

1 Digital Constitutionalism: An Introduction

1.1 Reframing Constitutionalism in the Digital Age

This is a book about rights and powers in the digital age. It is an attempt to reframe the role of constitutional democracies in the information or network society,¹ which, in the last twenty years, has transmuted into the algorithmic society as the current societal background featuring large, multinational social platforms ‘sit between traditional nation states and ordinary individuals and the use of algorithms and artificial intelligence agents to govern populations’.² Within this framework, states are not the only source of concern any longer. Global online platforms, such as Facebook, Amazon or TikTok, increasingly play a critical role at the intersection between public authority and private ordering.³ By focusing on the European constitutional framework as lodestar, this book looks at the rise and consolidation of European constitutionalism as a reaction to new digital powers. It also provides a normative strategy to face the opportunities and challenges of digital capitalism which, in the last twenty years, have not only led to a market revolution,⁴ and to the rise of platform capitalism,⁵ but have also impacted on the constitutional

¹ Manuel Castells, *The Rise of the Network Society: The Information Age: Economy, Society, and Culture* (Blackwell 2009); John Feather, *The Information Society: A Study of Continuity and Change* (American Library Association 2013).

² Jack M. Balkin, ‘Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation’ (2018) 51 U.C. Davis Law Review 1151.

³ José van Dijck, Thomas Poell and Martijn de Waal, *The Platform Society: Public Values in a Connective World* (Oxford University Press 2018).

⁴ Daniel Schiller, *Digital Capitalism: Networking the Global Market System* (MIT Press 1999).

⁵ Nick Srnicek, *Platform Capitalism* (Polity Press 2016).

dimension of democracy as information capitalism,⁶ or surveillance capitalism.⁷

This research unpacks the path of the Union moving from neoliberal positions towards democratic shores guided by the beacon of European constitutionalism. Since the end of the last century, the charm of accommodating the promises of digital technologies has led to neglecting and forgetting the role of constitutionalism, and then constitutional law, in protecting fundamental rights and limiting the rise and consolidation of unaccountable powers abusing constitutional values. Neoliberal reverences, also driven by technological optimism and the consolidation of liberal narratives around Internet governance,⁸ have indeed encouraged constitutional democracies to subject public functions in the digital environment to the logic of the market by delegation or inertia. This process has contributed to the consolidation of new founding powers escaping public oversight and providing quasi-constitutional models which compete with public authorities. The case of global online platforms operating on a transnational base is a paradigmatic example of this trend. The challenges raised by the discretionary deplatforming of President Trump or the electoral concerns around the Cambridge Analytica scandal are just two major events that raised constitutional questions which are still unanswered in terms of legitimacy, power and democracy in the algorithmic society.

Rather than solving this issue by relying on the self-correction of the market, these questions constitute a call for action for scholars to reframe the role of constitutional law as an overarching framework of values and principles of the algorithmic society. If the digital environment has been an opportunity to offer cross-border services and exercise individual freedoms in a new space where information and data flow, on the other hand, it has also increased the threats to individual rights and freedoms which are no longer subject just to public interferences but also to private determinations. In other words, reframing constitutionalism in the algorithmic society requires understanding

⁶ Julie E. Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2020).

⁷ Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs 2018).

⁸ Jean-Marie Chenou, 'From Cyber-Libertarianism to Neoliberalism: Internet Exceptionalism, Multi-stakeholderism, and the Institutionalisation of Internet Governance in the 1990s' (2014) 11(2) *Globalizations* 205.

the exercise of freedoms and new relationships of powers driven by the consolidation of digital technologies.

The question is not just about whether constitutional democracies could inject democratic values in the technological architecture. Technology is just a means for mediating the relationship of power between humans. Behind digital technologies, including artificial intelligence, there are actors defining the characteristics of these systems. These technologies are not autonomous or neutral but make decisions about human beings based on principles which are primarily shaped by other human beings. In order to face the challenges of ‘algocracy’,⁹ it is critical to find a way to preserve the role of human expertise.¹⁰ Therefore, the primary challenge for constitutional law in the algorithmic society is not to regulate technology but to address the threats coming from the rise of unaccountable transnational private powers, whose global effects increasingly produce local challenges for constitutional democracies.

In a sense, the mission of modern constitutionalism is to protect fundamental rights while limiting the emergence of powers outside any control.¹¹ Constitutions have been developed with a view to limiting governmental powers, thus shielding individuals from interference by public authorities. From a constitutional law perspective, the notion of power has traditionally been vested in public authorities. Constitutions already provide systems of checks and balances for limiting public powers. Still, they have not been conceived as a general barrier against the consolidation of paralegal systems or the exercise (rather abuse) of private freedom. On the contrary, constitutions aim to protect pluralism and freedoms of individuals against interferences by public actors while leaving public authorities the responsibility to intervene to ensure that fundamental rights are respected even at the horizontal level between private actors. This constitutional turn from the vertical to the horizontal dimension is generally the exception and occurs in the context of the

⁹ John Danaher, ‘The Threat of Algocracy: Reality, Resistance and Accommodation’ (2016) 29 *Philosophy & Technology* 245.

¹⁰ Frank Pasquale, *New Laws of Robotics: Defending Human Expertise in the Age of AI* (Belknap Press 2020).

¹¹ András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017); Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ (2012) NYU, Public Law Research Paper No. 10–87 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1722771&rec=1&srcabs=1760963&alg=1&pos=1 accessed 21 November 2021. Constitutionalism has also a positive side encouraging public actors to promote the well-being and common good. See Adrian Vermeule, *Common Good Constitutionalism* (Wiley & Sons, forthcoming); Nicolas Barber, *The Principles of Constitutionalism* (Oxford University Press 2018).

horizontal application of fundamental rights or when constitutional values permeate legal norms by regulation.¹²

In the algorithmic society, the primary threats for constitutional democracies do not come any longer exclusively from public authorities, since they come primarily from private actors governing spaces which are formally private spaces, but exerting in practice, and without any safeguard, functions traditionally vested in public authorities without any safeguard. This challenge, however, does not imply the need to revolutionise the grounding roots of modern constitutionalism but that to reframe the role of constitutional law and interpret the challenges of the algorithmic society under the lens of digital constitutionalism. As Suzor observes, ‘digital constitutionalism requires us to develop new ways of limiting abuses of power in a complex system that includes many different governments, businesses, and civil society organisations’.¹³ Put in a different way, digital constitutionalism consists of articulating the limits to the exercise of power in a networked society.¹⁴

As the expression suggests, digital constitutionalism is made of two souls. While the first term (‘digital’) refers to technologies based on the Internet such as automated technologies to process data or moderate content, the second (‘constitutionalism’) refers to the political ideology born in the eighteenth century where, according to the Lockean idea, the power of governments should be legally limited, and its legitimacy depends upon complying with these limitations.¹⁵ Despite this chronological gap, the adjective ‘digital’ entails placing constitutionalism in a temporal and material dimension. Digital constitutionalism indeed refers to a specific timeframe, precisely the aftermath of the Internet at the end of the last century. Moreover, from a material perspective, this adjective qualifies constitutionalism, moving the focus to how digital technologies and constitutionalism affect each other. Merging the expressions ‘digital’ and ‘constitutionalism’ does not lead to revolutionising the pillars of modern constitutionalism. Instead, it aims to understand how to interpret the (still hidden) role of constitutional law in the algorithmic society. Therefore, digital constitutionalism should be seen

¹² Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford University Press 2019).

¹³ Nicolas Suzor, *Lawless: The Secret Rules That Govern Our Digital Lives* 173 (Cambridge University Press 2019).

¹⁴ Claudia Padovani and Mauro Santaniello, ‘Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Eco-System’ (2018) 80 *International Communication Gazette* 295.

¹⁵ Peter Grimm, *Constitutionalism: Past, Present and Future* (Oxford University Press 2016).

not as a monolith but as the expression of different constitutional approaches to digital technologies from an internal and external point of view.

From an internal angle, digital constitutionalism does not provide a unique way to solve the challenges of the algorithmic society. Despite the relevance of global constitutionalism,¹⁶ still the way in which constitutional law reacts to the challenges of the algorithmic society is driven by regional and local constitutional traditions and cultures. This internal dimension is primarily because, even in a phase of internationalisation of constitutional law,¹⁷ constitutions represent the identity and values of a certain community which, by definition, is connected to territorial boundaries. Although the protection of constitutional rights or the rule of law are missions shared by constitutional democracies, nonetheless, how these values are effectively protected depends on the political, institutional and social dynamics of different constitutional systems. Therefore, from an internal perspective, the constitutional answers to the challenges of the algorithmic society could not always overlap but lead to diverging paths. In this book, the European and US strategies to face the challenges of platform governance provide an example of the multiple faces of digital constitutionalism across the Atlantic.

The external point of view of digital constitutionalism shows how the constitutional reactions to the challenges of the algorithmic society are different when looking not only at the internal peculiarities of constitutional models around the world but also beyond the traditional boundaries of political and legal constitutionalism.¹⁸ In particular, states' constitutions are not the only sources of norms and principles. Even outside the framework of digital technologies, constitutional law has struggled with maintaining its role in relation to the consolidation of normative principles resulting from international organisations, transnational corporations and standard-setting entities, defining the consolidation of societal constitutionalism,¹⁹ or, more broadly, legal

¹⁶ Antje Wiener and others, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law' (2012) 1 *Global Constitutionalism* 1.

¹⁷ Sergio Bartole, *The Internationalisation of Constitutional Law* (Hart 2020).

¹⁸ Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010).

¹⁹ Angelo Jr. Golia and Gunther Teubner, 'Societal Constitutionalism: Background, Theory, Debates' Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2021-08 <https://papers.ssrn.com/sol3/papers.cfm?abstract=4000000>

and constitutional pluralism.²⁰ This form of pluralism leads to looking at legal constitutionalism under a broader umbrella where the link between law and territory is increasingly replaced by the relationship between norms and powers coming from different autonomous rationalities shaping each other in a process of mutual influence.

The rise of the algorithmic society highlights this path, underlining both the internal and external angle of digital constitutionalism. Constitutional democracies rely on policies to address common challenges but based on different constitutional values. For instance, the way in which freedom of expression promotes or limits platform power across the Atlantic shows a different constitutional sensitivity. This difference shows how, even if linked by common principles, constitutional democracies do not always share the same internal understanding of rights and powers, thus leading to diverging reactions. Likewise, the external point of view of digital constitutionalism can be examined by looking at how multiple entities influence Internet governance by imposing their internal values, while defining standards of protection competing externally with the principles and safeguards of constitutional democracies. The institutionalisation of social media councils such as the Facebook Oversight Board or the increasing power of online platforms to set the standards of protection on a global scale are nothing else than paths of constitutionalisation beyond the traditional boundaries of modern constitutionalism.

1.2 Paths of Constitutionalisation

Since the end of the twentieth century, daily life has increasingly gone digital towards an ‘onlife’ dimension.²¹ Individuals increasingly experience their rights and freedom in a ubiquitous digital environment,²² which differs from the end of the last century.²³ Within this framework, social relationships are mediated by a mix of entities expressing forms of public authority and private ordering. The pandemic season has been

t_id=3804094 accessed 20 November 2021; Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

²⁰ Paul S. Berman, *Global Legal Pluralism: A Jurisprudence of Law beyond Borders* (Cambridge University Press 2012). Neil Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65(3) *The Modern Law Review* 317–59.

²¹ Luciano Floridi (eds.), *The Onlife Manifesto: Being Human in a Hyperconnected Era* (Springer 2015).

²² Laura De Nardis, *The Internet in Everything: Freedom and Security in a World with No Off Switch* (Yale University Press 2020).

²³ Sherry Turkle, *Life on the Screen, Identity in the Age of Internet* (Simon & Schuster 1997).

a litmus test in this sense. Amazon provided deliveries during the lockdown phase, while Google and Apple offered their technology for contact tracing apps. These actors have played a critical role in providing services which other businesses or even the state failed to deliver promptly. The COVID-19 crisis has led these actors to become increasingly involved in daily lives, underlining how they are part of the social infrastructure.²⁴ This situation has highlighted how transnational private actors are considered essential platforms or digital infrastructures.²⁵

In this digital transition, law, technology and society, as examples of social systems, have not ceased to produce internal norms,²⁶ while continuously shaping each other in a process of mutual influence or rather digital constitutivity.²⁷ The law is indeed the result not only of its own logics but also of a compromise between technological architecture, social norms and market forces competing online.²⁸ At the same time, the law indirectly influences the other systems which, even if they produce their norms in an internal environment, are inevitably part of a greater picture. Usually, legal categories such as rules, authority or rights and freedoms contribute to shaping the boundaries of recognised powers. Although these definitions do not exist outside the legal framework but are created within the rationality of the law, these legal notions are exposed to systemic interferences from other (sub)systems. Likewise, the influence of legal systems shapes the boundaries and characteristics of technology and society.²⁹ In other words, the peculiarity of the law as a social system is to define spaces as delegated and autonomous manifestations of powers.

The rise of digital technologies has contributed to influencing the previous equilibrium among social systems, defining what Kettemann calls the normative order of the Internet.³⁰ And constitutional law was

²⁴ Jennifer Cobbe and Elettra Bietti, 'Rethinking Digital Platforms for the Post-COVID-19 Era' CIGI (12 May 2020) www.cigionline.org/articles/rethinking-digital-platforms-post-covid-19-era accessed 21 November 2021.

²⁵ Nikolas Guggenberger, 'Essential Platforms' (2021) 24 Stanford Technology Law Review 237.

²⁶ Niklas Luhman, *Social System* (Stanford University Press 2016).

²⁷ Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993).

²⁸ Lawrence Lessig, *Code: And Other Laws of Cyberspace. Version 2.0* (Basic Books 2006).

²⁹ David Delaney, 'Legal Geography I: Constitutivities, Complexities, and Contingencies' (2015) 39(1) *Progress in Human Geographies* 96.

³⁰ Matthias Kettemann, *The Normative Order of the Internet: A Theory of Rule and Regulation Online* (Oxford University Press 2020).

not spared in this process. The shift from atoms to bits at the end of the last century has affected constitutional values such as the protection of fundamental rights and democracy,³¹ ultimately leading to a new digital constitutional phase at the door of the algorithmic society.³² At the end of the last century, digital technologies have triggered the development of new channels, products and services, extending the opportunities to exercise economic freedoms and fundamental rights such as freedom of expression or the freedom to conduct business.³³ The Internet has fostered the possibilities to share opinions and engage with other ideas, thus fostering civil and political rights. This positive framework for democratic values was also one of the primary reasons justifying the technological optimism at the end of the last century, which considered the digital environment not as a threat but as an opportunity to empower freedoms while limiting interferences by public authorities.³⁴

From a constitutional standpoint, this revolution has led to a positive alteration of the constitutional stability. At first glance, the benefits of this bottom-up constitutionalisation would have compensated for the drawbacks of self-regulation, especially when thinking about public surveillance and monitoring. Nonetheless, the digital age is far from being outside any form of control. Apart from the interferences of public actors,³⁵ the digital environment is subject to the governance (or authority) of private actors. Google, Facebook, Amazon or Apple are paradigmatic examples of digital forces competing with public authorities in the exercise of powers online.

Within this framework, constitutional democracies are increasingly marginalised in the algorithmic society. The power of lawmakers has

³¹ Andrea Simoncini and Erik Longo, 'Fundamental Rights and the Rule of Law in the Algorithmic Society' in Hans-W. Micklitz and others (eds.), *Constitutional Challenges in the Algorithmic Society* 27 (Cambridge University Press 2021); Oreste Pollicino and Graziella Romeo (eds.), *The Internet and Constitutional Law: The Protection of Fundamental Rights and Constitutional Adjudication in Europe* (Routledge 2016).

³² Paul Nemitz, 'Constitutional Democracy and Technology in the age of Artificial Intelligence' (2018) Royal Society Philosophical Transactions A 376.

³³ Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press 2006).

³⁴ David R. Johnson and David Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48(5) *Stanford Law Review* 1371.

³⁵ Justin Clark and others, 'The Shifting Landscape of Global Internet Censorship' (2017) Berkman Klein Center for Internet & Society Research Publication <https://dash.harvard.edu/handle/1/33084425> accessed 21 November 2021.

been scaled back, and it is not a surprise that courts have taken the lead to overcome legislative inertia in the digital age.³⁶ The events around the Australian Competition and Consumer Commission News Media and Digital Platforms Mandatory Bargaining Code are a paradigmatic example of the power online platforms can hold in shaping public policies and decision-making.³⁷ As an answer to this political move, Facebook first decided to ban Australian publishers and users from sharing or viewing Australian as well as international news content. Second, just a couple of days later, the social media platform changed its view, once the Australian government decided to step back and negotiate with Facebook. Facebook's (temporary) choice to ban news in Australia is not just a business decision, reflecting the platform's economic freedoms. This case shows a 'power move' to push the Australian government, which had worked for months on the bill in question, to step back and negotiate with Facebook overnight. This interaction is not just an example of how Facebook can influence public policies, but it also shows how powers are relocated among different actors in the algorithmic society, within the push towards a new phase of digital constitutionalism.

This example demonstrates why the reactions of lawmakers and courts are not the result of a constitutional moment in Ackerman's terms.³⁸ Ackerman's theory looks at constitutional values not just as a mix of expressions and interpretations of the courts, but as the set of principles agreed upon by the people in an extraordinary moment of constitutional participation. Instead, the rise and consolidation of digital private powers represents an example of the constitutionalisation of global private spheres. In this process, constitutional values as translated by lawmakers and interpreted by courts are under a process of extraconstitutional amendment or, better, a reframing which is not expressed by codification but by the constitutional contamination of private determinations. This case is a clear example of how the internal rules produced by social systems compete with the autopoietic characteristics of (constitutional) law. By referring to Teubner, this framework

³⁶ Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?* (Hart 2021).

³⁷ Giovanni De Gregorio, Oreste Pollicino and Elena Perotti, 'Flexing the Muscles of Information Power: On the Australian News Media Mandatory Bargaining Code' (2021) *Verfassungsblog* (26 February 2021) <https://verfassungsblog.de/facebook-flexing/> accessed 20 November 2021.

³⁸ Bruce Ackerman, *We The People: Transformations* (Belknap Press 1998).

could be described as ‘the constitutionalisation of a multiplicity of autonomous subsystems of world society’.³⁹

The constitutionalisation of global private spheres in the algorithmic society should not be seen only as an isolated phenomenon but as a piece of the puzzle in the process of globalisation which has increasingly promoted the meeting, and conflict, of different legal systems and rationalities,⁴⁰ while raising questions about the idea of networked statehood.⁴¹

In the last thirty years, globalisation has affected legal systems, thus causing a constitutional distress.⁴² Traditional legal categories have been put under pressure. Different entities beyond state actors have extended their rules on a global scale.⁴³ Financial markets or environmental standards are paradigmatic examples of sectors where political choices are increasingly taken outside traditional democratic circuits, showing the law-making power of private actors.⁴⁴

From a transnational constitutional perspective, constitutional democracies struggle with extending their reach to transnational phenomena occurring outside their territory.⁴⁵ Local dynamics and values still constitute the basic roots of each constitutional system. Still, supranational and international bundles, as in the case of the consolidation of multilevel constitutionalism in the European experience,⁴⁶ or the constitutionalisation of international law,⁴⁷ lead to the emancipation of

³⁹ Gunther Teubner, ‘Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?’ in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds.), *Transnational Governance and Constitutionalism* 3 (Hart 2004).

⁴⁰ Lars Vellechner, ‘Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law’ (2015) 6(2) *Transnational Legal Theory* 312; Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Ashgate 2010); Graft-Peter Calliess and Peer Zumbansen *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart 2010).

⁴¹ Angelo Jr. Golia and Gunther Teubner, ‘Networked Statehood: An Institutionalised Self-contradiction in the Process of Globalisation?’ (2021) 12(1) *Transnational Legal Theory* 7.

⁴² Mark Tushnet, ‘The Inevitable Globalization of Constitutional Law’ (2009) 49 *Virginia Journal of International Law* 985.

⁴³ Saskia Sassen, *Losing Control? Sovereignty in the Age of Globalization* (Columbia University Press 1996).

⁴⁴ Louis L. Jaffe, ‘Law Making by Private Groups’ (1937) 51(2) *Harvard Law Review* 201.

⁴⁵ Eric C. Ip, ‘Globalization and the Future of the Law of the Sovereign State’ (2010) 8(3) *International Journal of Constitutional Law* 636.

⁴⁶ Ingolf Pernice, ‘Multilevel Constitutionalism and the Crisis of Democracy in Europe’ (2015) 11(3) *European Constitutional Law Review* 541.

⁴⁷ Jan Klabbbers, Anne Peters and Geir Ulfsein, *The Constitutionalisation of International Law* (Oxford University Press 2009).