processor's lead supervisory authority' 16/EN WP 244 rev.01, 13 December 2016 as amended on 5 April 2017, http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50083 accessed 3 November 2017.

[69] Article 56(6) GDPR.

reasons, it is time to reflect on the decisive role that an updated Irish Constitution could, and should play.

Conclusion

This paper has performed a 'health check' of the Irish Constitution in occasion of its eightieth anniversary. Such a test aimed at assessing the resilience of the Bunreacht to the challenges of the digital age, and, more specifically, at monitoring the state of protection of digital rights.

The medical report has identified three principles that currently play a critical role as legal response to protect citizens in the digital environment, namely freedom of information, data protection and informational self-determination, and Internet access. This paper has highlighted a series of elements showing the constitutional 'ripeness' of these principles[70], such as, for instance, the fact that they stem from other existing constitutional rights, or that are enshrined in other constitutional texts at national, regional or global level. An analysis of the Irish context has however diagnosed their absence from the text of the Bunreacht, and, conversely, their presence at statutory/regulatory level or, as in the case of Internet access, in current political debates.

From a prognostic perspective, this condition could degenerate in a state of constitutional anomie, where citizens perceive the existing constitutional framework as obsolete, and they no longer understand what their guiding principles are. This situation could also be combined with a severe state of constitutional anaemia, where societal lymph no longer circulates in the veins of the constitutional text, and, consequently, the constitutional centrality fades.

The suggested treatment consists in crafting a Bunreacht na hÉireann 2.0 incorporating these new constitutional principles. Three normative arguments have led to prefer this solution. Firstly, a constitution should in general illuminate the route ahead of present and future generations. Using Lessig's metaphor, it should work as a 'lighthouse'. A laconic and generic text that, as the Bunreacht, implies a series of unenumerated rights entails *ex post* judicial intervention, and does not preserve the educative value of the Constitution. Secondly, national constitutions, especially in a multilevel constitutional environment, should operate as ultimate barriers protecting fundamental rights. Borrowing Machiavelli's image, national constitutions should be the dams sheltering their citizens' rights in case of unexpected floods. Only a Constitution with an expanded reach could still perform this fundamental limitative function. Thirdly, today Ireland has become the European digital hub. Consequently, the Republic has acquired the responsibility to protect the fundamental rights of many European citizens, and, to this end, an updated Constitution could, and should play a decisive role of guidance with regard to all the actors involved.

Certainly, in constitutional law there is no therapy with immediate effect: lighthouses, and dams are hard to build. However, the night can come quickly, and the river can soon be in flood. It is time to reflect on a Bunreacht na hÉireann for the digital age. An early diagnosis is useful, but prevention is the key.

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[70] The expression 'constitutional ripeness' (in Dutch "constitutionele rijpheid") was first adopted by the Commission on Fundamental Rights in a Digital Age created in 1999 in the Netherland (so-called Franken Commission). The term was used to denote the quality of those rights that were considered ready to be included in the Dutch constitution. See Gert-Jan Leenknegt, 'The constitutional ripeness of principles in Internet law in the Netherlands' in Oreste Pollicino, and Graziella Romeo (eds), *The Internet and constitutional law. The Protection of fundamental rights and constitutional adjudication in Europe* (Routledge 2016); 'Rapport Commissie Grondrechten in het Digitale Tijdperk' (2000) https://www.recht.nl/exit.html?id=734&url=http%3A%2F%2Fwww.minbzk.nl%2Fgdt%2Fartikelen%2Frapport_gdt_5-00.pdf accessed 8 November 2017.