The Quest for Balancing Rights in the Digital Age: Perspectives from the Metaverse

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Abstract

The evolution of the metaverse is raising constitutional questions. The opportunities and threats to rights and freedoms in these new spaces primarily developed by online platforms such as social media lead to questioning not only the protection of fundamental rights such as freedom of expression and privacy but also the balancing between conflicting constitutional interests, particularly the protection of individual rights and economic freedoms. This paper argues that the sustainability of the metaverse is connected not only to investments and technological developments but also to the possibility of reconciling and balancing the protection of conflicting constitutional interests.

1. Introduction

Metaverse spaces have been spreading across society. The possibility of accessing augmented and virtual reality technologies across different services is accelerating the digitization of daily lives.[1] Users can access services and express themselves by creating avatars, engaging with communities, working or studying. The exercise of rights and freedoms in this immersive digital space amplifies, rather than generates, questions on how to balance conflicting constitutional interests in the digital age, and how to reconcile individual rights with economic freedoms.

However, this balancing exercise does not lead to a unique result and differs across constitutional models. When examining the European constitutional systems, fundamental rights do not enjoy absolute protection. Both the European Convention on Human Rights (ECHR) and the European Charter of Fundamental Rights (CFREU) restrict the possibility for public actors to interfere with the scope of rights and freedoms,[2] while also limiting the risk of abuse of rights. As a result, the

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[1] Matthew Ball, *The Metaverse: And How It Will Revolutionize Everything*, New York, 2022.
[2] European Convention on Human Rights (1950); Charter of Fundamental Rights of the

protection of a single individual right is not protected as a monad, but it is part of a larger system of interaction with other constitutional interests. In Europe, fundamental rights are not absolute: their scope is determined on a case-by-case basis and in consideration of the interplay with other potentially conflicting constitutional interests.

This observation also extends to the metaverse. The possibility of exercising rights and freedom in an immersive space with multiple "rooms" raises questions about content moderation, protection of privacy, personal data and identity. Nonetheless, and even more importantly, the private governance of these spaces increasingly underlines the constitutional tensions provoked not only by the implementation, enforcement, and balancing of individual fundamental rights in the metaverse but moreover related to the scope of economic freedoms. Indeed, notwithstanding the importance and necessity to safeguard fundamental rights from emerging and increased threats, such as avatar's sexual harassment or discrimination, approaching individual fundamental rights from a position of absolute protection would lead to affecting the protection of other conflicting constitutional rights, particularly economic freedoms, and, therefore, to the constitutional unsustainability of the metaverse in the long run.

The European legal system has already provided a firm response to the challenges raised by digital spaces governed by online platforms, as underlined in the field of content and data.[3] Adopting the Digital Services Act is only one example in a larger process of constitutionalising the digital environment driven by the protection of fundamental rights and democratic values.[4] Despite the relevance of this approach, the European model raises questions about the sustainability of economic freedoms and, therefore, of the Digital Single Market, and more specifically, of the development of the metaverse.

Although the increasing use of the risk-based approach signals the European institutions' willingness to pursue a framework that correctly balances the interests at stake,[5] it is nevertheless necessary to inquire whether this has been concretely

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European Union (2012) OJ C 326/391.

[3] Giovanni De Gregorio, *Digital Constitutionalism in Europe. Reframing Rights and Powers in the Algorithmic Society*, Cambridge, 2022.

[4] 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) OJ L 277/1.

[5] Giovanni De Gregorio - Pietro Dunn, *The European Risk-Based Approaches: Connecting Constitutional Dots in the Digital Age*, in *Common Market Law Review,*

achieved. Having all these premises in mind, the primary question for the metaverse is how to develop systems that protect fundamental rights while balancing conflicting interests between public and private governance. This analysis aims to directly impact the development of digital policies for the metaverse, and its goal is to search for a sustainable constitutional approach.

By focusing on metaverse spaces developed by business actors, such as social media, this paper argues that the sustainability of the metaverse is closely connected to the characteristics of European constitutionalism, primarily driven by the protection of fundamental rights, particularly human dignity, and democratic values such as transparency and due process, which are enshrined in European Treaties and national constitutions. Even more importantly, European constitutionalism does not tolerate absolute protection of rights and freedoms, thus making the principle of proportionality a critical part of the European constitutional architecture. Both the European Convention on Human Rights (ECHR) and the Charter of the Fundamental Rights of the European Union (CFREU) reject the possibility of granting protection to single rights and freedoms that could affect the essence of other fundamental rights.

This paper underlines how this principle of proportionality plays a critical role in overcoming the conflict between individual rights and economic freedoms. As one of the primary values of European constitutionalism, proportionality is an effective instrument for balancing rights and freedoms in the Digital Single Market. Rather than enabling absolute protection of fundamental rights, the proportionality principle acts as a safety valve that reconciles the protection of fundamental rights: namely, freedom of expression is to be reconciled with economic freedoms, such as the freedom to conduct business, that are both constitutional values in Europe.

2. Balancing Rights and Freedoms in the European Constitutional Framework

The metaverse creates new opportunities for users to exercise rights and freedoms. Yet, there have already been cases underlining how some spaces in the metaverse can host harmful expressions and conduct that call for moderation[6] or raise questions

59, 2022, 473 ss.

[6] Tanya Basu, *The Metaverse has a Groping Problem Already*, in *MIT Technology Review*, 2022.

about surveillance.[7] Different applications and services in the metaverse, such as Spatial or RecRoom, can be used for various purposes, from showing artworks or connecting with friends to disseminating discriminatory content or infringing copyright.

Inevitably, these spaces can become sources of conflicts among fundamental rights. On the one hand, the metaverse raises and amplifies traditional constitutional questions about the balancing between different fundamental rights: such as freedom of expression, privacy, and dignity, particularly relevant in an immersive reality. On the other hand, these new spaces make it increasingly suitable for the need to strike a balance between protecting individual rights and economic freedoms, promoting the development of these new digital spaces, and primarily the freedom to conduct business.

As mentioned above, in the European constitutional system, the scope of fundamental rights is generally not considered absolute and is primarily based on proportionality.[8] Despite some exceptions such as torture, in the framework of the Council of Europe, the ECHR expressly states that public authorities can interfere, for instance, with the right to freedom of expression,[9] or private and family life,[10] in accordance with the law and where necessary in a democratic society to pursue public interest. Likewise, the CFREU limits public authorities' capacity to restrict fundamental rights based on the criteria of legality, legitimacy, and proportionality criteria.[11]

Furthermore, the supremacy of fundamental rights is mitigated by the CFREU and the ECHR, which provide clauses prohibiting the abuse of rights.[12] These aim to deal with the unintended consequence that the protection of any right could destroy other constitutional values. Indeed, the European constitutional framework places dignity at the centre to ensure zero tolerance for the misuse of the protection of rights that results in annihilating other constitutional interests.[13] Therefore, within the European framework, the constitutional system incorporates an intrinsic mechanism that allows

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[7] Derek Robertson, *Human Rights in the Metaverse*, in Politico, 2022.
[8] Alec Stone Sweet - Jud Mathews, *Proportionality Balancing and Global Constitutionalism,* in *Columbia Journal of Transnational Law,* 47, 2008, 68 ss.
[9] ECHR, Art 10.
[10] *Ibid*, Art 8.
[11] CFREU, Art 52.
[12] ECHR, Art 17. CFREU, Art 54.
[13] Christine Duprè, *The Age of Dignity: Human Rights and Constitutionalism in Europe*, London, 2015.

striking a balance among constitutional interests, thus making proportionality a critical piece of the European constitutional puzzle: it follows that excessive democratic tolerance or oppressive regimes of protection tend to be incompatible with the European framework.

This constitutional architecture ensures that the essence of fundamental rights is also safeguarded from disproportionate pursuits of legitimate public interest, such as security. Indeed, the conflict between constitutional rights is not the only concern when addressing the balancing among constitutional interests. One of the primary challenges for the protection of rights finds its root in the interferences by public actors that need to justify limitations to rights and freedoms through the test provided by the CFREU, the ECHR, and national constitutions.

Nonetheless, the primary constitutional question for the metaverse resides in how to deal with the conflict between individual rights such as freedom of expression and economic freedoms, particularly the freedom to provide services and the freedom to conduct business. Those, as mentioned, are part of the European constitutional system and enshrined in the Charter and the Treaty on the Functioning of the European Union notably.[14] Even after the adoption of the Nice Charter in 2000 and the recognition of its binding effects in 2009, the Union did not abandon. Still, it complemented its liberal imprinting based on economic pillars, namely fundamental freedoms, with an approach based on the protection of fundamental rights and democratic values. The Treaties aim to ensure the free movement of persons, the freedom of establishment, the freedom to provide goods and services, and the free movement of capital. These freedoms can still, though not exclusively, be considered the primary drivers of European integration and growth in the internal market. Therefore, the consolidation and harmonisation of the internal market are still the primary engines of the Union.

The application of this constitutional framework to the metaverse raises questions. Particularly, the intrinsic private governance of the metaverse spaces underlines the constitutional tensions among conflicting rights such as freedom of expression and privacy, and between the protection of civil and political rights and economic freedoms. This point is of primary importance to understand whether the amplification of opportunities and challenges that the metaverse will bring and the

[14] Consolidated version of the Treaty on the Functioning of the European Union (2012) OJ C 326/47, Title II and IV.

consequent responses from constitutional democracies will make these digital spaces constitutionally sustainable in the long run.

3. Private Governance in the Metaverse

Private actors have primarily driven the development of the metaverse. There is increasing competition among online platforms to become a standard-setter in this new market.[15] The rebranding of Facebook in Meta is one example of the private sector's interest in expanding digital services into this new space that promises to provide new opportunities for the development of the digital environment, and, consequently, the provision of digital services that can also attract advertising revenues.

This private dimension leads the metaverse to become a space driven by private standards. Even more so than in social media spaces, the metaverse integrates at least two layers of governance. The first layer is defined by the platform hosting the metaverse spaces, as in the case of Meta. In this case, users are subject to terms of services and community guidelines that define the rules of conduct in the metaverse. The Code of Conduct for Virtual Experience is a primary example of how the metaverse is organised through private standards.[16] A second layer is governed by the applications offering their services to users in the metaverse, such as RecRoom or Bigscreen. Therefore, inside the metaverse, users enter spaces based on different terms of services and standards. In other words, participating in the metaverse also means addressing multiple standards and procedures that will shape rights and freedoms. The mix between these norms underlines the complexity of these spaces as governed by self-regulation processes.

This process already characterises the rise and development of social media spaces. By adopting procedural and technical tools underpinning their standards, platforms establish the rules defining the scope and organisation of online content.[17] In this peculiar case, setting private standards in the metaverse tends to reflect the expression of a quasi-legislative function. Although this autonomy meets some limits when the rule of law expands to the private sector through horizontal regulation such

[15] Alex Heath, *Zuckerberg says Meta and Apple are in 'very deep, philosophical competition' to build the metaverse*, in The Verge, 2022.
[16] Meta, *Code of Conduct for Virtual Experience*.
[17] Luca Belli - Jamila Venturini, *Private Ordering and the Rise of Terms of Service as Cyber-Regulation,* in *Internet Policy Review,* 5(4), 2016.

as the Digital Services Act, these private determinations can be considered the rules to abide by for content moderation in the metaverse.

Furthermore, online platforms do not only set standards but also enforce these rules, including through automated systems. For instance, the removal of online content or the erasure of data can be performed directly by online platforms without the involvement of any public body ordering the infringing party to respect Terms of Services and community guidelines. This activity reflects a quasi-executive function. Remarkably, the metaverse raises new questions on enforcing standards that aim to protect users from discrimination considering that users do not only engage with content in their space but also directly with other users through their avatars.

In addition to these normative and executive functions, online platforms tend to make decisions on fundamental rights and freedoms. Namely, platforms have performed functions consisting of the adjudication of conflicting rights and freedoms when blocking accounts or removing online content. This form of quasi-judicial function leads online platforms to make decisions on fundamental rights in the digital age. Including in the metaverse, decisions on blocking accounts or speech limitations lead online platforms to make constitutional decisions.

However, this, which results in private governance, does not exclude that the metaverse is subject to the rule of law. Defamation and harassment remain illegal conducts even in these digital spaces, with the result that platforms are responsible for tackling the spread of these conducts, particularly when they become aware of these unlawful conducts. And this approach has been increasingly consolidated with adoption of the Digital Services Act. As underlined by the President of the European Commission, «It gives practical effect to the principle that what is illegal offline, should be illegal online».[18] Indeed, the Digital Services Act has not only maintained the same regime of liability for online intermediaries established by the e-Commerce Directive but has also increased the relevance and accountability of platforms when moderating online content.[19]

These examples underline how the governance of the metaverse is increasingly shared between the public and private actors. The rule of law is not the only model governing online content. Online platforms set standards and procedures according

[18] European Commission, Digital Services Act: Commission welcomes political agreement on rules ensuring a safe and accountable online environment, 2022.
[19] Digital Services Act, Art 6.

to predictive analysis based on the processing of users' data. In this sense, the metaverse will tend to replicate some of the challenges experienced in social media spaces while introducing new challenges, particularly for identity and discrimination. This environment underlines the tension between the protection of individual rights and the need to protect economic freedoms, thus leading to the quest to balance these conflicting constitutional interests in the digital age.

4. Rights and Freedoms between Public and Private Actors

Economic freedoms are critical in providing spaces for private actors to set standards in the metaverse. From monetisation to conduct moderation, the metaverse rules are primarily driven by the possibility of developing services across digital markets. Considering the challenges for fundamental rights in these digital spaces, the primary question is how to reconcile public and private values in the metaverse or strike a fair balance that ensures a sustainable path to protect fundamental rights and the pursuit of legitimate interests while enabling economic freedoms.

From a constitutional perspective, fundamental rights directly apply only in relation to public actors. Constitutions are a critical part of the social contract that limits governmental powers and ensures individual freedoms are not interfered with by public authorities.[20] This public-private divide is primarily relevant to protect private freedoms that can be threatened by interference from public actors. The focus of modern constitutionalism has traditionally been on limiting the authority of public actors, and this system does not extend to private actors. Without any regulation, it is impossible to require private actors such as social media to protect constitutional rights such as freedom of expression from a legal standpoint.

Nonetheless, the European constitutional model is not based on a rigid distinction between public and private actors. The constitutional keyword is *Drittwirkung*, which is a legal concept originally developed in the '50s by the German Constitutional Court,[21] which presumes that an individual plaintiff can rely on a national bill of rights to sue another private individual alleging the violation of fundamental rights. In other words, the horizontal effects of fundamental rights can be defined as a form of total constitution that tends to cover the exercise of powers

[20] Andras Sajó - Renata Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism*, Oxford, 2017.
[21] German Constitutional Court, judgment of 15 January 1958, BVerfGE 7, 198.

by public authorities and private actors.[22] It is a legal concept that, as mentioned, has its roots in Germany and then subsequently migrated to many other constitutional jurisdictions, exerting a strong influence including on the case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).[23]

When focusing on social media, including metaverse spaces, decision-making on content, such as content removal, and, more generally, content moderation, is an example of how private actors exercise freedoms, even if such exercise can lead to consequences for constitutional rights such as freedom of expression or privacy. Courts in Member States such as Italy,[23] Germany,[24] and the Netherlands,[25] have underlined this situation. Indeed the European Commission has intervened in this space through regulation, as demonstrated by the adoption of the Digital Services Act.

The absolute protection of individual freedom and private autonomy is not constitutionally compatible with the protection of fundamental rights in the European constitutional framework. The very concept of the abuse of rights, which is not equally relevant in other constitutional systems, is explicitly codified in the ECHR and in the CFREU, which seem to reflect the grounding principle that drives the balancing between rights and freedoms in Europe.

This European tendency towards protecting fundamental rights has also led courts to extend the protection of constitutional rights in the digital age. This process has been part of the consolidation of European digital constitutionalism.[26] In the last twenty years, the policy of the European Union in the field of digital technologies has shifted from a liberal economic perspective to a democratic approach. This change of strategy has resulted primarily from the rise of the information society, and then of the algorithmic society, which has created not only new opportunities, but also posed new challenges to fundamental rights and democratic values.

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[22] Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, (2006) 7(4) in German Law Journal, 7(4), 2006, 341.
[23] Court of Rome, 12 December 2019, R.G. 59264/2019.
[24] BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 19. December 2021- 1 BvR 1073/20.
[25] Rechtbank Noord-Holland, 6 October 2021, C/15/319230/KGZA 21-432.
[26] Giovanni De Gregorio, *The Rise of Digital Constitutionalism in the European Union,* in *International Journal of Constitutional Law*, 19(1), 2021, 41 ss.

Within this new constitutional framework, the CJEU started to apply the CFREU as a standard for assessing the validity of and interpreting European legal instruments, thus focusing on the effective protection of fundamental rights and freedoms. Given the lack of any prior legislative review, the Charter has played a critical role in highlighting the challenges for fundamental rights online, and in guiding the transition from a mere economic perspective to a new constitutional phase.[27]

The court has firmly underlined the need to ensure effective protection of fundamental rights, particularly in the case of privacy and data protection. The case law of the CJEU in the field of data protection shows how the relationship between fundamental freedoms and rights in the internal market is anything but equivalent. From the first recognition of data protection as a fundamental right in the Promusicae case,[28] without emancipating this right from the safeguard of private life,[29] the CJEU reinforced the protection of this fundamental right, unequivocally in the decisions on digital privacy after the adoption of the Treaty of Lisbon.

These examples have only heralded a series of reactions that underline how the European approach is oriented to the protection of fundamental rights. The lesson learned from judicial activism has not gone unnoticed by the Union. The CJEU's judicial activism has played a crucial role in triggering a new European constitutional phase toward the injection of democratic values into the digital environment, and particularly with respect to content moderation. In the framework of the Digital Single Market strategy, the Commission underlined the need for online platforms to «protect core values« and increase «transparency and fairness for maintaining user trust and safeguarding innovation».[30] This is because of the role of online platforms in giving access to information and content to society and, as a result, their impact on users' fundamental rights. As the Commission stresses, this role implies «wider responsibility».[31]

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[27] Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet. A Road towards Digital Constitutionalism?,* Oxford, 2021.
[28] Case C-275/06, Productores de Música de España (Promusicae) v Telefónica de España SAU, ECR I-271 (2008), 63.
[29] Juliane Kokott - Christoph Sobotta, *The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR*, (2013) 3 *International Data Privacy Law,* 3, 2013, 222 ss.
[30] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Online Platforms and the Digital Single Market Opportunities and Challenges for Europe COM(2016) 288 final.
[31] *Ibid.*

This framework has led the Union to adopt a new system of soft and hard law. The GDPR has introduced other safeguards and increased accountability to protect the fundamental rights of data subjects.[32] The Directive on Copyright in the Digital Single Market,[33] the amendments to the Audiovisual Media Service Directive,[34] and the Regulation on Terrorist Content,[35] have provided sectorial answers, and the Digital Services Act is introducing a horizontal framework that aims to provide a regulatory landscape for online content.

Nonetheless, the Digital Services Act is just one piece of a broader European strategy set on reviewing the objectives of the Digital Single Market.[36] The proposal for a regulation on artificial intelligence technologies is another example of this European "reactive" framework.[37] Furthermore, the Commission has introduced co-regulatory solutions through which it is seeking to cooperate with platforms in the fight against certain forms of expression, for instance, disinformation as underlined by the adoption of the Strengthened Code of Practice.[38]

This reactive framework could impact the metaverse as a space. Platforms developing and hosting metaverse applications will need to take into account a complex set of rules which is expanding as demonstrated by emendments on the Artificial Intelligence Act to consider virtual reality applications in the highest category of risk due to the challenges of manipulative techniques.[39] This approach could lead to altogether limiting the scope of these applications in Europe. In

[32] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC OJ L 119/1.
[33] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (2019) OJ L 130/92.
[34] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities OJ L 303/69.
[35] Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online *OJ L 172/79.*
[36] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Shaping Europe's digital future' COM(2020) 67 final.
[37] 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 COM(2021) 206 final.
[38] Strengthened Code of Practice on Disinformation, 2022.
[39] See *supra* n. 37.

addition, the legal uncertainty resulting from these large volumes of rules contributes to creating a legal barrier for small organisations seeking to the market of the metaverse. Considering the novelty of this space, such an approach can produce disadvantages for the internal market in terms of diversity and competition.

The constitutional transformation of the Union has contributed to underlining the role of fundamental rights in the digital age. At the same time, it has also led to more friction between the protection of these rights and economic freedoms, thus making the safety valves in European (constitutional) law relevant to make the metaverse sustainable in the long run.

5. The Quest for Proportionality

The conflict between fundamental rights in the digital age has already led social media to develop decision-making processes to solve these conflicts, primarily through content moderation procedures, and respond against threats and harmful behaviours. The metaverse will amplify this challenge, thus increasing the pressure for public actors to intervene in order to protect fundamental rights. This trend would make the clash between individual rights and economic freedoms increasingly relevant. Therefore, when approaching the metaverse, it is important to wonder how to strike a proportionate balance between rights and freedoms in these spaces.

In this case, the principle of proportionality plays a critical role in the sustainability of the metaverse. From a methodological perspective, the balancing of rights is not only an exercise in recognising that fundamental rights need to be balanced with other constitutional interests, but also requires to consider the context of the specific case, as clarified in *Volker*.[40] Indeed, courts and public authorities tend to solve conflicts by striking a balance basing it on political and legal purposes beyond contextual analysis. This issue has been underlined in the CJEU cases on digital privacy. In the *Schrems* saga,[41] the CJEU has extended the scope of European data protection law by interpreting "adequacy" as "equivalence" in order to ensure the effective protection of the fundamental rights to privacy and data protection as enshrined in the Charter. Likewise, in *Google Spain*,[42] the role of the CJEU in

[40] Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, ECLI:EU:C:2018:871.
[41] Case C-362/14, *Maximillian Schrems v Data Protection Commissioner* (6 October 2015); Case C-311/18, *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* (16 July 2020).
[42] Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de*

extending (or adapting) the scope of fundamental rights in the digital age has led to recognising the obligation for search engines to delist personal data from their search results.

One of the key questions to address then relates to the need to reconcile legal and technical arguments. It seems that European courts (not only the Court of Justice) did not devote much attention to technical and empirical arguments in their legal reasoning in the judgments concerning the enforcement of digital privacy. If, on the one hand, this makes sense in light of the specific mandate of courts (interpreting the law and then enforcing it), on the other hand, the fact that technical and empirical arguments have been neglected so far may give rise to some criticalities in light of the privatisation of the enforcement of these rights which emerges in connection, among others, to content moderation activities and the right to be forgotten. Particularly, the balancing of fundamental rights in the metaverse will require taking into account the peculiar dimension of this space, particularly looking at private governance.

The horizontal translation of the principle of proportionality can be examined by looking at the expansion of risk-based regulation in European digital policy.[43] The notion of risk regulation is expanding in Europe as a compromise between fundamental rights and economic freedoms. This approach recognises that there are risks for fundamental rights in the digital age that require public and private actors to balance conflicting constitutional interests. However, risk-based regulation has not been implemented following the same logic in the European digital policy.

The GDPR introduces a system based on the principle of accountability,[44] meaning that it is up to data controllers to demonstrate that their data processing activities comply with data protection law.[45] Such a principle, in the context of the GDPR, thus translates in a risk-based approach following a "bottom-up" perspective. It is directly up to data controllers to assess the risks entailed by their processing activities when it comes to the protection of data subjects' privacy and data protection rights and to adopt, consistently, «appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with [the] Regulation».[46] In other words, it is up to data controllers themselves (and to data

Datos (AEPD) and Mario Costeja González (13 May 2014).
[43] De Gregorio - Dunn, *supra* note.
[44] GDPR, art. 5.
[45] Raphael Gellert, *The Risk-Based Approach to Data Protection*, Oxford, 2020.
[46] GDPR, art. 24.

processors) to identify the appropriate measures to mitigate and reduce risk, thus tailoring the way they comply with the GDPR in such a way as to respond to and reflect the specific characters of their own activities.

The Digital Services Act also features a risk-based approach, especially when it comes to the new rules it introduces with respect to content moderation practices. Through an asymmetric approach, the DSA reflects the critical features of risk-based regulation. Most notably, VLOPs must periodically operate an assessment of the systemic risks in the Union stemming from the design or functioning of their service and their related systems,[47] and put in place reasonable, proportionate and effective mitigation measures tailored to the specific systemic risks identified.[48] The structure of the DSA, as a result, may thus be defined as a sort of hybrid, in the sense that, although the Regulation's overall structure follows a categorisation of risk that is defined on a top-down basis operated directly by the European lawmakers, concurrently important bottom-up features complement such a structure.

Within the Artificial Intelligence Act, the shift from a bottom-up to a top-down model is even more evident. Depending on the risk level specifically assigned to a certain AI system,[49] those ones must comply with increasingly burdensome requirements, and their providers and users are subject to certain duties and obligations. Therefore, if an AI system entails an unacceptable risk, that system will altogether be prohibited, whereas a mechanism of self-regulation based on the adoption of codes of conduct, encouraged by the European Commission, applies to minimal risk systems. Therefore, in this case, risk assessment and risk mitigation are tasks that, rather than being delegated, are retained by the EU lawmakers, thus producing a risk-based approach that inherently follows a top-down structure.

Nonetheless, the risk-based approach does not exhaust the quest to strike a fair balance between fundamental rights and economic freedoms. Another important challenge is connected to the geography of proportionality. Indeed, the European approach tends also to extend its boundaries to the global scale, thus raising the question of the sustainability of the metaverse beyond Europe.

[47] Digital Servies Act, art. 34.
[48] *Ibid,* art. 35.
[49] *Artificial Intelligence Act, Arts. 6-29.*

In *Google v CNIL*,[50] the CJEU highlighted the different approaches to the right to privacy and data protection in other legal systems as well as the relative nature of this fundamental right. Two pillars underlying the extraterritoriality effect seem to have fallen. On the one hand, the limited digital sovereignty of the EU has been recognised, or rather the presence of different sovereignties within the digital world has been recognized; on the other hand, the trump card of the absolute right to data protection and privacy online appears, in part, to have become less powerful. As a result, even if, in light of the precedents, the coherent solution would have been to extend the right to be forgotten on a global scale, the CJEU opted for a self-restraining approach, motivated by the desire to mitigate the risk of a kind of European legal colonisation in the name of cultural hegemony. A similar approach can be discerned with freedom of expression. Specifically, in *Glawischnig-Piesczek v Facebook*,[51] the CJEU addressed the territorial scope of national orders concerning the removal of content, thus underlining the potential extension of EU law, especially freedom of expression, on a global scale.

These examples underline the complexity of defining a proportional approach to balancing fundamental rights and economic freedoms. Nonetheless, they also underline how, in the European context, it is not possible to recognise absolute protection of fundamental rights without taking into account other constitutional interests. Therefore, proportionality plays the role of a safety valve to ensure the sustainability of the metaverse, particularly to strike a balance between individual rights and economic freedoms.

6. Conclusions

The metaverse is another example of spaces shaping the digital society and, as such, it will be a source of opportunities and conflicts. Considering the potentiality of this space, it is critical not to postpone the discussion on the constitutional sustainability of this space. Rather than adopting a broad neoliberal approach that prevailed at the end of the last century or a rigid policy that will curtail the development of the metaverse, it is critical to define the values that will drive the evolution of these spaces between public and private actors.

[50] Case C-507/17, *Google Inc. v Commission nationale de l'informatique et des libertés* (CNIL) (2019).
[51] Case C-18/18, *Eva Glawischnig-Piesczek* v Facebook (2019).

In the European context, the protection of fundamental rights needs to consider conflicting constitutional interests, thus making proportionality one of the primary tools to solve conflicts. Particularly, the metaverse raises questions regarding balancing economic freedoms with the protection of privacy and freedom of expression. These conflicting fundamental rights constitute examples of the need to concretely assess the complexity of balancing freedom to conduct business and other economic freedoms in the internal market with the protection of individual fundamental rights. However, the conflict among constitutional values involves more than just fundamental rights and legitimate interests but also the relationship between individual rights and economic freedoms. As a result, the sustainability of the metaverse is primarily linked to this constitutional relationship.

This conflict is primarily relevant for the metaverse, given its private governance. Online platforms play a critical role in shaping the rules of these spaces. Despite the regulation of content and data in the European framework, the metaverse is made of multiple layers of private standards, thus making constitutional conflicts increasingly complex. The governance of the metaverse is not only shaped by the law or private standards, but their mix contributes to driving the evolution of these spaces.

This situation can trigger reactions from public actors in order to protect fundamental rights and democratic values. In the last twenty years, the European approach has complemented its liberal strategy with a democratic-oriented approach to address the challenges raised by the digital age. This transformation has already underlined the reactive approach of the European constitutional framework to private governance. The Digital Services Act and the Artificial Intelligence Act are only two cases underlining this European approach.

In order to define a sustainable approach for the metaverse, the centrality of proportionality within the European constitutional framework can be considered a way to address the conflicts between the market and democracy. In this case, it is critical to take into account, first, that the balancing exercise is primarily contextual and not only based on legal and political narratives. Second, this activity cannot be just left to private actors, but it is critical to include this function in a regulatory framework such as the approach to risk-based regulation. Third, balancing fundamental rights encounters its limits when extended to the global scale.

In this case, the possibility to rely on proportionality as a safety valve for the development of the metaverse provides a first approach to reconciling individual rights and economic freedoms. While the protection of free speech is quasi-absolute

in the US framework, it is more limited in Europe. Likewise, even if privacy and data protection in Europe enjoy high protection, they cannot be considered absolute rights. The primary challenge is building transparent and accountable collaboration systems between public and private actors. This approach would ensure that balancing rights and freedoms in the metaverse is not merely driven by a fragmented mix of hard regulation or extensive self-regulation but considers the multiple layers of governance of these spaces.