

## Constitutionalism in the Digital Age

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**Abstract:** This paper aims to introduce the notion of digital constitutionalism and, in particular, to define its relationship with contemporary constitutionalism. Constitutionalism is a historical concept, whose main values and principles have constantly evolved, and are still evolving today. Digital constitutionalism embodies the idea of projecting the values of contemporary constitutionalism in the context of the digital society. This paper assesses the transformative character of digital constitutionalism. It concludes that digital constitutionalism does not subvert the DNA of contemporary constitutionalism, but rather aims to perpetuate its core values in a form that better addresses the peculiarities of the digital society. Digital constitutionalism is not engendering a constitutional revolution, but represents a necessary evolution of contemporary constitutionalism in the context of the digital age.

**Keywords:** Digital revolution, constitutionalism, constitutionalisation, digital constitutionalism.

*As the Internet is becoming the most important infrastructure for worldwide communication, constitutionalising its governance is required in order to ensure its security and resilience as well as the protection of the individual rights of all people involved, including the freedoms of information and expression, of sciences and education, intellectual property rights and the protection of data and privacy as elementary aspects of human dignity.*

– Ingolf Pernice<sup>2</sup>

### 1. A NEW CONSTITUTIONAL MOMENT

A series of ongoing transformations in contemporary society are challenging existing constitutional law apparatuses. The changes prompted by the digital revolution in relation to ourselves, our relationships with other individuals and, ultimately, in the

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<sup>2</sup> Ingolf Pernice, 'Global Constitutionalism and the Internet. Taking People Seriously,' in Stefan Kadelbach and Rainer Hofmann (eds), *Law Beyond the State: Pasts and Futures* (Campus Verlag 2016), also available at <<https://ssrn.com/abstract=2576697>>, 48.

society at large ferment under a vault of constitutional norms that have been shaped for ‘analogue’ communities. However, the constitutional ecosystem does not lie inert. Existing constitutional settings are being modified or integrated in a way that better addresses the transformations of the digital age. We are witnessing a new constitutional moment: a complex process of constitutionalisation is currently under way.

A multiplicity of normative counteractions is emerging to address the constitutional challenges of the digital revolution. They attempt to reaffirm our core fundamental rights in the digital context and to rebalance new asymmetries of power. The increased power of states that, through the use of digital technology, have gained even more control over the lives of their citizens. But also, the power of the new ‘silicon giants’,<sup>3</sup> potent multinational companies that, by managing digital products and services, *de facto* influence the way in which we enjoy our fundamental rights. A paradigmatic example is the progressive development of data protection law. An area of law that has profound constitutional implications, as it is designed to limit the power of public and private actors to control our digital body, and in parallel aims to strengthen a series of positive rights of the individuals, such as their capability to freely develop their personality in the online world.

However, interestingly, this complex process of constitutionalisation of the digital society is not concerted centrally: there is no single constitutional framer. As in a vast construction site there are several contracting companies working at the same time, so, in a globalised environment, constitutionalisation simultaneously occurs at different societal levels. Not only in the institutional perimeter of nation-states, but also beyond: on the international plane, in the private fiefs of multinational technology companies, within the civil society. The sense of this Gordian knot of multilevel normative responses can be deciphered only if these emerging constitutional fragments are interpreted as complementary tesserae of a single mosaic. Each one surfacing with a precise mission within the constitutional ecosystem, each one compensating the shortcomings of the others in order to realise a common aim: translating the core principles of contemporary constitutionalism in the context of the digital society. Or, in other words: achieving a ‘digital constitutionalism’.

The purpose of this paper is to introduce the notion of digital constitutionalism and, in particular, to define its relationship with contemporary constitutionalism. Indeed, is digital constitutionalism a new form of constitutionalism? By adapting its core values to face the mutated context of the digital society, is the constitutional ecosystem radically changing its core tenets? Does digital constitutionalism represent a constitutional revolution, or is it rather a physiological evolution of constitutionalism in the digital age?

<sup>3</sup> Stefano Rodotà, ‘Una Costituzione per Internet?’ [2010] *Politica del diritto* 337.

This paper will proceed in four parts. Considering the great level of ambiguity and inconsistency within the scholarship, section 2 will preliminary clarify the distinction between the notion of constitutionalism and the often interchangeably used concept of constitutionalisation. Section 3 will explain that constitutionalism is a historical concept, whose main values and principles have constantly evolved, and are still evolving today. Section 4 will then introduce the concept of digital constitutionalism and will analyse the idea of projecting the values of contemporary constitutionalism in the digital age. Lastly, section 5 will assess the transformative character of digital constitutionalism. The paper will conclude that digital constitutionalism does not represent a Copernican revolution, but a necessary evolution of contemporary constitutionalism in the context of the digital age.

## 2. CONSTITUTIONALISM VS CONSTITUTIONALISATION

Constitutionalisation and constitutionalism are not two interchangeable concepts. Unfortunately, the scholarship sometimes uses these two terms as synonyms.<sup>4</sup> Several authors attempted to systematically define the meanings of the trio constitution-constitutionalism-constitutionalisation.<sup>5</sup> Yet, it seems that a certain nebulosity on the matter still persists.<sup>6</sup> Undoubtedly, the absence of a common definition of the notion of constitution does not help.<sup>7</sup> Moreover, the application of these terms in the fields of international law and legal sociology has amplified their degree of semantic flexibility and further nuanced the boundaries of their expressive contours.<sup>8</sup>

<sup>4</sup> Rossana Deplano, 'Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry' [2013] *European journal of legal studies*.

<sup>5</sup> See Paul Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7 *European Law Journal* 125; Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579; Karolina Milewicz, 'Emerging Patterns of Global Constitutionalisation: Towards a Conceptual Framework' (2009) 16 *Indiana Journal of Global Legal Studies* 413.

<sup>6</sup> See Deplano (n 4); Peer Zumbansen, 'Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order' (2012) 1 *Global Constitutionalism* 16; Anne Peters and Klaus Armingeon, 'Introduction: Global Constitutionalism from an Interdisciplinary Perspective' (2009) 16 *Indiana Journal of Global Legal Studies* 385; Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (Cambridge University Press 2014).

<sup>7</sup> See Herbert John Spiro, 'Constitution', *Encyclopedia Britannica* (2018) <<https://www.britannica.com/topic/constitution-politics-and-law>> accessed 23 October 2018; Roger A Shiner, 'Constitutions' in Enrico Pattaro (ed), *A Treatise of Legal Philosophy and General Jurisprudence*, vols 3 'Legal Institutions and Sources of Law' (Springer 2005); Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016); Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56 *The American Political Science Review* 853.

<sup>8</sup> See Federico Fabbrini, 'The Constitutionalization of International Law: A Comparative Federal Perspective' (2013) 6 *European journal of legal studies* 7; Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009); Christoph B Graber, 'Bottom-up Constitutionalism: The Case of Net Neutrality' (2016) 7 *Transnational Legal Theory* 524; Chris Thornhill, *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective* (Cambridge University Press 2013); Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

However, it is possible to present a basic distinction between the two concepts, on which the scholarship seems to generally agree.

The concept of constitutionalisation denotes a process.<sup>9</sup> The suffix –isation characterises a procedure, an operation; it implies the idea of advancement, progression, and evolution. It may have occurred in the past, be still ongoing, or be advocated in a normative sense for the future. Conversely, constitutionalism is a ‘theory’,<sup>10</sup> a ‘movement of thought’,<sup>11</sup> a ‘conceptual framework’,<sup>12</sup> a ‘set of values’,<sup>13</sup> an ‘ideology’.<sup>14</sup> Again, an analysis of the term itself can be of help. The suffix –ism does not imply the idea of process; it denotes a more static concept.<sup>15</sup> An ism is a ‘a distinctive practice, system, or philosophy, typically a political ideology or an artistic movement’.<sup>16</sup> Neglecting for a moment the question of what the actual principles of constitutionalism – the aims of this ideology – are, one could argue that, *lato sensu*, constitutionalisation is the process of implementation of constitutionalism. Constitutionalisation would put into effect the values of constitutionalism or, regarded the other way around, constitutionalism would provide the principles that permeate, guide, inform constitutionalisation.<sup>17</sup>

### 3. THE VALUES OF CONSTITUTIONALISM

Constitutionalism evolves. This concept does not denote a process, as we have seen, but this does not contradict the fact that its underlying values, ideals, principles have changed over time. The notion of constitutionalism emerged at the beginning of the nineteenth century as a response to absolute monarchy and popular despotism.<sup>18</sup> It

<sup>9</sup> See Girardeau A Spann, ‘Constitutionalization’ [2004] *Saint Louis University Law Journal* 709; Milewicz (n 4); Garrett Wallace Brown, ‘The Constitutionalization of What?’ (2012) 1 *Global Constitutionalism* 201; Aoife O’Donoghue, ‘Alfred Verdross and the Contemporary Constitutionalization Debate’ (2012) 32 *Oxford Journal of Legal Studies* 799; Antje Wiener and others, ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’ (2012) 1 *Global Constitutionalism* 1.

<sup>10</sup> Jeremy Waldron, ‘Constitutionalism: A Skeptical View’ [2010] Philip A. Hart Memorial Lecture <<https://scholarship.law.georgetown.edu/hartlecture/4/>>; see also Pernice (n 2) 7, according to whom constitutionalism is a form of ‘theoretical thinking’.

<sup>11</sup> Marco Bani, ‘Crowdsourcing Democracy: The Case of Icelandic Social Constitutionalism’ (Social Science Research Network 2012) SSRN Scholarly Paper ID 2128531 <<https://papers.ssrn.com/abstract=2128531>> accessed 15 August 2019.

<sup>12</sup> Zumbansen (n 6).

<sup>13</sup> O’Donoghue (n 6).

<sup>14</sup> Edoardo Celeste, ‘Digital Constitutionalism: A New Systematic Theorisation’ (2019) 33 *International Review of Law, Computers & Technology* 76.

<sup>15</sup> See Waldron (n 10); Milewicz (n 5).

<sup>16</sup> *Oxford Dictionary of English* (Third Edition, Oxford University Press 2010).

<sup>17</sup> Celeste, ‘Digital Constitutionalism’ (n 14).

<sup>18</sup> András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford University Press 2017) ch 1; Harold J Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Harvard University Press 1983); Graber (n 8).

advocated the adoption of a constitution, a written legal text establishing the fundamental law of a country, and, at the same time, its primacy over the discretion of rulers.<sup>19</sup> The power of the government should be legitimated by the constitution, an expression of popular sovereignty, and should be bound by the constitution, which represents its ultimate limit.<sup>20</sup> No actor in society should detain at the same time the legislative, executive and judiciary power.<sup>21</sup> No ruler should be *ab-solutus*, unrestricted from the control of other institutional organs whose power derives from the constitution. At the outset, constitutionalism was an ideology, a movement of thought that claimed the values of the rule of law and the separation of power.

This normative vision of society championed by the original constitutionalism was subsequently enriched with other ideals. Democracy definitively supplanted other forms of government and established itself as a foundational value.<sup>22</sup> Besides a negative, limitative approach, claiming the restriction of the power of rulers by law and the institution of a system of checks and balances, constitutionalism also developed a positive aspect, pivoting around individual empowerment.<sup>23</sup> In this way, the ultimate mission of constitutionalism, the limitation of power, was re-oriented towards the protection of fundamental rights and, ultimately, the safeguarding of human dignity.<sup>24</sup>

Looking back before the nineteenth century, one could identify forms of constitutionalism within other ages. One could talk of a Greek or Roman constitutionalism, for instance.<sup>25</sup> However, this intellectual exercise is only possible analogically and by extension. Gerhard Casper rightly observed that

constitutionalism does not refer simply to having a constitution, but to having a particular kind of constitution.<sup>26</sup>

When one thinks of constitutionalism, one generally implies the values underlying contemporary constitutionalism, the ideology that progressively developed from the big revolutions of the end of the eighteenth century. Constitutionalism is today syn-

<sup>19</sup> See Milewicz (n 5); Sajó and Uitz (n 18) chs 1 and 8; Berman (n 18); Peters (n 5).

<sup>20</sup> See Waldron (n 10); András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press 1999); Wil Waluchow, 'Constitutionalism' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2018, Metaphysics Research Lab, Stanford University 2018) <<https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/>> accessed 16 August 2019; Peters (n 5).

<sup>21</sup> See Richard Bellamy, 'Constitutionalism', *Encyclopædia Britannica* (2019) <<https://www.britannica.com/topic/constitutionalism>> accessed 16 August 2019.

<sup>22</sup> See Sajó and Uitz (n 18) ch 3; Nicholas W Barber, *The Principles of Constitutionalism* (Oxford University Press 2018) ch 6; see also Pernice (n 2).

<sup>23</sup> See Barber (n 22) ch 1; Waldron (n 10).

<sup>24</sup> See Sajó and Uitz (n 18) chs 1 and 10; Milewicz (n 5); Pernice (n 2).

<sup>25</sup> See Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Amagi, originally published by Cornell University Press, 1947, 2007).

<sup>26</sup> Gerhard Casper, 'Constitutionalism' in Leonard W Levy; Karst L Kenneth and Dennis J Mahoney (eds.), *Encyclopedia of the American Constitution* (1986th edition, Macmillan) 474.

onymous with the values of democracy, the rule of law and the separation of powers. Constitutionalism is associated with the idea of the protection of all fundamental rights that have been gradually recognised over the past few centuries, be they civil, political, socio-economic or cultural.<sup>27</sup> However, what today no longer holds true is the necessary connection of the idea of constitutionalism with the nation state.

The values of constitutionalism historically ripened in the context of the state.<sup>28</sup> However, over the past few decades, in a society that has become increasingly more global, the centrality of the state has faded due to the emergence of other dominant actors in the transnational context.<sup>29</sup> The scholarship has therefore started to transplant the constitutional conceptual machinery beyond the state, including the concept of constitutionalism.<sup>30</sup> The myth of the compulsory link between constitutionalism and the state is debunked.<sup>31</sup> As Hamann and Ruiz Fabri state, today 'it appears that any polity can be endowed with or can acquire constitutional features'.<sup>32</sup> Consequently, the constitutional ecosystem becomes plural, composite and fragmented.<sup>33</sup> If the values of constitutionalism remain the same in their essence, their articulation in specific contexts, within and beyond the state, necessarily becomes 'polymorphic'.<sup>34</sup>

#### 4. DIGITAL CONSTITUTIONALISM

Contemporary constitutionalism was not extracted from the rock of history as a monolithic marble block. Constitutionalism developed more like an onion. Its inner fundamental values progressively shaped further external layers: principles budding to face the emerging complexities of the society. In the words of Chris Thornhill:

Constitutional norms are constructed as layers within the evolving inclusionary structure of the political system; new constitutional norms are articulated, progressively, as society's political system is exposed to challenges and demands, which it cannot absorb, and as it requires additional normative complexity to sustain its functions of

<sup>27</sup> See Sajó and Uitz (n 18) chs 1 and 10.

<sup>28</sup> See Grimm (n 7).

<sup>29</sup> See Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010).

<sup>30</sup> See Grimm (n 7) chs VII and VIII.

<sup>31</sup> See Ulrich K Preuss, 'Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010).

<sup>32</sup> A Hamann and H Ruiz Fabri, 'Transnational Networks and Constitutionalism' (2008) 6 *International Journal of Constitutional Law* 481, 503.

<sup>33</sup> Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *The Modern Law Review* 317; Teubner (n 8); see also Paul Blokker, 'Modern Constitutionalism and the Challenges of Complex Pluralism' in Gerard Delanty and Stephen P Turner (eds), *Routledge International Handbook of Contemporary Social and Political Theory* (Routledge 2011) <<https://papers.ssrn.com/abstract=1719258>> accessed 22 August 2018.

<sup>34</sup> See Walker (n 33).

inclusion. The key to understanding constitutions, in consequence, is to examine constitutional norms as a historically constructed, adaptive apparatus, which is closely correlated with distinct *inclusionary pressures* in society.<sup>35</sup>

Today, analogue constitutional principles cannot anymore solve all the challenges of the digital society. The external shape of constitutionalism necessarily changes again. New constitutional layers are progressively added to those already in existence. Novel principles emerge to articulate the fundamental values of constitutionalism in light of the problematic issues of contemporary society.<sup>36</sup> The scale of transformation prompted by the advent of the digital revolution is such that one can neatly distinguish the multiplicity of new normative layers embracing or even incorporating older ones. A fresh sprout within the constitutionalist theory: what one could call ‘digital constitutionalism’.

Digital constitutionalism is a useful shorthand to denote the theoretical strand that advocates for the translation of the core values of constitutionalism in the context of the digital society.<sup>37</sup> At first sight, however, such a descriptor could appear as misleading.<sup>38</sup> The adjective ‘digital’ does not directly qualify the substantive ‘constitutionalism’. It is not akin to expressions such as ‘democratic constitutionalism’ or ‘liberal constitutionalism’ in which, respectively, democracy and liberalism characterise a newly acquired orientation of the theory of constitutionalism.<sup>39</sup> ‘Digital’ is rather an adverbial conveying the idea that one is referring to that strand of the constitutional theory that seeks to articulate principles for the digital society.<sup>40</sup> Similarly, the scholarship has talked of ‘global’ or ‘international’ constitutionalism.<sup>41</sup>

The notion of ‘digital constitutionalism’, and, more broadly, the idea of project-

<sup>35</sup> Thornhill (n 8) 9,

<sup>36</sup> Cf. Osvaldo Saldías, ‘Patterns of Legalization in the Internet: Do We Need a Constitutional Theory for Internet Law?’ (Social Science Research Network 2012) SSRN Scholarly Paper ID 1942161 paras 5–6 <<https://papers.ssrn.com/abstract=1942161>> accessed 19 August 2019.

<sup>37</sup> First formulated in this sense in Edoardo Celeste, ‘Digital Constitutionalism: Mapping the Constitutional Response to Digital Technology’s Challenges’ (2018) HIIG Discussion Paper Series No 2018-02 <<https://papers.ssrn.com/abstract=3219905>> accessed 23 August 2018; subsequently revised and amplified in Celeste, ‘Digital Constitutionalism’ (n 14). In this last paper, at 88, I defined ‘digital constitutionalism’ as ‘the ideology which aims to establish and to ensure the existence of a normative framework for the protection of fundamental rights and the balancing of powers in the digital environment’.

<sup>38</sup> See Edoardo Celeste, ‘What Is Digital Constitutionalism?’ (*HIIG Science Blog*, 31 July 2018) <<https://www.hiig.de/en/what-is-digital-constitutionalism/>> accessed 31 August 2018.

<sup>39</sup> See Blokker (n 33); Michael W Dowdle and Michael Wilkinson (eds), *Constitutionalism beyond Liberalism* (Cambridge University Press 2016).

<sup>40</sup> In these terms, Celeste, ‘What Is Digital Constitutionalism?’ (n 38); Celeste, ‘Digital Constitutionalism’ (n 14).

<sup>41</sup> See, ex multis, Jan Klabbers, ‘Constitutionalism Lite’ (2004) 1 *International Organizations Law Review* 31; Ronald MacDonald and Douglas Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Brill 2005); Peters (n 5); CEJ Schwöbel, ‘Situating the Debate on Global Constitutionalism’ (2010) 8 *International Journal of Constitutional Law* 611.



ing constitutionalism in the context of the digital environment, is not new. However, the scholarship employed this concept in an inconsistent way.<sup>42</sup> Fitzgerald talked of ‘informational constitutionalism’ to denote state law, in particular in the fields of intellectual property, competition, contracts and privacy, aiming to limit the power of tech companies to self-regulate.<sup>43</sup> For Berman, ‘constitutive constitutionalism’ advocates for an expansion of the reach of US constitutional law to encompass those private actors.<sup>44</sup> In Suzor, ‘digital constitutionalism’ is a project seeking to articulate a set of limits on private powers that affect how individuals can enjoy their rights in the digital world. The values of state constitutional law would inform the adoption of ordinary statutes imposing a series of minimal guarantees that tech companies should respect in self-regulating their products and services.<sup>45</sup> Karavas praised a form of digital constitutionalism without the state, or, at least, with its intervention kept to a minimum. The communities of cyberspace should be able to self-constitutionalise themselves in a bottom-up and incremental way. State judges should play only a maieutic role, socratically teaching what the basic rules in creating valid constitutional norms are.<sup>46</sup> Redeker, Gill and Gasser, lastly, employed the notion of digital constitutionalism to connect the emergence of a series of non-binding declarations of Internet rights which aim to set limits on both public and private power in the digital context.<sup>47</sup>

At first sight, all of these interpretations of digital constitutionalism appear different. However, they are not incompatible as, if comprehensively regarded, they reveal themselves as multiple facets of a broader unitary picture.<sup>48</sup> They all deal with the issue of the limitation of power of dominant actors and, when considered together, they recognise the existence of a plurality of normative instruments translating constitutional values in the digital society, both emerging in the state context, such as constitutional and ordinary law, and beyond, as in the case of private companies’

<sup>42</sup> For a comprehensive and detailed analysis of the literature on the topic, see Celeste, ‘Digital Constitutionalism’ (n 14).

<sup>43</sup> See Brian Fitzgerald, ‘Software as Discourse? A Constitutionalism for Information Society’ (1999) 24 *Alternative Law Journal* 144.

<sup>44</sup> Paul Berman, ‘Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation’ (2000) 71 *University of Colorado Law Review* 1263.

<sup>45</sup> 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/>> accessed 30 August 2018; Nicolas Suzor, ‘The Role of the Rule of Law in Virtual Communities’ (2010) 25 *Berkeley Technology Law Journal* 1817.

<sup>46</sup> See 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).

<sup>47</sup> Dennis Redeker, Lex Gill and Urs Gasser, ‘Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights’ (2018) 80 *International Communication Gazette* 302; for a critical analysis, see Celeste, ‘Digital Constitutionalism’ (n 14).

<sup>48</sup> See Celeste, ‘Digital Constitutionalism’ (n 14) para 4.



self-regulation. Ultimately, these various readings provide plausibility for the wider vision that sees digital constitutionalism as the theoretical strand of contemporary constitutionalism that is adapting core constitutional values to the needs of the digital society. Digital constitutionalism advocates the perpetuation of foundational principles, such as the rule of law, the separation of powers, democracy and the protection of human rights, in the mutated scenario of the digital society. It triggers a complex process of constitutionalisation of the virtual environment, which occurs through a multiplicity of constitutional counteractions, both within and beyond the state. Century-old values are translated in normative principles that can speak to the new social reality. Digital constitutionalism reiterates that digital technology does not create any secluded world where individuals are not entitled to their quintessential guarantees.

### 5. A NEW CONSTITUTIONALISM?

Digital constitutionalism represents the conceptual lymph of the current constitutional moment. It normatively advocates a reconfiguration of the constitutional framework. Analogue norms are no longer able to address the full range of complexities of the virtual environment. A series of normative counteractions are emerging to implement the principles of a constitutionalism rethought for the digital age. The current constitutional moment, too, has a ‘transformative impact’.<sup>49</sup> Core constitutional values are generalised and subsequently re-specified in light of the characteristics of the contemporary society.<sup>50</sup> Constitutionalism is translated in a language that speaks to the actors of the virtual environment. In this way, old principles become more easily applicable in new societal contexts. Further corollaries, and even novel norms emerge to express foundational constitutional values in the digital society.

This process of constitutionalisation is still ongoing; yet, it is legitimate to ask: are we facing an evolution or a *r*-evolution of contemporary constitutionalism? Is reshaping constitutionalism for the digital age merely a way to enhance its fitness vis-à-vis the mutated conditions of the social reality? Or does it imply a more radical change of paradigm?

The extended scope of digital constitutionalism in comparison with its analogue version could be mentioned as apparent evidence of the revolutionary nature of the current constitutional moment. Constitutionalism is no longer anchored to the nation state. In the digital age, it promotes ways to limit the power of all dominant

<sup>49</sup> JHH Weiler, *The Constitution of Europe: ‘Do the New Clothes Have An Emperor?’ And Other Essays on European Integration* (Cambridge University Press 1999) 4.

<sup>50</sup> The idea of a process of generalisation and re-specification of constitutional principles was first advanced in Gunther Teubner, ‘Societal Constitutionalism; Alternatives to State-Centred Constitutional Theory?’ in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism. International Studies in the Theory of Private Law* (Hart 2004); see also Teubner (n 8); Celeste, ‘Digital Constitutionalism’ (n 14).

actors, be they public or private.<sup>51</sup> Overlooking the capability of non-state actors to affect individual rights would be anachronistic, and would ultimately fail to safeguard human dignity, which can be equally violated by public and private hands.<sup>52</sup>

According to Suzor, the present circumstances would necessarily require ‘a new constitutionalism’.<sup>53</sup> One is tempted to evoke the advent of a new form of constitutionalism because constitutional moments generally represent the apex of a transformative process. Adaptations and transformations have always been integral components of the vital cycle of constitutionalism. However, today, constitutional counteractions emerge in response to a digital revolution that is violently shaking the existing constitutional architecture. Existing constitutional norms, which were shaped for an analogue society, are under unprecedented stress. One therefore envisages the need for immediate, drastic transformations. Digital constitutionalism would represent an appeal to urgently take a remedial action: a last minute, normative SOS.<sup>54</sup>

If the digital revolution is regarded as a looming and inexorable cataclysm, the extent of the constitutional change is dramatized too. The constitutional ecosystem has still to fully realise the severity of the storm that it has started to navigate. It has waited until the last minute to understand the necessity to react against the challenges of the digital revolution, and now one has the impression that the normative transformations needed will represent a Copernican revolution.

Certainly, the emergence of constitutional counteractions is not evidence that supports the vision of a constitutional ecosystem that is riding the digital revolution on the crest of the wave – this is true. However, from an objective standpoint, the current constitutional moment does not represent a radical upheaval.<sup>55</sup> We are not facing a change of paradigm that is indelibly transforming the shape of our constitutional identity. We are not witnessing a transition from democracy to technocracy, for example.<sup>56</sup> Digital constitutionalism does not advocate a *tabula rasa* of our core constitutional values. On the contrary, it is deeply rooted in these foundational principles.

Digital constitutionalism champions their translation in the context of the dig-

<sup>51</sup> See Fitzgerald (n 43).

<sup>52</sup> Celeste, ‘Digital Constitutionalism’ (n 14) paras 3.5 and 4.2; see also Redeker, Gill and Gasser (n 47); cf. 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, where a conception of digital constitutionalism still anchored to the idea of limitation of power of public actors is present.

<sup>53</sup> Nicolas Suzor, *Lawless. The Secret Rules That Govern Our Digital Lives* (Cambridge University Press 2019) 9, original emphasis.

<sup>54</sup> See Teubner (n 8) 82.

<sup>55</sup> See Celeste, ‘Digital Constitutionalism’ (n 14) para 2.

<sup>56</sup> See Emilio Castorina, ‘Scienza, tecnica e diritto costituzionale’ [2015] *Rivista AIC* <<http://www.rivistaaic.it/la-scienza-costituzionalistica-nelle-transizioni-istituzionali-e-sociali.html>>.

ital society. Innovation, of course, occurs – it suffices to think to the fact that digital constitutionalism seeks to limit the power of private actors too. The societal context unavoidably imposes similar changes. However, this does not subvert the original constitutional paradigm founded on the values of democracy, the rule of law, the separation of powers, and the protection of human rights. Digital constitutionalism perpetuates these constitutional principles in a mutated social reality: in the digital society, the DNA of contemporary constitutionalism is ultimately preserved.