A charter of rights for Internet users :

For a Canadian perspective

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Union des consommateurs, *Strength through Networking*

Union des consommateurs is a non-profit organization comprised of 13 consumer rights groups.

UC's mission is to represent and defend the rights of consumers, with special emphasis on the interests of low-income households. Its activities are based on values cherished by its members: solidarity, equity and social justice, and improving consumers' economic, social, political and environmental living conditions.

UC's structure enables it to maintain a broad vision of consumer issues while developing in-depth expertise in certain programming sectors, particularly via its research efforts on the emerging issues confronting consumers. Its activities, which are nation-wide in scope, are enriched and legitimated by its field work and the deep roots of its member associations in their communities.

UC acts mainly at the national level, by representing the interests of consumers before political or regulatory authorities, in public forums or through class actions. Its priority issues, in terms of research, action and advocacy, include the following: household finances and money management, energy, issues related to telephone services, broadcasting, cable television and the Internet, public health, financial products and services, and social and fiscal policies.

Introduction

If cyberspace were a country, it would be the largest and most populated in the world, albeit one without any constitutions or government.
Anja Mihr[1]

At times called the third industrial revolution[2], the information society[3] has been leading to the development of a multitude of information and communication technologies. The Internet is certainly one of the most important, if not the most important, of those innovations.

The Internet network, i.e. the electronic link of myriad networks across the world, constitutes a remarkable tool for information access and sharing, communication and socialization, education, entertainment and commerce. All the more so because the network is accessible free of charge to anyone using a protocol that meets certain technical standards[4].

In 2014, the World Wide Web, that indispensable Internet application for navigating the network by means of a system of hypertexts, celebrated its 25th anniversary[5]. That application currently makes it possible to consult some 1.6 billion websites[6].

But the Internet's creator, Tim Berners-Lee, did not celebrate the occasion. The Web is unfortunately not exclusively a source of social and democratic benefits and advances. It must be admitted that the Web generates a number of problems. Leaks and merchandising of online personal information, massive dissemination of fake news, consolidation of the Web giants' overwhelming economic power (Google, Amazon, Facebook, Apple and others): Those are a few of the grave problems unfortunately faced by Internet users in 2019.

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[1] **MIHR, A.** *Good Cyber Governance: The Human Rights and Multi-Stakeholder Approach*, Georgetown Journal of International Affairs, 2014.
[2] **OCHOA, N.** *Le principe de libre-circulation de l'information - Recherche sur les fondements juridiques d'Internet*, 2016, p. 2, online: https://halshs.archives-ouvertes.fr/halshs-01531301 (document consulted on December 15, 2018).
[3] "Information society is usually understood as a society that makes extensive use of information networks and information technology, produces large quantities of information and communication goods and services, and has diversified content industry": **ESKANEN, J. and SUNDSTRÖM, H.** *ICT statistics at the new Millennium – developing official statistics – Measuring the diffusion of ICT and its impact, IAOS Satellite Meeting on Statistics for the Information Society*, Tokyo, August 2001, p. 1, online: https://www.stat.go.jp/english/info/meetings/iaos/pdf/jeskanen.pdf (document consulted on December 15, 2018).
[4] **BIRNHACK, M. D. and ELKIN-KOREN, N.** *The Invisible Handshake: The Reemergence of the State in the Digital Environment*, Virginia Journal of Law and Technology, vol. 8, No. 6, summer 2003, p. 45, online: http://vjolt.org/wp-content/uploads/2017/Articles/vol8/issue2/v8i2_a06-Birnhack-Elkin-Koren.pdf (document consulted on December 15, 2018).
[5] **CERN**. *The birth of the Web*, online: https://home.cern/science/computing/birth-web (page consulted on December 15, 2018).
[6] **INTERNET LIVE STATS.** Online: http://www.internetlivestats.com/ (dated May 2019).

According to Berners-Lee, it would be naïve now to hope for an open and neutral Internet that would foster human rights, unless necessary measures are taken to that end. And Berners-Lee used the Web's anniversary celebrations as an opportunity to advocate one such measure: the development of an online Magna Carta[7]. He has since encouraged the signing of a "social contract for the Web" as part of a major campaign conducted by his foundation, which has obtained the support of large corporations such as Google and Cloudflare, the French Minister of State for the digital economy, and former British Prime Minister Gordon Brown, among others[8].

That online Magna Carta – which in this report we will call a charter of rights for Internet users – reportedly aims at stating and guaranteeing the basic rights of Internet users, because those rights are considered as every person's inalienable rights, essential to be protected and exercised in order to maintain a free and democratic society[9].

In Canada, basic rights are recognized in several legislative documents, such as the Canadian Charter of Rights and Freedoms[10], the Canadian Human Rights Act[11] and, in Quebec, the Charter of Human Rights and Freedoms[12]. It should be noted that most of those documents were adopted in this country in the seventies or early eighties, before the deployment of the Internet as we know it today. But Internet access has since become essential for access to information, democratic participation, socialization, etc. And online respect for basic rights is just as essential, as well as respect for certain rights more intimately related to the network.

Sadly, it appears that applying the rights and principles stated in the traditional instruments is at times difficult online. Adaptations and clarifications are required due to the particularities of the digital world. This finding has led to the project to develop a charter specifically addressing the rights of Internet users.

Our report is in three parts. First we will explore the various debates about the development of charters of rights for Internet users. Authors are divided on the very interest in this type of document, on the way of implementing such charters, and on the fundamental rights that

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[7] **KISS, J.** *An online Magna Carta: Berners-Lee calls for bill of rights for web*, March 2014, The Guardian, online: https://www.theguardian.com/technology/2014/mar/12/online-magna-carta-berners-lee-web (page consulted on February 15, 2019).

[8] **WORLD WIDE WEB FOUNDATION.** *For the Web*, online: https://fortheweb.webfoundation.org/ (page consulted on February 15, 2019); **SAMPLE, I.** *Tim Berners-Lee launches campaign to save the web from abuse, The Guardian*, November 2018, https://www.theguardian.com/technology/2018/nov/05/tim-berners-lee-launches-campaign-to-save-the-web-from-abuse (page consulted on February 15, 2019); **DODDS, L.** *Sir Tim Berners-Lee launches "Magna Carta for the web" to save internet from abuse*, The Telegraph, November 2018, https://www.msn.com/en-gb/money/news/sir-tim-berners-lee-launches-magna-carta-for-the-web-to-save-internet-from-abuse/ar-BBPnP5y (page consulted on February 15, 2019).

[9] This definition states some of the principles of the Universal Declaration of Human Rights and explained by the Office of the United Nations High Commissioner for Human Rights: **UNITED NATIONS GENERAL ASSEMBLY**. Universal Declaration of Human Rights, 1948, 217 [III] A, Paris; **OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS**. *What are human rights?*, online: https://www.ohchr.org/EN/pages/home.aspx (page consulted on February 15, 2019).

[10] *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[11] *Canadian Human Rights Act*, RSC (1985), c. H-6.

[12] *Charter of Human Rights and Freedoms,* CQLR c C-12.

might be included therein. We will also examine the more and more important place taken by Internet users' rights as part of Internet governance.

We will then study four initiatives that foreign jurisdictions have developed or adopted in recent years to codify Internet users' rights. What answers to the various theoretical debates have been found or retained by the respective authors of those initiatives? We will also focus on those instruments' treatment of the rights to Internet access and to online privacy, both of particular concern to Canadian Internet users.

Lastly, we will consider the situation in Canada, sine the current federal government wants to make the country an "advanced digital environment[13]." What has been done to date in terms of recognizing and protecting the rights of Internet users? How should Canada participate in the current global movement to develop charters of rights for Internet users? Is such a document necessary? Those are a few of the questions we will try to answer in this report.

[13] **GOVERNMENT OF CANADA.** *Budget 2017*, "Chapter 1 – Skills, Innovation and Middle Class Jobs," 2017, online: https://www.budget.gc.ca/2017/docs/plan/chap-01-en.html?=undefined&wbdisable=true (page consulted on February 20, 2019).

1. The Idea of a Digital Charter of Rights

1.1 The Internet's raison d'être: A desire for freedom and access to information

Before any discussion of the recognition and protection of Internet users' rights, it's important to briefly put in context that network's development and raison d'être. The latter led to its creation and development, and explains its phenomenal expansion.

The Internet network was developed by scientists during the Cold War, at the request of the United States Defense Department, which wanted an information exchange network that could not be neutralized by a single attack[14]. To that end, an entirely decentralized architecture was designed – the electronic linkage of a multitude of networks distributed across the entire world, with no central control or coordination.

To the purely strategic requirements of the American military were added goals of freedom, accessibility and equality, supported by the scientists involved:

> *Ces chercheurs, habitués à collaborer, inscrivent dans le réseau les valeurs de leur communauté : coopération, réputation entre pairs, autonomie, gratuité, consensus et liberté de parole… Ils créent ainsi une architecture ouverte, capable de fonctionner sur plusieurs réseaux et sur des machines variées. Celle-ci promeut l'échange entre égaux : tous les paquets d'information qui transitent sur le réseau sont traités à la même enseigne. Dépourvue de centre, cette architecture rend d'emblée difficile le contrôle et vise à favoriser la connectivité et l'expansion du réseau*[15]*.*

The Internet was quickly perceived as a place of emancipation and freedom. The decentralized architecture means that anyone using a protocol that meets certain technical standards (e.g.: ISO/IEC 802-3: Ethernet) can connect to the network for free[16]. Content access and dissemination are greatly facilitated: no more dissemination costs (production and distribution of copies, using the spectrum, etc.), absence of the editorial control found in written media, radio or television, etc.[17] The pioneers soon dreamed of making available to as many people as possible this "espace de liberté et d'autonomie alternatif indéfiniment extensible[18]."

The networks' unification was ultimately achieved for the general public with the creation of the World Wide Web in 1992 (but its practical development began in 1989 – thus its 25th anniversary in 2014), an Internet application that enabled navigation on the network by means of hyperlinks[19]. Called in 1993 a "map to the buried treasures of the Information Age" by the New York Times[20], the application (and the first navigation program for the

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[14] **RICHARD, C**. *Penser internet. Une histoire intellectuelle et désenchantée du réseau*, *Revue du Crieur*2, 2015, p. 8, online: https://www.cairn.info/revue-du-crieur-2015-2-page-144.htm (page consulted on June 21, 2019).
[15] *Ibid.*
[16] **BIRNHACK and ELKIN-KOREN**. *The Invisible Handshake*, *op. cit.* 4, p. 45.
[17] *Ibid.*, p. 46.
[18] **RICHARD.** *Penser internet*, *op. cit.* 14, p. 8.
[19] *Ibid.*, p. 12.
[20] **PEW RESEARCH CENTER.** *World Wide Web Timeline*, online: https://www.pewinternet.org/2014/03/11/world-wide-web-timeline/ (page consulted on March 3, 2019).

general public, Mosaic) greatly facilitated Internet use and made the number of users skyrocket in the following years[21].

Despite its origins in the United States, the Internet rapidly became independent of any country. Internet users enjoy unprecedented freedom, whereby civil society structures, regulates and organizes itself[22]. And attempts by states to (re)take control are no longer welcome, as evidenced in the following excerpt from *A Cyberspace Independence Declaration*, produced in 1996 by John Perry Barlow, one of the founders of the Electronic Frontier Foundation:

We are creating a world that all may enter without privilege or prejudice accorded by race, economic power, military force, or station of birth.

We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.

Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are based on matter. There is no matter here.

Our identities have no bodies, so, unlike you, we cannot obtain order by physical coercion. We believe that from ethics, enlightened self-interest, and the commonweal, our governance will emerge. Our identities may be distributed across many of your jurisdictions. The only law that all our constituent cultures would generally recognize is the Golden Rule. We hope we will be able to build our particular solutions on that basis. But we cannot accept the solutions you are attempting to impose. […]

We will create a civilization of the Mind in Cyberspace. May it be more humane and fair than the world your governments have made before[23].

1.2 Internet governance: What place is there for the rights of Internet users?

Despite that initial desire to make the Internet a place independent of governments and laws, it was soon admitted that a certain level of governance had to be established. Regulation would focus on a few broad themes[24]:

- Control of “critical Internet resources” (e.g.: attribution of Web addresses[25]);

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[21] **MURPHY, J. and ROSER, M.** *Internet, Our World in Data*, online: https://ourworldindata.org/internet (page consulted on March 3, 2019).
[22] **LOVELUCK, B.** *Internet, une société contre l'État ?,* Réseaux, n° 192, 2015.
[23] **BARLOW, J. P.** *A Cyberspace Independence Declaration*, February 2000, online: http://www.cs.cmu.edu/~ralf/cdoi.html (page consulted on March 3, 2019). That Declaration constituted the author's response to the adoption of the Communications Decency Act, 47 U.S.C., of which an important part was declared unconstitutional by the Supreme Court as early as 1997, because it was deemed to contravene the right to free expression enshrined in the American Constitution. (Reno v ACLU).
[24] The literature offers various essential similar categorizations. See for example: **DENARDIS, L. and RAYMOND, M.** *Thinking Clearly about Multistakeholder Internet Governance*, text presented during the Eighth Annual GigaNet Symposium, Bali, Indonesia, October 21, 2013, p. 3.
[25] Internet Corporation for Assigned Names and Numbers (ICANN).

- Development of network interoperability standards[26];
- Cybersecurity;
- The role and regulation of intermediaries (e.g.: social media, research engines);
- Protection of intellectual property rights in the Web architecture.

Afterward, in the early 2000s, more-resolutely social considerations related to the exercise of online persons' human rights came to the fore, as demonstrated by the first world summits on the information society that were organized by a United Nations agency, the International Telecommunication Union. To signal a willingness to go beyond purely technical aspects, the following was asserted in the preamble of the Geneva Declaration of Principles, adopted at the first phase of the summits, in 2003:

> *our common desire and commitment to build a people-centred, inclusive and development-oriented Information Society, where everyone can create, access, utilize and share information and knowledge, enabling individuals, communities and peoples to achieve their full potential in promoting their sustainable development and improving their quality of life, premised on the purposes and principles of the Charter of the United Nations and respecting fully and upholding the Universal Declaration of Human Rights*[27].
>
> (our underlined)

We observe that same change in perspective within the Internet Governance Forum (IGF), a place of multi-stakeholder dialogue developed by the United Nations in 2005 and aimed at the development and application of Internet governance. Internet access, initially addressed by Forum members in terms of managing critical resources and infrastructure, was henceforth considered more according to the effects of its use (notably regarding human rights)[28].

The discourse was transformed, but developing standards for protecting human rights online remains highly contentious[29]. Although discussions have been held since 2006 within the IGF in view of developing a declaration of Internet users' rights[30], there is still no legally enforceable international document in this regard almost 15 years later.

Moreover, we are witnessing the development of several voluntary initiatives involving the United Nations, certain governments and actors in the private sector and civil society. A few of those initiatives will be studied in greater detail in the following pages. But we will

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[26] Internet Engineering Task Force (IETF).
[27] **WORLD SUMMIT ON THE INFORMATION SOCIETY**. *Declaration of Principles*, May 2004, doc No. WSIS-03/GENEVA/DOC/4-F, preamble, para 1, online: https://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf (document consulted on June 20, 2019).
[28] **ANTONOVA, S.** *Internet and the Emerging Global Community of Rights: The Human-Rights Debate at the Internet Governance Forum,* Journal of Philosophy of International Law, vol 4, No. 1, 2013, p. 92.
[29] "Gaining consensus on Internet-related human rights, however, has proven to be one of the most complicated efforts in Internet governance": **PETTRACHIN, A.** *Towards a universal declaration on internet rights and freedoms?,* The International Communication Gazette, Vol. 80(4), 2018, p. 338.
[30] As part of the Forum, a panel was held on the concept of an "Internet Bill of rights" and led to the creation of a "dynamic coalition" on the subject: **DORIA, A and KLEINWÄCHTER, W,** dir. *Internet Governance Forum (IGF). The First Two Years,* 2008, p. 386, online: https://www.intgovforum.org/cms/documents/publications/172-internet-governance-forum-igf-the-first-two-years/file (document consulted on June 21, 2019).

examine first the various debates reported in the literature about charters of rights for Internet users.

1.3 Why a charter of digital rights?

By January 2019, there were no less than 4.388 billion Internet users in the world, a number that never ceases to increase – it is estimated that there are one million more Internet users every day – but that already represents almost 60% of the world's population[31].

> *The Internet is a powerful enabler of human rights. As a medium of communication, the freedoms fostered by the Internet to express ideas, connect and associate with others, and exercise our human creativity and innovation are unprecedented*[32].

It is undeniable that today the Internet considerably influences the exercise of users' basic rights. The great social movements of recent years illustrate that – the Arab Spring, Occupy, Indignados, MeToo, etc. They were largely guided by the Internet and social media, and could not have had such an impact without this means of communication.

But the Internet's results in terms of human rights are not only positive, because the network also provides new opportunities for their large-scale violation: techniques to filter content, manage copyright, block access to certain websites, and restrict freedom of expression, the right of access to information and the exercise of other democratic rights; dissemination of hateful material attacking human dignity; or massive monitoring and collection of personal information, in a ubiquitous invasion of privacy[33].

The state of human rights online thus needs to be improved, an exercise that would ideally take into account, according to some, the adoption of a charter of rights for Internet users. But not everyone agrees with that. We will examine here the main arguments for and against such a codification exercise.

1.3.1 THE MAIN ARGUMENTS IN FAVOUR

Tenants of a charter recall that the Internet is a powerful vehicle of communication, social inclusion and economic development, thus constituting a common good, a global public space, that should be recognized as such. It is proposed that the Internet be "governed" in

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[31] **DATAREPORTAL**. *Digital 2019: Global Digital Overview*, online: https://datareportal.com/reports/digital-2019-global-digital-overview (page consulted on March 19, 2019); **INTERNET WORLD STATS.** *Internet Usage Statistics. The Internet Big Picture*, online: https://www.internetworldstats.com/stats.htm (page consulted on March 19, 2019).

[32] **INTERNET SOCIETY.** *The internet and Human Rights,* online: https://www.internetsociety.org/wp-content/uploads/2015/10/ISOC-PolicyBrief-HumanRights-20151030-nb.pdf (page consulted on March 19, 2019).

[33] **HICK, S, HALPIN, E and HOSKINS, E,** dir. *Human Rights and the Internet,* 2000, Palgrave Macmillan, Part IV; **DE NARDIS, L.** *The Emerging Field of Internet Governance,* Yale Information Society Project Working Paper Series, 2010, p. 11, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1678343 (page consulted on June 21, 2019).

consequence, through an approach to guarantee and protect human rights and to value democracy[34].

It is also argued that despite the Internet's undeniable benefits for the exercise of human rights, rules must be put in place, because those rights are regularly denied there, often more easily than offline.

> *At the same time, the focus on positive aspects should not lead to the neglect of the "sins of the digital age," such as inequality, commercial exploitation, exposure of misleading information, threats to privacy and the "tyranny" of access control[35].*

The need for additional online protections is said not to be met by existing human rights legislation, given that its application and adaptation to the digital world often prove complex. It would be illusory to believe that existing guarantees ensure the "automatic transfer" of human rights to the Internet or that a simple transfer would suffice; major adaptations are required due to the network's "unique nature[36]." Therefore, regulations and their provisions for protecting basic rights online should be clarified to ensure that Internet users fully benefit from legal protections. "New rights" should also be recognized for Internet users – distinct rights in addition to the human rights traditionally recognized offline[37].

Accordingly, many propose the development of a charter, particularly to formalize the protection and application of human rights online and to provide clarifying terms of application where required[38].

1.3.2 THE MAIN ARGUMENTS AGAINST

Inversely, many firmly oppose the development of such a charter and see little use for it.

Some, at times called "cyber-libertarians," view the idea of such a charter as an unjustified hindrance to the very foundation of the Internet, a network initially intended to be free of government and regulation[39]. State intervention is said not to be required online, since the network is equipped, by its very nature, with the necessary features for protecting its users *de facto*:

> *[…] the Net is in itself endowed with features that enable it to maintain its overall condition of openness in face of and for a variety of actors, contents and forms of knowledge organisation. Given freely, collective contributions make possible the*

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[34] **BROUSSEAU, E and MARZOUKI, M.** *Governance, Regulation and Powers on the Internet*, 2012, Cambridge University Press, p. 369; **MUSIANI, F.** *The Internet Bill of Rights Project: The Challenge of Reconciliation between Natural Freedoms and Needs for Regulation*, GigaNet: Global Internet Governance Academic Network, Annual Symposium 2009, p. 6.

[35] **MUSIANI.** *The Internet Bill of Rights Project, op. cit.* note 34, p. 5.

[36] **DE MINICO, G.** *Towards an Internet Bill of Rights,* Loyola International and Comparative Law Review, vol 37, No. 1, 2015, p. 13.

[37] **JØRGENSEN, R F and MARZOUKI, M.** *Internet Governance And the Reshaping Of Global Human Rights Legacy At WSIS+10*, text presented at the 10th GigaNet Annual Symposium, November 9, 2015, Brazil, p. 2.

[38] **MUSIANI.** *The Internet Bill of Rights Project, op. cit.* note 34, p. 8; **LUCCHI, N.** *The Impact of Science and Technology on the Rights of the Individual,* Springer, 2016, p. 90.

[39] **CASTRO, D and ATKINSON, R. D.** *Beyond Internet Universalism: A Framework for Addressing Cross-Border Internet Policy,* The International Technology & Innovation Foundation, 2014, p. 8, online: http://www2.itif.org/2014-crossborder-internet-policy.pdf (document consulted on June 20, 2019).

> *establishment of equally accessible, democratically organised online resources, which overcomes the barriers posed by other forms of communication ("interpret censorship as damage, and route around it") and increase the possibility of a collective critical evaluation of information*[40].

Others maintain that a charter of rights for Internet users would be redundant and useless. It is argued that a broad interpretation of currently recognized human rights would amply suffice to cover the various cases of potential violation of human rights online. Ensuring respect for Internet users' rights is said to be the purview of courts, which are responsible, when necessary, to adapt or clarify the basic rights already identified in countries' constitutions, in response to social and technological changes[41].

Moreover, a charter of rights for Internet users could rapidly become obsolete due to continuing technological developments, or even could restrict the eventual scope of protections regarding future innovations[42]. Others are concerned that in thus developing "new rights" piecemeal, the importance of basic rights of general application (legal core) might unintentionally be reduced, weakened or diminished, or the necessity of a broad and evolving interpretation of those rights might be restricted[43].

Lastly, some opponents of developing such a charter invoke the difficulty of effectively implementing the protections offered by a document. Since the state is only one of many other actors in the digital environment, is it really appropriate to impose the government's will? To date, government powers have been circumscribed by the control – at times substantial – exercised by other actors in the digital environment, including certain major Web companies[44]. Government adoption of a charter would not change that situation.

1.3.3 WHAT TO MAKE OF IT?

While it's true that a charter of rights for Internet users may not be required in a context where a broad interpretation of existing rights favours adaptation and application to different environments, adopting such an instrument still could be appropriate and desirable, if only to provide those very courts with an interpretation guide.

Nevertheless, fears of a charter's implementation should not be taken lightly, but the way to design and develop such a charter might help appease them.

The various existing initiatives we will study below in this report also present aspects that make it possible to assess the appropriateness of such a document.

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[40] **MUSIANI.** *The Internet Bill of Rights Project, op. cit.* note 34, p. 13.
[41] **DE MINICO.** *Towards an Internet Bill of Rights,* op. cit. note 36, p. 13.
[42] **MUSIANI.** *The Internet Bill of Rights Project, op. cit.* note 34, p. 14.
[43] **YILMA, K M.** *Digital privacy and virtues of multilateral digital constitutionalism –preliminary thoughts,* International Journal of Law and Information Technology, vol 25, No. 2, 2017, p. 126.
[44] **RILEY, M. C.** *Anarchy, State, or Utopia? Checks and Balances of Power in Internet Governance*, 2013, p. 2, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262055 (document consulted on June 21, 2019).

1.4 How to codify digital rights?

We will discuss here various aspects that authors think should be considered when reflecting on the development of that type of document:

- The approach or scope of the codification document: *Should a national or international charter be established? What are the respective pros and cons?*
- The author(s) of the codification document: *Who should be responsible for drafting the charter? Governments? The United Nations? The major Web companies?*
- The content of the codification document: *what is meant by "Internet users' rights"? Should specific rights be recognized for certain types of Internet users, who are more vulnerable or have particular needs?*

Another issue – the rank a charter of rights for Internet users should have in the legal hierarchy, the legal system (law, declaration of principles, reference document, etc.) – is explored in the next chapter as part of an analysis of four foreign initiatives.

1.4.1 POSSIBLE APPROACHES

The authors who have explored the subject note the two main possible approaches regarding the development and scope of a charter of rights for Internet users: a national or an international approach (or in collaboration between several governments, at least).

As its name indicates, the national approach consists of adopting a charter of rights for Internet users within a country. That document generally takes the form of a law, a declaration or a government policy. The international approach consists rather of an agreement between several countries, within a region or an international organization such as the United Nations (UN) or the Organisation for Economic Cooperation and Development (OECD) for example, to produce and apply a shared text.

Unfortunately, each of those two approaches has a serious drawback, which we will briefly discuss.

1.4.1.1 The international approach: a difficult compromise between countries

Developing an international charter of rights for Internet users requires negotiating shared positions on the sensitive subject of human rights online. That is a daunting challenge, given the occasionally substantial discrepancy between the concerns and values of different countries about issues such as freedom of expression, the fight against cybercriminality or state supervision[45].

[45] **CASTRO and ATKINSON.** *Beyond Internet Universalism, op. cit.* note 39, p. 2.

Some governments are reproached for attempting, most often in international discussions on Internet users' rights, to impose on everyone either their own values or the political concerns or positions that would benefit themselves economically[46].

The codification initiatives undertaken to date – mainly by Western countries – are also reproached for not taking into account the "digital divide" between those countries and developing ones[47].

And even between Western countries with justice systems or public policies that are more aligned, the design or way to apply certain digital rights can differ considerably:

> *[…] countries vary widely in their treatment of hate speech, even democratic ones. France and Germany have strong laws combatting anti-Semitism and other forms of non-violent hate speech, whereas the United States puts a premium on free speech rights. Attempting to reconcile these conflicting laws to create universal rules for regulating speech on the Internet is futile and doomed from the start. Likewise, democratic nations have very different approaches to Internet privacy, with many in Europe seeing privacy as a fundamental human right while many in the United States see privacy as just one value to be considered among many (e.g., innovation and economic growth)[48].*

In those circumstances, how to imagine the development in the short term of an international document that would codify accurately the various digital rights of Internet users?

1.4.1.2 The national approach: limits to applying a national law in the Internet era

Because the search for an international compromise can appear difficult, several governments have instead created national documents – laws, declarations or others – to recognize basic rights on the Internet for their respective citizens. Those documents are easier to produce (subject of course to the national context) but face a serious problem of application. The Internet is a global network that is not limited to countries' physical borders.

Recognizing an Internet users' right in one country will have repercussions on individuals, organizations or websites within that territory, because that country will have the means to ensure the right's application within its own territory; but the right may also have repercussions on another country. What happens if the latter also adopts regulations on the subject, but they conflict with those of the first country? Without international collaboration, a country will have difficulty handling another country's situation (on which it has no direct authority), which nevertheless has an impact on its own territory and citizens, through the Internet.

That's not a purely theoretical concern. Problems related to the territoriality of one country's laws regarding the Internet have already been largely exposed.

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[46] *Ibid*.
[47] **YILMA.** *Digital privacy and virtues of multilateral digital constitutionalism, op. cit.* note 43, pp. 127–128.
[48] **CASTRO and ATKINSON.** *Beyond Internet Universalism, op. cit.* note 39, p. 8.

In Canada, the *Equustek* case, for example, led to a Supreme Court decision in June 2017. Due to copyright violations (sale of pirated products), the Supreme Court of Canada confirmed the merit of an interlocutory injunction enjoining Google to cease listing and referencing certain results of its Internet search engine[49]. That court order had international scope, and didn't apply only to google.ca, because:

> *The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally. […] If the injunction were restricted to Canada alone or to google.ca, […] Google would still be facilitating Datalink's breach of the court's order which had prohibited it from carrying on business on the Internet. There is no equity in ordering an interlocutory injunction which has no realistic prospect of preventing irreparable harm[50].*

But is it so simple? Shortly after that court decision, Google instituted proceedings before a California court to prevent the Canadian injunction from applying in the United States. The American court agreed to that request, since the disputed injunction did not comply with American law[51]. In just a few months, the Canadian attempt to impose a decision on the entire Web was successfully blocked.

A similar situation arose in France in 2006 in the case of the Ligue internationale contre le racisme et l'antisémitisme against Yahoo!. Faced with sales of Nazi symbols and objects (a crime in France) on Yahoo!'s auction website – but not Yahoo.fr –, a French court ordered Yahoo! to take technical or access control measures preventing residents of France from having access to those sales[52]. Yahoo! challenged that decision before a California court. And a trial judge found the decision did not comply with American law because it violated the right to free expression recognized in the Constitution and was therefore unenforceable in the United States[53]. However, the U.S. Court of Appeals for the Ninth Circuit overturned the trial judge's decision[54].

Those much-publicized "legal ping-pong" situations are one reason why some authors severely criticize the multiplication of national initiatives with provisions that can encounter

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[49] Google Inc. v. Equustek Solutions Inc., [2017] 1 RCS 824.
[50] *Ibid*., para 41.
[51] In the United States, Google is reportedly covered by the immunity provided in section 230 of the Communications Decency Act.; see the American temporary injunction: **UNITED STATES DISTRICT COURT.** Google LLC v Equustek Solutions Inc., et al., order granting plaintiff's motion for preliminary injunctive relief, Northern District of California, Dkt. No. 16, online: https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2015/02/Google-v-Equustek-US-District-Court-for-Northern-CaliforniaTemporary-Injunction-2017-11-02.pdf; and the permanent injunction: **UNITED STATES DISTRICT COURT.** Google LLC v Equustek Solutions Inc., et al., order granting plaintiff's motion for default judgment and permanent injunctive relief, Dkt. No. 53, online: https://casetext.com/case/google-llc-v-equustek-solutions-inc
[52] **GEIST. M.** *Is there a there there? Toward greater certainty for Internet jurisdiction,* study commissioned by the Uniform Law Conference of Canada and Industry Canada, version 1.3, p. 4 and fol., online: https://www.ic.gc.ca/eic/site/cmc-cmc.nsf/vwapj/geist_e.pdf/$file/geist_e.pdf (document consulted on June 21, 2019).
[53] Yahoo!, Inc. v. la Ligue contre Le racisme et l'antisémitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), online: https://law.justia.com/cases/federal/district-courts/FSupp2/169/1181/2423974/
[54] Yahoo! Inc. v. la Ligue contre Le racisme et l'antisémitisme, l'Union des étudiants juifs de France, a French Association, 433 F.3d 1199 (9th Cir. 2006), online: https://law.justia.com/cases/federal/appellate-courts/F3/433/1199/546158/

the same type of application problems. For example, De Minico refers to a fragmented "mosaic of State net regulations" that is developing frantically but is of very little use[55].

1.4.1.3 The possibility of a middle-of-the-road approach?

The coordination problems between states, whether to produce an international document recognized and accepted by all, or to apply national documents regarding the Internet, are inducing some to advocate a mixed approach:

> *While both approaches–universalism and Balkanism–have problems, they are not without their merits. Universalism appeals to the desire to have cooperation between different nations, while Balkanization minimizes many of the problems associated with conflicting policies. Combining both of these frameworks yields an alternative approach to Internet policy that captures the best of each approach while sidestepping their pitfalls[56].*

According to the tenants of that hybrid approach, it would be possible to grant rights and protection measures for Internet users both in international agreements and national documents, depending on the interests at stake.

Among the advocates of that mixed approach to Internet governance is the Information Technology and Innovation Foundation (ITIF), which proposes several phases. First, regarding international agreements, the states' shared principles or objectives are identified in view of developing regulations specific to the Internet. For example, there is more of an international consensus on certain objectives, such as reducing online criminal activities (child pornography, circulation of arms, etc.)[57]. Governments that adopt national regulations afterward must ensure their compliance with the principles collectively approved. For subjects on which there is no consensus – likely including several basic rights (freedom of expression, Net neutrality, etc.) –, it is proposed that the decision would belong to each country, inasmuch as other countries' citizens are not affected and that a national measure considered does not directly contradict a shared objective:

> *where there is no consensus on the broad goal, nations should limit their policymaking activities to proposals that do not impact those outside their borders. […] Thus if a country blocks access to certain sites deemed offensive domestically, such that the blocking does not affect users outside of its borders, other nations should not interfere, unless such reasons are in fact a pretense for limiting a universal good (e.g., international trade).*
>
> *[…] If there is no direct impact on individuals or businesses in other countries, then a country should be free to pursue these policies (i.e., there is little or no cross-border policy conflict). This is not to say that certain countries need to endorse the policies of other countries, or even that they cannot try to dissuade them from pursuing a course they disagree with. Rather it is to say that ultimately these are issues where different countries should be allowed to "agree to disagree." For example, Western democratic nations may not like the fact that the Chinese*

[55] **DE MINICO.** *Towards an Internet Bill of Rights,* op. cit. note 36, p. 19.
[56] **CASTRO and ATKINSON.** *Beyond Internet Universalism, op. cit.* note 39, p. 10.
[57] *Ibid.,* p. 11.

> *government blocks access to online political content it deems threatening, but fundamentally that is its right as a sovereign government[58].*

That approach would certainly eliminate the risks of conflict between national governments, but admittedly certain rights are difficult to recognize in the exercise proposed by the ITIF.

For example, the right to be forgotten, a right associated with privacy protection and online reputation, and mainly consisting of forcing search engines to dereference Web pages "that contain inaccurate, incomplete or outdated [personal] information[59]." In light of the *Equustek* case, how can that right be recognized for an individual and be applied adequately, without affecting individuals in another country? How can local dereferencing have the effect desired by the person who requests it, while the search engine's other versions are also available in the country[60] ? We think the ITIF's proposed approach would unfortunately result in making it impossible to exercise or protect certain rights, such as the right to be forgotten.

Although the ITIF's proposed approach seems imperfect, it strongly resembles a position adopted by the OECD regarding Internet governance. The OECD indeed expressed a preference for a legislative and regulatory approach that would be multinational as well as national, in a 2011 news release pertaining notably to online privacy protection, while insisting on a principle of mutual recognition of domestic laws:

> *[…] we agreed as governments, private sector stakeholders and civil society to the following basic principles for Internet policy-making:*
>
> *[…] Privacy rules should be based on globally recognised principles, such as the OECD privacy guidelines, and governments should work to achieve global interoperability by extending mutual recognition of laws that achieve the same objectives. Cross-border enforcement co-operation will further protect privacy and promote innovation[61].*
>
> [our underlined]

1.4.2 VARIOUS POSSIBLE ACTORS

Another contentious issue concerns the possible authors of a charter of rights for Internet users. Should the state be responsible for codification? Or the major Web companies? The United Nations? There are mixed views on the role that that should be given to each party, but a consensus is building on the necessity of a collaborative process.

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[58] **CASTRO and ATKINSON.** *Beyond Internet Universalism, op. cit.* note 39, pp. 11–12.
[59] **OFFICE OF THE PRIVACY COMMISSIONER OF CANADA.** *Improvements need to protect online reputation, Privacy Commissioner says*, news release, January 2018, https://www.priv.gc.ca/en/opc-news/news-and-announcements/2018/nr-c_180126/ (page consulted on June 21, 2019).
[60] **AGENCE FRANCE-PRESSE.** *Google plaide contre une portée mondiale du « droit à l'oubli » européen*, La Presse, September 2018, online: https://www.lapresse.ca/techno/internet/201809/11/01-5196102-google-plaide-contre-une-portee-mondiale-du-droit-a-loubli-europeen.php (page consulted on June 21, 2019).
[61] **OECD.** *Communiqué on Principles for Internet Policy-Making,* June 2011, Paris, p. 6, online: https://www.oecd.org/internet/innovation/48289796.pdf (document consulted on June 21, 2019).

1.4.2.1 The Web companies' role

Some have argued that the major Web companies may be best placed to design a charter of rights for Internet users because of their role and power in the digital world. Although the network is a public good, the power of the major providers of Internet access, content and services leads some to believe that the Internet is an "essentially private environment[62]."

Those powerful private companies have historically played an important role in developing certain standards and managing infrastructures, the more physical and technical aspects of Internet governance[63]. Should those companies also be the entities most responsible for codifying and protecting human rights online?

A survey conducted in 2016 by the Berkman Center for Internet & Society of Harvard University among more than 7,000 Internet users in Asian countries reports a high level of trust in Web companies (telecommunications, software and search engine companies). To the question about whom they most trust to manage the Internet network, one-third first pointed to software and search engine companies, such as Microsoft and Google, ahead of governments and international organizations[64].

Those results are surprising to say the least, given the multiple scandals at the heart of which those companies have found themselves in recent years: dubious business practices, abusive collection of personal information, etc. That trust in the major private Internet companies doesn't appear shared by Canadian Internet users, as revealed by the results of a survey conducted in 2018 by the Global Commission on Internet Governance and Chatham House[65]:

- 71% of respondents thought the social media companies contributed to their distrust of the Internet[66];
- 59% thought the online search engine companies contributed to their distrust of the Internet[67];
- 58% thought the Internet access providers contributed to their distrust of the Internet[68].

In addition, an approach that would amount to self-regulation by the industry, in particular where human rights are concerned, is discounted by many experts. De Minico rightly

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[62] **CERDA SILVA, A J.** *Internet freedom is not enough: Towards an Internet based on human rights,* SUR, No. 18, June 2013, pp. 19 and 22, online: https://sur.conectas.org/en/internet-freedom-not-enough/ (page consulted on June 21, 2019); **FRANKLIN, M I.** *Digital Dilemmas : Power, Resistance, and the Internet*, Oxford University Press, 2013, p. 69.

[63] **DE NARDIS.** *The Emerging Field of Internet Governance, op. cit.* note 33, p. 11.

[64] **SHEN, F and TSUI, L.** *Public Opinion Toward Internet Freedom in Asia: A Survey of Internet Users from 11 Jurisdictions*, Berkman Center Research Publication, No. 2016-8., p. 12, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773802 (document consulted on June 21, 2019).

[65] **CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION**. *2018 CIGI-Ipsos Global Survey on Internet Security and Trust, online:* www.cigionline.org/internet-survey-2018 (page consulted on June 20, 2019).

[66] *Ibid.,* data table, doc. No. 2018-Q7, Excel page 62.

[67] *Ibid.,* data table, doc. No. 2018-Q7, Excel page 146.

[68] *Ibid.,* data table, doc. No. 2018-Q7, Excel page 90.

recalls that defending the public interest is not an intrinsic part of a private company's objectives:

> *Private stakeholders, when left by themselves, have shown time and time again that they pursue only egotistical interests. […] the achievement of the common good depends on whenever it, by chance, happens to correspond with private interests*[69].

The *internet.org*[70] initiative developed by Facebook in 2013, in partnership notably with Nokia, Ericsson and Samsung[71], is a good example of the limits given by the major Web companies to the place and importance of the "defence" of human rights. Intended to promote Internet access for free or at low cost in certain developing countries – a goal shared by many people who want that access recognized as a basic right –, the initiative did indeed make it possible to connect "over 100 million" persons to the Internet, according to the organization[72], but not without its approach raising criticism. In fact, *internet.org* does not provide full Internet access. Rather, it limits that access to only a hundred mainly American websites[73], which thus don't reflect the users' cultural and linguistic particularities[74]. Moreover, *internet.org* offers no access to the major communication or email platforms competing with Facebook[75]. That tight access control provided to the beneficiaries of the *internet.org* initiatives seems to be a clear violation of Net neutrality[76], the principle whereby an Internet access provider handles all Internet traffic equally[77]. The economic considerations of the project's funders are preventing the platform's users to fully exercise a right of access to the Internet.

Accordingly, we don't think it appropriate for Web companies to be the main agents responsible for an eventual exercise to codify those rights. But that does not question the role the companies would likely play in the application of and respect for the rights recognized in such a document, due to the companies' prominent place in the digital

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[69] **DE MINICO.** *Towards an Internet Bill of Rights,* op. cit. note 36, pp. 4–5.
[70] **INTERNET.ORG BY FACEBOOK.** Online: https://info.internet.org/en (page consulted on June 21, 2019).
[71] **JØRGENSEN and MARZOUKI.** *Internet Governance And the Reshaping Of Global Human Rights Legacy, op. cit.* note 37, p. 12.
[72] **INTERNET.ORG BY FACEBOOK.** *Our Impact*, online: https://info.internet.org/en/impact/ (page consulted on June 21, 2019).
[73] **ELGAN, M.** *The surprising truth about Facebook's Internet.org*, ComputerWorld, February 2016, online: https://www.computerworld.com/article/3032646/the-surprising-truth-about-facebooks-internetorg.html (page consulted on June 21, 2019).
[74] **GLOBAL VOICES ADVOX**. *Free Basics in Real Life*, July 2017, pp. 3 et 13, online: https://advox.globalvoices.org/wp-content/uploads/2017/08/FreeBasicsinRealLife_FINALJuly27.pdf (document consulted on May 30, 2019).
[75] *Ibid*., p. 22.
[76] India's telecommunications regulator, the Telecom Regulatory Authority of India, ended the initiative's implementation in India due to the initiative's noncompliance with the principle of Net Neutrality: **HEMPEL, J.** *India Bans Facebook's Basics App To Support Net Neutrality,* Wired, February 2016, online: https://www.wired.com/2016/02/facebooks-free-basics-app-is-now-banned-in-india/ (page consulted on May 20, 2019); **VINCENT, J.** *Facebook's Free Basics service has been banned in India*, February 2016, https://www.theverge.com/2016/2/8/10913398/free-basics-india-regulator-ruling (page consulted on May 20, 2019); *India blocks Zuckerberg's free net app,* BBC News, February 2016, https://www.bbc.com/news/technology-35522899 (page consulted on May 20, 2019).
[77] **HOUSE OF COMMONS OF CANADA.** *The Protection of Net Neutrality in Canada*, Report of the Standing Committee on Access to Information, Privacy and Ethics, 42nd Parliament, 1st session, May 2018, p. 5, online: https://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP9840575/ethirp14/ethirp14-e.pdf (document consulted on May 20, 2019).

environment. Similarly, we don't entirely exclude their participation in the process of developing a charter. Rather, we maintain that they cannot be the only or main agents responsible for such an exercise.

1.4.2.2 The state's role

Governments could assume the responsibility of creating a charter of rights for Internet users. They are surely among the traditional authors regarding the protection of human rights, and officially obtained that responsibility after the Second World War[78]. As confirmed by the Universal Declaration of Human Rights, "Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms[79]." Authors generally refer to three main corollary obligations[80]:

- Refraining from any measure likely to deprive persons of the enjoyment of their human rights;
- Preventing violations of human rights by third parties;
- Ensuring that persons have the possibility of meeting their basic needs.

This fundamental state role in recognizing and defending human rights seems to us just as applicable and appropriate in the digital environment. While historically, states have limited their Internet interventions, their approach has since evolved, as reported by Birnhack and Elkin-Koren:

> *The new type of State involvement in the information environment is different in various aspects from ownership or regulation previously undertaken by the State. One is the kind of role the State undertakes: in addition to the role of a regulator, the State recaptures its role as an active player, taking action in the online environment to secure national interests in a global network. The second aspect, a derivative of and intertwined with the previous one, is the nature of State intervention. The State no longer restricts itself to the role of a neutral regulator, a forum for resolving conflicting interests and ideologies of its citizenry through a system of rules; rather, it implements its ancient duty of securing individual safety and national security[81].*

But like Web companies, states are not immune from possible conflicts of interest regarding the protection of citizens' rights. Freedom House, which annually studies the status of individual rights on the Internet, has observed for a few years the rise of what it calls digital authoritarianism[82]. Shutting down the Internet or blocking social media during social

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[78] **ANTONOVA.** *Internet and the Emerging Global Community of Rights, op. cit.* note 28, p. 86.
[79] **UNITED NATIONS GENERAL ASSEMBLY**. Universal Declaration of Human Rights, *op. cit.* note 9, preamble.
[80] **ANTONOVA.** *Internet and the Emerging Global Community of Rights, op. cit.* note 28, p. 86; **SEPULVEDA, M et al**, Human Rights Reference Handbook, 3rd ed., University for Peace, 2004, online: https://fr.scribd.com/document/369855571/Human-Rights-Reference-Handbook (page consulted on June 20, 2019).
[81] **BIRNHACK and ELKIN-KOREN**. *The Invisible Handshake*, *op. cit.* 4, para 37.
[82] **FREEDOM HOUSE.** Freedom on the Net 2018 - The Rise of Digital Authoritarianism, https://freedomhouse.org/report/freedom-net/freedom-net-2018/rise-digital-authoritarianism (page consulted on June 15, 2019); **FREEDOM HOUSE.** *Freedom on the Net 2017 - Manipulating Social Media to Undermine*

movements, surveillance and censorship of online dissidents, online content manipulation and opinion shaping, massive collection of personal information, cyberattacks against the media: State violations of human rights are unfortunately very numerous[83].

So maybe it's preferable not to make the state, any more than Web companies, the sole agent responsible for codifying Internet users' rights.

1.4.2.3 A United Nations undertaking

Among the tenants of an international codification of Internet users' rights, some raise the possibility of the UN leading the exercise.

In 2013, a petition presented to the UN and signed by more than 500 authors, including Canadians Margaret Atwood and Yann Martel, included the following demands:

> *We call on the United Nations to acknowledge the central importance of protecting civil rights in the digital age, and to create an international bill of digital rights.*
>
> *We call on governments to sign and adhere to such a convention[84].*

With its long history of developing international instruments pertaining to human rights, the UN does appear well placed to codify Internet users' rights[85].

The Internet's international nature is another serious reason for arguing that by its very nature, the UN should spontaneously be mandated to draft a charter of rights for Internet users. Cerda Silva summarizes that position as follows:

> *In addition to being an open and free space, the Internet establishes a real common patrimony of humanity. Consequently, it should have a system of governance, an international regulatory framework, and institutional operations similar to other goods with common patrimonial interests, such as Antarctica, the radio spectrum, or the High Seas[86].*

Democracy, online: https://freedomhouse.org/report/freedom-net/freedom-net-2017 (page consulted on June 15, 2019).

[83] *Ibid*.

[84] **AMIS. M et al.** *International bill of digital rights: call from 500 writers around the world*, The Guardian, December 2013, online: https://www.theguardian.com/world/2013/dec/10/international-bill-digital-rights-petition-text (page consulted on June 15, 2019).

[85] **UNITED NATIONS GENERAL ASSEMBLY**. Universal Declaration of Human Rights, *op. cit.* note 9; **UNITED NATIONS GENERAL ASSEMBLY**. International Covenant on Economic, Social and Cultural Rights, (1976) 999 U.N.T.S. 171; **UNITED NATIONS GENERAL ASSEMBLY**. International Covenant on Civil and Political Rights, (1976) 999 U.N.T.S. 171; **UNITED NATIONS GENERAL ASSEMBLY**. Convention on the Rights of the Child, Resolution AG 44/25, Annex, November 20, 1989; **UNITED NATIONS GENERAL ASSEMBLY**. Convention on the Elimination of All Forms of Discrimination against Women, (1981) 1249 U.N.T.S. 13; etc.

[86] **CERDA SILVA.** *Internet freedom is not enough*, *op. cit.* note 62, p. 26.

1.4.2.5 Multistakeholderism

To identify the actor(s) that should be chosen to develop a charter of rights for Internet users, we can also refer to the positions taken by various groups that have focused on the actors to be included in the process of developing Internet governance.

The *Tunis Agenda for the Information Society,* which results from the first world summits on the information society in 2003 and 2005, states the following:

> *[…] the management of the Internet encompasses both technical and public policy issues and should involve all stakeholders and relevant intergovernmental and international organizations*[87]*.*
>
> (our underlined)

Moreover, a 2011 OECD communiqué on the principles applicable to Internet policies mentions the following:

> *The Internet's complexity, global reach, and constant evolution require timely, scalable, and innovation-enabling policies. Due to the rapidly changing technological, economic and social environment within which new policy challenges emerge, multi-stakeholder processes have been shown to provide the flexibility and global scalability required to address Internet policy challenges. These multi-stakeholder processes should involve the participation of all interested stakeholders and occur in a transparent manner. In particular, continued support is needed for the multi-stakeholder environment, which has underpinned the process of Internet governance and the management of critical Internet resources (such as naming and numbering resources) and these various stakeholders should continue to fully play a role in this framework. Governments should also work in multi-stakeholder environments to achieve international public policy goals and strengthen international co-operation in Internet governance*[88]*.*
>
> (our underlined)

Those two documents thus propose the adoption of a multi-stakeholder approach to Internet governance; henceforth, the recognition and protection of online human rights are certainly part of such governance. That approach would involve collaboration between the actors mentioned above – states, private companies and intergovernmental organizations such as the UN – in developing a charter of rights for Internet users. Representatives of civil society and non-governmental organizations, nowadays fully recognized for their contribution to the development of fundamental international instruments regarding human rights[89], should also be included.

As the OECD noted, the multi-stakeholder approach has been widely favoured in past (technical) Internet governance initiatives, whether within the Internet Engineering Task

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[87] **WORLD SUMMIT ON THE INFORMATION SOCIETY.** *Tunis Agenda for the Information Society,* doc No. WSIS-05/TUNIS/DOC/6(Rev.1)-E, November 2005, para 35, online: http://www.itu.int/net/wsis/docs2/tunis/off/6rev1.html (document consulted on June 15, 2019).
[88] **OECD.** *Communiqué on Principles for Internet Policy-Making, op. cit.* note 61.
[89] See for example: **KOREY, W.** *NGOs and the Universal Declaration of Human Rights: A Curious Grapevine*, Palgrave Macmillan, 1998.

Force or ICANN[90]. Additionally, the definition of "Internet governance" developed by a United Nations working group includes that approach *de facto*:

> *Internet governance is the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet[91].*

UNESCO, which has also advocated multi-stakeholder Internet governance, has put forward a set of general principles that should underpin that process to develop public policies. Among those principles are transparency, inclusion, flexibility, equality and accountability[92].

1.5 What to include in a charter of rights for Internet users ?

1.5.1 A FEW DEBATES

1.5.1 Different conceptions of digital rights

Regarding the content of an eventual charter of rights for Internet users, a basic question arises immediately: What is meant by "digital rights" or "Internet users' rights"?

Two major conceptions of digital rights confront one another[93].

On one hand, some consider digital rights as an adaptation to the digital environment of existing and recognized basic rights. In guaranteeing access to information without discrimination, the right to Net neutrality would be, for example, an expression of human rights protected by freedom of opinion and expression and by the right to equality. Similarly, the right to data encryption would be an application of the right to privacy.

Others rather view digital rights as new rights that are distinct from those already recognized and asserted, that are specific to technological developments, and that must be protected because of those developments. For example, the right to Internet access

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[90] **GLOBAL COMMISSION ON INTERNET GOVERNANCE.** *Who Runs the Internet? The Global Multi-stakeholder Model of Internet Governance*, vol 2, January 2017, pp. 30 et fol., online: https://www.cigionline.org/sites/default/files/documents/GCIG%20Volume%202.pdf (document consulted on June 15, 2019).

[91] **WORKING GROUP ON INTERNET GOVERNANCE.** *Report of the Working Group on Internet Governance*, June 2005, para 10, online: https://www.wgig.org/docs/WGIGREPORT.pdf (document consulted on June 20, 2019).

[92] **VAN DER SPUY, A.** *What if we all governed the Internet? Advancing multistakeholder participation in Internet governance*, UNESCO Publishing, 2017, online: https://unesdoc.unesco.org/ark:/48223/pf0000259717 (document consulted on June 20, 2019). It should be noted that according to the OECD, accountability covers the fact of defining clear goals and objectives, take responsibility for attaining them, and accept to be sanctioned eventually in case commitments made are not kept: **OECD**. "The concept of accountability in international development co-ordination" in *Development Co-operation Report 2015: Making Partnerships Effective Coalitions for Action,* OECD Editions, Paris, 2015, online: https://www.oecd-ilibrary.org/development/development-co-operation-report-2015/the-concept-of-accountability-in-international-development-co-operation_dcr-2015-11-en (page consulted on June 20, 2019).

[93] **MUSIANI, F, PAVAN, E and PADOVANI, C.** *Investigating Evolving Discourses on Human Rights in the Digital Age: Emerging Norms and Policy Challenges*, International The International Communication Gazette, vol. 72, p. 374.

and the right to network interoperability are more difficult to assimilate within traditionally recognized human rights.

Admittedly, those debates are quite theoretical, since the two conceptions can assuredly coexist, as Professor De Minico proposes:

> *The extension of the same constitutional protection to rights and liberties offline and online does not imply an automatic transfer of the offline discipline, as a whole, in the world of virtual reality. As it has been argued previously, this would not be effective and would only undermine the uniqueness of the Internet. The extension considered here is limited to the basic constitutional guarantees of rights and liberties, while a different sub-constitutional regulation may remain to be provided in detail*[94]*.*
>
> (our underlined))

1.5.2 Recognition of rights specific to certain users

Some experts raise the possibility of recognizing rights specific to certain categories of Internet users.

We will see in the analysis of existing foreign initiatives that those rights are in the end rarely integrated in the final documents. Recognition of such rights still raises several interesting questions about the vulnerability and specific needs of certain Internet users.

1.5.2.1 Digital rights specific to children?

During discussions on the importance of protecting Internet users, we note that children very often serve as examples, likely due to their greater vulnerability[95]. Without noticing or realizing the consequences of consent, children provide personal information online or imperil this type of data (connected toys, social media, etc.) to an ever greater extent.

The protection of children's rights is naturally part of any discussion on Internet users' rights, if only because of their demographic weight. At least one in three Internet users in the world is less than 18 years of age[96] and that ratio will increase, because Internet use is growing rapidly in developing countries, which is not the case in the practically saturated Western countries, and because the proportion of children in developing countries is ten times higher[97].

So should rights specific to children be asserted? Do children have specific needs regarding Internet access and use? We observe a recurrent tension between two visions

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[94] **DE MINICO.** *Towards an Internet Bill of Rights,* op. cit. note 36, p. 13.
[95] **LIVINGSTONE, S and THIRD, A.** *Children and young people's rights in the digital age: an emerging agenda,* New Media and Society, vol 19, No. 5, 2017, pp. 659–660.
[96] **LIVINGSTONE, S, CARR, J and BYRNE, J.** *One in Three: Internet Governance and Children's Rights*, Global Commission on Internet Governance Paper Series, No. 22, November 2015, p. 3, online: https://www.cigionline.org/sites/default/files/no22_2.pdf (document consulted on June 20, 2019).
[97] *Ibid*., p. 7.

of children's needs – visions that nevertheless are not opposed: between defending their right to participate in the digital world, and the necessity of protecting them online (the empowerment versus protection debate)[98].

We also observe a second source of tension, for assigning the responsibility of protecting children online. Should parents be responsible for ensuring respect of their child's or children's privacy (notably) on the Internet? The parents' consent "in the child's best interests" is after all the general rule, usually clearly defined and well respected, for the many aspects of children's daily lives offline (health, school, sports, etc.). But are parents able to exert through consent an equivalent control over their children's online activities[99]? It's undeniable that parents' consent is rarely requested online, whereas it would be in equivalent circumstances in the real world environment. Should the state intervene, then?

In practice, despite the comments and recommendations of some researchers on the subject, the recognition of digital rights specific to children has remained largely absent from recent codification initiatives. How to explain that? Some argue that recognition of rights specific to children would tend to hinder the recognition or scope of the rights of other Internet users, because the latter's vulnerability and the gravity of attacks on their digital rights would be less clearly perceived in comparison[100].

Another explanation pertains to the risks of diversion posed by the "need" to protect children online. That explanation is based notably on the statement by the former Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, who noted in 2014 that such a diversion was already observable in some countries:

> *Child protection arguments are part of a new pattern in which children are increasingly used to justify restrictions not only on their access to information, but also on the rights of adults. In many cases, the restrictions are rooted in a genuine, well-meaning desire to protect children from harmful information, while in others they have been used to defend discrimination and censorship[101].*
>
> (our underlined))

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[98] **LIVINGSTONE and THIRD.** *Children and young people's rights in the digital age*, *op. cit.* note 95, p. 662.
[99] "Regarding parents, there is an abundance of evidence that they often lack the awareness, competence, will, time and resources, or the understanding, to protect and empower their children online": **LIVINGSTONE, CARR et BYRNE.** *One in Three, op. cit.* note 96, p. 13. See also: **MACENAITE, M.** *From universal towards child-specific protection of the right to privacy online: Dilemmas in the EU General Data Protection Regulation,* New Media and Society, vol 19, No. 5, 2017, p. 773.
[100] **LIVINGSTONE and THIRD.** *Children and young people's rights in the digital age*, *op. cit.* note 95, pp. 660–661.
[101] **SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION.** *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, United Nations, doc No. A/69/335, August 2014, para 52, online: https://undocs.org/en/A/69/335

1.5.2.2 When Internet users are also consumers

Should a charter of rights for Internet users include protections for digital consumers, a category of Internet users for whom specific rights are claimed at times?

An Internet user is also a consumer in a multitude of situations. To access the Internet, he will generally subscribe to an Internet access service with a provider. Once on the Internet, he can purchase goods and services on myriad websites and applications. Acts of consumption (or occasions to perform them) are simply omnipresent online. An online act of consumption doesn't require payment: for example, a user of Facebook, a free-of-charge platform, is also a consumer, according to Canadian law[102]. Thus, among acts of consumption are business relations of this type, the use of all such services, cloud computing, etc.

But are digital consumers' rights so different from all consumers' rights, already recognized in the International Charter of Consumer Rights, adopted by the UN in 1985? That doesn't appear to be the case. Consumer rights to security, information, remedy if a problem arises, etc. remain the same online and offline. But protective measures to ensure respect of those rights must at times be adapted to the digital world.

And are consumers' basic rights really different from Internet users' basic rights? Here again, the answer appears to be no.

The European Consumers' Organisation (BEUC) and the Trans Atlantic Consumer Dialogue (TACD)[103] have both produced documents intended to state/codify the rights of Internet users as consumers. We observe that all the rights asserted in those documents are essentially the same as those asserted in general charters of rights for Internet users:

- Right to Net neutrality;
- Right of access to a variety of information and digital media;
- Right to the security of networks and services;
- Right to device and software interoperability;
- Right to benefit from technological innovations;
- Right to consumer privacy;
- Right to Internet security.

[102] Douez v Facebook, Inc., [2017] 1 RCS 751, 2017 CSC 33.
[103] **BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS**. *Campaign for Digital Rights*, 2005, online: https://web.archive.org/web/20060210032650/http://www.consumersdigitalrights.org:80/cms/declaration_en.php (document consulted on March 15, 2019); **TRANS ATLANTIC CONSUMER DIALOGUE**. *Charter of Consumer Rights in the Digital World*, mars 2008, online: https://www.vzbv.de/sites/default/files/mediapics/charter_consumerrights_digital_world__tacd_2008.pdf (page consulted on March 15, 2019).

2. Exploration of Foreign Initiatives

This second part of our research consists of a more in-depth study of a few foreign initiatives to codify Internet users' rights, so that we may understand the operation and raison d'être of those initiatives. What motivated the adoption or creation of such documents? How have the latter been applied? What Internet users' rights were considered "fundamental" and were included in those documents? How are some of those rights addressed? What is the scope of the protections granted?

Those are a few of the questions we will try to answer in the following pages.

2.1 The study's parameters and a methodological summary

THE CHOICE OF INITIATIVES

We focused on four codification initiatives carried out in recent years:

- The *Charter of Human Rights and Principles for the Internet* of the Internet Rights and Principles Dynamic Coalition (of the UN's Internet Governance Forum);
- *The African Declaration On Internet Rights And Freedoms* of the African civil society;
- The *Marco Civil da Internet* (the Civil Rights Framework for the Internet (Law No. 12.965/2014)) of the Brazilian state;
- The *Dichiarazione dei dritti in Internet* (Declaration of Rights on the Internet) of the Italian state.

An examination of those four documents makes it possible to draw a portrait of different approaches to that codification. One of the documents is a framework law, another a (more or less binding) state declaration, and the two others are reference documents intended more to raise public and government awareness. In scope, two of the documents are national, one is regional, and the other is international. Two were mainly produced by lawmakers, another by civil society, and the other by a multi-stakeholder group "sponsored" by a UN organization. Some come from the southern and others from the northern hemisphere. In short, we think those four initiatives offer a good variety of possibilities.

It should be noted that other "types" of charters of rights for Internet users exist, but they are of little scope, so we chose not to study them further: for example, charters developed entirely by private companies, such as AT&T's Bill of Rights[104], which has been the object of much criticism[105]. Other charters pertain only to certain basic rights or certain aspects of

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[104] **AT&T.** *Consumers Need an Internet Bill of Rights*, January 2018, Online: https://about.att.com/story/consumers_need_an_internet_bill_of_rights.html (page consulted on June 20, 2019).

[105] **COLDEWEY, D.** *AT&T's 'Internet Bill of Rights' idea is just a power play against Google and Facebook*, Techncrunch, 2018, https://techcrunch.com/2018/01/24/atts-internet-bill-of-rights-idea-is-just-a-power-play-against-google-and-facebook/ (page consulted on June 20, 2019); **ELECTRONIC FRONTIER FOUNDATION**. *The Hypocrisy of AT&T's "Internet Bill of Rights,"* February 2018, online: https://www.eff.org/fr/deeplinks/2018/01/hypocrisy-atts-internet-bill-rights (page consulted on June 20, 2019);

the Internet, for example the Bill of Privacy Rights for Social Network Users of the Electronic Frontier Foundation[106] and the Social Network Users' Bill of Rights[107].

DETAILED STUDY OF CERTAIN RIGHTS ONLY

In addition to analysing the adoption process of the four selected documents and their respective foundations, we wanted to understand how Internet users' rights were addressed in those documents.

Given the size of the documents studied, we had to restrict our analysis to a few rights. The following three rights were eventually selected: the right to Internet access (including the right to Net neutrality), the right to online privacy, and the right to protection against the commodification of online personal information. Those three rights in particular are objects of concern and discussion in Canada, so we chose to pay special attention to them in this study.

The right to Internet access

Generally, the right to Internet access corresponds with the right to be connected to the Internet network (which implies geographic, economic, cultural, etc. access) and with the right to access Internet content, without unjustified restrictions from the state and in compliance with the principle of Net neutrality.

Several (online) surveys report the recurrent view of a majority of Internet users about the fundamental nature of that access. A 2012 survey conducted by the Internet Society among Internet users from some twenty countries around the world reported a strong majority of respondents (83%) in favour of recognizing a right to Internet access as a basic human right[108]. A survey conducted by the Centre for International Governance Innovation and Ipsos among Canadian Internet users arrived at a similar result in 2014 and added an important variable: access affordability. More than 3/4 of Canadians surveyed (76%) thought affordable Internet access was a basic human right[109]. Moreover, we note Canadians' recent interest in Net neutrality, a principle regarding access to Internet content.

BODE, K. *AT&T's Push For A Fake Net Neutrality Law Begins In Earnest*, Motherboard, January 2018, online: https://motherboard.vice.com/en_us/article/ev53n7/att-internet-bill-of-rights-net-neutrality (page consulted on June 20, 2019).

[106] **ELECTRONIC FRONTIER FOUNDATION.** *A Bill of Privacy Rights for Social Network Users,* May 2010, online: https://www.eff.org/fr/deeplinks/2010/05/bill-privacy-rights-social-network-users (page consulted on June 20, 2019).

[107] **COMPUTERS, FREEDOM, AND PRIVACY IN A NETWORKED SOCIETY**. *A Social Network Users' Bill of Rights,* 2010, Online: http://www.cfp2010.org/wiki/index.php/A_Social_Network_Users%27_Bill_of_Rights (page consulted on June 20, 2019).

[108] **INTERNET SOCIETY.** *Global Internet User Survey Summary Report*, 2012, p. 4, online: http://wayback.archive-it.org/9367/20170906043414/http://www.internetsociety.org/sites/default/files/rep-GIUS2012global-201211-en.pdf (document consulted on June 20, 2019).

[109] **CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION.** *2014 CIGI-Ipsos Global Survey on Internet Security and Trust,* 2014, Q6.5, online: https://www.cigionline.org/internet-survey-2014 (document consulted on June 20, 2019).

Among Canadian Internet users surveyed by Angus Reid in 2018, 90% thought Net neutrality should be "protected" in the country's regulations[110].

The right to online privacy

The right to privacy is generally associated with the inviolability of the home, with intimacy, individual image and choice[111]. Privacy protection includes protection of personal information, but without being limited to that[112].

The importance of protecting the online privacy of Canadian Internet users is well documented. The annual surveys of CIGI and IPSOS demonstrate, for example, the surveyed Canadians' increased concern about respect for their online privacy in recent years. In 2017, more than half of respondents said they were more worried than at the same time in the previous year[113]. A 2019 Angus Reid survey also reported the favourable attitude of many Canadians toward establishing in Canada a right to be forgotten, as in Europe[114].

In addition to popular opinion on the subject, we were interested in the treatment given to privacy in the charters of rights for Internet users, given that using the network greatly facilitates access to personal information and violations of the right to privacy: "The Internet facilitates the violation of the right to privacy, as each time a user connects to the network, his or her identity and online behavior can be monitored[115]."

The right to protection against the commodification of online personal information: disappointing findings

Lastly, we noted, from the results of the 2017 survey conducted by the Office of the Privacy Commissioner of Canada de 2017, Canadians' major concerns about commodification of their online personal information, i.e. the collection of personal information for commercial purposes. Bataineh *et al* summarize the practice as follows:

> *The widespread adoption of the Internet and smartphones led to the production of huge amounts of data that can be used in a wide variety of domains including targeted marketing, credit and loan evaluation, medical research, and crime analysis. This opens the door for multi-billion dollar businesses involving buying and selling customer data. Companies like Google and Facebook are earning*

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[110] **ANGUS REID INSTITUTE.** *Vast majority of Canadians support Net Neutrality, but split over whether current regulations are sufficient,* April 2018, online: http://angusreid.org/net-neutrality-canada/ (page consulted on June 20, 2019).

[111] **LEBRUN, P-B.** *La vie privée,* Empan, vol 1004, 2015, p. 169.

[112] See on this subject: **CLÉMENT-FONTAINE, M.** *L'union du droit à la protection des données à caractère personnel et du droit à la vie privée,* LEGICOM, vol 592, 2017.

[113] **CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION**. *2017 CIGI-Ipsos Global Survey on Internet Security and Trust,* 2017, Q1, online: https://www.cigionline.org/internet-survey-2017 (document consulted on June 20, 2019).

[114] **ANGUS REID INSTITUTE.** *Should Canadians have the right to be forgotten? Most would follow Europe on Internet search law*, January 2019, online: http://angusreid.org/right-to-be-forgotten/ (page consulted on June 20, 2019).

[115] **CERDA SILVA.** *Internet freedom is not enough*, *op. cit.* note 62, p. 18.

> *much of their revenues by enabling marketers to target a specific audience, based on the audience characteristics*[116]*.*

According to the Office of the Commissioner's survey, 87% of Canadians are against the use of such information to analyse their tastes or preference[117]. And a similar percentage would like their consent to be required before their personal information is used for targeted marketing purposes, a type of advertising associated by many with a violation of their online privacy[118].

In the end, our study did not allow us to address this issue further. We did not observe in the four documents studied any rights or protection measures specific to the commodification and consequent use of personal information. The more general principles regarding the necessity of Internet users' consent to the collection and use of their personal information are present in all the documents studied, and are addressed in our analysis of measures to protect online privacy.

METHODOLOGICAL LIMITATIONS

Our study has two major methodological limitations.

Two of the documents studied come from countries where the official language is neither French nor English. Although official translations exist of the *Marco Civil da Internet* (in Portuguese originally) and the *Dichiarazione dei dritti in Internet* (in Italian originally), that is rarely the case for related documents (explanatory documents, transcriptions of parliamentary debates, media coverage, etc.). To learn the content of those documents, we thus had to use translation tools that can contain errors likely to result in misunderstanding or in loss of nuance.

The documents studied are relatively recent; at times it was difficult to understand or appreciate their impacts (few analyses having been performed to date on the subject). Those impacts may become manifest or more apparent only in coming years.

2.2 Recognition of digital rights nationally or internationally

Historically, the codification of Internet users' rights has developed internationally to a greater extent. As of the late nineties and early 2000s, several documents of international scope were published by influential groups, such as the Association for Progressive Communications, which has a consultative status at the UN (*Internet Rights Charter*, 2002)

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[116] **BATAINEH, A S et al.** *Monetizing Personal Data: A Two-Sided Market Approach*, Procedia Computer Science, vol. 83, 2016, p. 472.
[117] **OFFICE OF THE PRIVACY COMMISSIONER OF CANADA.** 2016 Survey of Canadians on Privacy, 2017, online: https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2016/por_2016_12/ (page consulted on June 12, 2019).
[118] *Ibid*.

and the World Summit on the Information Society of the International Telecommunication Union, a United Nations agency (*Declaration of Principles*, 2003)[119].

A study conducted by the authors Gill, Redeker and Gasser, about the codification initiatives developed between 1999 and 2015, found that almost 75% of them (22 out of 30) were international in scope[120]. As described below, that proportion is slowly falling with the growing popularity of national initiatives.

Generally, we note that documents of international scope that were developed as part of international conferences were largely modelled after the principles and rights asserted in international treaties or conventions, such as the International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights. However, as opposed to the documents they were modelled after, the international conference documents are not enforceable on the states and other stakeholders, but rather attempt to influence the development of national and international policies regarding Internet governance[121].

We will analyse two initiatives as examples – one of international and the other of regional scope – of which the content and development seem to us quite representative of this type of international conference documents.

2.2.1 The example of the Charter of Human Rights and Principles for the Internet

2.2.1.1 Development of the document

One of the most famous codification initiatives of international scope is the 2010 Charter of Human Rights and Principles for the Internet de 2010 produced by the Internet Rights & Principles Coalition (IRPC), an international network of individuals and organizations under the purview of the United Nations Internet Governance Forum.

The IRPC results from the merger of two coalitions formed during the 2005 World Summit on the Information Society, i.e. the Internet Bill of Rights and the Framework of Principles for the Internet (a third coalition regarding freedom of expression subsequently joined the project)[122]. Initially intended to develop principles regarding online human rights and Internet governance, respectively, it was decided after a few years that those two exercises went hand in hand and should be performed together[123]. That merger reflects again the

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[119] **GILL, L REDEKER, D and GASSER, U.** *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights,* Berkman Center Research Publication no. 2015-15, November 2015, pp. 10–11, online: https://dash.harvard.edu/bitstream/handle/1/28552582/SSRN-id2687120.pdf?sequence=1 (document consulted on June 20, 2019).

[120] *Ibid*.

[121] *Ibid*., p. 13.

[122] **INTERNET RIGHTS & PRINCIPLES COALITION.** *The IRP Coalition*, online: http://internetrightsandprinciples.org/site/about/ (page consulted on June 15, 2019).

[123] **INTERNET RIGHTS & PRINCIPLES COALITION.** *Charter of Human Rights and Principles for the Internet*, p. 3, online: http://internetrightsandprinciples.org/site/wp-content/uploads/2018/10/IRPC_english_5thedition.pdf (document consulted on March 20, 2019).

transformation of Internet governance discourse, more and more focused on Internet use (and its impact on human rights) rather than technical aspects.

In 2008, the newly formed coalition mainly had the mandate to develop a consensus between the members about a definition of Internet users' rights and the application of online human rights[124]. To that end, it was decided to draft a Charter that would assert the rights and principles in question. In developing the Charter in a simple and easily read format, the IRPC also wanted to make it a tool for raising public awareness, "so users and providers of services become more aware of the rights they have on any given website or when using services[125]."

The IRPC held a large consultation in view of developing the document's content: meetings between coalition members, submission of the document to a group of human rights experts charged with verifying compatibility with existing human rights instruments, and a call for comments from other Internet Governance Forum members[126].

The final document was completed in 2010 and translated in seven languages. Those languages are not United Nations official languages; for unknown reasons, the full document has not been translated in French or Russian. A simplified version, called the Ten Punchy Principles, was nevertheless produced and translated in 25 languages to ensure dissemination to as many persons and organizations as possible[127].

2.2.1.2 Its raison d'être and foundations

Within the coalition, there was concern about the difficulty many had to understand the application of international law standards on human rights to certain online situations[128]. But the full enjoyment of human rights also requires the full exercise of those rights online, according to the Charter's preamble[129]. The Charter's principles thus aim at clarifying that application[130] or, as described by some authors, at "translating" existing human rights into the digital world.

Designed as an instrument of reflection and awareness-raising, the Charter has no binding force. But it can be used as an example or as a basis for reflection by governments wanting to establish standards (enforceable, ideally) of Internet governance[131]. Still, the Charter recalls that governments should be aware of the supranational nature of respect for human

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[124] **MUSIANI.** *The Internet Bill of Rights Project, op. cit.* note 34, pp. 10–11.
[125] *Ibid*.
[126] **INTERNET RIGHTS & PRINCIPLES COALITION.** *Charter of Human Rights and Principles for the Internet, op. cit.* note 123, p. 1.
[127] *Ibid*., p. 7. **INTERNET RIGHTS & PRINCIPLES COALITION.** IRPC Campaign, online: http://internetrightsandprinciples.org/site/campaign/ (page consulted on June 20, 2019).
[128] *Ibid*., preamble *in fine* : "Whereas a common understanding of how universal human rights and freedoms apply in the digital environment is necessary for the full realization of this pledge."
[129] *Ibid*.
[130] FRANKLIN, M. I. "Mobilizing for Net Rights: The IRPC Charter of Human Rights and Principles for the Internet" in **FREEDMAN, D. et al,** dir. *Strategies for Media Reform: International Perspectives*, Fordham University Press, 2016, p. 73.
[131] **INTERNET RIGHTS & PRINCIPLES COALITION.** *Charter of Human Rights and Principles for the Internet, op. cit.* note 123, p. 2.

rights: “The universal, indivisible, interdependent and interrelated nature of human rights outweighs the specificities of any political, economic and cultural system[132],” the document’s preamble declares.

Now after nine years of existence, the Charter’s creators state that it has attained its objectives in terms of raising the awareness of and pressure on decision-makers and their public policies. For example, the Charter’s creators cite the document’s influence on the development of the Council of Europe’s Guide to Human Rights for Internet Users[133] and on codification attempts in the Philippines and New Zealand[134].

We will see below that the Brazilian, Italian and African initiatives studied here have also been inspired by that Charter.

2.2.1.3 Its content

The Charter is available as a booklet putting the IRPC and the document in context, a list of the 10 general principles (Ten Punchy Principles) and a more specific statement of basic rights, along with explanations (in the form of sections and paragraphs). In those explanations, two types of standards are stated: rights and principles, i.e. public policy elements that support the exercise of those rights. For the sake of clarity, the Charter distinguishes those two types of standards by the wording used (the verbs “have” and “must,” for example)[135].

The statement of rights contains 21 sections that address the following elements:

- The right to access to the Internet;
- The right to liberty and security on the Internet;
- The right to development through the Internet;
- Freedom of expression and information on the Internet;
- Freedom of religion and belief on the Internet;
- Freedom of online assembly and association;
- The right to privacy and digital data protection on the Internet;
- The right to work on and about the Internet ;
- The right to online participation in public affairs;
- The right to legal remedy and fair trial for actions involving the Internet;
- The rights of children in relation to the Internet;

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[132] *Ibid*., preamble.
[133] **INTERNET GOVERNANCE FORUM**. *The IRPC Charter of Human Rights and Principles for the Internet: Six Years On, online:* http://www.intgovforum.org/multilingual/index.php?q=filedepot_download/6091/1117 (document consulted on June 20, 2019); **FRANKLIN.** “Mobilizing for Net Rights: The IRPC Charter of Human Rights and Principles for the Internet,” *op. cit.* note 130, p. 80; **CONG, W.** *Understanding Human Rights on the Internet: An Exercise of Translation?,* Tilburg Law Review, vol 22, 2017, p. 144, online: https://tilburglawreview.com/articles/abstract/10.1163/22112596-02201007/ (document consulted on June 20, 2019).
[134] **INTERNET GOVERNANCE FORUM**. *The IRPC Charter of Human Rights and Principles for the Internet: Six Years On, op. cit.* note 133.
[135] **INTERNET RIGHTS & PRINCIPLES COALITION.** *Charter of Human Rights and Principles for the Internet, op. cit.* note 123, p. 2.

- The rights of people with disabilities in relation to the Internet;
- The rights to consumer protection on the Internet;
- Internet governance;
- Duties and responsibilities on the Internet;
- General clauses.

It should be noted that several of the rights and freedoms recognized by the Charter are closely related to those recognized by international instruments. Indeed, explanatory texts accompanying the Charter's sections refer directly to provisions of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, instruments of international law that have been the starting point for the Charter's development[136].

And like the Universal Declaration of Human Rights[137], the Charter specifies each person's responsibilities in applying basic rights online:

> *Everybody has the duty and responsibility to respect the rights of all individuals in the online environment.*
>
> *Power holders must exercise their power responsibly, refrain from violating human rights and respect, protect and fulfill them to the fullest extent possible[138].*

The general clauses point out that the rights asserted are interdependent and mutually reinforcing[139]. With the exception of the right to access to the Internet, the Charter does not prioritize the rights it asserts. It also states that it is not exhaustive, that other human rights and principles pertaining to the Internet may exist or be developed[140].

Lastly, the Charter provides criteria for an "acceptable" limitation to the rights it asserts. Those restrictions, which should exist only in "exceptional circumstances," must (1) be precise and narrowly defined, (2) meet a real need recognized under international law, and (3) be proportional to that need. They should also meet the additional criteria detailed under the statement of certain rights[141].

Next we will discuss how Internet access and online privacy protection are addressed in the Charter.

Right to access to the Internet

The Charter's first section begins as follows:

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[136] **JØRGENSEN and MARZOUKI.** *Internet Governance And the Reshaping Of Global Human Rights Legacy, op. cit.* note 37, p. 9.

[137] **UNITED NATIONS GENERAL ASSEMBLY**. Universal Declaration of Human Rights, *op. cit.* note 9, art 29.

[138] **INTERNET RIGHTS & PRINCIPLES COALITION.** *Charter of Human Rights and Principles for the Internet, op. cit.* note 123, art 20.

[139] *Ibid.*, art 21.

[140] *Ibid.*, art 21(C).

[141] *Ibid.*, art 21(B); see for example arts 5(1) and 14(b).

> *Everyone has the right to access to, and make use of, the Internet. This right underpins all other rights in this Charter*[142]*.*

Internet access and use are thus considered indispensable to the exercise of human rights and are recognized as rights in themselves, distinct from the other rights of which they enable the online exercise[143]. Given the importance of the rights to Internet access and use, the Charter also provides additional criteria, which again limit those found in the general clauses, for a restriction of those rights to be acceptable, in particular the only legitimate objectives of such a restriction: protection of national security, public order, morality or public health[144]. Moreover, the only applicable restrictions should be those provided in a legislative text and be limited to what is necessary in a democratic society.

The Charter also addresses Internet access inequality between certain social groups, whether in terms of infrastructure availability or the absence of means or possibilities for using the Internet effectively. Given that such a situation limits the ability of certain social groups to exercise their human rights online to the same extent as other members of society, the Charter encourages every effort to recognize those inequalities and remedy them[145].

Regarding those inequalities, the Charter mentions that certain categories of Internet users – the elderly, ethnic and linguistic minorities, children[146], disabled persons[147], etc. – can have specific needs to access the Internet and use it effectively. Taking those needs into account depends on respect for their human rights, notably their right to human dignity and to public and social participation[148]. So we observe that the Charter doesn't recognize specific rights for those more vulnerable persons, but rather aims at ensuring that their particular vulnerabilities do not limit the exercise of already recognized rights.

The document also addresses more-technical aspects of Internet access and use. Each person's freedom to choose the systems, applications and software of his choice is recognized so that he may access and use the Internet[149]. To ensure the existence of that choice and foster the innovation and creation of content, services and applications online, the Charter advocates that infrastructures and protocols be based on open technical standards for the Internet.

The Charter also mentions respect for two essential principles of access: Net neutrality and Net equality. Those two principles, which are not differentiated in the document, require the absence of discrimination, privilege or obstacle for economic, social, cultural or political motives regarding all or part of the content of information or communications transmitted[150]. It should be noted that according to some American experts, Net equality, which they say implies Net neutrality[151], refers more broadly to the universal adoption of the Internet and

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[142] *Ibid*., art 1.
[143] *Ibid*., art 1, para 2.
[144] *Ibid*., art 1, para 3.
[145] *Ibid*., art 2(a).
[146] *Ibid*., art 12(a).
[147] *Ibid*., art 13(a).
[148] *Ibid*, art 2(b).
[149] *Ibid.*, art 1(b).
[150] *Ibid.*, art 1(d).
[151] **MCMURRIA, J.** *From Net Neutrality to Net Equality,* International Journal of Communication, vol 10, 2016, p. 5944.

to the elimination of the digital divide between various population groups[152]. The Charter specifies that respect for the principles of Net neutrality and Net equality does not prevent the development of positive discrimination policies, which ultimately aim at promoting access to the Internet and diversity on and through the Internet[153].

The right to online privacy

The Charter insists on the responsibility of national legislatures to adopt binding regulations regarding online privacy protection and more specifically the collection of online information.

> *States must establish, implement and enforce comprehensive legal frameworks to protect the privacy and personal data of citizens. These must be in line with international human rights and consumer protection standards, and must include protection from privacy violations by the state and by private companies[154].*
>
> *Fair information practices should be enacted into national law to place obligations on companies and governments who collect and process personal data, and give rights to those individuals whose personal data is collected[155].*

The Charter also mentions the importance of making independent and transparent authorities, without commercial interest or political influence, responsible for ensuring the observance of measures to protect online personal information[156].

The Charter presents a set of principles and rights concerning the collection and use of Internet users' personal information. Those principles and rights are generally found in national laws protecting personal information, and include:

- The right to exercise control over the personal data collected about oneself[157];
- The obligation to obtain, before collecting such information, an Internet user's informed consent regarding the content, purposes, storage location, duration and mechanisms for access, retrieval and correction of his personal data[158];
- Internet access services and online services that have privacy policies and settings that are easy to access, use and manage[159];
- The right of every individual to use encryption technology to ensure secure, private and anonymous communication[160];

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[152] **KOVACS, A.** *Balancing net equality and net neutrality,* The Hill, December 2014, https://thehill.com/blogs/congress-blog/technology/227759-balancing-net-equality-and-net-neutrality (page consulted on June 21, 2019); **MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL.** *Net Equality*, https://www.mmtconline.org/net-equality/ (page consulted on June 21, 2019).
[153] **INTERNET RIGHTS & PRINCIPLES COALITION.** *Charter of Human Rights and Principles for the Internet, op. cit.* note 123, art 1(d).
[154] *Ibid.*, art 8(a).
[155] *Ibid.*, art 9(a).
[156] *Ibid.*, art 9(d)
[157] *Ibid.*, art 9(b)
[158] *Ibid.*, art 9(b)
[159] *Ibid.*, art 8(b)
[160] *Ibid.*, art 8(e)

- Minimal collection, use and conservation of online personal data[161];
- The right to protection of personal data collected and to receive a notice in the event of unauthorized access, alteration or dissemination of such data[162];
- The right to communicate online without arbitrary surveillance or interception (including mass government surveillance, but also behavioural tracking, profiling, and cyber-stalking)[163].

Le Charter addresses a few other facets of online privacy that are distinct from the protection of personal information. For example, an inviolable right to a virtual personality is recognized[164]. Moreover, the right to privacy is associated with the right not to have one's honour or reputation attacked online[165]. Notably, as opposed to other codification initiatives, the Charter expressly provides that: "protection of reputation must not be used as an excuse to limit the right to Freedom of Expression beyond the narrow limits of permitted restrictions [166]," and thus adopts a position, without mentioning it explicitly, in the debate on the exercise and interpretation of the right to be forgotten[167].

Others

Among other notable provisions are those pertaining to Internet governance, that recognize everyone's right to a social and international order appropriate for the Internet and that assert several basic principles in that regard, such as openness, transparency, multilateralism and multilingualism[168].

The Charter also contains multiple provisions of interest regarding freedom of expression (on online censorship, protest and mobilization, hate speech, etc.)[169] and online access to knowledge and culture (media plurality, linguistic diversity, intellectual property, free/open source software, etc.)[170].

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[161] *Ibid.*, art 9(c)
[162] *Ibid.*, art 9(c)
[163] *Ibid.*, art 8(f)
[164] *Ibid.*, art 8(d). Notably, this provision offers few details on the meaning of a right to a virtual personality. Does that mean full protection and recognition of avatars, as some propose? See on this subject: **MUSIANI, F.** *The Internet Bill of Rights: A Way to Reconcile Natural Freedoms and Regulatory Needs?,* Journal of Law, Technology and Society, vol 62, 2009, p. 508, online: https://hal-mines-paristech.archives-ouvertes.fr/hal-00442922/document (document consulted on June 21, 2019).
[165] **INTERNET RIGHTS & PRINCIPLES COALITION.** *Charter of Human Rights and Principles for the Internet, op. cit.* note 123, art 8(g).
[166] *Ibid.*
[167] **BOWCOTT, O.** *'Right to be forgotten' could threaten global free speech, say NGOs,* The Guardian, September 2018, online: https://www.theguardian.com/technology/2018/sep/09/right-to-be-forgotten-could-threaten-global-free-speech-say-ngos (page consulted on June 20, 2019).
[168] **INTERNET RIGHTS & PRINCIPLES COALITION.** *Charter of Human Rights and Principles for the Internet, op. cit.* note 123, arts 19(a) and (b).
[169] *Ibid.*, art 5.
[170] *Ibid.*, arts 11 and 5.

2.2.3 The example of The African Declaration on Internet Rights and Freedoms

A few years after the development of the Charter of Human Rights and Principles for the Internet (CHRPI), a similar document, this time of regional scope, was produced in Africa: The African Declaration on Internet Rights and Freedoms[171].

2.2.3.1 Development of the document

The African Declaration was developed by some twenty regional organizations, including the Internet Society – Ghana, the South African Human Rights Commission, Kenya ICT Action Network, DotAfrica and the Media Foundation for West Africa[172]. Certain non-African organizations also took part in the discussions (e.g.: Article 19, Web We Want Foundation, Association for Progressive Communications).

As with the CHRPI, the idea of developing a regional declaration was first discussed at a forum on Internet governance, the 2013 African Internet Governance Forum[173]. A meeting was held afterward with various civil society organizations to generally identify human rights and certain concerns specific to Africa that should be addressed. For example, the lack of legal supervision regarding censorship was identified as a major concern in anglophone West Africa. In addition, violence against women and limited access to online content in local languages were called priorities in southern Africa[174].

A narrower working group then drafted the document and submitted it several times during the process to the groups involved and to experts from the Media Legal Defence Initiative and UNESCO[175]. Lastly, a public consultation about the document on which the organizations had agreed took place in summer 2014; the comments of some forty other groups, experts and militants were thus obtained[176].

2.2.3.2 Its raison d'être and foundations

Like the CHRPI, The African declaration is not binding on the Web's various actors. It aims above all at raising awareness. But its public target is more precise: African lawmakers.

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[171] **AFRICAN DECLARATION GROUP.** *African Declaration on Internet Rights and Freedoms*, online: http://africaninternetrights.org/wp-content/uploads/2015/11/African-Declaration-English-FINAL.pdf (document consulted on June 20, 2019).
[172] **AFRICAN DECLARATION GROUP.** *Meeting Report Regional Meeting towards an African Declaration on Internet Rights and Freedoms,* p. 11 and Annex 2, online: https://africaninternetrights.org/wp-content/uploads/2015/11/2-Meeting-Report-Joburg-Regional-Meeting-towards-an-African-Declaration-on-Internet-Rights-and-Freedoms-February-2014.pdf (document consulted on June 20, 2019).
[173] **TORRELL, T.** *The African Declaration On Internet Rights And Freedoms: A Positive Agenda For Human Rights Online*, November 2015, pp. 10-11, online: https://www.gp-digital.org/wp-content/uploads/pubs/african-declaration-a-positive-agenda-for-rights-online.pdf (document consulted on June 20, 2019); **THIRD AFRICAN INTERNET GOVERNANCE FORUM**. *Draft report*, July 2014, p. 31, online: https://www.afigf.africa/sites/default/files/report%20afigf%202014.pdf (document consulted on June 20, 2019).
[174] **AFRICAN DECLARATION GROUP.** *Meeting Report, op. cit.* note 174, p. 6.
[175] **TORRELL, T.** *The African Declaration On Internet Rights And Freedoms, op. cit.* note 173*,* pp. 12–13.
[176] *Ibid*., p. 13.

At the Declaration's launch during a forum held in Turkey in 2014 (Internet Governance Forum), Towela Nyirenda Jere, from the African Union Development Agency, summarized the document's usefulness as follows:

> *I think Governments would for me see this Declaration on the one hand as a way to actually check themselves in terms of how well they are doing as far as meeting some of these aspirations that have been expressed as far as Human Rights and freedoms online and offline. But on the other hand, I think it also then serves as a guide that can be referenced to actually identify where the gaps are and what needs to actually be done*[177]*.*
>
> (our underlined))

The Declaration can thus be seen as a roadmap that should inspire African governments wanting to legislate regarding the Internet. Indeed, the Declaration was developed in a period of legislative effervescence on the continent:

> *As in other parts of the world, many African countries are beginning to adopt policies, regulations or laws to regulate and, in some cases, control the Internet. In effect, many African countries are transitioning from a low regulatory Internet environment to what is fast becoming a heavily regulated environment*[178]*.*

The Declaration is also a response to laws adopted to date in Africa – which in many cases have failed flagrantly – and a proposal for improvements:

> *Often, these laws and regulations not only fail to protect human rights but violate established human rights norms and principles without adequate safeguards*[179]*.*

Accordingly, the Declaration's creators wanted to propose to lawmakers a set of principles based on respect for online rights and freedoms, and added explanatory and strategic texts for implementing the proposed standards[180]. The Declaration was also intended to compensate for the lack of regional policy or strategy regarding governance of the Internet and of information and communication technologies[181]. The Declaration's development and adoption thus respond to a necessity, given the Internet's particular importance to Africa's social, economic and human development[182]. The preamble mentions "it is critical for all African stakeholders to invest in creating an enabling and empowering Internet environment that truly serves the needs of Africans through the adoption and implementation of this Declaration[183]."

Although reference documents already exist elsewhere in the world, the Declaration's creators wanted to offer African lawmakers a set of rules taking into account the continent's realities. For example, Edetaen Ojo, one of the Declaration's creators, reproached African

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[177] **FRIENDS OF THE IGF.** *Launch of an African Declaration on Internet Rights & Freedoms*, session transcript, September 2014, online: http://friendsoftheigf.org/transcript/469 (page consulted on June 20, 2019).
[178] **AFRICAN DECLARATION GROUP.** *The African Declaration On Internet Rights And Freedoms*, *op. cit.* note 171, introduction.
[179] *Ibid*.
[180] *Ibid*., preamble; **TORRELL, T.** *The African Declaration On Internet Rights And Freedoms, op. cit.* note 173, p. 9.
[181] **TORRELL, T.** *The African Declaration On Internet Rights And Freedoms, op. cit.* note 173, p. 9.
[182] **AFRICAN DECLARATION GROUP.** *The African Declaration On Internet Rights And Freedoms*, *op. cit.* note 171, preamble.
[183] *Ibid*.

governments for having adopted regulations imported from other (mainly Western) countries "without taking in to account local needs and local contexts[184]."

To ensure the Declaration's dissemination in civil society and ultimately among local decision-makers, it was presented in several international and regional forums and during thematic weeks such as the Social Media Week Africa. It was also presented and discussed at local forums and workshops of the Governance Forum in Zimbabwe, South Africa and Kenya[185]. It should be noted that the Declaration's development has since been reviewed positively by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of the United Nations Human Rights Council[186].

To reach a broader public, the Association for Progressive Communications has also created an interactive Web platform that makes it possible to read the entire Declaration in four languages (English, French, Portuguese and Arab), refers readers to multiple resources for exercising the rights mentioned in the Declaration, and offers the possibility of commenting on the Declaration by means of a dedicated forum[187].

2.2.3.3 Its content

The Declaration is comprised of a preamble, 13 articles, explanations accompanying each article, and recommendations to the stakeholders (governments, Internet access providers, international organizations, etc.). The issues addressed are:

- Internet access;
- Open Internet and Net neutrality;
- Internet security and stability;
- Freedom of expression online;
- The right to information and access to information online;
- Freedom of assembly and association on the Internet;
- Cultural and linguistic diversity on the Internet;
- Protection of marginalized or vulnerable groups online;
- Gender equality in Internet access and use;
- Online privacy protection;
- The right to fair and due process;
- Multistakeholder and democratic Internet governance.

The digital rights asserted in the Declaration are inspired by several declarations and charters on human rights in Africa, such as: the *African Charter on Human and People's*

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[184] **FRIENDS OF THE IGF.** *Launch of an African Declaration on Internet Rights & Freedoms*, *op. cit.* note 177.
[185] **AFRICAN INTERNET RIGHTS.** *African Declaration on Internet Rights. What is ahead?,* mars 2016, online: http://africaninternetrights.org/updates/2016/03/article-621/ (page consulted on June 20, 2019).
[186] **SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION.** *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, United Nations, doc No. A/HRC/32/38, May 2016, para 14, online: https://undocs.org/en/A/HRC/32/38 (document consulted on June 20, 2019).
[187] **AFRICAN INTERNET RIGHTS.** Online: http://engage.africaninternetrights.org/ (page consulted on June 20, 2019); **ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS.** *Engage with the African Declaration on Internet Rights and Freedoms* , online: https://www.apc.org/en/node/21808 (page consulted on June 20, 2019).

Rights, the *Windhoek Declaration on Promoting an Independent and Pluralistic African Press* and the *Declaration of Principles on Freedom of Expression in Africa*[188]. The rights recognized in those documents were adapted to the Internet context in this new Declaration.

Due to its regional nature, the Declaration asserts the rights while emphasizing certain concerns specific to the African continent. For example, the emphasis is several times on the exercise of digital rights by women and girls and on gender equality on the Internet. We will see that the Declaration's content still features several major similarities with the CHRPI of international scope.

The Declaration also contains a set of recommendations to the stakeholders, such as governments, civil society, media organizations and university, research and training institutions, as well as technology and Internet companies[189].

For example, all African stakeholders are invited to do the following:

- *Formally endorse this Declaration, the African Declaration on Internet Rights and Freedoms;*
- *Use this Declaration to develop a deeper understanding of how existing human rights apply to the Internet.*

And national governments are invited to do the following:

- *Ratifying and giving effect to all relevant international and regional human rights treaties on human rights related to protection of human rights on the Internet, through incorporation to their domestic legislation or otherwise;*
- *Adopting clear legal, regulatory, and policy frameworks for the protection of these rights, in full compliance with international standards and best practice, and with the full and effective participation of civil society and other concerned stakeholders at all stages of their development;*
- *Providing sufficient safeguards against the violation of these rights and ensure that effective remedies for their violations are available;*
- *Ensuring that national regulators in the telecommunications and Internet sectors are well-resourced, transparent and independent in their operations*[190]*.*

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[188] **AFRICAN DECLARATION GROUP.** *The African Declaration On Internet Rights And Freedoms, op. cit*. note 171, preamble; **MEDIA RIGHTS AGENDA NIGERIA.** *The African Declaration on Internet Rights and Freedoms*, presentation, diapositives 22 et 23, online: https://slideplayer.com/slide/9998704/ (document consulted on June 20, 2019); **TORRELL, T.** *The African Declaration On Internet Rights And Freedoms: A Positive Agenda For Human Rights Online*, November 2015, p. 11, online: https://www.gp-digital.org/wp-content/uploads/pubs/african-declaration-a-positive-agenda-for-rights-online.pdf (document consulted on June 20, 2019).

[189] **AFRICAN DECLARATION GROUP.** *The African Declaration On Internet Rights And Freedoms*, *op. cit.* note 171, pp. 24 and fol.

[190] *Ibid*., p. 25.

Right to Internet access

Like the CHRPI, the Declaration recognizes the priority of Internet access, due to its influence on the exercise of all the other rights at stake[191].

As opposed to the CHRPI, which discussed Internet access and use, the Declaration refers only to access. This is notable: The Declaration makes little reference to persons' needs related to effective Internet use[192], even though it expressly mentions the existence of a digital divide on the continent[193], a divide not limited to inequality in access to infrastructure. The accent is rather on Internet availability for all, without distinction "such as ethnicity, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status[194]." The concern about economic access is notable. Union des consommateurs has long reminded Canadian regulatory authorities that access to the Internet is not limited to geography. Internet access is indispensable for exercising human rights, from freedom of expression to participation in democratic life, so it's important for that access to be guaranteed also to those who have severe economic constraints.

The Declaration addresses another very concrete aspect related to Internet availability and not discussed by the CHRPI: The status of the Internet access market. For everyone to have Internet access, the Declaration recommends requiring providers to provide universal service and "fair and transparent market regulation[195]."

In addition to such regulation, the document recommends that governments financially support the establishment of necessary infrastructures and facilities for everyone's Internet access. When discussing how to make the Net accessible and affordable for all, access sources other than individuals' residences are mentioned – community centres, libraries and schools[196] –, likely because the cost of Internet access on the continent is excessively high, making universal residential access illusory[197].

Like the CHRPI, the Declaration refers to the principle of Net neutrality; the definition and regulations it offers are similar[198], with the addition of a more precise regulation for transparency in the traffic management practices of Internet access providers[199].

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[191] *Ibid.*, art 2.
[192] The Declaration nevertheless mentions the importance of developing digital skills in school: "Media and information literacy programmes should be instituted in schools and in other public institutions. Where practical, school children and other learners should have access to Internet-enabled devices.": *Ibid.*, p. 18.
[193] *Ibid*., pp. 13-14.
[194] *Ibid*., art 2.
[195] *Ibid*., p. 13.
[196] *Ibid*.
[197] Whereas the Broadband Commission for Sustainable Development of the United Nations and the International Telecommunication assesses that an entry-level broadband Internet service should not cost more than 2% of the monthly gross per-capita income in developing countries, the 2017 data of the World Wide Web Foundation's Alliance for Affordable Internet reported instead that the average monthly cost in those countries was 8.76% of per-capita income: **BROADBAND COMMISSION FOR SUSTAINABLE DEVELOPMENT.** *2025 Targets: "Connecting the Other Half,"* 2018, online: https://broadbandcommission.org/Documents/publications/wef2018.pdf (document consulted on June 20, 2019); **ALLIANCE FOR AFFORDABLE INTERNET**. *Affordability Report*, 2018, online: https://a4ai.org/affordability-report/report/2018/ (document consulted on June 20, 2019).
[198] **AFRICAN DECLARATION GROUP.** *The African Declaration On Internet Rights And Freedoms*, *op. cit.* note 171, p. 13.
[199] *Ibid*., p. 14.

Right to privacy on the Internet

The African Declaration's treatment of the right to online privacy and the protection of Internet users' personal data is also very similar to that provided in the CHRPI. Essentially the same principles are asserted regarding personal data collection and use[200], but with certain additional clarifications in the Declaration.

The authors' willingness to present a detailed portrait of fundamental rules on this subject in the Declaration is likely explained by the weakness of current legislation on the continent. In 2018, only 23 of the 55 African countries had a law or a bill under study regarding protection of personal data[201]. And that absence of clear legal protections is not without consequence. A 2018 study by Internet sans frontières revealed that the terms of use and the privacy policies of Internet access providers Vodafone (Safaricom in Kenya) and Orange (Orange Senegal and Sonatel in Senegal) were much less permissive and more transparent in Europe than in Senegal concerning the collection and use of users' personal information[202].

Also because of certain regional realities[203], the document specifically addresses the protection of the personal information of women and girls. They should notably have "individualised tools that allow them to track and limit the availability of personal information about them online (including public sources of data), and improved usability for anonymity and pseudonymity-protecting tools[204]." On this point, despite the particular vulnerability of women and girls on the continent (mainly due to the increase in cases of "technology-assisted violence against women"), we think all individuals should benefit from a right to access and use tools for controlling the availability of their personal information online. As reported by the Association for Progressive Communication, the use of communication anonymity and encryption tools is today closely linked to the exercise of the rights to

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[200] *Ibid*., pp. 18-19.

[201] **LATIF DAHIR, A.** *Africa isn't ready to protect its citizens personal data even as EU champions digital privacy,* Quartz Africa, May 2018, online: https://qz.com/africa/1271756/africa-isnt-ready-to-protect-its-citizens-personal-data-even-as-eu-champions-digital-privacy/ (page consulted on June 20, 2019); **FICK, M and AKWAGYRIAM, A.** *In Africa, scant data protection leaves internet users exposed,* Reuters, April 2018, online: https://www.reuters.com/article/us-facebook-africa/in-africa-scant-data-protection-leaves-internet-users-exposed-idUSKCN1HB1SZ (page consulted on June 20, 2019); **CIPESA.** *State of Internet Freedom in Africa 2018 – Privacy and Data Protection in the Digital Era : Challenges and Trends in Africa*, September 2018, pp. 28 and fol., online: https://cipesa.org/?wpfb_dl=278 (page consulted on June 20, 2019).

[202] **INTERNET SANS FRONTIÈRES.** *Digital Rights in Sub Saharan Africaroits: Analysis of Practices by Orange in Senegal and Safaricom in Kenya,* January 2018, online: https://www.accessnow.org/cms/assets/uploads/2018/02/RDR-Africa_Final-version-5_January-2018.pdf (document consulted on June 20, 2019).

[203] This specific consideration for the online personal data of women and girls is explained in the Declaration by the observation that inequality between the sexes in society is reproduced on the Internet: **AFRICAN DECLARATION GROUP.** *The African Declaration On Internet Rights And Freedoms*, *op. cit.* note 171, p. 22. It should be noted that the Africa Summit on Women and Girls in Technology reported in 2018 a continual increase in cases of "Technology-Assisted Violence against Women (TAVAW)" on the continent (cyber intimidation, online harassment, hacking, etc.): **ARTICLE 19 and AFRICA SUMMIT ON WOMEN AND GIRLS IN TECHNOLOGY.** *Workshop Series: Enhancing Digital Security and Advocacy for Women & Girls in Africa*, 2018, p. 1, online: http://webfoundation.org/docs/2018/10/About-the-Enhancing-Digital-Security-and-Advocacy-Workshop.pdf (document consulted on June 20, 2019).

[204] **AFRICAN DECLARATION GROUP.** *The African Declaration On Internet Rights And Freedoms*, *op. cit.* note 171, p. 22.

freedom of expression and to online privacy protection[205] – basic rights that all Internet users have, whatever their gender.

Like the CHRPI, the Declaration discusses the monitoring of online communications. It encourages states to enact laws that officially prohibit their citizens' communications from being indiscriminately monitored and controlled online – "a disproportionate interference, and thus a violation, of the right to privacy, freedom of expression and other human rights[206]." It also refers to the requirements of international human rights law regarding state surveillance of individuals, and to the limitations imposed by such law (targeted surveillance, based on reasonable suspicion, judicially authorized, etc.)[207].

Others

Among other provisions of interest, there are those concerning freedom of expression, which includes "freedom to seek, receive and impart information and ideas of all kinds through the Internet and digital technologies and regardless of frontiers[208]," and an Internet governance provision emphasizing everyone's right to participate in it[209].

There is also the presence, surprising at first sight, of the "right to due process" in the Declaration[210], a right generally associated with criminal law (non-arbitrary detention, fair and impartial process, etc.). In practice, that provision addresses various aspects of the judicial handling of disputes about the Internet – aspects such as determining the competent court, the "single publication" rule, or taking into account the public interest in protecting the Internet when determining standards of liability[211].

2.3 Recognition of digital rights nationally

As mentioned above, although initiatives of international or multinational scope have been favoured historically, we now observe a rise in the popularity of national initiatives[212]. Perhaps because they are easier to develop or because they take into account the needs and preferences of targeted populations, several bills have been tabled by national legislatures in recent years. According to Gill, Redeker and Gasser, "states are increasingly

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[205] **ASSOCIATION FOR THE PROGRESSIVE COMMUNICATION.** *The right to freedom of expression and the use of encryption and anonymity in digital communications,* document submitted to the United Nations Special Rapporteur on the Right to Freedom of Opinion and Expression by the Association for Progressive Communication, February 2015, pp. 3-5, online: https://www.ohchr.org/Documents/Issues/Opinion/Communications/AssociationForProgressiveCommunication.pdf (document consulted on June 20, 2019).
[206] **AFRICAN DECLARATION GROUP.** *The African Declaration On Internet Rights And Freedoms*, *op. cit.* note 171, p. 18.
[207] *Ibid*.
[208] *Ibid*., art 3.
[209] *Ibid*., art 12.
[210] *Ibid*., art 11.
[211] **AFRICAN DECLARATION GROUP.** *The African Declaration On Internet Rights And Freedoms*, *op. cit.* note 171, p. 21 et art 11.
[212] **GILL, REDEKER et GASSER.** *Towards Digital Constitutionalism?, op. cit.* note 119, p. 11.

perceived as a site of power and influence over Internet governance, and […] more intervention at the level of domestic policy is to be expected[213]."

Still, very few national initiatives have completed all the stages of the legislative process or of public policy development. Bills have been tabled in the Philippines (2013)[214], New Zealand (2014)[215], the United States (2012)[216], Nigeria (2019)[217] and the United Kingdom (2015)[218], but without ultimate success. We will focus on the Marco Civil da Internet, a Brazilian law generally perceived as exemplary in codifying rights nationally.

In addition to laws and bills developed in recent years, some legislatures have attempted to make public policy declarations. This is the case for Italy, of which we will study the *Dichiarazione dei dritti in Internet,* adopted in 2015.

The national initiatives mentioned above address exclusively the recognition and protection of Internet users' fundamental rights. Some countries are an exception to this trend. For example, France has approached the protection of French Internet users' rights as part of a broader legislative project, which pertains to the digital world and deals with a variety of other issues, such as Open Data, copyright, and online gambling and games of chance[219].

2.3.1 Recognition of digital rights in law: the Marco Civil da Internet in Brazil

2.3.1.1 Development of the document

The Brazilian state took more than five years to develop and adopt its *Marco Civil Da Internet (*Law No. 12.965/2014), which is translated as the *Brazilian Civil Rights Framework*

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[213] *Ibid*., p. 12.

[214] **CONGRESS OF THE REPUBLIC OF THE PHILIPPINES.** *The Magna Carta for Philippine Internet Freedom,* Senate Bill S. No. 53, online: https://fr.scribd.com/document/151536266/The-Magna-Carta-for-Philippine-Internet-Freedom-v-2-0-Filed-as-SBN-53 (document consulted on June 20, 2019).

[215] **GREEN PARTY.** *Green Party launches Internet Rights and Freedoms Bill,* April 2014, online: http://www.scoop.co.nz/stories/PA1404/S00361/green-party-launches-internet-rights-and-freedoms-bill.htm (page consulted on June 20, 2019).

[216] **ROGERS, K.** *Congressman drafts 'Digital Bill of Rights' – what would you add?,* The Guardian, June 2012, online:https://www.theguardian.com/technology/us-news-blog/2012/jun/13/digital-bill-of-rights-sopa (page consulted on June 20, 2019); **GALLAGHER, B.** *Congressman Darrell Issa Signs Declaration Of Internet Freedom*, Techcrunch, 2012, online: https://techcrunch.com/2012/07/09/congressman-darrell-issa-signs-declaration-of-internet-freedom/ (page consulted on June 20, 2019).

[217] **ADESOJI, B S.** *Digital Rights and Freedom Bill: Why Buhari maybe right to decline assent*, Nairametrics, March 2019, online: https://nairametrics.com/2019/03/23/digital-rights-and-freedom-bill-why-buhari-maybe-right-to-decline-assent/ (page consulted on June 20, 2019).

[218] **LIBERAL PARTY**. *Creating a 'Digital Bill of Rights': Why do we need it, and what should we include?, online:* https://d3n8a8pro7vhmx.cloudfront.net/libdems/pages/8730/attachments/original/1428513286/Digital_Bill_of_Rights_Consultation_Paper_FINAL.pdf?1428513286 (document consulted on June 20, 2019); **DEARDEN, L.** *General Election 2015: Lib Dems propose Digital Bill of Rights to protect personal data online*, Independent, April 2015, online: https://www.independent.co.uk/news/uk/politics/generalelection/liberal-democrats-propose-digital-bill-of-rights-to-protect-personal-data-online-10169393.html (page consulted on June 20, 2019).

[219] **FRANCE.** Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique, JORF n° 0235 du 8 octobre 2016, online: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033202746&dateTexte=&categorieLien=id

for the Internet or *Civil Law of the Internet*[220]*.* It is also occasionally called the "Brazilian Internet Constitution[221]."

In response to a proposal to regulate the Internet essentially on the basis of penal sanctions (the *Azeredo Bill* of 2007) and to the protest movement that ensued, the *Comitê Gestor Internet do Brasil (*CGI.br), an interdepartmental committee (Communication, and Science and Technology) formed by government members and civil society and private sector representatives, undertook a consultation process in 2009 to identify ten basic principles for Internet governance and use in Brazil[222].

However, the committee quickly came to the conclusion that it was necessary to develop a more concrete regulatory framework:

> *Despite these Principles, rising tensions between a rights-based and a criminal-based approach to Internet regulation indicated the need for a clearer regulatory framework capable of establishing more concrete principles and guidelines for the Internet in Brazil*[223]*.*

Two public consultations followed, by means of a Web platform administered by the Brazilian Ministries of Culture and Justice, and more than 2,000 comments were collected from 287 stakeholders[224]. Still, that inclusive and transparent process did not please everyone; several major private companies chose to make private written representations before the Minister rather than use the platform[225]. Some have also criticized the telecommunications and intellectual property lobbies for having made their representations at the very end of the consultation periods, thus making it more difficult to debate the companies' arguments[226].

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[220] **HERRADOR COSTA LIMA DE SOUZA, S.** *Internet Policy Framing in Emerging Economies: A Case Study of Marco Civil da Internet, A Brazilian Law for Internet Governance,* a text presented at the GigaNet: Global Internet Governance Academic Network, Annual Symposium 2016, December 2016, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2909859 (document consulted on June 20, 2019).

[221] **RUVOLO, J.** *Brazil's 'Constitution Of The Internet' Puts Net Neutrality In The Spotlight*, Techcrunch, 2014, online: https://techcrunch.com/2014/03/19/brazils-constitution-of-the-internet-puts-net-neutrality-in-the-spotlight/ (page consulted on June 20, 2019); **ABRAMOVAY, P.** *Brazil's Internet Constitution,* Huffpost, July 2014, online: https://www.huffpost.com/entry/brazils-internet-constitution_b_5274633 (page consulted on June 20, 2019); *Net neutrality wins in Brazil's Internet Constitution*, Al Jazeera, March 2014, online: http://america.aljazeera.com/articles/2014/3/26/brazil-internet-constitution.html (page consulted on June 20, 2019).

[222] **VAN DER SPUY, A.** *What if we all governed the Internet?, op. cit.* note 92, p. 45; **INTERNET SANS FRONTIÈRES.** *Brésil : Le "Marco Civil" enfin voté grâce à la société civile, online:* https://internetwithoutborders.org/au-bresil-le-marco-civil-enfin-vote-grace-a-la-perseverance-de-la-societe-civile/ (page consulted on June 20, 2019).

[223] **VAN DER SPUY, A.** *What if we all governed the Internet?, op. cit.* note 92, p. 45.

[224] *Ibid.,* pp. 46-47; **HERRADOR COSTA LIMA DE SOUZA, S.** *Internet Policy Framing in Emerging Economies, op. cit.* note 220; **INTERNET SANS FRONTIÈRE.** *Brésil, op. cit.* note 222.

[225] **KEANE, J.** *Should Brazil's Marco Civil internet law be left alone?,* IDG Connect, August 2016, online: https://www.idgconnect.com/abstract/19440/should-brazil-marco-civil-internet-law-left (page consulted on June 20, 2019); **ROSSINI, C, BRITO CRUZ, F AND DONEDA, D.** *The Strengths and Weaknesses of the Brazilian Internet Bill of Rights: Examining a Human Rights Framework for the Internet*, Centre for International Governance Innovation and the Royal Institute of International Affairs, series No. 19, September 2015, p. 5, online: https://www.cigionline.org/sites/default/files/no19_0.pdf (document consulted on June 20, 2019).

[226] **HOTSKINS, G T.** *Draft Once; Deploy Everywhere? Contextualizing Digital Law and Brazil's Marco Civil da Internet,* Television & New Media, vol 195, 2018, p. 437.

Following those consultations, a bill was tabled several times in the Brazilian House of Representatives, but without success, as the initiative was constantly delayed by other issues and priorities[227], until the NSA scandal erupted[228].

The bill resurfaced in 2013 after revelations by the whistleblower Edward Snowden on surveillance of Internet users and foreign governments, notably in Brazil, by American intelligence agencies, including the NSA[229]. Adopting the bill thus became a government priority, to the point that it was considered an "urgent procedure," before any other bill would be examined[230].

The *Marco Civil Da Internet* was ultimately sanctioned by President Dilma Rousseff on April 23, 2014, after being adopted by Brazil's House of Representatives and Senate in March and April 2014, respectively.

2.3.1.2 Its raison d'être and foundations

As mentioned above, the Marco Civil Law results from the government's initial willingness to develop a set of basic principles for Internet governance in Brazil. At the time, it was observed that in the absence of clear regulations specific to the Internet, the country's decision-making bodies had no shared vision, so that a structured development of the Internet was difficult in Brazil:

> *[…] the absence of a guiding law for the Internet wreaked havoc on its development in Brazil. Courts issued conflicting decisions, regulators worked at cross purposes, and legislators knew that some guidance was required but were often clueless about what to do. Important issues such as free speech online, intermediary liability and many others were decided for years in a random way[231].*

The law's first article thus states that it aims to assert the principles, guarantees, rights and obligations for Internet use in Brazil, and to provide a guide and/or guidelines to the levels of government[232].

In practice, the "principles, guarantees, rights and obligations" of the Marco Civil Law – although they appear more precise than those provided by other codification initiatives –

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[227] **VAN DER SPUY, A.** *What if we all governed the Internet?, op. cit.* note 92, pp. 47-48; **HOTSKINS**. *Draft Once, op. cit.* note 226, p. 440.
[228] See on this subject: **MACASKILL, E and DANCE, G**. *NSA Files : Decoded. What the revelations mean for you*, The Guardian, November 2013, online: https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded#section/1 (page consulted on June 20, 2019).
[229] **VAN DER SPUY, A.** *What if we all governed the Internet?, op. cit.* note 92, pp. 47-48; notably, communications of the Diplomatic Missions of Brazil and the Cabinet of the Presidency were intercepted by what Brazil called a "global network of electronic espionage": **UNITED NATIONS GENERAL ASSEMBLY.** *President of Brazil Dilma Roussef's statement summary*, general debate, 68th session, September 2013, online: https://gadebate.un.org/fr/68/br%C3%A9sil (page consulted on June 20, 2019).
[230] **INTERNET SANS FRONTIÈRE.** *Brésil, op. cit.* note 222.
[231] **LEMOS, R.** *Brazil's Internet Law, the Marco Civil, One Year Later,* Council on Foreign Relations, June 2015, online: https://www.cfr.org/blog/brazils-internet-law-marco-civil-one-year-later (page consulted on June 20, 2019).
[232] **COMITÊ GESTOR INTERNET DO BRASIL**. *Marco Civil Law of the Internet in Brazil,* official translation, No. 12.965, April 2014, art 1, online: https://www.cgi.br/pagina/marco-civil-law-of-the-internet-in-brazil/180 (page consulted on June 20, 2019).

remain quite vague and difficult to apply. In fact, they shouldn't be viewed as the legislative process's completion. On the contrary, Deputy Alessandro Molon, involved in developing the document, spoke of a "framework law" preceding the adoption of other laws to regulate certain Internet issues more specifically[233]. The government adopted in May 2016 a regulation related to the Marco Civil Law, the *Marco Civil Reglamenation Decree,* intended to clarify certain rules pertaining to the safeguarding and transmission of personal information and to Net neutrality[234].

What are the outcomes of the Marco Civil Law?

Since the Marco Civil Law is a rare instrument for codifying Internet users' rights that has binding force, it's appropriate to analyse the concrete effects since its adoption in 2014.

Generally, the law appears to have produced positive effects in developing public policies. An analysis performed by the Internet Lab five years after the law's adoption noted the establishment of several important government programs regarding Internet access and the country's digital literacy, in accordance with the document's principles[235].

That observation is more nuanced where the courts' recognition of rights is concerned. Concern has frequently been expressed about the very broad margin of manœuvre granted to the courts in the Marco Civil Law's interpretation:

> *[…] ever since it came into force, the interpretation of the Marco Civil has been a matter of discussion and concern. Some of its articles are open to broad interpretation, and in some cases, that could negatively impact internet users' rights. For instance, some interpretations would undermine Net Neutrality by creating loopholes for abuse. Others could erode the procedural rules for government requests of users' personal information[236].*

Some lower court decisions indeed demonstrate the paradoxical effect of the Marco Civil Law's lack of clarity. For example, the law has been invoked in 2015 and 2016 by judges to justify completely blocking the whatsApp communication platform, extremely popular in

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[233] **GNBA AVOGADOS.** *Entenda as polêmicas sobre o Marco Civil da Internet*, January 2014, online: http://gnba.com.br/marco-civil-da-internet-2/ (page consulted on June 20, 2019).

[234] **PRESIDÊNCIA DA REPÚBLICA**. *Decreto nº 8.771, de 11 de maio de 2016*, online: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2016/Decreto/D8771.htm; English translation available online: **ACCESS NOW.** *Marco Civil Reglamenation Decree in English*, online: https://www.accessnow.org/cms/assets/uploads/2016/06/MarcoCivil_reglamentation_decree.pdf (document consulted on June 20, 2019).

[235] **INTERNET LAB.** *5 anos depois: um balanço das políticas públicas de internet no Brasil*, April 2019, online: http://www.internetlab.org.br/pt/especial/5-anos-depois-um-balanco-das-politicas-publicas-de-internet-no-brasil/ (page consulted on June 20, 2019); **ARTICLE 19.** *Country Report: Brazil's Marco Civil da Internet*, November 2015, online: https://www.article19.org/resources/country-report-brazils-marco-civil-da-internet/ (page consulted on June 20, 2019).

[236] **PALLERO, J.** *Brazil must protect the Marco Civil regulatory decree,* Access Now, June 2016, online: https://www.accessnow.org/brazil-must-protect-marco-civil-regulatory-decree/ (page consulted on June 20, 2019).

Brazil[237]. A troubling result, for a law intended to protect the basic rights of the country's Internet users…

The considerable delays before developing other laws and regulations (the *Marco Civil Reglamenation Decree*, for example, was adopted two years after the Marco Civil Law*)* have been blamed in explaining the law's application and effectiveness problems[238]. For example, Sao Paulo's Court of Appeal decided in 2015 that the law's provisions for safeguarding online personal data would not produce any concrete effect until more-precise regulations accompanied them[239].

Nevertheless, Affonso Souza and Lemos think the law's judicialization should make it possible in the longer term to reinforce considerably judges' knowledge and understanding of the evolution of information and communication technologies[240]. That objective is just as desirable in Canada; according to the Judicial Council, judges must gain a better understanding of technological innovations and their impact on society and legal issues, in order to perform their duties responsibly and ultimately maintain the legal system's credibility and the rule of law[241].

Another problem, a political one, has been observed since the Marco Civil Law was adopted: the surprisingly precarious status of the law, particularly in Brazil's unstable political context in recent years.

Following Roussef's ouster in 2016, the Brazilian Parliament (more right-wing than previously) put forward no less than seven bills regarding the fight against cybercriminality; that bill would disproportionately diminish the online privacy protection of Brazilians and hinder freedom of expression[242]. According to the organization Digital Rights Latin America

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[237] **SGANZERLA, T.** *WhatsApp is back on in Brazil. But why was it blocked in the first place?,* PRI Media Company, December 2015, online: https://www.pri.org/stories/2015-12-18/whatsapp-back-brazil-why-was-it-blocked-first-place (page consulted on June 20, 2019); **MUGGAH, R and THOMPSON, N. B.** *Brazil's Digital Backlash*, The New York Times, January 2016, online: https://www.nytimes.com/2016/01/12/opinion/brazils-digital-backlash.html (page consulted on June 20, 2019); **SREEHARSHA, V.** *WhatsApp Blocked in Brazil as Judge Seeks Data,* The New York Times, May 2016, Online: https://www.nytimes.com/2016/05/03/technology/judge-seeking-data-shuts-down-whatsapp-in-brazil.html (page consulted on June 20, 2019); **GREENWALD, G.** *WhatsApp, Used by 100 Million Brazilians, Was Shut Down Nationwide by a Single Judge,* The Intercept, May 2016, online: https://theintercept.com/2016/05/02/whatsapp-used-by-100-million-brazilians-was-shut-down-nationwide-today-by-a-single-judge/ (page consulted on June 20, 2019); **VAN DER SPUY, A.** *What if we all governed the Internet?, op. cit.* note 92, p. 51.

[238] **ARTICLE 19.** *Country Report, op. cit.* note 235.

[239] **TRIBUNAL DE JUSTIÇA DO ESTADO DE SÃO PAULO.** Agravo de Instrumento n. 2168213-47.2014.8.26.0000 (judgment of March 10, 2015). For explanations of the decision: **AFFONSO, PEREIRA DE SOUZA, C, VIOLA, M and LEMOS, R.** *Understanding Brazil's Internet Bill of Rights,* Instituto de Tecnologia & Sociedade de Rio, 2015, p. 43, online: https://itsrio.org/wp-content/uploads/2015/11/Understanding-Brazils-Internet-Bill-of-Rights.pdf (document consulted on June 20, 2019).

[240] **AFFONSO SOUZA, C et LEMOS, R**. *Brazilian Courts and the Internet – Rulings Before and After the Marco Civil on Intermediary Liability*, Global Network of Internet and Society Research Center, online: https://publixphere.net/i/noc/page/OI_Case_Study_Brazilian_Courts_and_the_Internet (page consulted on June 20, 2019).

[241] **CONSEIL DE LA MAGISTRATURE.** *Quel juge pour quelle société ?,* actes du Congrès de la Magistrature, 2008, p. 17, online: https://conseildelamagistrature.qc.ca/fr/medias/fichiers/publication/Colloque_2008_fr_4.pdf (document consulted on June 20, 2019). ===

[242] **RODRIGUEZ, K and SCHOEN, S.** *A Battery of Dangerous Cybercrime Proposals Still Hang Over Brazil*, Electronic Frontier Foundation, April 2016, online: https://www.eff.org/deeplinks/2016/04/battery-dangerous-

& The Caribbean, the proposals' thinly veiled goal was to seriously diminish the Marco Civil Law's protections:

> *Many of the propositions stemming out of the final report* [on cybercriminality] *aim at amending Marco Civil and essentially dismantle it as the important, collectively constructed Bill of Internet Rights that it represents. These bills attempt to fill this important piece of legislation with substantive criminal and criminal procedure matters, instead of dealing with these questions in a different and more appropriate legal instrument or debate*[243]*.*

For better or worse, the Brazilian law could thus be amended or its effects hindered or contradicted quite easily by another law. In 2017, the authors Affonso Souza, Steibel and Lemos identified bills that would amend the Marco Civil Law on subjects as varied as the right to be forgotten, content filtering tools and access to online data[244].

2.3.1.3 Its content

The law contains 32 articles generally addressing the following:

- The foundations and principles of Internet use in Brazil;
- The objectives of Internet use;
- Access to the Internet;
- Online privacy protection;
- Protection of online freedom of expression;
- Net neutrality;
- The responsibility of Internet access or content providers;
- State obligations;
- General provisions for the law's application and interpretation.

As opposed to the initiatives we discussed previously, the Brazilian law appears to consider freedom of expression, and not Internet access, as the primary foundation of the document:

> *Art. 2 º - The discipline [regulation] of internet use in Brazil is founded on the basis of respect for freedom of expression, as well as: […]*[245]

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cybercrime-proposals-still-hang-over-brazil (page consulted on June 20, 2019); **NORDVPN**. *An Overview: Data Retention Practices in Brazil,* December 2016, online: https://nordvpn.com/fr/blog/an-overview-data-retention-practices-in-brazil/ (page consulted on June 20, 2019); **GLICKHOUSE, R.** *Why Brazil's Internet Freedoms Are Under Threat,* Medium, April 2016, online: https://medium.com/@RachelG/why-brazil-s-internet-freedoms-are-under-threat-9c1c8f7b4456 (page consulted on June 20, 2019).

[243] **LUCENA, C.** *Marco Civil is not broken, but pushing cybercrime guesses into it will do the trick,* Digital Rights Latin America & The Caribbean, June 2016, online: https://www.digitalrightslac.net/en/o-marco-civil-nao-esta-quebrado-mas-aceitando-as-orientacoes-sobre-cybercrimes-isso-pode-vir-a-acontecer/ (page consulted on June 20, 2019).

[244] **AFFONSO SOUZA, C, STEIBEL, F and LEMOS, R.** *Notes on the creation and impacts of Brazil's Internet Bill of Rights*, The Theory and Practice of Legislation, vol 51, 2017, p. 14.

[245] **COMITÊ GESTOR INTERNET DO BRASIL**. *Marco Civil Law of the Internet in Brazil, op. cit.* note 232, art 2.

> *Art. 8º - The guarantee of the right to privacy and to freedom of speech in communications is a condition for the full exercise of the right to access to the internet*[246]*.*

The law also presents a set of general principles to guide the document's interpretation, such as the stability and security of networks, the preservation of Net neutrality, and respect for human rights online[247].

Like the African Declaration, Brazil's law mentions government responsibilities for Internet governance and the protection of Internet users' rights. The long list of those responsibilities[248] includes:

- Promotion and use of the Internet in Brazil;
- Development of objectives, strategies, plans and schedules for Internet use in the county;
- Optimization of Internet access infrastructure and networks;
- Integration of reliable, responsible and careful Internet use in the school curriculum, and development of Internet use training programs.

Since the text has binding force, the law addresses the way to remedy hindrance situations or compensate Internet users whose rights have been violated. For certain rights (such as the withdrawal of content violating the right to online honour and reputation), the Marco Civil Law even provides recourse to the Brazilian small claims court, free of charge and without a lawyer[249].

Right to Internet access

Although Brazil's law calls Internet access "essential to the exercise of citizenship[250]", it only discreetly and obliquely addresses everyone's right to access the Internet, in contrast to the documents reviewed previously. In fact, the only mention of that right is in an article about the objectives of Internet governance in Brazil. Among those objectives are: "To promote every person's right to access the Internet."

The effect of such a mention in the Marco Civil Law is unclear, as a considerable part of the country's population is not connected to the network[251]. The law says little about equal access, apart from an article on government initiatives regarding digital literacy[252] and a

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[246] *Ibid.,* art 8.
[247] *Ibid.,* arts 6, 2 and 3.
[248] *Ibid.,* arts 24 to 28.
[249] *Ibid.,* art 19(3); **MEDEIROS, F A et BYGRAVE, L A.** *Brazil's Marco Civil da Internet: Does it live up to the hype*?, Computer law & security review, vol 311, 2015, p. 129.
[250] **COMITÊ GESTOR INTERNET DO BRASIL**. *Marco Civil Law of the Internet in Brazil*, *op. cit.* note 232, art 7.
[251] **ALVES, L.** *Number of Internet Users in Brazil Grows by Ten Million in One Year,* The Rio Times, December 2018, online: https://riotimesonline.com/brazil-news/rio-business/number-of-internet-users-in-brazil-grows-by-ten-million-in-one-year/ (page consulted on June 20, 2019).
[252] **COMITÊ GESTOR INTERNET DO BRASIL**. *Marco Civil Law of the Internet in Brazil, op. cit.* note 232, art 27.

mention of the special needs of Internet users whose physical, motor, sensory or intellectual skills differ from the average[253].

For those who subscribe to an Internet access service, the Brazilian law recognizes very specific rights regarding their subscription:

- The right not to have one's service disconnected or suspended, except in cases of payment default[254];
- The right to maintenance of quality service[255];
- The right to clear and complete information in the contract and terms of service, including providers' policies regarding privacy protection and Internet traffic management[256].

That attention paid by the Marco Civil Law to the rights of Internet service consumers is likely explained by the historic importance attached to those rights in the country. We recall that the state's obligation to protect consumers is enshrined in Brazil's Constitution[257].

The Marco Civil Law provides another important protection for Internet service subscribers: respect for the principle of Net neutrality[258]. But here again, the text unfortunately presents a weaker version than the one found in the Charter of Human rights and Principles for the Internet and in The African Declaration On Internet Rights And Freedoms[259]:

> *The party responsible for the transmission, switching or routing has the duty to process, on an isonomic basis, any data packages, regardless of content, origin and destination, service, terminal or application.*
>
> *The discrimination or degradation of traffic […] can only result from: technical requirements essential to the adequate provision of services and applications; and […]* [260]
>
> (our underlined))

The law contains no definition of those "technical requirements." In Canada, we would tend to associate that exception with the Internet traffic management practices (ITMPs) regulated by the CRTC. But in the absence of such regulation in Brazil, many have demanded that the government be more specific, out of concern that providers will interpret too broadly that exception to Net neutrality[261].

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[253] *Ibid.,* art 7(1)XII).
[254] *Ibid.,* art 7(1)IV).
[255] *Ibid.,* art 7(1)V).
[256] *Ibid.,* arts 7(1)VI) and 7(1)XI).
[257] **FEDERATIVE REPUBLIC OF BRAZIL**. *Constitution of the Federative Republic of Brazil*, constitutional text of October 5, 1988 amended by Constitutional Amendments No. 1/92 to 17/97 and by the revised Constitutional Amendments No. 1/94 to 6/94, art 5(XXXI), online: https://www.wipo.int/edocs/lexdocs/laws/en/br/br117en.pdf (document consulted on May 20, 2019).
[258] **COMITÊ GESTOR INTERNET DO BRASIL**. *Marco Civil Law of the Internet in Brazil, op. cit.* note 232, art 9.
[259] **MEDEIROS and BYGRAVE.** *Brazil's Marco Civil da Internet, op. cit.* note 249, p. 125.
[260] **COMITÊ GESTOR INTERNET DO BRASIL**. *Marco Civil Law of the Internet in Brazil, op. cit.* note 232, art 9.
[261] **PEREIRA, A. A.** *Network Neutrality in Brazil: The Recently Enacted Presidential Decree Consolidates Meaningful Rules*, The Center for Internet and Society, July 2016, online:

The 2016 decree finally clarified the restrictive character of that exception to Net neutrality and clearly prohibited certain controversial practices by providers (for example, the data exemption practice known as zero-rating)[262].

Right to online privacy protection

The Marco Civil Law attaches a lot of importance to Brazilian Internet users' right to privacy, particularly their right to personal data protection. The law's rules are generally more detailed in this regard than those in the Charter of Human Rights and Principles for the Internet and in The African Declaration On Internet Rights And Freedoms.

Three broad online privacy themes are discussed in around a dozen articles of the law, i.e. users' rights, online personal data collection and treatment, and log retention.

Considering the difficulties of implementing national laws regarding the Internet, the law specifically indicates to whom those rules apply:

> *Art. 11. In any operation of collection, storage, retention and treating of personal data or communications data by connection providers and internet applications providers where, at least, one of these acts takes place in the national territory, the Brazilian law must be mandatorily respected, including in regard the rights to privacy, to protection of personal data, and to secrecy of private communications and of logs.*
>
> *§ 1º The established in Art. 11 applies to the data collected in the national territory and to the content of the communications in which at least one of the terminals is placed in Brazil.*
>
> *§ 2º The established in Art. 11 applies even if the activities are carried out by a legal entity placed abroad, provided that it offers services to the Brazilian public or at least one member of the same economic group is established in Brazil […]*[263].
>
> (our underlined)

Concerning personal data collection and treatment, we observe that the Marco Civil Law's rules are similar to those of the other documents we studied: explicit consent, illicit aims, limitations, etc.[264] The law also specifically mentions the nullity of contracts containing rules that would contradict the right to the "inviolability and secrecy of private communications over the Internet[265]."

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http://cyberlaw.stanford.edu/blog/2016/07/network-neutrality-brazil-recently-enacted-presidential-decree-consolidates-meaningful (page consulted on June 20, 2019); *Net neutrality in Brazil: the debate continues*, Internet Lab Report, April 2016, online: http://www.internetlab.org.br/en/internetlab-reports/net-neutrality-in-brazil/ (page consulted on May 20, 2019).

[262] **PRESIDÊNCIA DA REPÚBLICA**. *Decreto nº 8.771, op. cit.* note 234; **PEREIRA**. *Network Neutrality in Brazil, op. cit.* note 261.

[263] **COMITÊ GESTOR INTERNET DO BRASIL**. *Marco Civil Law of the Internet in Brazil, op. cit.* note 232, art 11.

[264] *Ibid.,* art 7.

[265] *Ibid.,* art 8(I).

The treatment of the thorny issue of log retention also distinguishes the Marco Civil Law from the other documents studied. Notably, Brazil's Constitution doesn't recognize the right to express oneself anonymously, which may explain the multiple rules regarding the logs of providers of Internet access and online applications in the Marco Civil Law[266]. The 2016 decree details the substantial information to be kept for 12 months and allows administrative authorities to obtain that information without judicial authorization in certain situations[267]. It's no surprise that several experts have strongly criticized the Marco Civil Law's log retention rules[268].

Others

The Brazilian law includes a set of provisions guiding the interpretation of the document and of Internet governance in the country. The foundations, principles and objectives of Internet regulation in the country are stated. Their respective meaning and usefulness are unfortunately difficult to understand, and several provisions seem redundant. For example: What could possibly be the difference between the two following provisions, and how can one attach appropriate weight to that difference when interpreting or applying the law?

> *Art. 2. The discipline of internet use in Brazil is founded on the basis of respect for freedom of expression, as well as: […]*[269]
>
> *Art. 3. The discipline of internet use in Brazil has the following principles: I - guarantee of freedom of speech, communication and expression of thought […]*[270]
>
> (our underlined))

To those foundations, principles and objectives – 9 in total – is added a provision for other elements to be taken into account in the law's interpretation (the nature of the Internet, Internet users' habits and routines, etc.)[271]. In trying to facilitate the understanding of the Marco Civil Law's rules and rights, we observe that its creators instead confuse readers and some judges, when we consider a few surprising decisions that judges have rendered to date.

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[266] **RODRIGUEZ, K**. *Marco Civil Da Internet: The Devil in the Detail,* Electronic Frontier Foundation, February 2015, online: https://www.eff.org/fr/node/84822 (page consulted on June 20, 2019).
[267] **PRESIDÊNCIA DA REPÚBLICA**. *Decreto nº 8.771, op. cit.* note 234.
[268] **OSSINI, BRITO CRUZ and DONEDA.** *The Strengths and Weaknesses of the Brazilian Internet Bill of Rights, op. cit.* note 225, p. 10.
[269] **COMITÊ GESTOR INTERNET DO BRASIL**. *Marco Civil Law of the Internet in Brazil, op. cit.* note 232, art 2.
[270] *Ibid.,* art 3.
[271] *Ibid.,* art 6.

2.3.2 RECOGNITION OF DIGITAL RIGHTS BY MEANS OF A DECLARATION OF PRINCIPLES: ITALY'S DICHIARAZIONE DEI DRITTI IN INTERNET

2.3.2.1 Development of the document

Inspired by the Brazilian initiative adopted a few months earlier, the President of Italy's Chamber of Deputies, Laura Boldrini, announced in spring 2014 her intention to develop an Italian "Web Constitution." To that end, a Special Commission on Internet Rights and Obligations was put in place, with the particularity of having among its members a majority of non-parliamentarians (13 of the 24 members), such as Juan Carlos de Martin from the Nexa Center for Internet & Society of the Polytechnic University of Turin, Marco Pierani from Euroconsumers, and Joy Marino from the Italian Chapter of Internet Society[272].

The Commission first proceeded with an analysis to summarize existing initiatives to codify Internet users' rights. It focused on the Charter of Human Rights and Principles of the Internet, called "the most important and mature normative efforts towards stratifying human rights on the Internet[273]."

In October 2014, the Commission members produced a first version of the Italian Declaration of Internet Rights, which contained 14 provisions, and was the subject of a public consultation that lasted more than 5 months[274]. Using a Web platform, Internet users could read the text, comment on it and suggest changes. The platform was consulted by 14,000 persons and collected almost 600 comments[275]. The Commission also held meetings with representatives of various stakeholders (telecommunications service providers, merchant associations, cybersecurity experts, etc.)[276]. For the sake of transparency, the documentation submitted to the Commission and the meeting minutes were made public[277].

The Declaration's final version was produced in July 2015. The President of the Chamber of Deputies pointed out that the Declaration might be revised and updated in the future according to the Internet's evolution[278].

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[272] **CAMERA DEI DEPUTATI.** *Composizione della Commissione per i diritti e i doveri relativi ad Internet,* XVII Legislatura, online: http://www.camera.it/leg17/1177 (page consulted on June 20, 2019).
[273] **KETTEMANN, M C.** *Forza Internet Rights: IRPC Charter as Source of Inspiration for Innovative Italian Declaration of Internet Rights*, Internet Rights & Principles Coalition, online: http://internetrightsandprinciples.org/site/forza-internet-rights-iprc-charter-as-source-of-inspiration-for-innovative-italian-declaration-of-internet-rights/ (page consulted on June 20, 2019).
[274] **CAMERA DEI DEPUTATI.** *Dichiarazione dei diritti in Internet - Nota informativa*, 2017, pp. 1-2 , online: http://www.camera.it/application/xmanager/projects/leg17/commissione_internet/note_informative_2017.pdf (document consulted on May 20, 2019).
[275] **CHERUBINI, F.** *Italy leads the way with Internet Bill of Rights*, World Association of Newspapers and News Publishers, July 2015, online: https://blog.wan-ifra.org/2015/07/29/italy-leads-the-way-with-internet-bill-of-rights (page consulted on June 20, 2019).
[276] **GUERRINI, F.** *Do internet users need their own bill of rights? Italy hopes to pave the way,* ZD Net, July 2015, online: https://www.zdnet.com/article/italys-bill-of-rights-for-the-internet-published-but-what-about-net-neutrality/ (page consulted on May 20, 2019); **MACI, L.** *Carta dei diritti in Internet, cos'è e cosa cambia*, EconomyUp, November 2015, online: https://www.economyup.it/innovazione/carta-dei-diritti-in-internet-cos-e-e-cosa-cambia/ (page consulted on May 20, 2019).
[277] **CAMERA DEI DEPUTATI.** *Resoconti della Commissione per i diritti e i doveri relativi ad Internet*, XVII Legislatura, online: http://www.camera.it/leg17/1175 (page consulted on May 20, 2019).
[278] **CHERUBINI.** *Italy leads the way with Internet Bill of Rights*, *op. cit.* note 275.

2.3.2.2 Its raison d'être and foundations

As opposed to the Brazilian law, the Italian Declaration of Internet Rights (hereinafter: Declaration) is not binding; it mainly has "cultural and political" rather than legal value[279].

The Declaration aims above all at guiding Italian decision-makers in the development of laws and public policies. Under a motion unanimously adopted by the Italian Chamber, the government must consider the principles and rights asserted in the Declaration when it enacts regulations affecting or likely to affect Internet use or Internet users' rights and duties[280].

Given that the Declaration is only a few years old and is not binding, it's still difficult to evaluate the concrete effects it may have had on Italian public policies. All the more so because the Italian state is also guided in its interventions by other digital public policies, of which certain principles certainly intersect those stated in the Declaration (e.g.: the Italian strategy for digital growth, the digital school plan, etc.[281]).

Unsurprisingly, the Declaration's non-binding nature has received its share of criticism. The most acerbic critic is probably Stefano Mannoni, Professor and former Commissioner of Autorità per le Garanzie nelle Comunicazioni, who has even said the exercise is futile and only designed to flatter its author's ego[282].

However, Italy advocates the development and adoption of Internet governance regulations internationally; the Declaration thus apparently aims at adding a building block to the edifice and contributing to the international debate on the issue[283]. For example, the Declaration's article 14 specifically addresses Internet governance. Although the Declaration is a document that "commits" only the Italian state, it should be noted that the necessity of universal or supranational Internet regulation is expressly recognized in the document:

> *The Internet requires rules consistent with its universal, supranational scope, aimed at fully implementing the principles and rights set out above, to safeguard its open and democratic nature, to prevent all forms of discrimination and to prevent*

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[279] *Ibid.*

[280] **CAMERA DEI DEPUTATI.** *Mozioni Quintarelli Ed Altri N. 1-01031 E Caparini Ed Altri N. 1-01052 Concernenti Iniziative Per La Promozione Di Una Carta Dei Diritti In Internet E Per La Governance Della Rete*, online: http://www.astrid-online.it/static/upload/protected/aa79/aa79fe7c36b05a8d203d7e236ab6b747.pdf (document consulted on June 20, 2019); **CAMERA DEI DEPUTATI**. *Mozione In Aula Impegna Il Governo Sui Diritti In Internet,* 2015, online: http://www.camera.it/leg17/1131?shadow_comunicatostampa=9558 (page consulted on June 20, 2019).

[281] **VETRO. A.** *Italy is giving itself a digital makeover. Here's how*, World Economic Forum, September 2016, online: https://www.weforum.org/agenda/2016/09/italy-global-information-technology-report-2016/ (page consulted on June 20, 2019).

[282] **GUERRINI, F.** *Dichiarazione per i diritti di Internet: arrivano le prime critiche alla bozza,* La Stampa, October 2014, online: http://www.lastampa.it/2014/10/17/tecnologia/dichiarazione-per-i-diritti-di-internet-arrivano-le-prime-critiche-alla-bozza-1xBU9i4jpK83gW5Ij2O16K/pagina.html (page consulted on June 20, 2019).

[283] **FERRARI, E.** *Italy issues a Declaration of Internet rights – now let's improve it*, Center for Global Communications Studies, August 2015, online: https://global.asc.upenn.edu/italy-issues-a-declaration-of-internet-rights-now-lets-improve-it/ (page consulted on June 20, 2019).

> *the rules governing its use from being determined by those who hold the greatest economic power*[284]*.*
>
> *The establishment of national and international authorities is essential to effectively ensure observance of the above criteria*[285]*.*

In the context of the motion mentioned above, the Italian Deputies pointed out the importance for Italy of actively supporting and participating in European efforts at Internet governance[286].

2.3.2.3 Its content

The Declaration begins with a preamble recognizing the many changes and benefits generated by the Internet: a redefinition of public and private spaces and of personal relations and relations between individuals and public institutions, an increase in the dissemination of information and knowledge, a rise in the possibilities of citizen participation, etc.[287] The Internet is thus called a "global resource" "that enables innovation, fair competition and growth in a democratic context[288]."

The Declaration first includes by reference the rights recognized by the UN's Universal Declaration of Human Rights, the Charter of Fundamental Rights of the European Union, national constitutions and other relevant international declarations, in order to impose their protection on the Internet[289].

The Declaration then contains 14 articles that address the following generally:

- Recognition of fundamental rights online and of the obligation to protect them;
- The right to Internet access;
- The right to online knowledge and education;
- Net neutrality;
- Online privacy protection;
- The right to a digital identity;
- The right to be forgotten;
- Automatic processing of personal data by the administrative and judicial systems;
- The transparency and integrity of digital platforms;
- Internet security;
- Internet governance.

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[284] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, English translation, XVII Legislatura, art 14(2), online: (document consulted on June 20, 2019).
[285] *Ibid.,* art 14(7).
[286] **CAMERA DEI DEPUTATI.** *Mozioni Quintarelli Ed Altri, op. cit.* note 280.
[287] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, preamble.
[288] *Ibid*.
[289] *Ibid.,* art 1(1).

There is a surprising omission: The right to online freedom of expression is not the subject of a distinct article[290]. Instead, that right is recognized laconically under the heading "Network security[291]." Questioned on the subject, the Commission responsible for developing the Declaration has argued that protection of freedom of expression underpinned the entire Declaration[292].

It should also be noted that the Declaration provides several rules of interpretation. For example, it is specified that such interpretation must aim at ensuring the effective application of the rights and protections asserted in the Declaration[293]. Moreover, in case of conflicts of law, the Declaration states that a balance must be struck between those rights on the basis of "the full recognition of the liberty, equality, dignity and unique diversity of each individual[294]," principles on which the Declaration is founded[295].

Three articles clarify the judiciary's roles and powers in implementing the rights:

- *No act, judicial or administrative order or decision that could significantly impact the private sphere of individuals may be based solely on the automated processing of personal data undertaken in order to establish the profile or personality of the data subject[296].*
- Concerning the right to anonymity: *In the event of violations of the dignity and fundamental rights of any person, as well as in other cases provided for by the law, the courts may require the identification the author of a communication with a reasoned order[297].*
- Concerning the right to be forgotten*: Where a request to be removed from search engines is granted, any person may appeal the decision before the courts to ensure that the public interest in the information is preserved[298].*

That mention of the courts is surprising at first sight, given that the Declaration is non-binding on the state. However, it appears that the object of those provisions is to adapt them to rights or protections recognized in other legislative instruments and for which legal action thus already exists[299]. Additionally, the mention of courts in the Declaration corresponds to the document's purpose as a guide. With an indication of the way to handle personal information and factors likely jeopardizing its protection, decision-makers can thus maintain a certain consistency with established objectives.

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[290] **GUERRINI.** *Do internet users need their own bill of rights?, op. cit.* note 276.
[291] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, art 13(2).
[292] **BASSINI, M.** *Né costituzione né legge. La Dichiarazione dei diritti in Internet verso una missione culturale*, Media Laws, July 2015, online: http://www.medialaws.eu/ne-costituzione-ne-legge-la-dichiarazione-dei-diritti-in-internet-verso-una-missione-culturale/ (page consulted on June 20, 2019).
[293] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, art 1(2).
[294] *Ibid.,* art 1(3).
[295] *Ibid.,* preamble.
[296] *Ibid.,* art 8.
[297] *Ibid.,* art 10(3).
[298] *Ibid.,* art 11(3).
[299] For example, the notes related to article 8 of the Italian Declaration explain: (translation) "European legislation and constitutional provisions require legal systems to keep the decision on the direction to be taken and the measures to be taken in the hands of human beings. Even in the face of the temptation to use computers to make procedures more efficient.": **CAMERA DEI DEPUTATI.** *Dichiarazione dei diritti in Internet - Nota informativa*, *op. cit.* note 274, p. 10.

The Declaration does not aim at creating new remedies for Internet users. Indeed, that is a criticism expressed by certain observers: several provisions appear superfluous since they address protections already recognized in Italian or European legislation[300].

The Declaration also encourages the establishment of national and international authorities for ensuring compliance with the principles stated in the Declaration, and more broadly with basic rights online[301]. Here again, that desire appears incompatible with the document's non-binding character.

Right to Internet access

Recognition of the right to Internet access has a place of choice in the Italian Declaration. Its preamble states that "the Internet must be treated as a global resource and must satisfy the criterion of universality[302]." One of the Declaration's first articles also calls Internet access a "fundamental right" and an essential condition for the development of individuals and society[303].

The Declaration also mentions the importance of equal access on the territory, but without discussing the role that the Italian state should play in that regard. It's all the more surprising because Internet access infrastructures have substantial limitations on the Italian territory. Within the European Union, Italy has one of the lowest rates of broadband coverage[304]. Thus, as with the Marco Civil Law's recognition of the right to access, it's difficult to foresee what concrete effect will result from recognition of a right to universal access to unavailable Internet service.

The Declaration is much more specific about the reduction of social obstacles to effective actual adoption and use:

- The Declaration recognizes that greater digital literacy enables a better exercise of fundamental rights and freedoms online[305] and advocates the prevention of behaviour that is discriminatory or prejudiced regarding online freedoms[306]. For example, the document's explanatory notes mention the importance for Italian Internet users to be able to detect fake news, evaluate the veracity of an electronic message, or determine the author or origin of online information[307].

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[300] See for example: **TROVATO, M.** *La Dichiarazione dei diritti di internet guarda avanti, ma storto*, Il Foglio, July 2015, online: https://www.ilfoglio.it/tecnologia/2015/07/29/news/la-dichiarazione-dei-diritti-di-internet-guarda-avanti-ma-storto-86189/ (page consulted on June 20, 2019); **ALOVISIO, M.** *Prime riflessioni sulla bozza della Dichiarazione dei diritti in Internet*, Il Piemonte delle Autonomie, vol 22, 2015, online: http://piemonteautonomie.cr.piemonte.it/cms/index.php/prime-riflessioni-sulla-bozza-della-dichiarazione-dei-diritti-in-internet (page consulted on June 20, 2019).
[301] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, art 14(7).
[302] *Ibid.,* preamble.
[303] *Ibid.,* art 2(1).
[304] **FREEDOM HOUSE.** *Freedom on the Net, Italy country profile*, 2017, online: https://freedomhouse.org/report/freedom-net/2017/italy (page consulted on June 20, 2019).
[305] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, art 3(3).
[306] *Ibid.,* art 3(5).
[307] **CAMERA DEI DEPUTATI.** *Dichiarazione dei diritti in Internet - Nota informativa*, *op. cit.* note 274, pp. 4-5.

- It provides a right to online education, including the acquisition of necessary knowledge for Internet use[308].

- It requires public institutions to take measures to reduce digital divides, created notably by gender inequality, disabilities or other vulnerable conditions[309].

- It indicates that public institutions must take measures to eliminate any form of cultural lag preventing or limiting Internet use by some people[310].

The Italian Declaration's accent on improving digital literacy is likely explained by the Internet's low adoption rate in that country compared to the rest of Europe. In 2017, 22% of the Italian population had never accessed the Internet (v. only 13% on average in the European Union as a whole)[311] and almost 30% had never used it in the 3 months prior to EuroStat's survey[312].

Like the other documents studied, the Italian Declaration mentions Net neutrality, and considers it as a recognized right for Internet users[313], and not only a feature of the open and non-discriminatory Internet network.

The Declaration also provides a right to the neutrality of systems[314], a more recent concept described by the European Consumer Organisation (Bureau européen des unions de consommateurs (BEUC)) as an extension of Net neutrality and aiming to guarantee the neutrality of the terminal enabling Internet access (computers, smartphones, tablets, voice assistants, connected cars, etc.)[315]. That rule certainly applies to one company in particular: Apple. The operating systems of that company's mobile devices are reproached for restricting, for example, access to third party app stores (other than Apple's proprietary App Store) and to certain applications, and for not allowing users to remove certain preinstalled applications[316].

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[308] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, art 3.
[309] *Ibid.,* art 2(5).
[310] *Ibid.,* art 3(4).
[311] **EUROSTAT**. *Level of Internet access - households*, 2019, online: https://ec.europa.eu/eurostat/databrowser/view/tin00134/default/table?lang=en (page consulted on June 20, 2019).
[312] *Ibid.*
[313] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, art 4.
[314] *Ibid.,* art 2(4).
[315] **BEUC.** *Letter addressed to Pietro Grasso* (*Bill n. 2484 – Provisions of Internet services for competition protection and free access for users. Scheduling request*), November 2017, online: https://www.beuc.eu/publications/beuc-x-2017-129_provisions_of_internet_services_for_competition_protection_and_free_access_for_users.pdf (document consulted on June 20, 2019).
[316] **HESTRES, L. E.** *App Neutrality: Apple's App Store and Freedom of Expression Online,* International Journal of Communication, vol 7, 2013, online: https://ijoc.org/index.php/ijoc/article/view/1904/926 (document consulted on June 20, 2019); See on this subject: **AUTORITÉ DE RÉGULATION DES COMMUNICATIONS ÉLECTRONIQUES ET DES POSTES**. *Smartphones, tablettes, assistants vocaux… Les terminaux, maillon faible de l'ouverture d'internet,* February 2018, https://www.arcep.fr/uploads/tx_gspublication/rapport-terminaux-fev2018.pdf (document consulted on June 20, 2019).

Right to online privacy protection

From the start, the Declaration recognizes everyone's right to the protection of one's online personal data – a right the Declaration associates with respect for human dignity, privacy and the right to an online identity[317]. As opposed to the other documents studied, the document defines such "personal data" as data making it possible to trace a person's identity[318], while specifying that the data generated by Internet connection equipment is included in the definition.

The Declaration then discusses the right to self-determination and mentions essentially the same obligations and prohibitions that appear on the subject in the other documents studied[319]. The explanatory notes point out that the right to self-determination is associated with many other basic rights: protection of human dignity, right to freedom of expression, right to personal development, protection against interference from public authorities, and right to the protection of privacy and confidentiality[320].

The Declaration also recognizes the right to be forgotten (or right to erasure or to de-referencing)[321], a right recognized in Europe in recent years and written in the recent General Data Protection Regulation[322]. In that sense, as opposed to the Brazilian law, the Italian Declaration doesn't recognize in that mention a new right for Italian Internet users. But the Declaration's description of the right to be forgotten, in line with European regulations and the initial decision of the Court of Justice of the European Union, could end an excessively broad interpretation adopted to date by Italian courts, which have, for example, ordered the withdrawal or suppression of certain journalistic content online[323].

To the provision on the right to be forgotten is added a new point: When a search engine accepts a de-referencing request, that decision can be challenged by anyone before a tribunal, which can assess whether public interest requires the information to remain available[324]. That remedy, which is not provided in the European regulations, has been criticized by Italy's Data Protection Authority because of possible counterproductive effects. To be able to challenge a de-referencing request, the public must be notified of the decision, likely through its publication, which may have the effect of drawing attention to

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[317] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, art 5(1).
[318] *Ibid.,* art 5(2).
[319] *Ibid.,* arts 5(5), 5(3), 5(7) and 6(2).
[320] **CAMERA DEI DEPUTATI.** *Dichiarazione dei diritti in Internet - Nota informativa*, *op. cit.* note 274, p. 8.
[321] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, art 11(1).
[322] **EUROPEAN PARLIAMENT.** *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC,* art 17.
[323] See for example: **MATTHEWS, A.** *How Italian courts used the right to be forgotten to put an expiry date on news,* The Guardian, September 2016, online: https://www.theguardian.com/media/2016/sep/20/how-italian-courts-used-the-right-to-be-forgotten-to-put-an-expiry-date-on-news (page consulted on June 20, 2019); **SCORZA, D.** *A ruling by the Italian Supreme Court: News do "expire". Online archives would need to be deleted*, L'Espresso, July 2016, online: http://espresso.repubblica.it/attualita/2016/07/01/news/a-ruling-by-the-italian-supreme-court-news-do-expire-online-archives-would-need-to-be-deleted-1.275720 (page consulted on June 20, 2019).
[324] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, art 11(3).

those who have justly requested to be forgotten and have obtained a positive decision in that regard[325].

The Declaration also recognizes a right to anonymity[326], which can be exercised by means of online anonymization tools. The wording doesn't mention encryption, as opposed to the IRPC Charter or the African Declaration, for example; rather, the provision mentions instruments, including technical systems. That absence has attracted criticisms[327], but according to a member of the committee responsible for producing the Declaration, Juan Carlos De Martin, it is instead a deliberate choice to facilitate the adaptation of the Declaration's principles to technological changes: "We preferred a more generic phrase because while now cryptography is important, in the future, other solutions may appear[328]." The Declaration's authors are thus also responding to the problem identified in the literature regarding the risk of codification documents eventually becoming obsolete due to continual technological advances.

Others

Among other provisions worthy of mention is the attribution of certain responsibilities to digital platform operators, such as Google, Facebook, Amazon and YouTube, including obligations of transparency, integrity and fair treatment of users and competitors[329].

The Declaration also addresses the Internet network's security in an article that describes infrastructure protection and the protection of Internet users against behaviours (discrimination, hate, violence online) likely to harm their human dignity[330]. It's the only article that mentions Internet users' freedom of expression – and unfortunately, to restrict it.

2.4 A few findings of our study of the various initiatives

2.4.1 A SIMILAR APPROACH TO THEIR DEVELOPMENT

We observe that the four documents studies have all been drafted by groups or committees formed by a variety of stakeholders and/or organizations. Even in the Brazilian and Italian

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[325] **SORO, A.** *Privacy e diritto all'oblio, la Costituzione di Internet così non va*, Huffpost, October 2014, online: https://www.huffingtonpost.it/antonello-soro/privacy-diritto-alloblio-costituzione-internet-non-va_b_5994560.html?utm_hp_ref=italy (page consulted on June 20, 2019); **CHIUSI, F.** *Italy Pioneers An Internet Bill of Rights*, TechPresident, October 2014, online: http://techpresident.com/news/25327/italy-pioneers-internet-bill-rights (page consulted on June 20, 2019).

[326] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, art 10(1); *Italy first European country to introduce Internet Bill of Rights,* World Wide Web Foundation, July 2015, online: https://webfoundation.org/2015/07/italy-first-european-country-to-introduce-internet-bill-of-rights/ (page consulted on June 20, 2019).

[327] **FREEDOM HOUSE.** *Italy Freedom on the Net 2015*, 2015, online: https://freedomhouse.org/report/freedom-net/2015/italy (page consulted on June 20, 2019); *Italy first European country to introduce Internet Bill of Rights,* World Wide Web Foundation, *op. cit.* note 327.

[328] **GUERRINI.** *Do internet users need their own bill of rights?, op. cit.* note 276.

[329] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, art 12.

[330] *Ibid.,* art 13.

initiatives, we observe the lawmakers' willingness to include non-state participants in developing and drafting the documents. And that participation was not just symbolic: More than half of the members of the Special Commissions on Internet Rights and Obligations were not parliamentarians – a first in Italy. The *Comitê Gestor Internet do Brasil* also included several private sector and civil society representatives. As mentioned above, UNESCO strongly encourages that multistakeholder approach to developing Internet governance.

In addition, we observe a willingness to involve the general public in developing the codification documents studied. After the texts' first draft or version, the Brazilian and Italian initiatives held a number of consultations, spread over several months, by means of official online platforms for collecting the public's comments about the projects. The four initiatives also held consultations with experts, organizations or militants involved in matters of human rights.

2.4.3 THE MAIN RIGHTS RECOGNIZED

Although our study focused more on two specific rights, we observed, in the documents studied and in the other recent attempts to codify Internet users' rights, the recurrence of a set of basic rights.

A few studies have been conducted in recent years about the language used in the main documents addressing human rights in a digital context[331]. In addition to the themes of Internet access and online privacy protection, those studies have identified the following recurrent themes in the majority of the documents studied:

- Online freedom of expression *(censorship, online freedom of the press, online freedom of association, etc.)*;
- Access to online information and knowledge;
- Net neutrality;
- Internet governance *(transparency, multistakeholderism, etc.)*

Other aspects are also discussed occasionally, such as online cultural and linguistic diversity, online intellectual property rights and copyright, online content providers, digital ethics (sustainable development of the Internet and of information and communications technologies), and individual and collective development through the Internet (social inclusion, reduction of inequalities, etc.).

Concerning the rights to Internet access and online privacy, we observe that many facets of those rights are discussed in the four documents studied in this report. That exposes the very broad scope of those rights and the substantial regulation that states, including Canada, could enact to ensure respect of those rights.

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[331] **PETTRACHIN.** *Towards a universal declaration on internet rights and freedoms?, op. cit.* note 29; **CASACUBERTA, D and SENGES, M.** *Do we need new rights in Cyberspace? Discussing the case of how to define on-line privacy in an Internet Bill of Rights*, Enrahona, vol 40, 2008; **MUSIANI, F, PAVAN, E and PADOVANI, C.** *Investigating Evolving Discourses on Human Rights in the Digital Age, op. cit.* note 93, p. 369.

Various Facets of Two Rights Addressed in the Documents Studied

Issues Regarding the Right to Internet Access	Issues of Online Privacy and Personal Data Protection
- Infrastructure availability and development	- National legislations and independent authorities
- Unequal access and digital divide	- Consent (and its terms) to personal data collection, use and transmission
- Digital literacy	- Licit objectives
- Market of Internet access services	- Minimization principle
- Rights of subscribers to Internet access service	- Right to a virtual personality
- Net neutrality (and its exceptions)	- Right to online reputation and right to be forgotten
- Net equality	- Right to anonymity
- Neutrality of systems	- Accessibility of protection tools (confidentiality parameters, encryption, etc.)
- Freedom to choose systems, applications and software	- State surveillance
- Infrastructure and protocol compatibility	- Violence against girls and women
- Open-source technical standards	

While the recognition of rights specific to certain groups of Internet users (consumers, children) has been the subject of several theoretical debates[332], we note that in practice, it is rare in the main documents codifying digital rights. The African Declaration is an exception by including rights specific to women, girls and children on the Internet. The explanation of that exception is likely due to the particular situation and concerns in Africa, which require targeted interventions. The Canadian context does not appear to require abandoning the all-inclusive approach adopted in Canada in the past to recognition of human rights. For example, the Supreme Court of Canada has already decided against a law that recognized a fundamental right – the right to equality – too restrictively, by not including certain categories of persons[333].

Another recommendation by certain researchers also seems to be neglected by the artisans of recent initiatives to codify Internet users' rights: the recommendation to determine which should rank first when they conflict[334]. Among the documents we studied, only the Italian Declaration discussed conflicts between rights. Without fully prioritizing

[332] See section 1.5.2 of this study.
[333] Vriend v. Alberta, [1998] 1 RCS 493.
[334] **CASACUBERTA, D and SENGES, M.** *Do we need new rights in Cyberspace?, op. cit.* note 331, pp. 108-109.

rights, it still placed respect for the principles of dignity, equality and diversity at the top of an eventual exercise to balance the rights covered by the Declaration[335].

Once again, we don't think this path should be followed in an eventual Canadian codification. It is simply not the approach usually adopted in Canadian law regarding human rights; on the contrary, the Canadian approach favours a balance between the various rights at stake. As pointed out by Chief Justice Lamer:

> *A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law [336].*

3. Overview of the Situation in Canada

3.1 Treatment of Internet users' rights in Canada: Do we need a charter?

Canada's legislative framework regarding human rights is spread over several legislative documents, which can have a constitutional or quasi-constitutional nature. Among them is of course the *Canadian Charter of Rights and Freedoms*, which asserts a set of rights and freedoms deemed essential to maintaining a free and democratic society[337], such as the rights to life and equality, as well as the *Canadian Bill of Rights*[338]. Some provinces have also adopted laws regarding human rights (or certain human rights), such as the *Charter of Human Rights and Freedoms* (Quebec)[339] and the *Human Rights Act* (New Brunswick)[340]. The fundamental rights recognized in those documents are just as applicable online as offline. Some apply to the state and others also apply to private actors, and even individuals.

To those more general rights are added rights specific to the protection of privacy and personal data, as provided in the *Privacy Act*[341] and the *Personal Information Protection and Electronic Documents Act*[342] (PIPEDA) (and their provincial counterparts, where applicable), which apply respectively to the public and the private sectors. Here again, generally, the regulations therein apply to the Internet as well.

There are also more-specific regulations regarding Internet access and online content that have been enacted by the Canadian Radio-television and Telecommunications Commission (CRTC); for example, the CRTC has imposed decisions and policies against

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[335] **CAMERA DEI DEPUTATI.** *Declaration of Internet Rights*, *op. cit.* note 284, preamble and art 1(3).
[336] Dagenais v. Société Radio-Canada, [1994] 3 RCS 835, p. 877.
[337] Canadian Charter of Rights and Freedoms, *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, art 1.
[338] Canadian Bill of Rights, SC 1960, c 44.
[339] Charter of Human Rights and Freedoms, CQLR, c C-12.
[340] Human Rights Act, RSNB 2011, c 171.
[341] Privacy Act, RSC 1985, c P-21.
[342] Personal Information Protection and Electronic Documents Act, SC 2000, c. 5.

provider practices that would be counter to Net neutrality, and regulates Internet traffic management practices[343].

In short, we find that generally, the rights asserted in the various "charters" of rights for Internet users elsewhere in the world already exist in Canada. Regulatory frameworks exist concerning online freedom of expression, privacy protection and Net neutrality, i.e. recurrent elements of those charters. While some Canadian regulations should probably be updated to better adapt to the new digital reality, it remains that the basic rights recognized for Canadians do apply online.

However, the right to Internet access, one of those almost systematically recognized in foreign "charters," is an exception. That right is not recognized in Canadian law, at least at the moment. We find in the Canadian Telecommunications Policy, integrated in the Telecommunications Act, the objective of enabling universal access to reliable, affordable and quality telecommunications services, including Internet access services[344]. But that objective is only one of the policy's nine objectives and must be balanced with free market maintenance, research and development, promoting "the ownership of Canadian carriers by Canadians," etc. So we're far from recognition of everyone's right to Internet access.

The organization Freedom House nevertheless draws a very positive portrait of Internet freedoms in Canada, while noting the recent adoption of a few excessively restrictive regulations for online civil liberties, under the guise of protecting public safety and fighting terrorism[345].

But the current recognition of human rights for Canadian Internet users should not end all discussion on the appropriateness of developing a charter of rights for Internet users in the country. As we have seen, one of the primary purposes of that type of document is to clarify the online application of basic rights, not to create the latter. Documents that recognize basic rights (and constitutional documents generally) existed just as much in Italy, Brazil and Africa. Those documents are even occasionally cited in the laws, charters and declarations developed there.

For example, we submit that an initiative to codify the rights of Canadian Internet users could prove useful in responding to certain persistent problems related to Internet access and to exercising the right to privacy.

In the following pages, we will try to identify Canadian regulations that would likely guarantee and protect online the fundamental rights of Canadians, and detect shortcomings that would justify adopting a better-targeted instrument.

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[343] **CRTC**. Telecom Regulatory Policy CRTC 2009-657 [decision on Internet traffic management practices]; **CRTC**. Broadcasting and Telecom Decision CRTC 2015-26 [decision on data charge exemption practices] ; **CRTC**. Telecom Regulatory Policy CRTC 2017-104 [decision on differential pricing practices].

[344] Telecommunications Act, SC 1993, c. 38, sec. 7(1)b).

[345] **FREEDOM HOUSE.** *Freedom on the Net – Canada country profile, online:* https://freedomhouse.org/report/freedom-net/2017/canada (page consulted on June 20, 2019).

3.1.1 THE SITUATION OF ONLINE PRIVACY

As mentioned above, the collection and use of online personal data are regulated in Canada, notably by the *Personal Information Protection and Electronic Documents Act* (PIPEDA). That federal law, which applies to companies in the course of their business activities[346], contains a set of principles the companies must apply when processing personal information, i.e. any factual or subjective information, recorded or not, concerning an identifiable person[347]. The Act contains, for example, a principle regarding consent:

> *Principle 3 - Consent*
>
> *The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information, unless where inappropriate[348].*

In reading the purpose of that Act, we might think it meets the current privacy needs of Internet users. Explicit mention is made of "an era in which technology increasingly facilitates the circulation and exchange of information[349]." And yet…

Rare are those who think PIPEDA is well adapted to current technologies. It was designed and formulated in the nineties, at the beginning of e-commerce, well before the advent of social media, advanced search engines, smartphones and other connected objects[350]. The existence and use of metadata ("big data") greatly change the situation, as pointed out by the Cyberjustice Laboratory:

> *L'entrée dans l'ère des mégadonnées ("big data") remet en cause les schémas simples et prévisibles d'échange de données tels qu'ils ont existé ces dernières décennies. […] L'émergence de moyens techniques puissants de stockage de données tels que l'infonuagique et de l'utilisation routinière d'internet pour toutes les transactions économiques et les interactions sociales (cookies, géolocalisation, achat, moteur de recherches…) crée des opportunités d'enrichissement considérable. Les données deviennent une matière première comme l'or ou l'argent. […] Le flux de métadonnées, reflet de la profusion des interactions*

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[346] Personal Information Protection and Electronic Documents Act, *op. cit.* note 342, sec. 4(1)a).

[347] *Ibid*., sec. 2; **OFFICE OF THE PRIVACY COMMISSIONER OF CANADA**. *PIPEDA in Brief PIPEDA*, May 2019, online: https://www.priv.gc.ca/fr/sujets-lies-a-la-protection-de-la-vie-privee/lois-sur-la-protection-des-renseignements-personnels-au-canada/la-loi-sur-la-protection-des-renseignements-personnels-et-les-documents-electroniques-PIPEDA/PIPEDA_survol/ (page consulted on June 20, 2019).

[348] **OFFICE OF THE PRIVACY COMMISSIONER OF CANADA**. *PIPEDA fair information practices*, May 2019, online: https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/p_principle/ (page consulted on June 20, 2019); although this is not the object of our study, it should be noted that the wording of the Act, which includes in annex a set of principles that are vague in some cases, would itself deserve an in-depth revision! See on this subject: **SCASSA, T.** *PIPEDA reform should include a comprehensive rewrite*, July 2018, online: http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=279:pipeda-reform-should-include-a-comprehensive-rewrite&Itemid=80 (page consulted on June 20, 2019).

[349] Personal Information Protection and Electronic Documents Act, *op. cit.* note 342, sec. 3.

[350] **POWELL, N and THOMSON, S.** *Remember the internet of the '90s? That's what Canada's outdated data protection laws were meant to handle*, Financial Post, December 2018, online: https://business.financialpost.com/technology/remember-the-internet-of-the-90s-thats-what-our-outdated-privacy-rules-were-built-to-handle (page consulted on May 20, 2019); **GEIST, M.** *No longer fit for purpose: Why Canadian privacy law needs an update*, The Globe and Mail, March 2018, online: https://www.theglobeandmail.com/report-on-business/rob-commentary/no-longer-fit-for-purpose-why-canadian-privacy-law-needs-an-update/article38214804/ (page consulted on May 20, 2019).

> *numériques, se substitue à l'échange bilatéral de données dans le cadre d'une transaction simple qui était le cadre de référence des législations jusqu'à présent*[351].

With metadata, it becomes more difficult to identify online surveillance and to consent to it or not (which is, as we have seen, the very foundation of Canadian law)[352]. Indeed, experts speak of an "archaic" legal framework[353] or of an Act sorely out of date[354].

Given that observation, a major review of PIPEDA has been demanded for several years, in particular by the Privacy Commissioner of Canada, who is responsible for the Act. But in vain. The federal government is lagging behind; only a few modest amendments to the Act have been adopted in recent years, and some 2006 amendments have still not been implemented fully[355]. Canada's inaction is all the more troubling because important advances have been made in online privacy protection elsewhere in the world[356].

Just as troubling are the detours the Commissioner is forced to make to offer Internet users adequate protections under the current PIPEDA. Although his intentions are laudable, at times he is virtually bypassing the law in place.

For example, the Commissioner proposed in April 2019 a radical shift in transborder dataflow for processing purposes. Whereas he had determined in 2019 that it was a transfer and not a communication of personal data, he now proposes to interpret it as a communication, requiring the concerned person's consent[357]. This was prompted by the breach of personal data at Equifax in 2017[358]. Without discussing the merits or appropriateness of this new position, we note that it is hardly supported by the PIPEDA text. Speaking of "significant mental gymnastics" and "dramatic reinterpretation," experts

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[351] **ÉPÉE, F**. *La protection des données personnelles au Canada à l'ère des données massives*, Cyberjustice Laboratory (Laboratoire de cyberjustice), July 2018, online: https://www.cyberjustice.ca/actualites/2018/07/24/la-protection-des-donnees-personnelles-au-canada-a-lere-des-donnees-massives/ (page consulted on June 20, 2019).

[352] **BENYEKHLEF, K, PAQUETTE-BÉLANGER, E and PORCIN, A**. *Vie privée et surveillance ambiante : le droit canadien en chantier,* Droit et cultures 65, 2013, para 49.

[353] **ÉPÉE**. *La protection des données personnelles au Canada à l'ère des données massives, op. cit.* note 351.

[354] **SCASSA.** *PIPEDA reform should include a comprehensive rewrite, op. cit.* note 348.

[355] **GEIST.** *No longer fit for purpose, op. cit.* note 350.

[356] **BARTISH, B P and JEHL, L E**. *GDPR Spurring Legal Reforms in South America With New Legislation In Brazil*, Mondaq, November 2018, online: http://www.mondaq.com/unitedstates/x/751260/data+protection/GDPR+Spurring+Legal+Reforms+in+South+America+With+New+Legislation+in+Brazil (page consulted on June 20, 2019); **YU, T.** *As Asia tightens up on data regulation, the EU GDPR leaves its footprint*, European Center for International Political Economy, October 2018, online: https://ecipe.org/blog/asia-data-regulation-gdp/ (page consulted on June 20, 2019).

[357] **OFFICE OF THE PRIVACY COMMISSIONER OF CANADA**. *Consultation on transborder dataflows, online:* https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-transborder-dataflows/ (page consulted on June 20, 2019); **OFFICE OF THE PRIVACY COMMISSIONER OF CANADA**. *Consultation on transfers for processing - Reframed discussion document*, online: https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-transfers-for-processing/ (page consulted on June 20, 2019).

[358] **OFFICE OF THE PRIVACY COMMISSIONER OF CANADA**. *Investigation into Equifax Inc. and Equifax Canada CO.'s compliance with PIPEDA in light of the 2017 breach of personal information*, PIPEDA report of findings #2019-001, April 2019, online: https://www.priv.gc.ca/en/opc-actions-and-decisions/investigations/investigations-into-businesses/2019/pipeda-2019-001/ (page consulted on June 20, 2019).

quickly criticized that interpretation[359], and some even view it as a broader problem, impairing the credibility of the legal system and framework in place:

> *This reimagining of PIPEDA really stretches statutory interpretation past the breaking point. It also has the effect of undermining the rule of law when an Officer of Parliament decides unilaterally to reinterpret and essentially re-write the statute presented to him by the institution to which he is accountable[360].*

Another initiative by the Commissioner attracted expert criticism in the country. In response to European regulatory measures regarding the right to be forgotten, the Commissioner argued that PIPEDA already recognized that right for Canadian Internet users. Again, this position does not appear to be supported by the text itself (which doesn't mention it)[361].

The Commissioner's position on the existence of a right to be forgotten in the country is currently debated in Federal Court. But for procedural reasons, the question of whether the application of the right to be forgotten would impair freedom of expression cannot be addressed in the case[362]. The result will thus be of little use; it will not settle the issues surrounding the constitutionality of the right to be forgotten in Canada or the limits of such a right, if applicable.

For all those reasons, it is inadequate for the Commissioner to "reform" in this manner the rules for online privacy protection, in response to lawmakers' inaction. The basic rights of Internet users are interdependent and mutually reinforcing, to use the CHRPI's wording[363]. They should not be analysed discretely as the Commissioner proposes, whose mandate and expertise are limited to privacy issues.

The statement by Aurélie Pols, a member of the European Data Protection Supervisor's Ethics Advisory Group, is eloquent on that point:

> *What I usually pass on to data scientists is: don't read the GDPR or the California Privacy Protection Act, but read The Charter of Fundamental Rights of the*

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[359] **GEST, M.** *Rewriting Canadian Privacy Law: Commissioner Signals Major Change on Cross-Border Data Transfers,* April 2019, online: http://www.michaelgeist.ca/2019/04/rewriting-canadian-privacy-law-commissioner-signals-major-change-on-cross-border-data-transfers/ (page consulted on June 20, 2019); **FRASER, D T S.** *Privacy Commissioner proposes new guidance on crossborder transfers, requiring consent for all outsourcing,* Canadian Privacy Law Blog, April 2019, online: https://blog.privacylawyer.ca/2019/04/privacy-commissioner-proposes-new.html (page consulted on June 20, 2019); **FASKEN**. *Privacy Commissioner of Canada Reverses Position on Transfers of Personal Information for Processing, Initiates Consultation on Cross-border Transfers*, Bulletin, May 2019, online: https://www.fasken.com/fr/knowledge/2019/05/van-opc-consultation-on-cross-border-transfers/ (page consulted on June 20, 2019).

[360] **FRASER**. *Privacy Commissioner proposes new guidance on crossborder transfers*, *op. cit.* note 359.

[361] **SCASSA, T.** *OPC Report on Online Reputation Misses the Mark on the Application of PIPEDA to Search Engines,* January 2018, online: http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=270:opc-report-on-online-reputation-misses-the-mark-on-the-application-of-pipeda-to-search-engines&Itemid=80 (page consulted on June 20, 2019); **SCASSA, T.** *It is time to overhaul Canada's data protection–your rights are at stake,* Maclean's, February 2018, online: https://www.macleans.ca/opinion/it-is-time-to-overhaul-canadas-data-protection-your-rights-are-at-stake/ (page consulted on June 20, 2019); **GEIST.** *No longer fit for purpose, op. cit.* note 350.

[362] **MCLEOD, J.** *Federal Court sidesteps constitutional questions–for now–in Google 'right to be forgotten' case,* Financial Post, April 2019, online: https://business.financialpost.com/technology/federal-court-sidesteps-constitutional-questions-for-now-in-google-right-to-be-forgotten-case (page consulted on June 20, 2019).

[363] **INTERNET RIGHTS & PRINCIPLES COALITION.** *Charter of Human Rights and Principles for the Internet, op. cit.* note 123, sec. 21(A).

> *European Union, which talks about discrimination, no torture, the right to dignity… That should drive digital identities–not some specific law in terms of compliance. It's about the high-level human rights of individuals that determine how we build in the right direction to build a society that we want. I think that's a good baseline for data identity*[364].

A Canadian charter or declaration of Internet users' rights would respond precisely to this necessity of considering Internet users' rights as a whole, and not as piecemeal measures of definition and protection, and would thus better protect them. Only with an overall vision and consistent guidelines would it be appropriate to reform more-specific regulations and/or reinterpret them, while keeping in mind the principles and basic rights identified.

A charter would also make it possible to address privacy issues according to shared principles, whatever the organization involved, and thus to reduce the risks of confusion or conflicts of interpretation about the status of online privacy in the country.

For example, the CRTC also has a role to play in protecting the privacy of Canadian Internet users, given its power to implement Canada's telecommunications policy[365]. The CRTC considers that role as complementary to that of the Office of the Privacy Commissioner of Canada[366]. In the past, it has occasionally imposed stricter obligations than PIPEDA on telecommunications service providers[367]. It's important to ensure that those organizations continue adopting compatible interpretations on a given subject, and a charter could be highly useful in helping them do that.

3.1.2 THE SITUATION IN TERMS OF INTERNET ACCESS

The situation is somewhat different for Internet access. No Canadian law covers it or even recognizes it as a fundamental right, as opposed to what is the case in Finland[368] and the United Kingdom[369].

On this issue, the interest of a charter of rights for Internet users thus resides not in clarifying or improving existing rights, but in recognizing a right to Internet access in Canada. And such a recognition, which would impose active measures to guarantee actual and universal Internet access, appears more and more as a necessity.

The Canadian Telecommunications Policy, integrated in the Telecommunications Act, recognizes the essential nature of telecommunications (telephony, Internet access) "in the

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[364] **JOHNSEN, K.** *Why data privacy is a human right: in conversation with Aurélie Pols,* Medium, October 2018, online: https://medium.com/fwd50/why-data-privacy-is-a-human-right-in-conversation-with-aur%C3%A9lie-pols-af6e1901eaf6 (page consulted on June 20, 2019).
[365] Telecommunications Act, *op. cit.* note 344, sec. 7(i).
[366] **CRTC**. 2009-657, *op. cit.* note 343, para 102.
[367] *Ibid.*, para 102.
[368] **JOHNSON, B.** *Finland makes broadband access a legal right,* The Guardian, October 2009, online: https://www.theguardian.com/technology/2009/oct/14/finland-broadband (page consulted on June 20, 2019); *First nation makes broadband access a legal right,* CNN, July 2010, online: http://www.cnn.com/2010/TECH/web/07/01/finland.broadband/index.html (page consulted on June 20, 2019).
[369] **KAUFMAN, M.** *The UK calls internet access a 'legal right' like water and power,* Mashable, December 2017, online: https://mashable.com/2017/12/20/uk-decides-broadband-internet-is-a-legal-right/ (page consulted on June 20, 2019).

maintenance of Canada's identity and sovereignty[370]." The objective is stated of enabling all Canadians to access reliable, affordable and quality telecommunications services[371]. But that objective is only one of nine the CRTC must take into account in exercising its powers; and other objectives must be taken into account on a variety of subjects (free market, research and development, Canadian ownership and protectionism, etc.). To that balance between policy objectives – which reduces from the start the weight of the universal accessibility objective – are added the instructions the government can give the CRTC regarding the policy's implementation, which to date have not favoured universal access[372].

The CRTC has recognized several times the importance of Internet access (particularly broadband access, nowadays). In 2016, it even incorporated broadband in its objective of universal service under the Telecommunications Act, given that broadband access is "fundamental to Canada's future economic prosperity, global competitiveness, social development, and democratic discourse[373]."

However, that inclusion in the objective of universal service was not accompanied by any service obligation for Internet access providers, in contrast to a CRTC decision about residential telephone services:

> *The CRTC released its Telecommunication Decision 99-16. In this decision, the CRTC established the Basic Service Objective for telephone service. This created a minimum level of service that must be made available to consumers, regardless of their place of residence. Services such as touch-tone dialing, access to emergency service and long distance, directory assistance and a copy of the telephone directory. The Basic Service Requirement unfortunately does not apply to broadband internet services[374].*

It was a missed opportunity to establish real universal Internet access. And yet, there is no lack of models in this regard. The United Kingdom, Finland, Switzerland etc.: several countries have adopted service obligation regulations for Internet access services[375].

In Canada, an objective of universality is discussed for now, rather than a consumer right to Internet access. And practical problems of access persist.

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[370] Telecommunications Act, *op. cit.* note 344, sec. 7.
[371] *Ibid.,* sec. 7(1)b).
[372] Order Issuing a Direction to the CRTC on Implementing the Canadian Telecommunications Policy Objectives, SOR/2006-355.
[373] **CRTC**. Telecom Regulatory Policy CRTC 2016-496; **SANDLE, P.** *Britons will have legal right to high-speed broadband by 2020,* Reuters, December 2017, online: https://uk.reuters.com/article/uk-britain-broadband/britons-will-have-legal-right-to-high-speed-broadband-by-2020-idUKKBN1EE0RS (page consulted on June 20, 2019).
[374] **PIAC**. *Is Broadband Basic Service?,* 2010, p. 7, online: http://www.piac.ca/wp-content/uploads/2014/11/is_broadband_basic_service_piac_aug_2010.pdf (document consulted on June 20, 2019).
[375] **HOUSE OF COMMONS (UK).** *A Universal Service Obligation (USO) for Broadband,* Commons Library Briefing, CBP No. 8146, June 2018; **INTERNATIONAL TELECOMMUNICATIONS UNION.** *Broadband now a legal right in Finland,* ITU News6, 2010, online: https://www.itu.int/net/itunews/issues/2010/06/pdf/201006_34.pdf (document consulted on June 20, 2019); **FEDERAL COUNCIL OF THE SWISS CONFEDERATION.** *Broadband in the universal service,* online: https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-7308.html (page consulted on June 20, 2019).

In 2018, broadband was simply unavailable, geographically, for over 15% of households in Canada[376]. Several population groups are particularly affected:

- Over 60% of rural households[377];
- A disproportionate number of northern communities[378];
- A disproportionate number of native communities[379].

According to the House of Commons Standing Committee on Industry, Science and Technology, "this 'digital divide' exacerbates the challenges they already face[380]."

The situation should improve in coming years. the year 2019 will have been rich in announcements of investments in broadband deployment across Canada. The government recently announced a plan to connect all Canadians to high-speed broadband by 2030[381]. The amounts it intends to invest in broadband deployment in rural, remote of low population density areas are considerable[382], but this type of promises is often made, particularly as elections approach, and previous investment plans have not yielded the expected results[383]. So we'll see if this time it's for real…

Moreover, even if the availability of Internet access infrastructures were strongly improved in the country, universal access would not follow. What is the use of Internet access services being available if consumers can't afford the price of those services?

That is a second cause of the inequality of Internet access in Canada. Economic inequality, making the services unaffordable for some, is too often ignored or forgotten by governments promising investments to "connect all Canadians." The CRTC also lags

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[376] **CRTC**. *Communications Monitoring Report,* 2018, p. 152, online: https://crtc.gc.ca/pubs/cmr2018-en.pdf (document consulted on June 20, 2019).
[377] *Ibid.*
[378] **JACKSON, E**. *'Fibre is Nunavut's railroad': Senator boosts new pitch for Pan-Arctic fibre optic cable to bring decent Internet to the north,* Financial Post, September 2016, online: https://business.financialpost.com/technology/fibre-is-nunavuts-railroad-senator-boosts-new-pitch-for-pan-arctic-fibre-optic-cable-to-bring-decent-internet-to-nunavut (page consulted on June 20, 2019).
[379] **STOLLERY, B.** *Canada's Digital Divide: Preserving Indigenous Communities Means Bringing Them Online*, Friends of Canadian Broadcasting, May 2018, online: https://friends.ca/explore/article/canadas-digital-divide-preserving-indigenous-communities-means-bringing-them-online/ (page consulted on June 20, 2019).
[380] **HOUSE OF COMMONS.** *Broadband Connectivity in Rural Canada: Overcoming the Digital Divide,* Report of the Standing Committee on Industry, Science and Technology, 42nd Parliament, 1st session, April 2017, p. 11, online: https://www.noscommunes.ca/Content/Committee/421/INDU/Reports/RP9711342/indurp11/indurp11-e.pdf (document consulted on June 20, 2019).
[381] *Budget fédéral 2019 : Internet haute vitesse, la priorité des municipalités rurales,* Radio-Canada, March 2019, online: https://ici.radio-canada.ca/nouvelle/1159140/internet-rural-budget-manitoba (page consulted on June 20, 2019).
[382] **SHEKAR, S.** *Budget 2019 invests $1.7 billion for high-speed internet access by 2030*, Mobilesyrup, March 2019, online:https://mobilesyrup.com/2019/03/19/budget-2019-internet-rural-communities/ (page consulted on June 20, 2019).
[383] "Successive Liberal and Conservative governments have tried to address the lack of universal, affordable broadband services through targeted spending programs in rural communities that lack access. Those programs have provided some modest benefits, but have failed to ensure affordable access for all.": **GEIST, M.** *Make universal, affordable broadband an election issue: Geist*, Toronto Star, September 2015, online: https://www.thestar.com/business/2015/09/28/make-universal-affordable-broadband-an-election-issue-geist.html (page consulted on June 20, 2019).

behind in this regard, and regularly states – as a *leitmotiv* – that market forces must be given time to work their magic[384].

And yet, the problem is real and has not improved in recent years. Canadian households spend on average almost $50 a month for their Internet access service[385]. The Canadian market looks dismal when the price of that service in Canada is compared with prices in the other Western markets[386].

Low-income households are of course most affected. In 2016, the proportion of their income spent on broadband services was three times higher than the average for Canadian households[387]. A study conducted by the Public Interest Advocacy Centre in 2015 reported that communications services, including Internet access services, ranked fourth in the expenditures of the bottom quintile, after housing, transportation and food, but before clothing, health care and education[388].

A 2016 EKOS survey also revealed that 36% of Canadians surveyed limited their Internet use because of its cost[389]. And that unaffordability is reflected in the country's Internet adoption rates. While 98.1% of fifth quintile households ($130,046 and over) use the Internet at home, that proportion falls to 65.2% for first quintile households ($32,090 and less)[390]. Given that economic barrier to access, more than one-third of the country's poorest households don't use the Internet at home – a network the CRTC has called an essential instrument economically, socially, democratically and culturally in Canada[391].

Net neutrality concerns

A Canadian charter or declaration of rights for Internet users could also reinforce existing protections of Net neutrality in Canada.

It should be noted that the current Telecommunications Act, adopted in 1993, well before the development of the very concept, obviously doesn't expressly mention Net neutrality[392].

The Act does contain two sections prohibiting providers from intervening in the content of communications; those sections, when applied to the Internet, guarantee, thanks to the

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[384] See for example: **CRTC**. Telecom Decision CRTC 2018-31, para 22.
[385] **CRTC**. *Communications Monitoring Report, op. cit.* note 376, p. 27.
[386] **NORDICITY.** *2017 Price Comparison Study of Telecommunications Services in Canada and Select Foreign Jurisdictions,* October 2017, pp. 54-55, online: https://www.ic.gc.ca/eic/site/693.nsf/vwapj/Nordicity2017EN.pdf/$file/Nordicity2017EN.pdf (document consulted on June 20, 2019); **BACHAND, O.** *Payons-nous plus cher qu'ailleurs pour accéder à Internet?,* Radio-Canada, December 2016, online: https://ici.radio-canada.ca/nouvelle/1007292/prix-acceder-internet-consommation-crtc (page consulted on June 20, 2019).
[387] **CRTC**. *Communications Monitoring Report, op. cit.* note 376, p. 30.
[388] **PIAC**. *No Consumer Left Behind: A Canadian Affordability Framework for Communications Services in a Digital Age,* 2014, p. 18, online: http://www.piac.ca/wp-content/uploads/2015/03/PIAC-No-Consumer-Left-Behind-Final-Report-English.pdf (consulted on February 15, 2019).
[389] **EKOS**. *Let's Talk Broadband,* findings report, January 2016, p. 31, online: http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/crtc/2016/030-15-e/report.pdf (document consulted on June 20, 2019).
[390] **CRTC**. *Communications Monitoring Report, op. cit.* note 376, p. 41.
[391] **CRTC.** Telecom Regulatory Policy CRTC 2016-496, para 21; see also paras 60 and 103.
[392] **WU, T.** *Network Neutrality, Broadband Discrimination*, Journal on Telecom and High Tech Law, vol 2, 2003.

CRTC's interpretation and application to date, what is generally considered the determining feature of Net neutrality[393]:

> *27(2). No Canadian carrier shall, in relation to the provision of a telecommunications service or the charging of a rate for it, unjustly discriminate or give an undue or unreasonable preference toward any person, including itself, or subject any person to an undue or unreasonable advantage[394].*
>
> *36. Except where the Commission approves otherwise, a Canadian carrier shall not control the content or influence the meaning or purpose of telecommunications carried by it for the public[395].*

However, it may be desirable that a law explicitly recognize and protect that right, in order to avoid the possibility of a change in the interpretation of current regulations. Moreover, the presence of terms such as "except where the Commission approves otherwise" in section 36 of the Act opens the way to Net neutrality exceptions that would be left to the discretion of the CRTC, which must take into account several Canadian Telecommunications Policy objectives that might oppose Net neutrality (maintenance of the free market, use of Canadian facilities, etc.).

Those fears of a change in interpretation or of a reduced protection of Net neutrality in the country are not simply based on speculations: For example, it's somewhat worrisome that a CRTC representative has argued against enshrining Net neutrality in the Telecommunications Act, since that "might not fit with the flexibility that one might want going forward[396]." Providers, likely encouraged by the Commission's position, stated afterward to a House of Commons committee that adopting "more rigid" provisions regarding Net neutrality "could pose a risk to future innovation[397]."

Geist strongly criticized that opening on the part of the CRTC and several of its members, including its chair, to "modify" its analysis or the application of Net neutrality provisions:

> *[I]t does appear that the CRTC chair has bought into the position that would erode the policy despite considerable reason for skepticism. The latest calls to weaken net neutrality bear a striking resemblance to older campaigns from many of the same companies opposed to a policy that would restrict their ability to establish a two-tier Internet. In fact, researchers have noted that abandoning net neutrality could harm telemedicine, raising the prospect of two-tier tele-health care with faster networks for deeper pocketed providers or patients. Similar doubts have been raised with respect to autonomous cars, with experts noting that such vehicles are likely to use unlicensed spectrum known as the Dedicated Short Range Communications band to communicate.*
>
> *As these technologies develop, the pressure from large incumbents to water down net neutrality rules is sure to increase. With the CRTC chair citing with approval*

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[393] See for example: **CRTC**. 2009-657, *op. cit.* note 343; **CRTC**. 2015-26, *op. cit.* note 343; **CRTC**. 2017-104, *op. cit.* note 343.
[394] Telecommunications Act, *op. cit.* note 344, sec. 27(2).
[395] Telecommunications Act, *op. cit.* note 344, sec. 36.
[396] **HOUSE OF COMMONS.** *The Protection of Net Neutrality in Canada*, Report of the Standing Committee on Access to Information Privacy and Ethics, 42nd Parliament, 1st session, May 2018, p. 8, online: https://www.ourcommons.ca/Content/Committee/421/ETHI/Reports/RP9840575/ethirp14/ethirp14-e.pdf (document consulted on June 20, 2019).
[397] *Ibid.,* pp. 9-10.

> *incumbent talking points without the benefit of a hearing or evidentiary record, it would appear that maintaining Canada's leadership on net neutrality could face a policy fight at the commission in the years ahead[398].*
>
> (our underlined))

If taken seriously, the alarmist talk about Net neutrality protection in the country could raise fears of imminent and serious erosion of the principle. Including a right to Net neutrality in a Canadian charter or declaration would ensure that the interpretation and application of this indispensable principle don't depend on the goodwill or good intentions of the CRTC in its interpretation of a law that is dated and of which a reform would likely be complex. Enshrining the principle in a framework law of quasi-constitutional status would clarify definitively that Net neutrality is not simply a technical obligation on the part of providers, but a fundamental right of Canadian Internet users[399], on the same level as online freedom of expression or of religion.

3.2 Canada's lethargy, until very recently, in codifying Internet users' rights

We thus observe that the Canadian Charter of Human Rights and Freedoms as well as other laws in the country recognize a set of fundamental rights that must also be protected on the Internet. We also observe that the existing instruments prove incomplete in asserting human rights in a digital environment: some of the guaranteed rights are not suited for the digital era; some rights that appear fundamental in the digital world and are intimately related to it are absent from those existing instruments; and the absence of a coherent vision for applying existing rights online risks making the protection of Canadian Internet users disorderly and inconsistent.

Given that conclusion, it may be argued that the necessity of establishing a Charter of Rights for Internet Users in the country is evident.

The idea of considering such an instrument is also perfectly in line with the government's stated willingness to make Canada "an advanced digital environment[400]." This has been and is an effervescent period for the development of public policies regarding the Internet

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[398] **GEIST, M.** *CRTC Chair Opens the Door to Weakening Canadian Net Neutrality Rules*, November 2018, online: http://www.michaelgeist.ca/2018/11/crtc-chair-opens-the-door-to-weakening-canadian-net-neutrality-rules/ (page consulted on June 20, 2019).

[399] **SMITH, P.** *At net neutrality panel, Tim Berners-Lee says open internet is 'a human right',* Boston Business Journal, April 2018, online: https://www.bizjournals.com/boston/news/2018/04/20/at-net-neutrality-panel-tim-berners-lee-says-open.html (page consulted on June 10, 2019); **KULSHRESTHA, S**. *Net Neutrality: A Human Right for the Digital Age?,* Inquiries Journal, 2013, vol 58, online: http://www.inquiriesjournal.com/articles/744/net-neutrality-a-human-right-for-the-digital-age (page consulted on June 20, 2019); **GRABER, C.** *Bottom-Up Constitutionalism: The Case of Net Neutrality*, Transnational Legal Theory, 7 (04), March 2017, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2941985 (document consulted on June 20, 2019); **HUDSON, O.** *Net neutrality is part of the overall struggle for human rights in a digital age,* International Journal on Human Rights, 2018, vol 15 No. 27, online: https://sur.conectas.org/wp-content/uploads/2018/07/sur-27-ingles-interview-with-david-kaye.pdf (document consulted on June 20, 2019); **FRANKEN, A.** *Net neutrality is foremost free speech issue of our time,* CNN, August 2010, http://www.cnn.com/2010/OPINION/08/05/franken.net.neutrality/index.html (page consulted on June 10, 2019).

[400] **GOVERNMENT OF CANADA.** *2017 Budget*, *op. cit.* note 13.

in the country. Indeed, the government has launched several major "projects" in this regard in recent years, such as:

- Developing the "Digital Canada 150" strategy in 2014 [401];
- Holding national consultations on the digital world and data in 2018, to "foster Canadian leadership" in digital technologies and align innovation with consumer trust[402];
- Developing the Canadian government's digital standards[403] and naming a Minister for Digital Policy in 2018, with the mandate to improve the government's digital services[404];
- Participating in several operational aspects of Internet governance, through the Internet & Jurisdiction Policy Network[405];
- Joining the Digital 9 (also known as D9), a network of governments focused on the improvement and effectiveness of digital administrations[406].

But while Internet users' rights doubtless constitute a fundamental aspect of any discussion of today's digital environment, the Canadian government has remained strangely inactive on this issue, until very recently, despite the demands of several lawmakers, organizations and experts.

After an overview of those demands and of the government's timid participation in past undertakings to recognize and protect Internet users' rights, we will discuss the new (and disappointing) Canadian Digital Charter announced with great fanfare in spring 2019.

3.2.1 GROWING DEMANDS FOR A CANADIAN INITIATIVE

Following Berners-Lee's first comments, in 2014, on the urgency of protecting Internet users' basic rights and freedoms and of developing a "Web Magna Carta," several Canadian experts have spoken up on the issue.

In a speech before the Canadian Bar Association in 2014, Patricia Kosseim, Senior General Counsel and Director General of the Office of the Privacy Commissioner of

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401 **GOVERNMENT OF CANADA.** *Digital Canada 150,* 2014, online: https://www.ic.gc.ca/eic/site/028.nsf/vwapj/DC150-EN.pdf/$FILE/DC150-EN.pdf (document consulted on June 20, 2019).

402 **GOVERNMENT OF CANADA.** *Positioning Canada to Lead in a Digital- and Data-driven Economy: Discussion Paper*, 2018, online: https://www.ic.gc.ca/eic/site/084.nsf/eng/00007.html (page consulted on June 20, 2019).

403 **GOVERNMENT OF CANADA.** *Government of Canada's new Digital Standards place users at centre of service design,* News release, online: https://www.canada.ca/en/treasury-board-secretariat/news/2018/09/government-of-canadas-new-digital-standards-place-users-at-centre-of-service-design.html (page consulted on June 20, 2019).

404 **OFFICE OF THE PRIME MINISTER OF CANADA.** *Prime Minister announces changes to the Ministry,* nouvelle, online: https://www.canada.ca/en/treasury-board-secretariat/news/2018/09/government-of-canadas-new-digital-standards-place-users-at-centre-of-service-design.html (page consulted on June 20, 2019).

405 **INTERNET & JURISDICTION POLICY NETWORK**. *Members of the I&J Programs' Contact Groups*, online: https://www.internetjurisdiction.net/news/operational-approaches-documents-with-concrete-proposals-for-norms-criteria-and-mechanisms-released#timeline (page consulted on June 20, 2019).

406 **GOVERNMENT OF CANADA.** *Introducing the D9 & its Secretariat,* December 2018, online: https://open.canada.ca/en/blog/introducing-d9-its-secretariat (page consulted on June 20, 2019).

Canada, argued that there would certainly be benefits of adopting a digital bill of rights[407]. She provided few details on the way to proceed, and mainly referred to Tim Berner's proposal, but still stated a few rights that could be included (ethical use of online data, the right to be forgotten, etc.).

Similarly, Professor Michael Geist, Canada Research Chair in Internet and E-Commerce Law at the University of Ottawa, offered his support to an international initiative to codify digital rights in 2014[408]. He stated that that the initiative would correspond well with the government of the day's willingness – still present in 2019, apparently – to adapt the country to the new digital reality:

> *As the government finally embarks on its digital strategy, it has an opportunity to do more than just tout recent policy initiatives. Instead, it should consider linking its goals with the broader global initiatives to help create the Web we want[409].*

More recently, three civil society groups, Tech Reset Canada, the Digital Justice Lab and the Centre for Digital Rights launched a petition signature campaign to urge the federal government to develop a national strategy on digital rights[410]. That campaign was supported by several influential organizations in the country, including the Canadian Civil Liberties Association, the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic, and AccessNow[411].

What about Canadian Internet users in all those initiatives? We identified no survey of the Canadian public on an eventual codification of their fundamental rights online. Still, several recent surveys expose the importance attached by the Canadian public to the exercise and protection of basic rights online[412].

3.2.2 A LIMITED ROLE IN PAST INTERNATIONAL INITIATIVES

Despite its involvement in certain international Internet governance organizations, we observe that Canada has remained very discreet to date in the debate on the official

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[407] **OFFICE OF THE PRIVACY COMMISSIONER OF CANADA**. *Remarks at the Canadian Bar Association Legal Conference*, August 2014, online: https://www.priv.gc.ca/en/opc-news/speeches/2014/sp-d_20140815_pk/ (page consulted on June 20, 2019).
[408] **GEIST, M.** *The Web We Want: Could Canada Lead on a Digital Bill of Rights?,* The Toronto Star, March 2014, online: https://www.thestar.com/business/tech_news/2014/03/14/the_web_we_want_could_canada_lead_on_a_digital_bill_of_rights.html# (page consulted on June 20, 2019).
[409] *Ibid.*
[410] **DIGITAL RIGHTS NOW**. *Petition*, online: https://droitsnumeriques.ca/ (page consulted on June 20, 2019); **GALANG, J.** *Advocacy groups call on Canadian government to tackle digital rights in petition*, Betakit, June 2018, online: https://betakit.com/advocacy-groups-call-on-canadian-government-to-tackle-digital-rights-in-petition/ (page consulted on June 20, 2019).
[411] **DIGITAL RIGHTS NOW**. *Friends of DRN*, online: https://digitalrightsnow.ca/friends-of-drn/ (page consulted on June 20, 2019).
[412] **OFFICE OF THE PRIVACY COMMISSIONER OF CANADA.** *2016 Survey of Canadians on Privacy*, *op. cit.* note 117; **ANGUS REID INSTITUTE.** *Vast majority of Canadians support Net Neutrality, op. cit.* note 110; **IPSOS**. *Nine in Ten Canadians (92%) Believe in Right to Privacy Online,* April 2018, online: https://www.ipsos.com/en-ca/news-polls/guaranteed-removals-online-privacy-poll-April-2018 (page consulted on June 20, 2019).

international recognition of Internet users' rights. That absence appears in fact to be in line with a certain disengagement by the Canadian government with regard to human rights[413].

Canada did not participate in the development of recent initiatives to codify human rights abroad, such as the IRPC's Charter of Human Rights & Principles for the Internet, and the country's few international initiatives regarding Internet users' rights are rather disappointing.

Involvement in the Freedom Online Coalition

In answer to the question "What are we doing for Internet freedom?," the Canadian government's website refers to its involvement in the Freedom Online Coalition[414]. Canada is one of the 30 member countries of that coalition, which has the mission of supporting and protecting the exercise of fundamental rights and freedoms online[415]. Among the coalition's current priorities is that of developing global standards on human rights online, by means of shared declarations by member states[416]. Those shared declarations have concerned a variety of subjects to date: use of technologies (2014), access to social media (2014), national cybersecurity policy (2016), state-ordered Internet access interruptions (2017), etc.[417]

But is that Canadian involvement in the coalition sufficient, or even useful? In that involvement, does Canada really guarantee Internet freedom?

A study produced by the Center for Global Communication Studies and the Internet Policy Observatory at the University of Pennsylvania reported the coalition members' concerns about the lack of concrete achievements and the difficulty in evaluating the group's specific impacts[418]. The coalition was also criticized externally for its inaction, even its complacency, following Edward Snowden's revelations of online surveillance by the United States and

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[413] **GALLOWAY, G.** *Canada's global promotion of human rights has declined: internal memo*, The Globe and Mail, September 2015, online: https://www.theglobeandmail.com/news/politics/leaked-government-document-claims-canadas-international-clout-under-threat/article26583397/ (page consulted on June 10, 2019); **SCHÖNWÄLDER, G.** *Principles and Prejudice: Foreign Policy Under the Harper Government*, Centre for International Policy Studies, Policy Brief No. 24, June 2014, online: https://www.cips-cepi.ca/publications/principles-and-prejudice-foreign-policy-under-the-harper-government/ (page consulted on June 20, 2019); **AKHAVAN, P.** *Canada and international human rights law: is the romance over?,* Canadian Foreign Policy Journal, vol 223, 2016, pp. 331-338.

[414] **GOVERNMENT OF CANADA.** *Internet Freedom*, online: https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/internet_freedom-liberte_internet.aspx?lang=eng (page consulted on June 20, 2019).

[415] **FREEDOM ONLINE COALITION**. *Aims and Priorities*, online: https://freedomonlinecoalition.com/about-us/about/ (page consulted on June 20, 2019).

[416] *Ibid.*

[417] **FREEDOM ONLINE COALITION**. *Joint statements*, online: https://freedomonlinecoalition.com/joint-statements/ (page consulted on June 20, 2019).

[418] **MORGAN, S.** *Clarifying Goals, Revitalizing Means: An Independent Evaluation of the Freedom Online Coalition*, Internet Policy Observatory, 2016, p. 9, online: https://repository.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1001&context=internetpolicyobservatory (document consulted on June 20, 2019).

the United Kingdom, two of the coalition's member states[419]. According to Human Rights Watch:

> *Despite great rhetoric by a number of member governments, the Coalition's potential has been deeply undermined by revelations of mass surveillance from some of its most active founding members.*
>
> *[…] It is difficult to imagine that FOC members will be able to lead other governments on the path to freedom and security in the digital realm if they are not willing to hold themselves accountable to the principles they lay out for themselves[420].*

Support for three resolutions of the United Nations Human Rights Council

Since 2012, Canada has co-sponsored at the United Nations Human Rights Council several resolutions for the promotion, protection and enjoyment of human rights on the Internet[421]. Those resolutions recognize the importance of a global and open Internet network "towards development in its various forms" and state, among other things, that the rights enjoyed by persons offline must also be protected online[422].

Two of those resolutions encouraged states to adopt "national Internet-related public policies that have the objective of universal access and enjoyment of human rights at their core[423]." On this point, we're reminded of the difficulties still faced by many Canadians, for geographic, economic or other reasons, to access the Internet…

3.2.3 THE FEDERAL PARLIAMENT'S REJECTION OF A CODIFICATION ATTEMPT IN 2018

In response to the growing demand for a Canadian initiative regarding the exercise and protection of Internet users' rights, the New Democratic Party, currently the second opposition party, proposed the adoption of a "Canadian version" of a charter of rights for

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[419] **DONAHOE, E.** *Dispatches: Can the Freedom Online Coalition Live up to its Name?,* Human Rights Watch, May 2014, online: https://www.hrw.org/news/2014/05/02/dispatches-can-freedom-online-coalition-live-its-name (page consulted on June 20, 2019); **CARLSON, K.** *EFF Joins Coalition Calling on FOC Member States to Live up to Their Stated Commitments*, Electronic Frontier Foundation, April 2014, online: https://www.eff.org/deeplinks/2014/04/eff-calls-members-freedom-online-coalition-assess-their-stated-commitments (page consulted on June 20, 2019).

[420] **DONAHOE.** *Dispatches, op. cit.* note 419.

[421] **HUMAN RIGHTS COUNCIL.** *The promotion, protection and enjoyment of human rights on the Internet,* res 20/8, 20th session, doc A/HRC/RES/20/8, 2012, online: https://undocs.org/pdf?symbol=en/A/HRC/RES/20/8; **HUMAN RIGHTS COUNCIL.** *The promotion, protection and enjoyment of human rights on the Internet,* res 26/13, 26th session, doc A/HRC/RES/26/13, 2014, online: https://undocs.org/pdf?symbol=en/A/HRC/RES/26/13; **HUMAN RIGHTS COUNCIL.** *The promotion, protection and enjoyment of human rights on the Internet,* res 32/13, 32nd session, doc A/HRC/RES/32/13, 2016, online: https://undocs.org/pdf?symbol=en/A/HRC/RES/32/13.

[422] *Ibid*.

[423] *Ibid*.

Internet users in April 2018, in the form of a motion titled "Digital Bill of Rights"[424]. That motion (M-175) was ultimately not put to a vote[425].

In a House of Commons speech, Deputy Brian Masse, the motion's author, argued that it was required in addition to existing and future laws. He reproached the state's lack of an overall approach to the protection and exercise of fundamental rights online in the country.

> *What I have been calling for in Motion No. 175, a digital bill of rights, is a way to bring about a set of rules and guiding principles for a new digital age. Any single piece of legislation will not do the job. Again, the government is approaching this in a very piecemeal way at this time, when we need a much more sophisticated and robust discussion with regard to a new digital age[426].*

Despite its "Digital Bill of Rights" title, the motion pertained foremost to the rights of telecommunications service consumers. It doesn't associate those rights with the Internet, but with telecommunications services as a "tool for social, democratic, economic and cultural growth[427]." These are some of the principles referred to:

- The affordability, efficiency and universality of the telecommunications services offered[428];
- The transparency of service providers regarding service costs[429];
- The responsibility of telecommunications service providers to proactively protect their users' personal information in the digital space[430].

The motion did also mention a few Internet-related principles that should guide the government and governmental organizations charged with regulating telecommunications services – principles more often found in codification initiatives developed in recent years, such as:

- Net neutrality[431];
- Online privacy protection: the necessity of informed consent to the collection, use and communication of online personal information[432];
- Cybersecurity: the protection of Canadians against "foreign or domestic cyber-attacks that compromise public safety, financial security, personal information, and our democracy[433]";

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[424] **HOUSE OF COMMONS.** (Parliamentarian Brian Masse) *Motion No. 175 (Telecommunications services),* 42nd Parliament, 1st session, online: https://www.ourcommons.ca/Parliamentarians/en/members/Brian-Masse(9137)/Motions?sessionId=152&documentId=9779375 (page consulted on June 20, 2019).
[425] *Ibid.*
[426] **HOUSE OF COMMONS.** *Journal of Debates* 340, 42nd Parliament, 1st session, October 23, 2018, online: https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-340/hansard (page consulted on June 20, 2019).
[427] **HOUSE OF COMMONS.** *Motion No. 175 (Telecommunications services), op. cit.* note 424
[428] *Ibid.,* Principle (A).
[429] *Ibid.,* Principle (B).
[430] *Ibid.,* Principle (C).
[431] *Ibid.,* Principle (F).
[432] *Ibid.,* Principle (G).
[433] *Ibid.,* Principle (D).

- Digital literacy: the possibility for Canadians of all ages to improve their digital skills[434];
- Consumer rights: digital companies' respect for consumer rights in adhesion contracts[435].

In response to the motion proposed by Masse and the NPD, Deputy David Lametti, then Parliamentary Secretary of the Minister of Innovation, Science and Economic Development and now Justice Minister, offered a limited response to the issue of online privacy protection:

> *Our government is perfectly aware of how important it is to establish strong and effective rules to protect personal information. That is becoming more and more obvious in this digital age where every aspect of the economy and global society are becoming interconnected[436].*

He also referred to eventual amendments to the Personal Information Protection and Electronic Documents Act (PIPEDA) – a comment that somewhat confirms, ironically, the limited vision with a "piecemeal" approach criticized by Masse regarding the fundamental rights of Internet users.

After being questioned again about the motion and other issues it raises (access, security, etc.), Lametti answered very vaguely, and that ended the discussion in the House of Commons:

> *Mr. Speaker, the hon. member is correct to say that there are many issues on the table, and he has highlighted a large number of them. For the part of the government, there are a number of studies and collaborations ongoing, the largest one being our current consultation on data across the country. This will form another part of the information and evidence we have in front of us to try to manage a great number of these issues. We look forward to working with the hon. member in the future toward the resolution of this balance[437].*

In short, during those discussions in October 2018, the government showed little openness to the development of a Charter of Rights for Internet Users in the country.

And yet…

3.2.4 The announcement of a Canadian Digital Charter in spring 2019

In May 2019, the government announced the establishment of Canada's Digital Charter, a document asserting 10 principles that "will build a foundation of trust for Canadians in the digital sphere" and encourage "continued growth across our economy[438]."

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[434] *Ibid.,* Principle (K).
[435] *Ibid.,* Principle (J).
[436] **HOUSE OF COMMONS.** *Journal of Debates, op. cit.* note 426.
[437] *Ibid.*
[438] **GOVERNMENT OF CANADA.** *Minister Bains announces Canada's Digital Charter*, news release, May 2019, online: https://www.canada.ca/en/innovation-science-economic-development/news/2019/05/minister-

These are the principles:

> ***1. Universal Access:*** *All Canadians will have equal opportunity to participate in the digital world and the necessary tools to do so, including access, connectivity, literacy and skills.*
>
> ***2. Safety and Security:*** *Canadians will be able to rely on the integrity, authenticity and security of the services they use and should feel safe online.*
>
> ***3. Control and Consent:*** *Canadians will have control over what data they are sharing, who is using their personal data and for what purposes, and know that their privacy is protected.*
>
> ***4. Transparency, Portability and Interoperability:*** *Canadians will have clear and manageable access to their personal data and should be free to share or transfer it without undue burden.*
>
> ***5. Open and Modern Digital Government:*** *Canadians will be able to access modern digital services from the Government of Canada, which are secure and simple to use.*
>
> ***6. A Level Playing Field:*** *The Government of Canada will ensure fair competition in the online marketplace to facilitate the growth of Canadian businesses and affirm Canada's leadership on digital and data innovation, while protecting Canadian consumers from market abuses.*
>
> ***7. Data and Digital for Good:*** *The Government of Canada will ensure the ethical use of data to create value, promote openness and improve the lives of people—at home and around the world.*
>
> ***8. Strong Democracy:*** *The Government of Canada will defend freedom of expression and protect against online threats and disinformation designed to undermine the integrity of elections and democratic institutions.*
>
> ***9. Free from Hate and Violent Extremism:*** *Canadians can expect that digital platforms will not foster or disseminate hate, violent extremism or criminal content.*
>
> ***10. Strong Enforcement and Real Accountability:*** *There will be clear, meaningful penalties for violations of the laws and regulations that support these principles*[439].

bains-announces-canadas-digital-charter.html (page consulted on June 20, 2019); **GOVERNMENT OF CANADA.** *Canada's Digital Charter: Trust in a digital world*, online: https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00108.html (page consulted on June 20, 2019).

[439] *Ibid*.

Despite the name it was given, the Digital Charter is clearly no such thing. It's rather a list of principles that must guide the Canadian government's digital strategy – a list of legislative reforms, regulations and public policies the government intends to implement in coming years. The verbs' future tense ("will ensure," "will defend," etc.) is notable, as are conclusions such as "Canadians can expect" and "should feel safe." Thus, so long as the steps and measures announced are not completed, it will be impossible for a Canadian Internet user to rely on the Digital Charter's principles. We're far from a real Charter, i.e. a document recognizing rights and freedoms and generally providing remedies to ensure their respect. And yet, some of the Digital Charter's principles would have deserved the status of rights and official recognition as such, for example the principles of Internet access and of Internet users' greater control of their online personal data[440].

Still, while recognition of those rights would have been more appropriate, the Digital Charter is not totally without usefulness or interest. Canada much needed clear guidance for the exercise and protection of human rights online. The coming years will very likely be important in terms of legislative changes in the digital environment. Reforms are thus announced (or strongly recommended) for a series of federal laws: *Copyright Act*[441], *Telecommunications Act, Broadcasting Act*[442], *Canada Elections Act*[443], etc. Necessary legislative changes will also have to be made to implement the United States Mexico Canada Agreement (USMCA)[444].

It's important for those many reforms to be coherent, and that lawmakers thus use a holistic and intersectoral approach to Internet governance. In that sense, the newly announced Digital Charter could meet a need for guidance.

We note with interest the announcement, in tandem with the Digital Charter's unveiling, of a complete reform of PIPEDA. Minister Bains has stated that this reform corresponded to implementation of the Digital Charter's principles[445]. Recognition of a right to data portability, reinforcement of consent regulations, imposition of an algorithmic transparency

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[440] See what SCASSA, T. writes on this subject, in: **GEIST, M.** *The LawBytes Podcast, Episode 13: Digital Charter or Chart: A Conversation With Teresa Scassa on the Canada Digital Charter,* May 2019, online: http://www.michaelgeist.ca/2019/05/lawbytes-podcast-episode-13/ (page consulted on June 20, 2019).

[441] **BOURGAULT-CÔTÉ, G.** *Droit d'auteur : Ottawa veut une révision en profondeur de la loi*, Le Devoir, December 2017, online: https://www.ledevoir.com/culture/515447/droits-d-auteur (page consulted on June 20, 2019); **CHHABRA, S**. *House of Commons completes first phase of 'Copyright Act' review*, Mobilesyrup, October 2018, online: https://mobilesyrup.com/2018/10/19/copyright-act-review-phase-one-complete-canada/ (page consulted on June 20, 2019).

[442] **GOVERNMENT OF CANADA.** *Government of Canada launches review of Telecommunications and Broadcasting Acts*, news release, June 2018, online: https://www.canada.ca/en/canadian-heritage/news/2018/06/government-of-canada-launches-review-of-telecommunications-and-broadcasting-acts.html (page consulted on June 20, 2019).

[443] **GREENSPON, E and OWEN, T.** *Protéger la démocratie des menaces liées aux plateformes numériques*, La Presse, August 2018, online: http://mi.lapresse.ca/screens/b78866ea-02c5-4400-8c46-d791f9d6cfa3_7C_0.html (page consulted on June 20, 2019); **CORNELLIER, M.** *Élections et ingérence étrangère: vulnérabilité canadienne*, Le Devoir, April 2019, https://www.ledevoir.com/opinion/editoriaux/551804/elections-et-ingerence-etrangere-vulnerabilite-canadienne (page consulted on June 20, 2019).

[444] **FASKEN**. *ACEUM, USMCA, T-MEC – Status and Implementation in Canada, the United States, and Mexico,* newsletter, December 2018, online: https://www.fasken.com/en/knowledge/2018/12/ott-newsletter---cusma--usmca--t-mec---status-and-implementation-in-canada (page consulted on June 20, 2019).

[445] **GOVERNMENT OF CANADA.** *Minister Bains announces Canada's Digital Charter*, *op. cit.* note 438; **GOVERNMENT OF CANADA.** *Canada's Digital Charter, op. cit.* note 438.

obligation, etc.: the many proposed changes may represent the long awaited revolution in legislation to protect online personal data[446].

But even as a guide for the government in its coming legislation and public policies regarding the Internet, the Digital Charter is imperfect. At the very least, it is incomplete. It actually addresses only a few aspects of human rights online. No mention is made of Net neutrality or Internet governance, although they are recurrent aspects of other recent codification initiatives. Even the rights addressed appear to be discussed incompletely. Concerning online privacy protection for example, the Charter is limited to issues regarding the protection of Internet users' personal data, when kept by private companies[447]. Nor is there anything concrete about state surveillance or data collection (directly or indirectly), an issue that absolutely should have been addressed, according to Teresa Scassa[448].

And even on subjects actually addressed in the document, it's difficult to understand how the principles asserted will be put in balance, given the opposing interests at stake (thus confirming once again that we're far from a recognition of fundamental rights). For example, how will the planned measures balance the goal of *facilitating the growth of Canadian businesses* with that of *protecting Canadian consumers from market abuses* (the Digital Charter's 6th principle)? How will a balance be struck between *ethical use of data* and the *value* created by such data use (the Charter's 7th principle)?

We will thus have to wait for the adoption of the announced complementary measures before evaluating the actual scope of that new instrument. But it must be admitted that the presentation and formulation of some elements included in the Digital Charter[449] imply that it was not designed foremost as an instrument with the purpose, as would be expected in a Charter, of firmly recognizing basic rights for Internet users.

The document's unfinished (and unsuitable) nature may be explained by another consideration, which has already been criticized: the weakness of government consultations in view of producing the document.

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[446] **GEIST, M.** *Canada's digital charter represents a sea change in privacy law, but several unaddressed issues remain,* The Globe and Mail, May 2019, online: https://www.theglobeandmail.com/business/commentary/article-canadas-digital-charter-represents-a-sea-change-in-privacy-law-but/ (page consulted on June 20, 2019).

[447] *Ibid.*

[448] **GEIST.** *The LawBytes Podcast, Episode 13, op. cit.* note 440.

[449] As well as Minister Bains's presentation of that "Charter"; indeed, the Minister concluded that instrument's presentation by referring to technological advances in terms of competitive advantage and prosperity, the desire to position Canada as a global leader in the current digital and data economy, and as a global centre of innovation: **GOVERNMENT OF CANADA.** *Canada's Digital Charter in Action: a Plan by Canadians, for Canadians – Minister's Message*, 2019, online: https://www.ic.gc.ca/eic/site/062.nsf/eng/h_00109.html (page consulted on June 20, 2019).

Preliminary criticisms about the lack of real consultation

According to Minister Bains, "the Digital Charter has come about after 'extensive consultations' with Canadians, business leaders, academic experts and members of the federal government[450]." But is that really the case?

In stating that it's a "Plan for Canadians, by Canadians," the government refers mainly to national consultations held in summer 2018 on the digital environment and online data[451]. The government reportedly held 30 roundtables with "business leaders, innovators and entrepreneurs, academia, women, youth, Indigenous peoples, provincial and territorial governments, and all Canadians[452]." It also reportedly received almost 2,000 comments from the public on the consultations' website and other digital platforms.

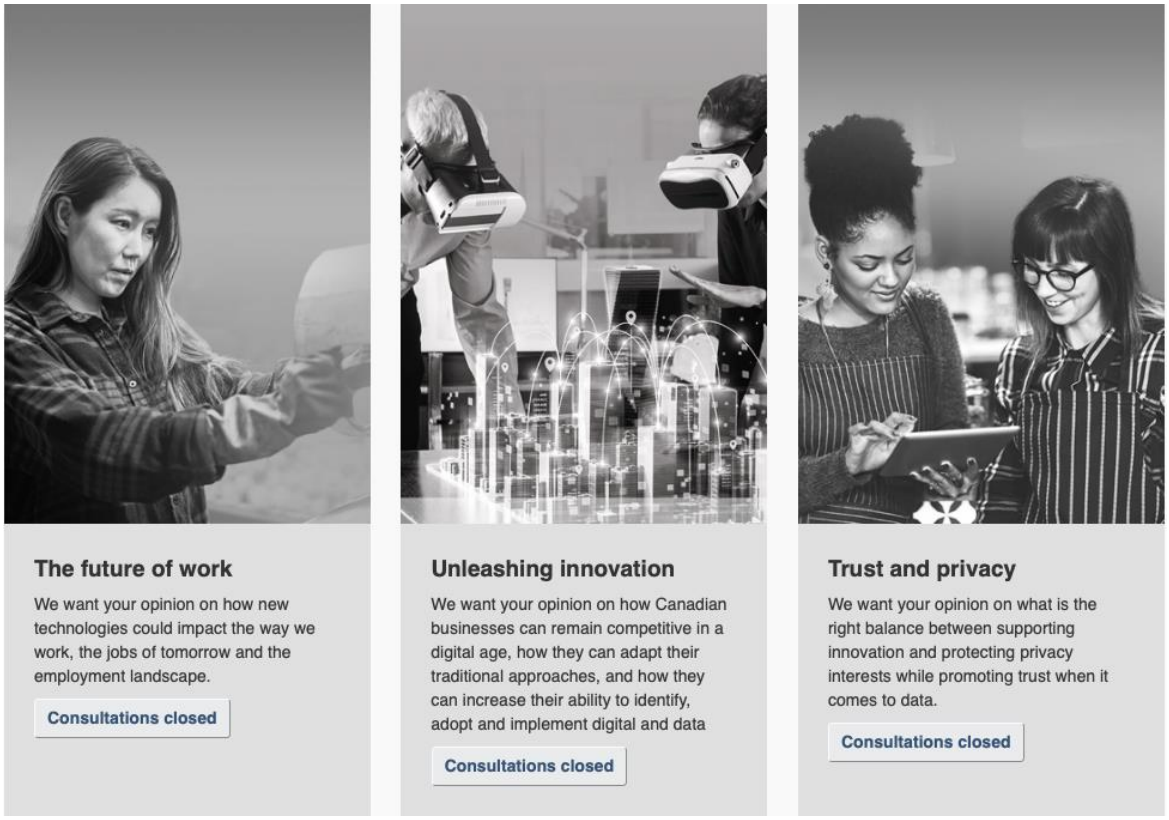
At first sight, those numbers suggest that broad consultations took place before the Charter was drafted. However, the devil is in the details, as the expression goes.

It should be noted first that the consultations pertained only to Internet users' personal data, which represents less than half of the points addressed in the Digital Charter. For example, those consultations had nothing to do with disinformation on social media, online dissemination of hate speech, or abuse by dominant actors online.

Additionally, the angle from which the consultations about data was approached doesn't appear suitable for a reflection on human rights online. Internet users' personal data were discussed foremost as an economic issue. The consultations' discussion document mentions at the start the importance of "embracing and leveraging the power of digital technologies and big data[453]." The table below provides an overview of the consultations' three major themes, as presented by the government itself.

Table 1
Excerpt of the federal government's website regarding the
National Digital and Data Consultations

[450] **SYED, F.** *Canada seeks to reform competition and privacy rules in Digital Charter,* National Observer, May 2019, online: https://www.nationalobserver.com/2019/05/21/news/canada-seeks-reform-competition-and-privacy-rules-digital-charter (page consulted on June 20, 2019).
[451] **GOVERNMENT OF CANADA.** *Minister's Message*, *op. cit.* note 449.
[452] *Ibid.*
[453] **GOVERNMENT OF CANADA.** *Positioning Canada to lead in a digital and data-driven economy: Discussion paper*, *op. cit.* note 402.



Source: **GOVERNMENT OF CANADA.** *National Digital and Data Consultations*, online: https://www.ic.gc.ca/eic/site/084.nsf/eng/home (page consulted on June 20, 2019).

While the consultation themes' overall presentation (as well as the headings and photos) did not sufficiently illustrate the primary economic angle, the points discussed within each discussion theme were very clear in that regard. The points below are taken from the official discussion document[454]:

Theme 1 ***The future of work***	**Theme 2** ***Unleashing innovation***	**Theme 3** ***Trust and privacy***
• Changes in the workplace • Skills and adaptation of Canadian workers • Skill development • Research and business inclusiveness	• Obstacles to adopting and deploying big data and digital technologies • Digital technologies and Canadian SMEs • Use of data and creation of new possibilities	• Cybersecurity • "The right balance between supporting innovation and protecting privacy interests" • Protection of intellectual property

[454] *Ibid.*

	• Assistance to the digital infrastructure	• Disruptive technologies and ethical and regulatory concerns • Data ownership

The adaptation of Canadian workers to new workplace realities? The use of digital technologies by Canadian SMEs? We're far from discussions about Internet users' recognition and enjoyment of their basic right to privacy online. Even the third theme, regarding online privacy, seems to present the latter as a right that does not take precedence over economic considerations! According to the document, that right should rather be balanced with the stimulation of innovation.

Haggart and Tusikov severely criticized that vision:

> *In its press release, the government framed the central issue as seeking a balance between economic innovation and privacy. This is unfortunate. Not only are these values not necessarily in tension […], but they provide a cramped framework for understanding what is at stake. […] This is a 20th-century approach to 21st-century topics.*
>
> *[…] There are tremendous opportunities here. But we are not extracting resources, we are building a world. It has to be a world we all want to inhabit. Let's do it the Canadian way – the pursuit of economic innovation within a framework of human rights and data justice*[455]*.*

The consultation's very "economic" perspective is also reflected in the parties involved. The roundtables were led by six "leaders in digital innovation" selected by the government. Those leaders certainly are impressive, but it's remarkable that none comes from the human rights community and only a few work or have worked in technology law[456].

The government's announcement of the Digital Charter also appears to suffer from that predominance of industry. The document was officially launched on May 21, 2019 as part of a panel held at the Empire Club of Canada and sponsored by giants such as Interac and Bayer. At the side of Minister Bains on the panel were CEOs of private companies (Skritswap (software), Pelmorex (weather networks), Portag3 Ventures (entrepreneurship) and OMX (project management))[457].

It was a missed opportunity to involve other stakeholders working in Internet governance and/or in the defence of fundamental rights in the country.

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[455] **AUSTIN, L.** *We must not treat data like a natural resource,* The Globe and Mail, July 2018, online: https://www.law.utoronto.ca/news/prof-lisa-austin-writes-we-must-not-treat-data-natural-resource-in-globe-and-mail (page consulted on June 20, 2019); **TUSIKOV, N.** *Data rights as human rights: the missing piece in Canada's data strategy consultations process,* The Hill Times, November 2018, online: https://www.hilltimes.com/2018/11/05/data-rights-human-rights-missing-piece-canadas-data-strategy-consultations-process/174007 (page consulted on June 20, 2019).

[456] **GOVERNMENT OF CANADA.** *Digital innovation leaders*, online: https://www.ic.gc.ca/eic/site/084.nsf/eng/00008.html (page consulted on June 20, 2019).

[457] *Empire Club – Hon. Navdeep Bains*, Mediaevents.ca, online: https://www.mediaevents.ca/empireclub-20190521/ (page consulted on June 20, 2019).

Conclusion

It is now spring 2019. The Canadian government has just unveiled its Digital Charter, intended to restore Canadians' "trust" in the digital world.

While almost three-quarters of Canadian Internet users spend at least three to four hours a day online[458], it's not surprising that the state is interested in ensuring respect for Internet users' rights online. As an instrument (free of charge) for accessing and sharing information, communication and socialization, education, entertainment and commerce, the Internet enables the exercise of several basic rights, essential to respect for human dignity and to maintaining a free and democratic society. In Canada, the most recent social and political movements of importance (Me Too, Idle No More, Occupy, etc.) have all been strongly supported by the Internet.

But the network also presents its lot of possibilities for violations of basic rights by state or private actors. Leaks and commodification of online personal data, massive dissemination of fake news, content restrictions and filtering: those are a few of the major problems unfortunately confronting Internet users in 2019 and against which they don't have practical remedies or effective protection.

The state of fundamental rights online needs improvement, which some think requires the adoption of a Charter of Rights for Internet Users.

While the courts' broad interpretation of existing legislation regarding fundamental rights might prove sufficient in clarifying their application to the digital world, a Canadian Charter of Internet Users' Rights still appears desirable for establishing coherent principles for guiding:

- The Canadian government in the development of public policies and the exercise of its regulatory power;
- Canadian courts and authorities in the interpretation of laws;
- Canadian lawmakers in their reform of existing laws or the development of new laws.

Certain Canadian laws, such as PIPEDA, certainly should be amended and adapted to today's digital realities and to the reforms being considered in light of Internet users' fundamental rights in their entirety. Issues of privacy protection or against hate speech should not, for example, be explored piecemeal. They also affect issues regarding the right to information, freedom of expression, Net neutrality, etc. The basic rights of Canadian Internet users are interdependent and mutually reinforcing – something lawmakers should not forget when the time comes to amend the laws concerning or affecting those Canadians. A Canadian Charter of Internet Users' Rights would likely offer the appropriate framework for analysis and intervention.

[458] **CIRA**. *2019 Canada's Internet Factbook,* March 2018, online: https://cira.ca/resources/corporate/factbook/canadas-internet-factbook-2019 (page consulted on June 20, 2019).

Unfortunately, the Canadian Digital Charter recently announced by the government doesn't respond to any of the above concerns and in no way fulfils the functions of a charter. It doesn't formalize the protection and application of human rights online to clarify their application or terms; in practice, it is not a charter, but a simple legislative and political roadmap for the years to come. Not does it ensure a vision and an analysis of fundamental rights online as a whole, as opposed to piecemeal definitions and protections. Indeed, several rights and principles fundamental to the exercise of human rights online are simply absent from the Digital Charter. It's disappointing to see the government, faced with such important issues, present as a charter a document openly announcing that it will attempt to balance, in instruments it has yet to design, economic and market interests with the fundamental rights that should rather be recognized and asserted positively.

That serious misstep probably results from the government's insufficient and inadequate consultations based above all on economic considerations (which certainly should never take precedence over the protection of human rights). Foreign jurisdictions that have undertaken vast consultations and set up representative multistakeholder commissions have adopted a much better preparatory procedure for developing a declaration of this importance, and the outcomes have demonstrated the wisdom of that approach. In short, the federal government should go back to the drawing board.

Once a clearer vision has been defined and the rights that must be recognized for Canadian Internet users have been identified and formulated, the government will have several options for establishing a real Charter of Rights for Internet Users. Those rights could be recognized by means of a framework law, such as the Marco Civil da Internet in Brazil. A declaration of principles to which the government would adhere following a motion in the House of Commons could also be considered, as with Italy's *Dichiarazione dei dritti in Internet*. Whatever the option chosen, it seems primordial that the recognition of fundamental rights on the Internet have binding force. To be truly effective, such an instrument cannot consist merely of a simple public awareness-raising document or, even worse, of an electoral declaration without follow-up.

Moreover, if Canada truly intends to ensure the recognition and respect of basic rights online, it should keep in mind the problems related to the territoriality of laws online, as demonstrated by the sorry application of the Supreme Court's *Equustek* decision. As that Court itself said: "The Internet has no borders – its natural habitat is global[459]." Our government doesn't seem at this time to have understood the profound meaning and the scope of that statement. In light of our study's results, we think it clear that Canada's development and implementation of a veritable Charter of Rights for Internet Users will be impossible to effect piecemeal.

That the Digital Charter announced by the federal government is so inadequate as a declaration of rights for Canada is all the more unfortunate because it neglects a proven multilateral approach we find ideal. The Digital Charter's development follows Canada's adherence to the "Christchurch Appeal," a (non-binding) commitment made alongside

[459] *Equustek Solutions Inc., op. cit.* note 49, para 41.

other nations such as the United Kingdom, France and Norway to intensify efforts against the dissemination and propagation of violent, terrorist or extremist content online[460].

In developing a real Canadian Charter of Internet Users' Rights, Canada should maintain that multilateral approach and also work to develop shared policies for Internet users' rights internationally, within the Internet Governance Forum, the OECD or other groups. This would avoid new episodes of judicial ping-pong, as in the *Yahoo.fr !* and *Equustek* cases, given that the subsequent application of national legislations would follow upon the adoption of a shared international text.

Recommendations

Whereas respect for human dignity and maintenance of a free and democratic society depend on the exercise of and respect for human rights;

Whereas full enjoyment of human rights also require the full exercise of those rights online;

Whereas the fundamental rights of Internet users are interdependent and mutually reinforcing;

Whereas the Internet considerably influences its users' exercise of their fundamental rights;

Whereas the Internet is a powerful facilitator of fundamental rights;

Whereas that network unfortunately also presents new opportunities for large-scale violation of human rights;

Whereas the need for additional protections of human rights online is not met by existing legislation regarding fundamental rights, of which the application and adaptation to the digital world prove complex at times;

Whereas the state of human rights online needs to be improved;

Whereas the development of a Charter of Rights for Internet Users would make it possible, notably, to:

- Formalize the protection and application of human rights online and clarify their application or terms, when required;
- Recognize new rights for Internet users that would be added to human rights traditionally recognized offline;
- Consider Internet users' rights above all as a whole, and not as piecemeal measures of definition and protection, in order to better ensure their exercise and protection.

[460] **LÉVESQUE, C.** *Violence en ligne : Le Canada se joint à l'"Appel de Christchurch",* La Presse, May 2019, online: https://www.lapresse.ca/affaires/techno/201905/15/01-5226198-violence-en-ligne-le-canada-se-joint-a-lappel-de-christchurch.php (page consulted on June 20, 2019).

Whereas an indispensable (and historic) role belongs to the state for recognizing and defending human rights;

Whereas Web companies have historically played a major role in developing certain Internet governance standards and in managing infrastructures;

Whereas civil society and non-governmental associations have historically contributed significantly to the development of fundamental international instruments regarding human rights;

Whereas a multistakeholder approach is strongly encouraged by UNESCO for developing Internet governance and has largely been adopted in past undertakings on this subject;

Whereas the development of a Charter of Rights for Internet Users should mobilize the participation of all interested stakeholders (private companies, civil society, the public, etc.) and operate transparently;

Whereas the Internet, as a global network, does not stop at and is not limited to countries' physical borders and that this results in problems related to the territoriality of a given country's laws for the Internet;

Whereas international agreements in principle or objectives shared between states in view of developing specific Internet regulations would reduce the risk of an incompatible application of national instruments on the Internet;

Whereas although the Canadian Charter of Human Rights and Freedoms and other Canadian laws recognize a set of fundamental rights that must also be protected on the Internet, those instruments prove incomplete or unsuitable in ensuring respect for human rights in a digital environment;

Whereas the absence of a coherent vision for the online application of existing rights risks a disorderly and inconsistent protection of Canadian Internet users;

Whereas Canada needs clear guidance for the exercise and protection of human rights online, in view of the multiple legislative reforms to come regarding the digital environment;

Whereas Canada has not participated in the development of recent initiatives to codify Internet users' rights abroad and that its few international initiatives regarding Internet users' rights are rather disappointing;

Whereas the recent Canadian Digital Charter does not meet the needs for recognition and codification of Internet users' rights, particularly because:

- It does not recognize specific rights for Canadian Internet users;
- It ignores several rights and principles that are fundamental to the exercise of human rights online and are indispensable for an overall view of those rights and principles;
- It has not been the subject of adequate consultations with the Canadian public and the various stakeholders about Internet governance and the defence of human rights;

Union des consommateurs recommends that the federal government:

1. Hold broad consultations with the various stakeholders in Internet governance and the defence of human rights and with the public, and form multistakeholder working committees in view of developing and establishing a real Canadian Charter of Internet Users' Rights;

2. Use as models the initiatives developed or adapted abroad in recent years to codify Internet users' rights, such as the *Charter of Human rights and principles for the Internet*, *The African Declaration On Internet Rights And Freedoms*, the *Marco Civil da Internet* and the *Dichiarazione dei dritti in Internet*, while considering the specific needs of Canadian Internet users, in order to develop and implement a real Canadian Charter of Internet Users' Rights that would notably include the following:

    i. Full recognition and applicability online of the fundamental rights recognized by Canadian and international instruments;
    ii. The right to Internet access;
    iii. The right to online privacy and personal data protection;
    iv. Freedom of expression online;
    v. The right to access to information and knowledge online;
    vi. The right to Net neutrality;

3. Get involved within relevant international organizations and/or forums in order to assert the appropriateness of a Charter of Rights for Internet Users and to develop shared international policies regarding Internet users' rights, on the basis of what will have been deemed essential at the national level.