

Digital constitutionalism: a socio-legal approach

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In law and legal studies there is a culture of definition. Defining concepts, interpreting actions and categorizing them is an integral part of legal research and practice. Yet, this definitional effort has always found significant limitations when faced to multifaceted and complex concepts. Different interpretations – rightly – emerge, contributing to create a plurality of approaches and practical implementations. In constitutional law, one of the most debated concepts is the very notion of ‘constitution’. Not to mention instances where the level of abstraction further increases, such as in the case of ‘constitutionalism’ or ‘constitutionalisation’.

The concept of ‘digital constitutionalism’ has recently emerged in this intricate galaxy, of which it shares its connatural level of polysemy. The aim of this brief contribution is to offer an aerial view of the main theoretical models of digital constitutionalism and illustrate the advantages of adopting a socio-legal approach. It will argue that the constitutional questions that the digital society is facing require going beyond the formal nature of normative sources, encompassing instruments that are not traditionally part of constitutional law. A holistic analysis of the constitutional counteractions to the challenges of the digital revolution depicts a multilevel process of constitutionalisation, where multiple actors and normative instruments interact, complementing and stimulating each other.

I. Theoretical models: beyond the State and the law

Scholars working on digital constitutionalism rarely offered systematic theorizations of this concept.¹ The first generation of digital constitutionalists adopted the most original and innovative meaning of this concept.² They paired the notion of constitutionalism with the realm of private actors, projecting this concept beyond its traditional anchoring to the State dimension. Digital constitutionalism would denote processes of instilling constitutional values and principles into the rules of private tech corporations, with particular attention to digital platforms. Suzor was one of the pioneers of digital constitutionalism, championing the idea that private law should be the main vehicle of transmission of constitutional values from the constitutional law dimension *stricto sensu* to the internal norms of digital platforms.³ Karavas

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¹ On the point, see Edoardo Celeste, ‘Digital Constitutionalism: A New Systematic Theorisation’ (2019) 33 *International Review of Law, Computers & Technology* 76.

² For a more comprehensive and detailed analysis, see Edoardo Celeste, ‘Conceptual Approaches to Digital Constitutionalism: A Counter-Critique’ in Indra Spiecker, Laura Mendes and Ricardo Campos (eds), *Digital Constitutionalism. A Normative and Institutional Framework for Conflict Solving under Construction* (Nomos, forthcoming 2024).

³ See Nicolas Suzor, ‘Digital Constitutionalism and the Role of the Rule of Law in the Governance of Virtual Communities’ (PhD, Queensland University of Technology 2010) <<https://eprints.qut.edu.au/37636/>>; Nicolas

analysed the ‘maieutic’ role that German judges played in setting standards that would guide the development of the terms of service of private tech companies.⁴

Differently from the idea of relying on legally binding instruments, such as private law or judicial decisions, other scholars argued that the engine of digital constitutionalism would lie in extra-legal normative sources. Gill, Redeker and Gasser⁵ and Pettrachin⁶ investigated the role played by ‘Internet bills of rights’, declarations of digital rights and principles promoted by civil society actors. Santaniello et al. analyzed the input of parliamentary initiatives adopting similar non-legally binding charters.⁷

More recent works have marked a widening of the use of digital constitutionalism, focusing their attention on more traditional legal sources. Pollicino⁸ and De Gregorio⁹ offered a comprehensive study of the contribution of, respectively, the Court of Justice of the EU and EU law more in general in advancing the protection of digital rights at EU level. Other scholars conversely dived into more specialist fields, investigating specific technologies, such as, for instance, the impact of quantum computing from a perspective of digital constitutionalism.¹⁰

A cursory look at the legal sources and actors involved in digital constitutionalism studies allows to realise that the constitutional framework that is reacting to the challenges of the digital revolution is plural and multilevel. The Author has thus proposed a systematic theorization of digital constitutionalism as the ideology that is currently guiding a multilayered process of constitutionalisation of the digital society.¹¹

II. A socio-legal approach: multilevel constitutionalisation

‘Constitutionalism’ and ‘constitutionalisation’ are terms with different meanings.¹² Digital constitutionalism represents the ideology advocating for the protection of fundamental rights and the preservation of the balancing of powers in the digital society. Digital constitutionalism stresses the need to ‘translate’ the core principles of contemporary constitutionalism in a way that can ‘speak’ to current societal actors. In this sense, digital constitutionalism does not

Suzor, ‘Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms’ (2018) 4 *Social Media + Society* 1.

⁴ Vagias Karavas, ‘Governance of Virtual Worlds and the Quest for a Digital Constitution’ in Christoph B Graber and Mira Burri-Nenova, *Governance of Digital Game Environments and Cultural Diversity: Transdisciplinary Enquiries* (Edward Elgar Publishing 2010); cf. Edoardo Celeste, ‘Digital Punishment: Social Media Exclusion and the Constitutionalising Role of National Courts’ (2021) 35 *International Review of Law, Computers & Technology* 162.

⁵ Lex Gill, Dennis Redeker and Urs Gasser, ‘Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights’ (2015) Berkman Center Research Publication No 2015-15 <<https://papers.ssrn.com/abstract=2687120>> accessed 30 August 2018.

⁶ Andrea Pettrachin, ‘Towards a Universal Declaration on Internet Rights and Freedoms?’ (2018) 80 *International Communication Gazette* 337.

⁷ Mauro Santaniello and others, ‘The Language of Digital Constitutionalism and the Role of National Parliaments’ (2018) 80 *International Communication Gazette* 320.

⁸ Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road towards Digital Constitutionalism?* (Hart 2021).

⁹ Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (1st edn, Cambridge University Press 2022).

¹⁰ Miriam Wimmer and Thiago Guimarães Moraes, ‘Quantum Computing, Digital Constitutionalism, and the Right to Encryption: Perspectives from Brazil’ (2022) 1 *Digital Society* 12.

¹¹ Celeste, ‘Digital Constitutionalism’ (n 1).

¹² On the point, see more in Edoardo Celeste, ‘The Constitutionalisation of the Digital Ecosystem: Lessons from International Law’ in Angelo Golia, Matthias C Kettemann and Raffaella Kunz (eds), *Digital Transformations in Public International Law* (Nomos 2022).

subvert the tenets of constitutional law, as we know it today; conversely, it aims to perpetuate its foundational values. It is about making evolve, and not revolutionising the DNA of contemporary constitutionalism.

In order to do so, traditional constitutionalising processes and instruments are not sufficient, at least not taken individually. The digital revolution overtakes national boundaries; the constitutional questions of the digital society involve a multiplicity of jurisdictions. Hence, the need of theorising a composite solution: a multilevel process of constitutionalisation that would aim to progressively instil the key values and principles of contemporary constitutionalism in the digital environment.¹³ The constitutional response to the challenges of the digital revolution is thus not unitary, but intrinsically plural and fragmented. We not only observe traditional constitutional instruments, such as national constitutions, laws with constitutional value, judicial decisions at national and supranational level. Non-legally binding Internet bills of rights promoted by civil society actors, terms of services of private technology companies, decisions of quasi-jurisdictional private adjudicating bodies equally emerge as constitutional counteractions.¹⁴

By adopting a holistic, socio-legal approach, we understand that all these instruments play a function from a constitutional perspective: they are all contributing to shape constitutional norms for the digital society. This process does not merely consist in a normative transplant of constitutional principles. It is a gradual translation, adaptation, what in Teubnerian terms we could call ‘generalisation and respecification’ of core principles of contemporary constitutionalism.¹⁵ All normative inputs count, regardless of their legal value. They are all part of the same normative conversation. We observe an ongoing cross-fertilisation; there is a constant mutual compensation and stimulation among normative instruments, as if they were ‘communicating vessels’.¹⁶

III. A tool to detect constitutional anaemia

Especially the emergence of Internet bills of rights, non-legally binding declarations on digital rights and principles, has not to be underestimated. From a socio-legal perspective, these documents play a constitutional function. They adopt a constitutional tone to access the normative conversation on which rights and principles we should enshrine to face the challenges of the digital revolution. They can address specific issues or represent distinct standpoints.¹⁷ Despite their lack of legal force, these instruments represent an alarm sign for the constitutional ecosystem, helping to diagnose risks of ‘constitutional anaemia’.¹⁸ As they

¹³ *ibid.*

¹⁴ For a visualisation of these various constitutional counteractions, see Celeste, ‘Digital Constitutionalism’ (n 1).

¹⁵ For a more exhaustive explanation, see Edoardo Celeste, ‘Internet Bills of Rights: Generalisation and Re-specification Towards a Digital Constitution’ (2023) 30 *Indiana Journal of Global Legal Studies* 25.

¹⁶ I have further explained these points in Celeste, ‘The Constitutionalisation of the Digital Ecosystem’ (n 12); these concepts draw on Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 *Leiden Journal of International Law* 579; and Christoph B Graber, ‘Bottom-up Constitutionalism: The Case of Net Neutrality’ (2016) 7 *Transnational Legal Theory* 524, 551.

¹⁷ See, respectively, Edoardo Celeste and others, *The Content Governance Dilemma: Digital Constitutionalism, Social Media and the Search for a Global Standard* (Palgrave Macmillan 2023); Edoardo Celeste, ‘Digital Constitutionalism, EU Digital Sovereignty Ambitions and the Role of the European Declaration on Digital Rights’ in Annegret Engel, Xavier Groussot and Gunnar Thor Petursson (eds), *New Directions in Digitalisation: Perspectives from EU Competition Law and the Charter of Fundamental Rights* (Springer 2024).

¹⁸ Edoardo Celeste, *Digital Constitutionalism: The Role of Internet Bills of Rights* (Routledge 2022).

are not the result of institutionalised processes, these documents are freer to innovate. In this way, they highlight areas of constitutional law that are in need of intervention and propose more tailored norms and principles.

Adopting a holistic, socio-legal approach allows to study these normative sources in conjunction with more traditional ones. This means investigating the constitutional questions of the digital society in a functional way, going beyond the formal nature of norms and looking at what they can achieve in practice. Indeed, the conundrum of future digital constitutionalism research not only lies in how to translate contemporary constitutionalism in a way that can effectively address the challenges of the digital revolution, but also in understanding which mix of normative instruments can successfully achieve this objective.