

Digital Constitutionalism, EU Digital Sovereignty Ambitions and the Role of the European Declaration on Digital Rights



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Abstract The *European declaration on digital rights and principles* represents the latest EU contribution to the complex process of constitutionalisation of the digital society. The Declaration, similar to many other Internet bills of rights emerged in the past few decades, shares the objectives of digital constitutionalism. It aims to update the constitutional normative framework to face the challenges of the digital revolution. To this end, the Declaration aspires to make rights and principles that should guide EU actors in the context of the digital transformation more visible. Its mission is twofold: programmatic and educative. On the one hand, it is a political document, aiming to set the objectives and commitments that the Union and its Member States should pursue to implement EU values in the digital society where we live. On the other hand, it is an educational tool: it aims to disseminate the EU visions for the digital transformation both internally, to raise societal awareness on digital rights, and externally, to promote the EU digital model in the world. The chapter reconstructs the legislative history of the Declaration, positions this initiative within the EU regulatory and policy framework in the digital field, assesses the overall degree of innovation of its content, re-contextualises this initiative within EU digital sovereignty strategies and evaluates its potential contribution to the agenda of digital constitutionalism.

1 Introduction

Over the past few years, scholars from various disciplines have observed the emergence of a plurality of declarations of digital rights, documents very often lacking any binding legal value, which aim to articulate rights and principles for the digital society and which are usually referred to with the expression ‘Internet bills

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255

of rights'.¹ This phenomenon has attained a considerable size, if one considers that, depending on the variables used, some scholars collected almost two hundreds of these documents spanning slightly more than two decades.² The proliferation of these declarations has been linked to the concept of 'digital constitutionalism', a notion variably defined, which in my view denotes the ideology underpinning this trend.³ Digital constitutionalism would not be a revolutionary theory subverting the tenets of contemporary constitutionalism, but would rather denote the idea that our rights and principles should evolve to face the challenges of the digital revolution. Digital constitutionalism would be the driver of a gradual process that is discussing, elaborating, and implementing rights that speak to the problems of the digital society: what I called a process of constitutionalisation.⁴

This chapter will analyse the *European declaration on digital rights and principles for the digital decade* (hereinafter, simply called the 'Declaration'), which represents one of the latest additions to the above-mentioned set of declarations as well as a very relevant one, given the fact that was solemnly adopted by the EU Commission, Parliament and Council.⁵ The chapter reconstructs the legislative history of the Declaration (2), positions this initiative within the EU regulatory and policy framework in the digital field (3), assesses the overall degree of innovation of its content (4), re-contextualises this initiative within the EU digital sovereignty strategies (5) and evaluates its potential contribution to the agenda of digital constitutionalism (6).

2 From Stakeholders' Engagement to the Solemn Declaration

The EU Commission first announced its plan to adopt a declaration on digital rights and principles in its Digital Compass Communication in March 2021.⁶ In May 2021 the Commission launched a public consultation on a set of digital rights and principles, followed by a special Eurobarometer survey in October of the same

¹ See Musiani et al. (2009), p. 359; Weber (2015); Oates (2015); Redeker (2018), p. 302; Celeste (2022a).

² See Celeste (2022b); for an updated list of these documents please consult the dataset at www.digitalconstitutionalism.org.

³ For a mapping of the various approaches to this concept, see Celeste (2019b), p. 76.

⁴ Ibid; Celeste (2022b) ch 6.

⁵ European Declaration on Digital Rights and Principles for the Digital Decade 2023 [2023/C 23/01].

⁶ European Commission, 2030 Digital Compass: The European Way For The Digital Decade, COM (2021) 118 Final. Available online: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021DC0118>.

year.⁷ In addition to these two consultation tools, a series of targeted workshops were organised to hear the view of consumer organisations, trade unions and small and medium-sized companies (SMEs), local and regional authorities as well as specific categories of individuals who might have had difficulties in accessing the public consultation and the Eurobarometer survey, such as children, individuals with disabilities, and elderly people.⁸ The research service of the Commission also engaged in an analysis of thirty digital rights declarations published between 2014 and 2021 by an array of actors, ranging from international organisations to local communities.⁹

A Commission Staff Working Document published in January 2022 includes a detailed report of the outcome of these various consultations, from which it emerged that the consulted stakeholders generally agreed on the importance of digital rights and principles.¹⁰ Strong of this result, in the same month the Commission published a communication including a draft of the *European Declaration on Digital rights and principles for the Digital Decade*.¹¹ This opened the triologue involving the EU Council and the Parliament. In particular, the Council made various amendments reflecting a series of criticism moved by consulted stakeholders after the publication of the first draft of the Declaration.¹² Its key changes aimed to broaden the scope of application of the stated rights and principles. First of all, by enlarging the perimeter of the addressees of the Declaration from EU citizens to ‘all people living in the EU’.¹³ Second, by explicitly referring to the aim of achieving gender balance and of benefitting also individuals from rural areas when the Declaration states the solidary and inclusive objectives of the digital transformation.¹⁴ Third, by adding more specific references to fundamental rights and ethical standards in relation to the use of AI.¹⁵ And, finally, by emphasising the importance of paying attention to the sustainability aspects of digital technologies at all stages, from their design and

⁷European Commission, Commission Staff Working Document Report on the Stakeholder Consultation and Engagement Activities Accompanying the Document Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, SWD(2022) 14 Final. Available online: <https://digital-strategy.ec.europa.eu/en/library/declaration-european-digital-rights-and-principles#Document>; EU Commission (2021).

⁸Ibid.

⁹Ibid 33 ff.

¹⁰Ibid.

¹¹EU Commission, Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 27 Final.

¹²See a summary in Car (2022).

¹³Declaration, Article 1.

¹⁴Declaration, Chapter II.

¹⁵Declaration, Chapter III.

development to their use and disposal, highlighting the importance of repairing and reusing.¹⁶

The final document was adopted as a ‘solemn’ joint declaration by the EU Commission, Parliament and Council on 15 December 2022.¹⁷ It explicitly recognised to be devoid of binding legal force, representing only a document with declaratory nature.¹⁸ It is composed of one preamble, twenty-four articles organised in six chapters and including fifty-one commitments. The next section will examine in more detail the content of the Declaration within the context of the EU regulatory framework in the digital field.

3 The Declaration Within the EU Digital Regulatory and Policy Framework

The Declaration represents an instrument in line with the EU tradition as a regulator of digital technologies and as a protector of digital rights. Digital technologies were the subject matter of EU law and policy since the 1990s. The Data Protection Directive, for example, represented the cornerstone of data privacy in relation to the use of automated means of processing from 1995 to 2018, when the GDPR was adopted.¹⁹ The E-Commerce Directive, adopted in 2000 and still in force, harmonises rules related to the provision of online services, online commercial communication, electronic contracts and the liability of online intermediaries.²⁰ From a policy perspective, the first consolidated and comprehensive policy document focusing on digital issues was the 2010 Commission’s Digital Agenda.²¹ Part of the broader EU 2020 strategy, it aimed to react after the 2008 recession. Reinforced by the adoption of the 2015 Digital Single Market strategy, this third decade of EU digital regulation culminated in the adoption of the GDPR in 2018.²² In this decade also the CJEU emerged as a decisive actor in shaping EU digital law. Judgments such as *Digital Rights Ireland*, *Google Spain* and *Schrems* represented seminal decisions that further strengthened digital rights in the EU.²³ The last few years have been characterised by

¹⁶Declaration, Chapter VI.

¹⁷European Commission (2022).

¹⁸Recital 10, Preamble.

¹⁹Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; Regulation (EU) 2016/679 (General Data Protection Regulation); see Lynskey (2015).

²⁰Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) 2000.

²¹‘A Digital Agenda for Europe’ (European Commission 2010) COM(2010)245.

²²‘A Digital Single Market Strategy for Europe’ (European Commission 2015) COM(2015) 192.

²³See Pollicino (2021); Fabbrini et al. (2021).

what Papakonstatinou and De Hert have defined as a phenomenon of ‘actification’, the proliferation of EU regulations bearing an ‘eponymous’ denomination including the ‘nickname’ of the piece of legislation, followed by the expression ‘act’, which is typical of the common law tradition.²⁴ In the digital field, this is the result of the adoption of a further policy strategy focusing on the digital, called the Digital Decade Policy Programme for 2030, which has led to the proposal and adoption of seminal pieces of legislation such as the Digital Services Act, the Digital Markets Act, and the AI Act.²⁵

In the digital field, a high level of attention to the dimension of individual rights has emerged since the beginning. For example, in the history of data protection, one of the areas on which the EU legislator paid attention since the 1980s, the EU approach differentiated itself from those of the other international organisations that were working in this area, such as the Organisation for Economic Cooperation and Development (OECD), for a distinct attention to the dimension of individual rights.²⁶ In 2000, the Charter of Fundamental Rights of the EU was one of the first international instruments to enshrine a fully-fledged right to data protection independent from the right to personal, family life and correspondence, what across the Atlantic is more known as the right to privacy.²⁷ From a policy perspective too, the attention to the individual dimension is apparent: a user/human-centric approach is not only evident in the Commission’s policy documents mentioned above but also in the political commitments enshrined in a series of declarations of the European Council on e-government and e-democracy²⁸ and in multiple resolutions of the EU Parliament.²⁹

The Declaration fits in this groove.³⁰ Recital 1 of its Preamble made a univocal reference to the Charter of Fundamental Rights of the EU and the international

²⁴Papakonstantinou and De Hert (2022).

²⁵European Commission (2021a); Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade Policy Programme 2030 2022; Proposal for a regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts 2021 2021; Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) 2022 (OJ L 265); Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance) 2022 (OJ L).

²⁶See Bygrave (2014).

²⁷See Lynskey (2015).

²⁸European Council (2017, 2020, 2021).

²⁹See, e.g., European Parliament resolution of 20 May 2021 on shaping the digital future of Europe: removing barriers to the functioning of the digital single market and improving the use of AI for European consumers (2020/2216(INI)) 2021.

³⁰Cf Hoepman (2022). Hoepman states that the Declaration is fundamentally liberal in nature by providing individual agency to people instead of protecting them, an element that Hoepman sees as very much in line with the economic focus of early European integration.

obligations of EU Member States, reiterating that the EU is a ‘union of values’. And not only values abstractedly, but values that put individuals at their centre. Article 1 of the Declaration affirms that ‘People are at the centre of the digital transformation in the European Union’; technology is seen as an instrument at the service of the society. An inclusive society: the Declaration not only refers to EU citizens but to ‘all people living in the EU’, an aspect that was intentionally amended by the Council to enhance the inclusivity of the proposal.³¹

In Recitals 7–12 of the Preamble, we can find relevant guidelines related to the positioning of the Declaration within the sources of EU law and a series of interpretative rules. From a policy perspective, Recital 5 tells us that the Declaration builds on previous declarations adopted by the EU Council in the field of digital transformation and complements the European Pillar of Social Rights, a set of twenty principles to make Europe fairer and more inclusive that was proclaimed by the EU Parliament, Commission and Council in 2017.³² From a legal perspective, the Declaration traces back its foundations in primary and secondary EU law as well as in the case-law of the CJEU.³³ In terms of its interpretation, the Declaration ‘should form a holistic reference framework and should not be read in isolation’.³⁴ It is ‘declaratory’ in nature³⁵ and is without prejudice to existing rights and their limits as established by EU law and case-law.³⁶

In the Commission’s Communication accompanying the first draft of the Declaration, we find other useful information that allow us to better understand the nature of this document. From a legal point of view, the Declaration does not have any legally binding force. However, it possesses a clear ‘political’ value, as it emerges from the objectives laid down in the Preamble and mentioned above. The Commission writes:

Given the political nature of the Declaration, not all principles correspond to rights that are directly enforceable: some are already laid down in legislation, others may require further action, at the appropriate level.³⁷

In this statement, the programmatic nature of the Declaration is apparent. It is neither a legally enforceable document nor a directly implementable one: it sets objectives for the EU and its Member States that will have to be further articulated in legislative proposals. Recitals 7–12 in the Preamble include interesting information about the aims of the Declaration. This initiative aims to spell out ‘shared political intentions and commitments, and recalls the most relevant rights in the context of the digital

³¹Declaration, Article 1.

³²See *supra* (n 28); European Union (2017); see also European Commission (2021a).

³³Recital 10, Preamble.

³⁴Recital 7, Preamble.

³⁵Recital 10, Preamble.

³⁶Recital 9, Preamble.

³⁷EU Commission, Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 27 Final (n 11) 6.

transformation'.³⁸ It should represent a reference point for policy-makers when developing their approach to the digital environment³⁹ as well as guide business actors in all phases related to use of digital technologies, from their design to their disposal.⁴⁰ Interestingly, the Declaration is presented as a programmatic document of the EU strategy in the digital field both internally and externally. It is a 'shared political commitment and responsibility' of the Union and its Member States to implement it.⁴¹ Moreover, the Preamble states that this document should be promoted and used in the context of EU trade relationships and within international organisations, an element that will be analysed below in the context of the EU digital sovereignty aspirations.⁴²

Despite not being legally binding, the EU Commission will prepare annual reports on "The State of the Digital Decade" and yearly Eurobarometer surveys to assess societal perceptions.⁴³ Reporting therefore represents the soft tool to ensure that the Declaration is being implemented and to measure the status of the programme outlined in the Declaration both from a legal and political point of view. Such reports will be shared with the Parliament and the Council,⁴⁴ and, according to the Commission's Communication, Member States will receive a series of recommendations and will be involved in ad hoc bilateral meetings with the Commission.⁴⁵ Annual reports will also be used by the Commission to assess the health of the Declaration and suggest amendments to the Parliament and Council, if deemed necessary.⁴⁶

4 Codification or Innovation?

Recital 3 of the Declaration's Preamble states:

With the acceleration of the digital transformation, the time has come for the EU to spell out how its values and fundamental rights applicable offline should be applied in the digital environment. The digital transformation should not entail the regression of rights.

³⁸Recital 7, Preamble. It is worth noting the repeated use of the expression 'spelling out', as seen in Recital 3.

³⁹Recital 7, Preamble.

⁴⁰Recital 8, Preamble.

⁴¹Recital 12, Preamble.

⁴²Recital 11, Preamble.

⁴³Recital 12, Preamble. EU Commission, Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 27 Final (n 11) 6.

⁴⁴Recital 12, Preamble.

⁴⁵EU Commission, Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 27 Final (n 11) 6.

⁴⁶Ibid 7.

The declaration does not fully present itself as an innovative instrument, but in the use of the expression ‘spelling out’ is implicit a logical exercise of rearticulation of rights in the digital context. Despite what is affirmed in Article 1(b), stating that rights and values of the EU that are valid offline should also be respected in the online dimension, the Declaration is not a simple recollection of already established principles, a superficial codification. The Declaration often makes a general reference to ‘fundamental rights’, without however reinstating them.⁴⁷ Contrary to other Internet bills of rights, as will be further explained in the last section, the Declaration does not aim to provide a catalogue of digital rights. Its objective is rather to provide a programme for the EU digital transformation by extracting its guiding principles from the puzzle of regulatory and policy tools adopted by the EU in this area.

The content of the Declaration can be classified into three groups: rights, which are explicitly flagged as such by the use of the expression ‘everyone has the right to’; two types of principles, one that is expressed in a peremptory way using a performative present tense and another whose normative character is softened by the use of conditional tense ‘should’; and, finally, commitments, which represent statements of political nature that are clearly introduced by the expression ‘we commit’. Given the legal focus of this chapter, the first two categories shall be analysed.

Only five principles are formulated as rights among the twenty-four articles included in the Declaration. These five rights do not reserve surprises in terms of content; they all represent rights enshrined in the Charter of Fundamental Rights of the EU that are reiterated in the context of the digital environment. Article 18 is the only one to include a right that represents a development in comparison with the content of the Charter. It is formulated as the right ‘not to be subjected to unlawful online surveillance, unlawful pervasive tracking or interception measures’. Building on a series of significant decisions of the CJEU, this principle is not explicit in the Charter, which limits itself to list a right to the protection of personal communications in Article 7.⁴⁸

Among the principles that are presented using a performative present tense, it is worth to mention what can be considered the imprinting of the EU: the human-centric approach to the digital transformation. Article 1 of the Declaration reads: ‘People are at the centre of the digital transformation’. This is not a new principle per se. The centrality of the individual in the digital field characterised early legislative interventions such as the Data Protection Directive.⁴⁹ Recital 2 of the Data Protection Directive stated that ‘data-processing systems are designed to serve man’. Similarly, Recital 4 of the GDPR states that ‘The processing of personal data should be designed to serve mankind.’ Although it is absent from the current text of the AI Act, a similar principle is explicitly mentioned in its accompanying explanatory memorandum and implicit in some of the key provisions of the act.⁵⁰

⁴⁷ See e.g. Article 9; 11(a); Chapter IV (a).

⁴⁸ See Celeste (2019a), p. 134. See also Celeste and Formici (2023, forthcoming).

⁴⁹ See Celeste and De Gregorio (2022), p. 4.

⁵⁰ Explanatory Memorandum, Section 1.1; Article 14 of the Proposal of AI Act (n 25).

The group of principles that are presented using the conditional form ‘should’ include more courageous statements that go beyond the EU *acquis*. Article 3 affirms that everyone *should* have a fast and affordable Internet connection, while the EU has so far limited itself to ensure the deployment of fast connectivity and to reduce the costs of installation of the necessary infrastructure.⁵¹ Article 7 states that everyone *should* have online access to key public services, building on the aspiration of the EU to introduce more efficient rules related to an EU system of digital identity to access public services online more easily.⁵² Article 8 respecifies the principle of digital humanism of Article 1 of the Declaration in the context of AI, making explicit one of the core assumptions of the proposed AI Act.⁵³ Article 9 complements this principle specifying that everyone *should* be able to make informed choices when interacting with AI systems, so echoing the transparency obligations enshrined in Article 52 of the proposed regulation. Article 10 enshrines the user’s freedom of choice of online services, affirming a principle that was implicit in the right to data portability introduced by the GDPR.⁵⁴ Article 19 seems to complement this provision by enshrining an innovative right to the individual self-determination of one’s own digital legacy.⁵⁵

Similarly innovative, Article 14 establishes a right to know media’s owners or controllers, in line with the objectives of the European Democracy Action Plan 2020 and one of its core projects, the Euromedia Ownership Monitor.⁵⁶ Article 15 instead highlights the role that online platforms should play in contrasting online disinformation and misinformation and promoting a ‘free democratic debate’, directly evoking the framework introduced by the Digital Services Act.⁵⁷ Articles 23 and 24 focus on the intersection between digital and green, building on recent EU strategies that try to harness the benefits of technology to tackle climate change.⁵⁸ Article 23 states that one should try to mitigate negative consequences from an environmental perspective during the whole life of a digital product or service, from its design to its disposal, while Article 24 requires more information about the

⁵¹ In 2014 the EU adopted to this end the Broadband Cost Reduction Directive, which is due to be repealed by the Gigabit Infrastructure Act that has been proposed by the Commission in February 2023.

⁵² In 2014 the EU adopted the Electronic Identification, Authentication and Trust Services (eIDAS) Regulation and an update of this framework is currently being discussed by the EU co-legislators.

⁵³ See explanatory memorandum accompanying the current proposal.

⁵⁴ Article 20 GDPR.

⁵⁵ See Maciel and Carvalho Pereira (2013); Harbinja (2017), p. 26.

⁵⁶ Euromedia Research Group (2022).

⁵⁷ According to Article 25(1) DSA, Very Large Online Platforms (VLOPs) are ‘online platforms which provide their services to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million’.

⁵⁸ See European Commission (2023). See also Celeste and Dominioni (2024, forthcoming).

sustainability, energy consumption, reparability of a product to be provided to users to facilitate their choices.⁵⁹

From this rapid analysis, it is possible to argue that the answer to the question of whether the Declaration carries out an action of codification or innovation in the digital field is in reality more nuanced. The Declaration seems to make explicit a series of principles that implicitly orient the EU regulatory strategy in the digital environment. The Declaration connects the dots between the general principles and values enshrined in EU primary law, and in particular the Charter of Fundamental Rights, and in the jurisprudence of the CJEU, on the one hand, and the concrete provisions of the EU regulatory framework and the Commission's policy strategies in the digital field on the other hand. The Declaration interprets the former to provide a more explicit rationale to the latter.

5 The Declaration's Contribution to the EU Digital Sovereignty Strategy

The Declaration opens with the first-person plural 'We', a typical language of constitutional instruments. One might wonder to whom this 'we' refers: the European people? The Commission, Parliament and Council? An answer to this question is difficult to provide. What is certain is that it refers to the EU dimension, a 'we' that embodies actors or promoters of the 'European way to the digital transformation'.⁶⁰ The previous section was concluded by arguing that the Declaration would represent a complementary instrument to the many 'acts' and proposals of acts that have been emerging in the past few years in the digital field. A 'quasi-constitutional' instrument, we could argue. A tool that is devoid of constitutional character strictly speaking, as the Declaration is merely of a declaratory and political nature, but that performs a *de facto* constitutional function. Not only because, as we have seen earlier, it aims to guide national and EU policymakers, public and private actors. But also because it 'spells out' a 'vision', the EU vision for the digital transformation.⁶¹ The recent process of 'actification' represents a phase of further ripening of the EU approach to digital rights. The Declaration confirms the acquisition of a high level of self-awareness of the EU as an actor with a distinct ideological identity and regulatory programme in the field of digital rights.

The EU 'vision' or 'model' for the digital transformation has two distinctive characteristics.⁶² Firstly, it is 'human-centric': individuals represent the top priority

⁵⁹See Proposal for a Directive of the European Parliament and of the Council on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828 2023.

⁶⁰Declaration, opening statement.

⁶¹Recital 6, Preamble.

⁶²Expressions found respectively in Recitals 6 and 5 of the Preamble.

of the EU regardless of their citizenship, social or economic status, as is evident in Article 1 of the Declaration and the provisions on solidarity and inclusion (Article 2), which have been previously commented on.⁶³ Secondly, the EU model is ‘value-based’.⁶⁴ As previously said, the Declaration, and its rights and principles, builds on EU primary law, and in particular on the values enshrined in the TEU and in the Charter of Fundamental Rights. Recital 6 of the Declaration’s Preamble includes the foundational principles of the ‘EU way for the digital transformation’, echoing the values included in Article 2 TEU, with some interesting addition, such as ‘digital sovereignty’ and ‘sustainability’.⁶⁵

The Declaration does not explain what it means when stating the EU model for the digital transformation ‘encompasses in particular digital sovereignty in an open manner’.⁶⁶ Apart from the Preamble, there are no other explicit references to the concept of EU digital sovereignty or its strategies in the Declaration. Digital sovereignty is in itself a relatively nebulous concept in the sense that both in the existing literature as well as in EU policy documents it has not received a univocal definition.⁶⁷ This is certainly partially due to the fact that the notion of sovereignty itself has evolved throughout the history and has never been definitively set in stone.⁶⁸ Digital sovereignty appears as the last offspring of the family of concepts applying the notion of sovereignty to the technological world, such as ‘technological sovereignty’ and ‘data sovereignty’. This trend is not surprising, as our vocabulary changes following the evolution of technology and reflects the relative importance that these innovations play within society.⁶⁹

In the documents presenting the project Gaia-X, the so-called ‘cloud made in the EU’, one of the most apparent examples of digital sovereignty claims within Europe, digital sovereignty is depicted as ‘an aspect of general sovereignty’,⁷⁰ and is defined as the ‘possibility of independent self-determination by the state and by organisations’ with regard to the ‘use and structuring of digital systems themselves, the data

⁶³The expression ‘human-centric’ can be found in EU Commission, ‘Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 27 Final’ (n 11) 7.

⁶⁴Ibid.

⁶⁵Recital 6 of the Declaration’s Preamble reads: ‘The EU way for the digital transformation of our societies and economy encompasses in particular digital sovereignty in an open manner, respect for fundamental *rights, rule of law and democracy*, inclusion, accessibility, *equality*, sustainability, resilience, security, improving quality of life, the availability of services and respect of everyone’s rights and aspirations. It should contribute to a dynamic, resource efficient, and fair economy and society in the EU.’ Article 2 TEU reads: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, *equality*, the *rule of law* and respect for human *rights*, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’ In both quotes, common values are put in italics.

⁶⁶Recital 6, Preamble.

⁶⁷See Celeste (2021).

⁶⁸See Kalmó and Skinner (2010).

⁶⁹See, e.g., in relation to the concept of digital constitutionalism, Celeste (2017).

⁷⁰Federal Ministry for Economic Affairs and Energy (BMWi) (2019a).

produced and stored in them, and the processes depicted as a result.⁷¹ Compared with the traditional notion of sovereignty, digital sovereignty is still a form of control and independence at the same time; it implies the possibility for an actor to determine the destiny of their digital assets. However, compared with the Westphalian notion of sovereignty, digital sovereignty is no longer exclusively linked to the idea of a territory; digital boundaries overtake national frontiers and new elements of connection between digital assets and sovereign entities emerge.

EU digital sovereignty claims emerged in anti-US and China perspectives.⁷² The EU perceived to have lost part of its control in the digital realm due to the fact that most of the digital products and services are commercialised by American or Chinese companies. US and China do not share the same human-centric and value-based ‘vision’ of the digital transformation advanced by the EU. In this context, claiming control means ensuring that EU fundamental rights are respected in the digital context, too. The Declaration thus emerges as a consolidating element of the theoretical justifications of EU digital sovereignty ambitions, which cannot be merely backed by economic aspirations—which would amount to protectionist policies and represent a form of what I have called ‘digital sovereinism’—but should be informed by the duty to protect fundamental rights.⁷³ The Declaration represents the ‘manifesto’ of EU digital sovereignty aspirations, not so much in the sense of providing programmatic provisions to implement specific digital sovereignty strategies, but rather as a document encompassing the rights and principles that should be used as a litmus test to assess the legitimacy—and thus the limits—of EU digital sovereignty strategies.

As digital sovereignty has an internal and an external dimension, the former intended as a control on digital assets and the latter as a form of independence from the influence of foreign actors, so the Declaration is set to be used as a guiding instrument in a twofold manner. Internally, to the benefits of the EU and its Member States, and, externally, as a policy document to promote the EU model among third countries, trade partners, and even in the context of EU activities within other international organisations and multistakeholder summits, such as the Internet Governance Forum.⁷⁴ However, in this explicit willingness stated in the Declaration of acting as an international model, the EU goes even beyond its digital sovereignty ambitions, a reality that could even be criticised as an expression of digital sovereinism. Indeed, digital sovereignty relates to digital assets with a link—not necessarily territorial—to the EU, while this globalising objective also encompasses portions of the digital environment that are devoid of any connection with the EU. And this is not expressed in a subtle or nuanced way: in the Commission’s Communication including the first draft of the Declaration, the EU is presented as a ‘global leader of a human-centred and value-based approach model in the digital

⁷¹ Federal Ministry for Economic Affairs and Energy (BMWi) (2019b).

⁷² See Celeste (2021, 2023a).

⁷³ Ibid.

⁷⁴ Recital 11, Preamble.

age'.⁷⁵ The Declaration, in this sense, is not only an instrument for the EU, but being part of the EU 'brand' in international relations it is also conceived to the benefit of third countries desiring to embrace a similar approach to the digital transformation.⁷⁶

6 The Declaration as an Expression of Digital Constitutionalism

All the more so in light of the just described global ambitions of the Declaration, one can analyse this EU document within the context of other similar initiatives connected to the idea of digital constitutionalism.⁷⁷ The necessity to translate the DNA of contemporary constitutionalism to face the challenges of the digital revolution, which represents the essence of digital constitutionalism as an ideology, informs a variety of processes at multiple levels.⁷⁸ One of the most peculiar ways in which this constitutionalisation of the digital society is taking place is through the emergence of 'Internet bills of rights', declarations articulating rights and principles for the digital age, adopted by a range of actors, and in most of the cases devoid of any binding legal force.⁷⁹ Yet, it is possible to argue that these documents play a constitutional role, nurturing the global conversation on which rights and principles should guide the digital transformation. They do not aim to set a final word, to establish a global constitution. They rather possess an experimentalist character; they aim to gradually innovate, to advocate and persuade, to enhance the level of awareness on digital rights and principles.⁸⁰

The European declaration well fits this trend. It does not aspire to be part of EU primary law, but assumes a softer nature, halfway between a legal, quasi-constitutional document and a policy programme. The EU itself contributes in this way to the global conversation on digital rights and principles, making its baggage of values more explicit in the context of the digital transformation, both internally—within the Union, at the level of its Member States—and externally—in its international relations. In terms of process of elaboration of the Declaration, the public consultation launched by the Commission in May 2021 is similar to the procedure adopted to draft other Internet bills of rights, such as the Brazilian Marco Civil or Italian Declaration of Internet Rights.⁸¹ Compared with other Internet bills of rights,

⁷⁵EU Commission, 'Establishing a European Declaration on Digital Rights and Principles for the Digital Decade, COM(2022) 27 Final' (n 11) 7. My emphasis.

⁷⁶See Article 1(d).

⁷⁷For an analysis of Internet bills of rights initiatives in the context of digital constitutionalism see Celeste (2022a).

⁷⁸See Celeste (2022a) (n 4).

⁷⁹See Celeste (2022b).

⁸⁰For a more detailed analysis of these arguments see Celeste (2023b).

⁸¹Marco Civil Da Internet (2014); Camera dei Deputati.

the Declaration adopts a spurious linguistic style. Expressions and elements that are typical of the constitutional jargon, such as the employment of the first-person plural or the more neutral ‘everyone’ are present besides sentences that seem more extracted from a policy document. Statements using the conditional tense and ‘we commit to’-type of sentences are more difficult to read as individual rights, exactly because they embody the programmatic nature of the Declaration. Another difference lies in the non-comprehensive nature of the Declaration that does not aim to reinstate all the EU rights and values that would be applicable in the digital context, but focuses its attention on the most emblematic areas that are connected to fields of EU digital regulation currently in need of guiding rights and principles, for the rest making a general reference to ‘fundamental rights’.

Despite these differences, the core similarity between the Declaration and other Internet bills of rights lies in its objectives. The Declaration aims to make EU rights and values more ‘visible’, by spelling out values and principles that are either expressed in analogue terms or are implicit in the EU regulatory framework in the context of the digital society. The Declaration, in this way, also embodies one of the ambitions of the Charter of Fundamental Rights, which is to enhance the ‘visibility’ of rights in light of societal changes, and in particular of technological developments.⁸² The last Eurobarometer survey confirms that from this point of view the EU is on the good track.⁸³ The report indicates that the majority of the respondents has a scarce knowledge of digital rights. Most do not even know that basic ‘analogue’ rights are valid online too. Now the ball is however in the hands of a plurality of actors: the dissemination and implementation of the values of the Declaration will tell us in the future about the success—hopefully—of this educational objective.

7 Conclusion

The Declaration on digital rights and principles represents the latest EU contribution to the complex process of constitutionalisation of the digital society. The Declaration too, similarly to many other Internet bills of rights emerged in the past few decades, shares the objectives of digital constitutionalism. It aims to update the constitutional normative framework to face the challenges of the digital revolution. To this end, the Declaration aspires to make rights and principles that should guide EU actors in the context of the digital transformation more visible. Its mission is twofold: programmatic and educative. The Declaration, indeed, does not have any binding legal value. On the one hand, it is a political document, aiming to set the objectives and commitments that the Union and its Member States should pursue to implement

⁸²The preamble of the CFR reads: ‘to this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.’

⁸³European Commission (2021b), p. 21.

EU values in the digital society where we live. And on the other hand, it is an educational tool; it aims to disseminate the EU vision for the digital transformation both internally, to raise societal awareness on digital rights, and externally, to promote the EU digital model in the world.

Political and educational ambitions are connected. The Declaration positions individuals at the centre of the digital transformation. Protecting individuals and their fundamental rights is one of the core objectives of the Declaration. But the Declaration itself derives its legitimacy from the people. The Declaration was adopted following encouraging results of a public consultation; it was solemnly proclaimed by the three EU institutions that embody the legislative power at EU level. The Declaration maps the principles and rights that should guide the development of the EU regulatory framework in the digital field. It is not purely an ex-ante exercise; the EU is already working on a significant series of legislative proposals in this area, so what the Declaration is doing is enhancing the awareness of the pillars, the guiding principles of this regulatory activity. The EU is working on its digital rights awareness. Both at institutional level—making sure that our policy makers know where the EU is going—and at societal level—to ensure that the norms adopted in the digital field will effectively be implemented and fully understood by all individuals. Only in this way, the EU can reinforce its identity as a player that puts values and individuals at the centre. Only in this way, the EU can be proud to export a model beyond its boundaries, without being accused of regulatory auto-referentialism, not to say normative colonialism.

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