

Digital Constitutionalism in Europe

Reframing Rights and Powers in the Algorithmic Society

This book is about rights and powers in the digital age. It is an attempt to reframe the role of constitutional democracies in the algorithmic society. By focusing on the European constitutional framework as a lodestar, this book examines the rise and consolidation of digital constitutionalism as a reaction to digital capitalism. The primary goal is to examine how European digital constitutionalism can protect fundamental rights and democratic values against the charm of digital liberalism and the challenges raised by platform powers. Firstly, this book investigates the reasons leading to the development of digital constitutionalism in Europe. Secondly, it provides a normative framework analysing to what extent European constitutionalism provides an architecture to protect rights and limit the exercise of unaccountable powers in the algorithmic society. This title is also available as open access on Cambridge Core.

Giovanni De Gregorio is Postdoctoral Researcher at the Centre for Socio-Legal Studies, University of Oxford. His research deals with digital constitutionalism, platform governance and digital policy.

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Giovanni De Gregorio
University of Oxford



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Foreword

It is a pleasure and a privilege to have the opportunity to introduce Giovanni De Gregorio's book, which, as far as I am aware, is the first monograph to provide a comprehensive analysis of the developing notion of 'digital constitutionalism'. In writing this book, Giovanni has made four major contributions, thus consolidating his leading position within debates among researchers concerning the relationship between public law and digital technologies.

First, Giovanni looks behind the 'label' of digital constitutionalism. Through a highly thoughtful, convincing and innovative analysis, the author seeks to 'unpack' digital constitutionalism, by situating this notion within its temporal and material dimension and also emancipating it from a 'monolithic' conceptualisation. As he rightly argues, digital constitutionalism should be seen not as a unique concept but as the expression of different constitutional approaches to digital technologies which are connected to political and institutional dynamics.

A second important merit of this book consists of deploying the concept of digital constitutionalism as a core instrument for dispelling the hypocritical narrative affirming that the freedom to conduct business, and even more importantly competition law, should occupy a dominant position in online platform regulation.

In looking at digital constitutionalism as the embodiment of the limits to the exercise of powers in a networked society, Giovanni explores the transformation of online platforms from (simply) economic actors into private powers capable of competing with public authorities. According to the author, this shift has systemic implications. The most important, in my view, is that the constitutional perspective is of an increasingly crucial significance. More specifically, as I have tried to explore in *Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism?* (Hart 2021), constitutionalism has a congenital mission of limiting power. Until recently, the challenge was to limit public (generally

governmental) power within the classic vertical dimension: (public) authority versus individual liberty.

As Giovanni persuasively argues, the geometry of power, and the resulting challenge for constitutional law, is becoming more complex and articulated: aside from the vertical dimension, there is a growing horizontal relationship which connects individuals with private digital powers competing with, and often prevailing over, public powers in the algorithmic society. As demonstrated by this book, the core issue at the new frontier of digital constitutionalism is precisely how to deal with the rise of private powers, bearing in mind that there cannot be any constitutional law if the aim is not to protect freedoms and limit power.

As a third point, this research reaches beyond a synchronic analysis of the current conceptual framework and adopts a highly innovative retrospective and prospective approach, which enhances the normative contribution of this research.

Retrospectively, the author demonstrates in an original way how the European approach to online expression and data has evolved since the turn of the century, through the gradual rise of a more constitutional and European institution-based approach. This approach, as Giovanni shows, has two prongs. Firstly, there is a judicial aspect. The Court of Justice of the European Union is finally able to draw on the Nice Charter as a bill of rights, establishing itself as a European constitutional court in the digital age. Secondly, the European approach has a legislative aspect relating to the codification of the ECJ's case law and the limitation of online platform powers within the framework of the Digital Single Market. In this context, at the end of 2020, the European Commission proposed a new digital package that fits within this framework.

As regards the prospective analysis, Giovanni focuses on the potential path of European digital constitutionalism by addressing three constitutional challenges: digital humanism versus digital capitalism; public authority versus private ordering; and constitutional imperialism versus constitutional protectionism. Facing these apparent dilemmas, the author raises a highly original question about whether the characteristics of European digital constitutionalism will be capable of leading to a European third way (a digital sustainable approach) among these global trends, and how this can be achieved eventually.

Fourthly, and finally, Giovanni has the invaluable merit of further emancipating the debate surrounding law and technology from the still dominant perspective of technocrats, privacy and intellectual property lawyers, by introducing a precious and increasingly necessary constitutional dimension.

Oreste Pollicino

Acknowledgements

This book is the result of a mix of places and people. It is an attempt not only to fill a gap in the debate around constitutionalism, public law and technology but also to give voice to those who have led me to address the challenges for constitutional democracies in the algorithmic society.

My research interest in this area has been primarily supported by my academic community in Milan, particularly by Oreste Pollicino who has kindly written the Foreword for this book as a symbol of his role in my academic path and my supervisor Giulio Enea Vigevani who has always contributed to enriching my research ideas. And I cannot escape from a special mention to Marco Bassini who has always been a great source of academic advice and guidance.

An invaluable part of these years has been travelling and exchanging views with different academic communities which have profoundly contributed to this research. My experience in Oxford has played a critical role in encouraging me to look beyond constitutionalism. In this sense, Linda Mulcahy and Nicole Stremlau have played a critical role in showing that there is life beyond the law. Also, Roxana Radu has tremendously contributed to my studies on Internet governance. I could express the same feeling for my visiting fellowship in Haifa where I had the pleasure to meet Niva Elkin-Koren and Maayan Perel. Both have enriched my research on content moderation and platform governance moving my perspective beyond public law, looking at the role of private ordering.

Participating in academic networks has also been critical for this research. I have always learned from talking about digital constitutionalism with Francisco De Abreu Duarte, Nicolas Suzor, Dennis Redeker, Edoardo Celeste, Amelie Heldt, Clara Iglesias Keller and Nicola Palladino. The community of the Internet Governance Forum and,

particularly, the Dynamic Coalition on Platform Responsibilities have also played an important role. In this case, I cannot escape from mentioning Luca Belli and Nicolo Zingales who have contributed to my research on the powers of online platforms. Likewise, the IACL Research Group on ‘Algorithmic State, Society and Market’ has been an infinite source for studying algorithmic governance and, in this case, the merit is of Giovanni Sartor, Amnon Reichman, Andrea Simoncini, Hans-W. Micklitz and Erik Longo. Besides, my studies on policy have been particularly enriched by the collaboration with Elena Perotti and my participation in the Internet and Jurisdiction Policy Network, led by Bertrand de la Chapelle and Frane Maroevic who continuously push the debate further in terms of content regulation and platform governance.

I cannot delay further from mentioning at least two scholars who have been continuously supportive during these years, Sofia Ranchordas and Catalina Goanta. Both have encouraged me to move my research forwards and have always created an environment for me to grow and learn from senior scholars.

When it comes to this book, special thanks go to Pietro Dunn who has provided incredible feedback and the editors at Cambridge University Press, Tom Randall and Becky Jackman, for their invaluable support, to Helen Kitto who has taken care of the copy-editing work, Akash Datchinamurthy for the type-setting and Ruth Martin for the indexing.

I consider this book to be the result of conversations and exchanges of views. It is not just the result of my doctoral studies but also of relationships which, in some cases, have also led to new friendships. Reading and writing have been critical in these years, but the most relevant part has been played by people.

Giovanni De Gregorio