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Digital constitutionalism

Mapping the constitutional response to digital technology's challenges

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ABSTRACT

‘Digital constitutionalism’ is an appealing concept to explain the recent emergence of constitutional counteractions against the challenges produced by digital technology. However, the existing scholarship does not offer a unitary picture of this notion. This paper carries out a literature review of the topic and proposes a new systematisation of the theoretical framework surrounding the concept of digital constitutionalism. It is argued that digital constitutionalism represents a declination of modern constitutionalism. It does not identify the normative responses to the challenges of digital technology, but rather embodies the set of principles and values that informs and guides them. Conversely, the emerging normative responses can be regarded as the components of a process of constitutionalisation of the digital environment. In light of the adopted definitions, the paper eventually illustrates a new way of mapping the constitutional responses emerged so far to address the challenges of digital technology. They not only include the constitutional tools which we could define as ‘classic’ in the context of constitutional law, such as the binding legal texts produced in the state-centric dimension, but, interestingly, also new instruments, which are developed in the transnational dimension of private actors.

KEYWORDS

Digital constitutionalism, constitutionalisation, ICANN, terms of service, Internet bills of rights.

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1 INTRODUCTION

Contemporary society is experiencing a new constitutional moment. This time, the main catalyst of change is the disruptive impact of digital technology. The latter has manifestly amplified the possibility of individuals to exercise their fundamental rights. One significant example of this is the unprecedented possibility we have to easily communicate with each other, which was truly unforeseeable some decades ago. At the same time, digital technology has also created new sources of threats for the fundamental rights of individuals. To this purpose, the increasing risks related to the processing of our personal data via electronic means are exemplary. Last, but not least, the rising relevance of digital technology in contemporary society vested an extraordinary amount of power in non-state actors, such as the big multinational corporations and the transnational organisations which own, commercialise or manage this technology, to the detriment of traditional constitutional actors like nation states.

Current times can be defined as a constitutional moment because the existing constitutional system is reacting to these new challenges (§2). A series of normative counteractions have emerged to face the alterations of the constitutional equilibrium generated by the advent of digital technology. ‘Digital constitutionalism’ is an appealing concept to explain why these reactions ought to materialise and what the guiding principles of these reactions are. Indeed, the existence of digital constitutionalism imposes to restore a state of relative equilibrium in the constitutional ecosystem in response to any attempt to impair it. Furthermore, digital constitutionalism provides the set of ideals, values and principles which guide the normative counteraction against the challenges generated by digital technology.

However, in the existing scholarship the denomination ‘digital constitutionalism’ has been used with different and sometimes conflicting meanings. Due to the lack of a comprehensive picture, this paper will carry out a literature review of the topic (§3), and will eventually propose a new systematisation of the theoretical framework surrounding the concept of digital constitutionalism (§4).

Digital constitutionalism will be defined as a declination of modern constitutionalism, and therefore as an ideology. In contrast to what some scholars argue, it will be clarified that digital constitutionalism does not identify the normative responses to the challenges of digital technology, but it is rather the set of principles and values that informs those responses. Conversely, it will be argued that the latter can be regarded as the components of a process of constitutionalisation of the digital environment.

In light of these definitions, this paper will eventually propose a new way of mapping the constitutional response emerged so far to address the challenges of digital technology (§5). In particular, it will not only include the constitutional tools analysed by the majority of scholars, which we could define as ‘classic’ in the context of constitutional law, such as the binding legal texts produced in the state-centric dimension, but also new instruments, which are developed in the transnational dimension of private actors.

2 A CONSTITUTIONAL MOMENT

The incessant development of digital technology and its disruptive impact on contemporary society are generating a new constitutional moment.¹ Over the past few decades, digital technology has affected the

¹ See Viktor Mayer-Schönberger, and John Crowley, ‘Napster’s second life?: The regulatory challenges of virtual world’ (2006) 100(4) *Northwestern University Law Review* 1775; Stefano Rodotà, ‘Una costituzione per Internet?’ (2010) 3 *Politica del diritto* 337; cf. Andreas Fischer-Lescano, ‘Redefining Sovereignty via International Constitutional Moments?’ in Michael Bothe, Mary

relative equilibrium of the constitutional ecosystem. Consequently, a series of normative counteractions have emerged to face the challenges of digital technology and restore a condition of relative equilibrium. The next two paragraphs will schematise these two logically distinct, but *de facto* intertwined processes. The last paragraph of this section will illustrate to what extent ‘digital constitutionalism’ is an appealing concept to explain this phenomenon.

2.1 The alteration of the constitutional equilibrium

I define constitutional equilibrium as the ideal condition produced by the application of the norms of constitutional law in a given legal order. Such a condition essentially involves two aspects, which reflect the basic functions of constitutional law: 1) the protection of fundamental rights, and 2) the balancing of powers.²

This section does not aim to focus on a specific legal order, but rather to show, from a general perspective, that the constitutional ecosystem is not immune to digital technology. I argue that the advent of digital technology generates the following alterations in the constitutional ecosystem:

a) It amplifies the possibilities of individuals to exercise their fundamental rights. Digital technology expands the possibility to transmit information. From a constitutional point of view, this circumstance implies that all fundamental rights based on the exchange of information, such as freedom of expression, religious freedom, freedom of assembly, freedom to conduct a business are enhanced.

b) Digital technology amplifies the risk of threats to fundamental rights. The same increased possibility to exchange information enabling the exercise of fundamental rights can also become a source of threats. Defamation, hate speech, cyberbullying, child pornography are some examples of how freedom of expression can be illegally used through digital instruments. Moreover, digital technology not only enhances the possibility to transmit information, but it also allows: 1) to block or limit such a transmission, 2) to monitor the content of the transmitted information, and 3) to register other information related to the individuals involved in the transmission. In the first case, a limitation of the transmission of information could violate all the rights which are based on that transmission, such as freedom of expression, information, association, etc. In the second case, the transmitted information could be confidential and could include personal data; therefore, an unauthorised access to such contents could violate all the rights aiming to protect the personal sphere of the individual, such as the right to privacy, right to respect of private life, secrecy of correspondence, right to data protection, as differently articulated in the various legal systems. In the third case, other information concerning the transmission of information could represent personal data, and, therefore, an illegitimate use of such data could infringe the rights aiming to ensure their protection.

c) Digital technology affects the balancing of powers in the constitutional ecosystem. Considering the power in a general sense, as the ability of a constitutional actor to direct the behaviour of another actor, it is possible to observe that private corporations producing, selling and managing digital technology products and services worldwide are emerging in the constitutional scenario as a new dominant actor beside nation-

Hellen O’Connel, and Natalino Ronzitti, *Redefining Sovereignty: The Use of Force after the Cold War* (Brill-Nijhoff 2005); Anne-Marie Slaughter, and William Burke-White, ‘The International Constitutional Moment’ (2002) 43(1) *Harvard International Law Journal* 1.

² Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ (2006) 19 *Leiden Journal of International Law* 579.

states.³ In fact, these corporations detain the power to regulate the use of digital technology instruments by individuals. In this way, they can interfere with the exercise of fundamental rights of individuals who use these instruments. Certainly, violations of fundamental rights perpetrated by private actors are not a novelty generated by the advent of digital technology.⁴ However, the massive diffusion of digital technology instruments among individuals, combined with the dominant role that private corporations play in the digital environment, increases the likelihood of rights violations perpetrated by non-state actors. This circumstance subverts the setting of the existing mechanisms of power balancing, which rather focus on the relationship between individuals and nation-states.

2.2 The emergence of normative counteractions

The alterations of the relative equilibrium of the constitutional ecosystem have in turn generated a series of normative counteractions. These counteractions consist in the integration or in the amendment of the existing normative framework and aim to restore a condition of relative equilibrium in the constitutional ecosystem.

With no pretention to provide an exhaustive directory, it is useful to categorise the normative counteractions emerged to face the challenges generated by the advent of digital technology according to the kind of alteration they aim to address. Following the schematisation proposed in the previous paragraph, it is possible to detect three categories of counteractions:

a) Norms aiming to recognise the increased possibility of exercising an existing fundamental right. Over the past few years, digital technology has been an extraordinary enabler of fundamental rights. The use of digital technology instruments has become an integral part of the architecture of contemporary society, so that it can now be deemed as a necessary precondition to exercise a series of rights. Therefore, as an example of this first category of norms, one can mention those recognising a right to Internet access as a necessary condition to exercise a whole series of existing rights, ranging from freedom of expression to freedom to conduct a business.⁵

b) Norms aiming to limit the increase of fundamental rights violation. An apparent example of the emergence of these norms is represented by the development of data protection law. From the '60s, the advent of computing technology allowed, for the first time, the creation of big databases and increased the possibility to easily transfer the data stored within them. This new development manifested a series of potential risks for the security of the stored data, especially if they represented information related to individuals. This circumstance led to the emergence of what we now call data protection law.⁶

c) Norms aiming to restore a balance among existing powers. As an example of these norms, it is possible

³ See 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) 3; Gunther Teubner, *Constitutional Fragments. Societal Constitutionalism and Globalization* (OUP 2012); Rodotà (n 1).

⁴ See, *ex multis*, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006).

⁵ See, e.g. Conseil constitutionnel (France), decision n° 2009-580 DC du 10 juin 2009, para. 12, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2009580dc.pdf>; Sala Constitucional de la Corte Suprema de Justicia (Costa Rica), sentencia n° 12790 de 30 de Julio de 2010, <https://www.poder-judicial.go.cr/salaconstitucional/index.php/servicios-publicos/759-10-012790>; ECtHR, *Cengiz and Others v. Turkey* [2015] (Applications nos. 48226/10 and 14027/11), para. 49; Law no. 12.965/2014 (Brazil), so-called 'Marco Civil da Internet', Article 4 and 7, <https://www.publicknowledge.org/assets/uploads/documents/APPROVED-MARCO-CIVIL-MAY-2014.pdf>.

⁶ Peter Blume, 'Data Protection and Privacy – Basic Concept in a Changing World' (2010) 56 *Scandinavian Studies in Law* 151.

to mention those requiring public institutions to publish selected information on their website, or those establishing a right to access documents held by public institutions through digital technology instruments.⁷ In fact, both these kinds of norms aim to introduce new forms of citizens' control on the power of public institutions. They represent a declination of the general right to information. This right emerged well before the advent of digital technology;⁸ nevertheless, it is possible to contend that the advent of digital technology undoubtedly provided a boost for the implementation of the principle of freedom of information. Indeed, these new technologies have offered, for the first time, the technical possibility to instantaneously give access to an unprecedented amount of governmental information at lower costs. With the advent of digital technology the concept of 'democracy in public' proposed by the Italian legal philosopher Norberto Bobbio has eventually found the technical instruments to be substantiated.⁹

2.3 The role of digital constitutionalism

The emergence of these normative counteractions generates two main questions. Firstly, why do they aim to face the alterations produced by the advent of digital technology and, secondly, how do they achieve this objective.

In relation to the first question, one could argue that modern constitutionalism always seeks to ensure the protection of fundamental rights and the balancing of power in a given legal order through constitutional law.¹⁰ A direct corollary of this principle is the imperative, which requires that an alteration of the constitutional ecosystem should necessarily be followed by an attempt to restore a state of equilibrium, in a similar way to Newton's Third Law of Motion.

Concerning the second question, one could contend that it is again modern constitutionalism, intended as an ideology, which provides the guiding ideals, values and principles to restore a state of constitutional equilibrium. Interestingly, from this perspective, it is conceptually appealing to single out the notion of 'digital constitutionalism'. Such a denomination recognises the role that digital technology has recently played as the main catalyst of change in the constitutional environment. In particular, it allows us to distinguish the specific branch or declination of modern constitutionalism that is translating and adapting existing constitutional values and principles to the peculiarities of the contemporary digital society.

In conclusion, it is possible to argue that digital constitutionalism, intended as a declination of modern constitutionalism, imposes the necessity to generate normative counteractions to the alterations of the

⁷ See, e.g. Article L311-1 of the Code des relations entre le public et l'administration, as modified by Article 3 of the Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique (France); Article 2 of the Legislative Decree no. 33/2013 (Italy); Article 6, 10, 11, and 12 of Regulation (EC) 1049/2011 (EU).

⁸ The first law on freedom of information is the 'Gracious Ordinance Regarding the Freedom of Writing and of the Press' enacted in 1766 by the Swedish King Adolphus Frederick, while the U.S. Freedom of Information Act 1966 is the first modern example of statute allowing access to governmental documents. See Juha Mustonen (ed), *The World's First Freedom of Information Act – Andres Chydenius' Legacy Today* (2006) Anders Chydenius Foundation, http://www.chydenius.net/pdf/worlds_first_foia.pdf; Herbert N. Foerstel, *Freedom of Information and the Right to Know – The Origins and Applications of the Freedom of Information Act* (Greenwood Press 1999).

⁹ Norberto Bobbio, Richard Bellamy (ed) and Roger Griffin (tr), *The Future of Democracy* (Minneapolis: University of Minnesota Press 1991).

¹⁰ See Jeremy Waldron, 'Constitutionalism: A Skeptical View' (2010) Scholarship @ GEORGETOWN LAW, <http://scholarship.law.georgetown.edu/hartlecture/4/>; see András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press 1999); cf. J. H. H. Weiler and Marlene Wind (eds.) *European Constitutionalism Beyond the State* (Cambridge University Press 2003); see Karolina Milewicz, 'Emerging Patterns of Global Constitutionalisation: Towards a Conceptual Framework' (2009) 16(2) *Indiana Journal of Global Legal Studies* 413; see Antje Wiener, 'Editorial: Evolving Norms of Constitutionalism' (2003) 9(1) *European Law Journal* 1.

constitutional equilibrium produced by the advent of digital technology and, at the same time, provides the ideals, values and principles which guide such counteractions.

3 DOCTRINAL DIVERGENCE

Digital constitutionalism is not a new concept. Thanks to its vague and evocative connotation, in the last twenty years the scholarship has employed it in different contexts and with different meanings. Recently, this denomination has come back in vogue to denote the emergence of charters of rights for the Internet. However, the core ideas underlying this notion appear in the reflections of eminent scholars since the beginning of the 2000's.

Considering the lack of a comprehensive survey of the existing literature on the topic, this section will reconstruct the development of the concept of digital constitutionalism in a chronological order.

3.1 Fitzgerald

Fitzgerald recognises that in the information society the exercise of power is shared between public and private actors.¹¹ Therefore, he argues that the concept of constitutionalism, intended as the mediation or definition of power relations, does involve both public and private actors.

According to Fitzgerald, the nature of information society, which is international, intangible, non-territorial, and decentralised, requires a mixed governance structure combining private sector's self-regulation and public institutions' oversight. On the one hand, private actors exercise their power by regulating the code of software. On the other hand, public actors maintain an important role at governance level because they can still exercise a coercive power.

'Informational constitutionalism' or 'informational law' is the denomination adopted by Fitzgerald in order to denote the law of the state (in particular: intellectual property law, contract law, competition law, and privacy law) which should be called to delimit private actors' self-regulation.¹²

Fitzgerald's normative theorisation of governance mechanisms in the information society sees states' private law playing the central 'constitutional' role of limiting private actors' self-regulation. However, from a general perspective, one could point out two main issues that affect in practice the operability of states' private law in carrying out this task. Firstly, sometimes it is difficult to subject private actors to one state's jurisdiction.¹³ Secondly, being the activity of private actors in the information society transnational, there could be collisions with the private law of other states.¹⁴

¹¹ Brian Fitzgerald, 'Software as discourse? A constitutionalism for information society' (1999) 24(3) *Alternative Law Journal* 144; Brian Fitzgerald, 'Software as discourse? The challenge for information law' (2000) 22(2) *European Intellectual Property Review* 47.

¹² Fitzgerald (n 11).

¹³ It suffices to think to the complex interpretative strategy adopted by the European Court of Justice in *Google Spain v. AEPD* (C-131/12; ECLI:EU:C:2014:317) in order to attract Google within the scope of application of the European data protection directive.

¹⁴ Cf. Andreas Fischer-Lescano and Gunther Teubner, 'Regime-collisions: the vain search of legal unity in the fragmentation of global law' (2004) 25 *Michigan Journal of International Law* 999.

3.2 Berman

Following Lessig,¹⁵ Berman considers private actors' ability to define cyberspace's code as a powerful regulatory instrument.¹⁶ In his paper, he analyses whether those actors should therefore be subject to US constitutional law.¹⁷ In the US, the state action doctrine limits constitutional adjudication to the conduct of public actors.¹⁸

Berman proposes a 'constitutive constitutionalism' as an alternative solution to bypass the state action doctrine and to eventually subject private actors to US constitutional law. According to Berman, constitutional adjudication should be extended to private actors instead of using ordinary law. In this way, courts could use the constitution as a touchstone for articulating constitutive values,¹⁹ solving politically demanding questions,²⁰ and encouraging people to engage in these issues.²¹

In contrast to Fitzgerald, who recognises the role of private law in limiting the power of private actors, Berman explicitly rejects the idea that, what he calls, 'ordinary law' could perform such a constitutionalising function.²² However, from this exclusion, one could propose a significant criticism to Berman's position. As recognised by Fitzgerald, indeed, ordinary law could reflect or be permeated by constitutional values, and therefore one cannot exclude that it does not act as an important constitutional instrument in the sphere of private actors.

3.3 Suzor

Drawing from Fitzgerald's theorisation, Suzor recognises the role of private actors' power in the regulation of virtual communities.²³ Referring both to Fitzgerald and Berman, he affirms that a constitutional perspective is useful in order to understand what the appropriate limits to the power of private actors should be. For this reason, he decides to employ the denomination 'digital constitutionalism' to denote the project which seeks to articulate a set of limits on private power, with particular attention to the context of virtual

¹⁵ Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999); see also Lawrence Lessig, *Code: Version 2.0*, 2nd ed. (Basic Books 2006).

¹⁶ Paul Schiff 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. Cf. Fitzgerald (n 11).

¹⁷ Berman quotes this evocative metaphor adopted by Lessig: "If code functions as law, then we are creating the most significant new jurisdiction since the Louisiana Purchase, yet we are building it just outside the Constitution's review. Indeed, we are building it just so that the Constitution will not govern-as if we want to be free of the constraints of value embedded by that tradition" at 1306.

¹⁸ Cf. the German system, where fundamental rights can have a horizontal effect on private actors (so called *Drittwirkung*); see Vaios Karavas and Gunther Teubner, 'www.CompanyNameSucks.com: The Horizontal Effect of Fundamental Rights on "Private Parties" within Autonomous Internet Law' (2005) 12(2) *Constellations* 262; Eric Engle, 'Third Party Effect of Fundamental Rights (*Drittwirkung*)' (2009) 5(2) *Hanse Law Review* 165.

¹⁹ Berman (n 16) 1293 ff.

²⁰ Berman (n 16) 1296 ff.

²¹ Berman (n 16) 1298 ff; "Indeed, we are apt to use the language of rights in popular discourse even in situations where the dispute concerns only "private" entities. For example, employees often view restrictions on their freedom of expression or invasions of their privacy in the workplace as constitutional issues" at 1302.

²² In particular, Berman contests the distinction between constitutional and ordinary law proposed by Richard Kay, according to whom: "[US Constitution's] attributes – including the Constitution's focus on the scope and shape of lawmaking power, its cumbersome amendment process, and its appeal to relatively permanent principles-make constitutional law unsuitable for ordinary law, which "tends to be more concerned with the resolution of day to day problems of social living"." at 1288. See Richard Kay, 'The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law' (1993) 10 *Constitutional Commentary* 329.

²³ Nicolas Suzor, 'Digital constitutionalism and the role of the rule of law in the governance of virtual communities' (2010) PhD Thesis, Queensland University of Technology, <https://eprints.qut.edu.au/37636/>.

communities, the topic in which he focuses his doctoral thesis. The concept that was previously denominated 'informational constitutionalism' by Fitzgerald and 'constitutive constitutionalism' by Berman eventually acquires the name of 'digital constitutionalism', a denomination that will also be maintained by subsequent scholars.

In line with Fitzgerald, Suzor considers the contractual framework of virtual communities as their law, and, consequently, the limitations imposed on that framework by contract law as their constitutional principles.²⁴ Virtual communities' self-regulation is considered as legitimate, even if it is unilaterally established, because users provide their consent to it.²⁵ However, despite the presence of a valid consent from the users, such a law could infringe some external values imposed by the state.²⁶ For this reason, the contractual framework of virtual communities is subject to the limitations imposed by contract law.

In contrast to Berman, Suzor excludes that the limitation of private power should be exercised by constitutional law. However, differently from Fitzgerald, Suzor argues that constitutional law plays a twofold role in the limitation of private power. Firstly, it can be used to determine the extent to which private actors' self-regulation is complying with the values established by the state. Secondly, it has the duty to inform and lead the development of contract law. In this way, constitutional principles, such as the rule of law,²⁷ could be transferred into the regulation of virtual communities via contract law.²⁸

Similarly to Fitzgerald, Suzor theorises the governance model of virtual communities as a mixture of public and private power. However, he underlines that such a model does not reflect a precise hierarchy between private self-regulation and state law, but he considers these two sources as melding together in a 'mesh' of public and private governance schemes.²⁹ According to Suzor, state law is losing its centrality in contexts, such as virtual communities, dominated by the law of private actors. Conversely, private self-regulation is increasingly central, considering the rising relevance of virtual communities in the life of individuals. Nevertheless, Suzor argues that attempts to achieve a democratisation or a model of joint governance in virtual communities have essentially failed,³⁰ and that, for this reason, the limiting role that state law should play remains crucial.

By recognising the constitutionalising role played by private law, and, at the same time, the guiding and informative function of constitutional law, Suzor somehow reconciles Fitzgerald's and Berman's positions. However, the criticism already reported in relation to Fitzgerald could still be advanced. By granting a role to state legislation, be it of constitutional or ordinary value, one unavoidably still attempts to subject the digital environment to states' jurisdiction, according to criteria developed for the physical world.

²⁴ Suzor (n 23) 121.

²⁵ Suzor (n 23) 111.

²⁶ Suzor (n 23) 113.

²⁷ Suzor explains what the role of the rule of law in the governance of virtual communities could be: "The rule of law consists of a number of different strands, none of which can be universally or directly applied to the governance of virtual communities, but each of which serve to highlight potential shortcomings in private governance. These include restraints on discretionary power, substantive limits based upon individual rights, formal limits on the creation and implementation of laws, procedural safeguards and due process, and an emphasis on consensual governance" at 21.

²⁸ Suzor refers to Dicey's doctrine on the role of private law in countries, like the United Kingdom, with an unwritten constitution: "This project follows somewhat from A V Dicey's argument that in the absence of a substantive written constitution, rule of law principles in the United Kingdom were protected by the evolution of private law doctrines that secured the substantive rights of citizens." at 53.

²⁹ Suzor explicitly refers to the model developed in Jeanne P. Mifsud Bonnici, *Self-regulation in cyberspace* (Asser Press 2008).

³⁰ Suzor refers to Jack Balkin, 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds' (2004) 90 *Virginia Law Review* 2043. In particular, he mentions as an example of successful joint governance model Wikipedia, while as an example of failure Facebook's attempt to involve its users in the process of revision of its terms of use.

3.4 Gill, Redeker and Gasser (2015)

In 2015 Gill, Redeker and Gasser published a working paper on ‘digital constitutionalism’.³¹ They propose to use this denomination as an umbrella term to connect a set of documents seeking to establish a bill of rights for the Internet. They argue that these texts, which have emerged in the last twenty-five years, are very different, but that they could be regarded as a part of a broader ‘pre’ or ‘proto-constitutional discourse’, as “intellectual building blocks for the constitutional material of the digital sphere” whose ultimate aim is to define comprehensive set of rights, principles, and governance norms for the Internet.³² Moreover, such a constitutional discourse is not seen as static; the working paper highlights a progressive trend towards a crystallisation of principles into binding legal texts.³³

Nevertheless, according to Gill, Redeker and Gasser, these Internet bills of rights are not constitutions in the classic sense, i.e. “mechanisms which delimit the boundaries of a state’s power over its citizens”.³⁴ Indeed, they do not have any foundational or primary position in the hierarchy of legal sources. However, they share the ‘core substantive aspects’ of constitutionalism, such as its values, problems and principles as well as its main functions of limiting state powers and empowering institutions within the society.³⁵

Gill, Redeker and Gasser argue that their conception of digital constitutionalism is not as narrow as that of Suzor, who referred to the limitation of power only within the context of virtual communities.³⁶ In reality, rather than broader, their interpretation appears to be different. For them digital constitutionalism aims at the limitation of public power, while for Suzor at that of private power.³⁷ Moreover, Gill, Redeker and Gasser identify such a limitative function in the documents of Internet bill of rights, while Suzor in the private law of the state.

The main merit of the working paper authored by Gill, Redeker and Gasser certainly is to have conducted the first systematic and comprehensive empirical analysis on the emergence of the texts of Internet bills of rights, stimulating a new series of researches on this topic.³⁸

However, taking into account the different positions adopted by Fitzgerald, Berman and Suzor, it is possible to advance two main remarks to the conception of digital constitutionalism presented in their working paper. Firstly, the restriction of the concept of digital constitutionalism to the limitation of *public* power – therefore excluding a role in limiting *private* power – does not seem to be justified. Secondly, one could question

³¹ 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://ssrn.com/abstract=2687120>.

³² Gill, Redeker and Gasser (n 31) 3.

³³ Gill, Redeker and Gasser (n 31) 2; cf. Francesca Musiani, Elena Pavan, Claudia Padovani who had already identified in a dataset of ten Internet bills of rights the elaboration of a series of elements which could have led to the development of a more structured normative framework, in ‘Investigating Evolving Discourses on Human Rights in the Digital Age: Emerging Norms and Policy Challenges’ (2010) International Association for Media and Communication Research (IAMCR), Annual congress on Human Rights and Communication, Jul 2009, Mexico. <https://hal-mines-paristech.archives-ouvertes.fr/hal-00448231>.

³⁴ Gill, Redeker and Gasser (n 31) 22.

³⁵ Gill, Redeker and Gasser (n 31) 23.

³⁶ Gill, Redeker and Gasser (n 31) 212.

³⁷ Gill, Redeker and Gasser (n 31) 23; Gill, Redeker and Gasser also exclude from their dataset a series of texts whose site of formal recognition is not the state or the international governance community, but corporate policy because “[t]hese documents are concerned with the exercise and limits on private power in virtual communities and private social networks, in the spirit of what Nicolas Suzor has also called ‘digital constitutionalism’” at 12; see also Kinfe Micheal Yilma, ‘Digital privacy and virtues of multilateral digital constitutionalism – preliminary thoughts’ (2017) 25 *International Journal of Law and Information Technology* 115.

³⁸ See Yilma (n 37); Special issue of the *International Communication Gazette* Vol. 80(4) on ‘digital constitutionalism’; Edoardo Celeste, ‘Terms of Service and Bills of Rights: New Mechanisms of Constitutionalisation in the Social Media Environment?’ (2018) *International Review of Law, Computer and Technology*, <https://doi.org/10.1080/13600869.2018.1475898>.

why the concept of digital constitutionalism should be restricted to the emergence of the Internet bills of rights, and not to extend to the role performed by private law and constitutional law in limiting private power, as in Fitzgerald, Berman and Suzor.

3.5 Redeker, Gill and Gasser (2018)

In 2018 Redeker, Gill and Gasser published a re-elaboration of their work of 2015 in a special issue of the *International Communication Gazette* focusing on the topic of digital constitutionalism.³⁹ Their paper includes some clarifications, and two main novelties.

Firstly, Redeker, Gill and Gasser confirm that their conception of digital constitutionalism is different from that developed by Suzor.⁴⁰ Moreover, they clarify that their theoretical framework can also be distinguished from that elaborated by Amoretti⁴¹ and Teubner⁴², respectively in relation to the concepts of electronic constitution and digital constitution. In particular, they argue that, even if Amoretti's and Teubner's theorisations could offer useful insights, the latter "remain either more focused on actual constitutions for the Internet or are less specifically informed by the transnational debate we explore in this article".⁴³

In his book, Amoretti defines the electronic constitution as a 'technical knowhow' which represents a "constitutive aspect of history", and more precisely as "a mix of processes – material and ideal – that digital technologies put in play: policies, ideologies, economic interests and individual and social practice".⁴⁴ One can therefore understand why Redeker, Gill and Gasser's position, which is still anchored to the legal tradition, differs from that developed by Amoretti, who explicitly recognises that his notion of constitution overtakes the traditional legal conception.⁴⁵

Teubner considers the digital constitution as the answer provided by constitutional law to three new challenges of modern society: namely, digitalisation, privatisation, and globalisation.⁴⁶ In particular, he argues that these challenges require us to reconsider the idea of constitution, which is no longer anchored to the state dimension, but projected beyond the state. Teubner argues that such a transnational constitution is emerging through a series of 'civil constitutions', sets of constitutional norms developed by autonomous societal subsectors which are progressively institutionalised in positive law through a process of mutual influence.⁴⁷

Redeker, Gill and Gasser do not specify which aspects of the Teubnerian theory are incompatible with their conception of digital constitutionalism. However, the author of this paper thinks that the two positions can be reconciled. In fact, as we will see later in this section, Redeker, Gill and Gasser, in their re-elaboration of 2018, even decide to interpret the emergence of the texts of Internet bill of rights in light of the

³⁹ Dennis Redeker, Lex Gill and Urs Gasser, 'Towards digital constitutionalism? Mapping attempts to craft an Internet Bill of Rights' (2018) 80(4) *International Communication Gazette* 302.

⁴⁰ Redeker, Gill and Gasser (n 39).

⁴¹ Francesco Amoretti, *Electronic Constitution: Social, Cultural, and Political Implications* (Information Science Reference 2009).

⁴² Gunther Teubner, *Constitutional Fragments. Societal Constitutionalism and Globalization* (OUP 2012).

⁴³ Redeker, Gill and Gasser (n 39).

⁴⁴ Amoretti (n 41) 3.

⁴⁵ Amoretti (n 41) 3.

⁴⁶ See also 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) 3.

⁴⁷ Teubner (n 42).

Teubnerian theory of societal constitutionalism.

Secondly, they overtake the unjustified restriction of the conception of digital constitutionalism only referring to the limitation of public power. They recognise that “[i]n today’s political economy of the Internet, states and private corporations alike can either limit or contribute to the realization of perceived digital rights”,⁴⁸ and that, consequently, digital constitutionalism could refer to the limitation of both public and private power. In reality, if one looks at the content of the article, it does not seem that this novelty produced substantive changes. The first criterion adopted to select the documents of Internet bill of rights to be analysed still exclusively refers to the limitation of ‘state power’,⁴⁹ and their dataset still excludes those documents which do not identify the state dimension or the global governance community as their site of formal recognition.⁵⁰

Thirdly, they embrace Teubner’s theory of societal constitutionalism.⁵¹ Teubner argues that constitutional norms can also be produced through a bottom-up process. Autonomous social sectors elaborate norms, which are progressively institutionalised at legal level, through a mutual influence between state institutions and the social context. Redeker, Gill and Gasser argue that the emergence of documents of Internet bills of rights could be interpreted as the first phase of the process described by Teubner, and, therefore, as the juridification or institutionalisation at social level of new constitutional principles.⁵² Moreover, they identify a progressive trend towards codification of these texts into binding legal documents, and they contend that this circumstance could be read as an evidence of the process of institutionalisation of the Internet bills of rights.⁵³ Finally, it is important to observe that Redeker, Gill and Gasser, in their work of 2018, did not qualify the phenomenon of the emergence of documents of Internet bills of rights as a pre- or proto-constitutional discourse.⁵⁴

Undoubtedly, the expanded conception of digital constitutionalism encompassing both the limitation of public and private power reinforces Redeker, Gill and Gasser’s analysis, and eliminates one of the main criticisms advanced against their paper of 2015. However, the second remark presented above still persists.⁵⁵ The concept of digital constitutionalism seems to be still uniquely associated to the emergence of the Internet bills of rights, somehow implicitly excluding that it could be referred to the limitation of private power performed by private law, constitutional law, and by the principles developed by transnational organisations like ICANN.⁵⁶

⁴⁸ Redeker, Gill and Gasser (n 39).

⁴⁹ Even if a few lines after, Redeker, Gill and Gasser write: “Governance norms and debates surrounding the limits of *state* and *corporate* power – including issues of participation, rule of law, democracy, stakeholder representation or political accountability – also help to form the substantive basis of digital constitutionalism” (emphasis added).

⁵⁰ Redeker, Gill and Gasser (n 39).

⁵¹ Teubner (n 46).

⁵² Redeker, Gill and Gasser (n 39); see Christoph B. Graber, ‘Bottom-Up Constitutionalism: The Case of Net Neutrality’ (2017) i-call working paper no. 1-2017, https://www.rwi.uzh.ch/dam/jcr:1845662e-0650-440f-9a3f-fee197edef62/201701_i-call_WP_CBGraber_Bottom-UpConstitutionalism.pdf.

⁵³ They mention as an example the adoption in Brazil of the so-called Marco Civil da Internet (Law no. 12.965, 23 April 2014); Redeker, Gill and Gasser (n 39); See also Francis Augusto Medeiros, Lee A. Bygrave, ‘Brazil’s Marco Civil da Internet: Does it live up to the hype?’ (2015) 31 *Computer Law and Security Review* 120.

⁵⁴ Redeker, Gill and Gasser do not explain the reasons of this choice. The author of this paper argues that embracing the Teubnerian theory of societal constitutionalism does not impose to renounce to the qualification of the phenomenon of the emergence of documents of Internet bills of rights as a pre- or proto-constitutional discourse. Conversely, the latter could even better describe the tendency towards a progressive codification highlighted by Redeker, Gill and Gasser in their paper.

⁵⁵ See *supra* § 4.4.

⁵⁶ Redeker, Gill and Gasser in their paper of 2018 explicitly exclude to deal with these principles because their analysis “focus[es] on documents that aim at transforming Internet governance per se – even if limited by some documents’ spatial focus, rather than a document defining the rules governing one particular organization, however great the importance of the organization for the governance of the Internet”.

Furthermore, it is possible to criticise the reduction of the whole concept of ‘juridification’ to its specific meaning of institutionalisation of a document within the hierarchy of legal sources of a specific legal order. Redeker, Gill and Gasser affirm that the level of development of the documents of Internet bill of rights does not overtake the first or the second phase of the process of societal constitutionalisation described by Teubner.⁵⁷ This means that these texts either remain “embodiment of normative stances of civil society and other groups” or can become legally binding, nevertheless without any “preeminent status”.⁵⁸ However, the concept of juridification not only encompasses the institutionalisation of a whole document, but also the institutionalisation of the norms and principles enshrined in such a document. In other words, one could argue that it is necessary to also look at whether and to what extent the norms and principles included in the Internet bills of rights have been institutionalised, and not only at whether the whole document has acquired a binding legal status. In fact, the interaction between national and transnational, institutional and societal dimensions could be metaphorically described as an exchange of fluids between porous and permeable materials: the components of the material itself do not move, but it is the fluid to be alternatively absorbed by one and the other material.⁵⁹ In other words, sometimes it could happen that a document of Internet bill of rights does not become legally binding, but conversely its norms and principles are recognised in a higher source of the legal order.⁶⁰

Finally, always in relation to the application of the Teubnerian theory of societal constitutionalism, one could question the correspondence of the documents of Internet bills of rights with the first phase of societal constitutionalisation described by Teubner. In particular, one could claim that such a first phase presupposes that an agreement on a set of norms has been reached at societal level. However, it would be appropriate to investigate to what extent and in which contexts specific norms have assumed sufficiently determined contours at social level.⁶¹ In fact, if one observes the number of Internet bills of rights emerged so far, one could argue that an agreement on the content of specific norms has not been reached yet. Therefore, it is opinion of the author that the process of emergence of documents of Internet bill of rights has not yet produced specific norms shared at social level, or, in other words, that the first phase of the process of constitutionalisation described by Teubner is still ongoing.

4 A PROPOSAL FOR A NEW SYSTEMATISATION

The existing literature does not offer a unitary picture of the concept of digital constitutionalism. In particular, there is no consensus on two fundamental characteristics of this notion. Firstly, on the ultimate aim of digital constitutionalism: it is not clear whether it aims to limit the private power or also the public power. Secondly, there is no agreement on the instrument which should translate digital constitutionalism:

⁵⁷ See also for a clear explanation Graber (n 52).

⁵⁸ Redeker, Gill and Gasser (n 39).

⁵⁹ Cf. the concept of ‘porous law’ in Gunther Teubner, *Law as an Autopoietic System* (European University Institute Press 1993); see Graber (n 52) who clearly explains with a series of examples the so-called process of double reflexivity of sociological system theory adopted by Teubner; cf. Andrea Simoncini, ‘The Constitutional Dimension of the Internet. Some Research Paths’ (2016) EUI Working Papers no. 2016/16; see Giovanna De Minico, ‘Towards an Internet Bill of Rights’ (2015) 37 *Loyola of Los Angeles International and Comparative Law Review* 1.

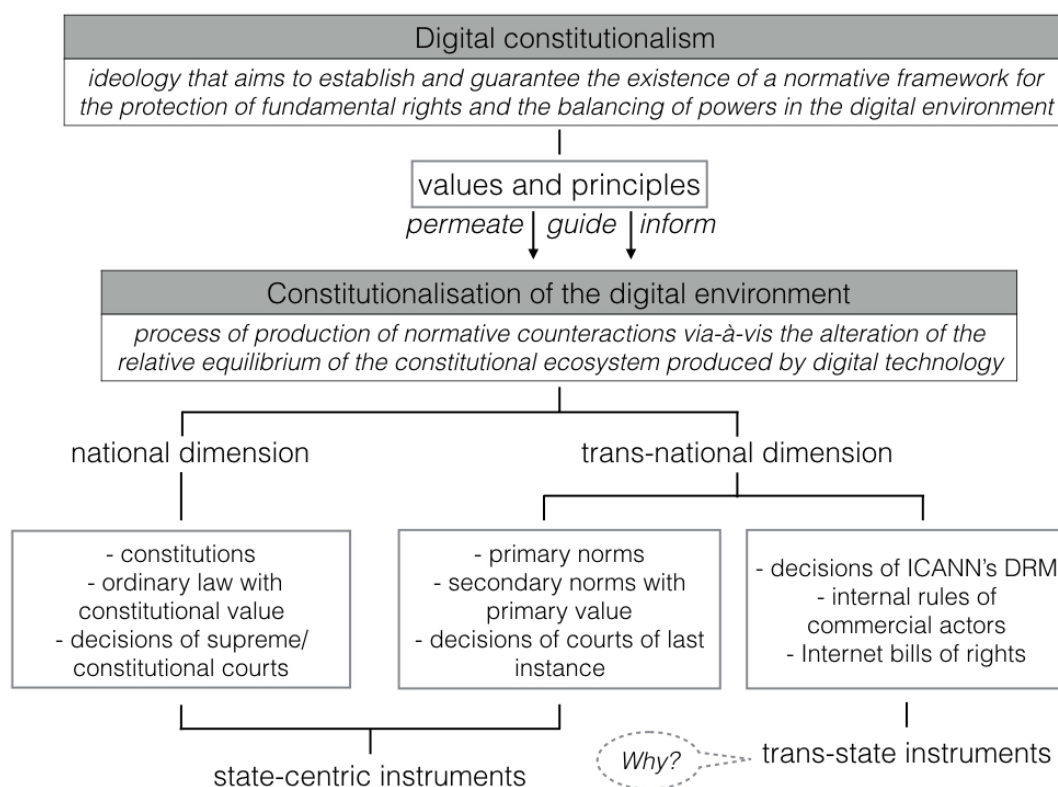
⁶⁰ It is worth reminding that for Teubner (n 46) the civil constitutions are “neither mere legal texts nor are they the *de facto* structures of social systems”. In fact, he clarifies that “[e]lements of a civil constitution in the strict sense can be spoken of only once an interplay of autonomous social processes on the one side and autonomous legal processes on the other comes about. In systems theory language: if long-term structural linkages of sub-system specific structures and legal norms are set up.”

⁶¹ Cf. Graber (n 52), who adopts similar words to describe the institutionalisation at societal level of the principle of net neutrality.

Fitzgerald entrusts this role to private law, Berman to constitutional law, Suzor on a private law informed by the principles of constitutional law, and finally Redeker, Gill and Gasser on the documents of Internet bill of rights.

On the one hand, the existing literature does not show doubts in relation to the notions of ‘constitution’ and ‘constitutional law’. In fact, all the analysed authors refer to their traditional meanings proper to the state dimension.⁶² On the other hand, the notions of ‘constitutionalism’ and ‘constitutionalisation’ appear to be surrounded by a certain nebulosity, especially because these concepts are generally referred to transnational contexts, such as that of private actors, in Fitzgerald and Suzor, or of civil society, in Redeker, Gill and Gasser.⁶³

This paper aims to build on the existing literature in order to reconcile some apparently divergent positions and to more clearly define the concepts of digital constitutionalism and constitutionalisation of the digital environment. To this end, the diagram below has been created to better visualise the new proposed theoretical systematisation and to provide a schematisation of the argumentative line that the next paragraphs will follow.



⁶² It is clear, for example, that in Redeker, Gill and Gasser (n 39) the Internet bills of rights are not constitutions; see also Claudia Padovani and Mauro Santaniello, 'Digital constitutionalism: Fundamental rights and power limitation in the Internet eco-system' (2018) 80(4) *International Communication Gazette* 295.

⁶³ Redeker, Gill and Gasser (n 39) only refer, but do not analyse in depth the concept of 'constitutionalisation'. To this purpose, they only write: "The purpose of this article is to conduct a mapping of the landscape and to arrive at a collection of documents from which we can gain preliminary insights about the potential constitutionalization of cyberspace."

4.1 Digital constitutionalism as an ideology

I consider digital constitutionalism as a declination of modern constitutionalism. The former shares the foundational values, the overall aims of the latter, but it focuses on the specific context affected by the advent of digital technology. Being digital constitutionalism an ism, one could define it 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.

The term ‘ideology’ is often used in a pejorative sense, following Marx’s concept of ideology as ‘false consciousness’, i.e. as “a set of beliefs with which people deceive themselves”,⁶⁴ or like in politics, as a non-practical attitude.⁶⁵ In this paper, this denomination is used in a neutral way, as a structured set of values and ideals.

The advantage of thinking of digital constitutionalism as an ideology, and, therefore, as a purely theoretical concept, lies in the possibility to distinguish it from its implementation, its translation into reality, as we will see later at § 4.3.⁶⁶

4.2 The aim of digital constitutionalism

The literature review presented in this paper showed that there is no consensus among the analysed scholars on the aim of digital constitutionalism. Fitzgerald, Berman and Suzor intended constitutionalism as the limitation of private power.⁶⁷ Redeker, Gill and Gasser, in the first version of their paper (2015), proposed a conception of digital constitutionalism as the limitation of public power, therefore maintaining a vision anchored to the traditional notion of constitution relating to the state dimension. Subsequently, this restriction was overtaken in the second version of their paper (2018), where they affirmed that “[e]fforts toward digital constitutionalism may aim to limit the power of both public authorities and private corporations”.⁶⁸

As recognised by Redeker, Gill and Gasser in the last version of their paper (2018), I argue that there is no reason to restrict the concept of digital constitutionalism to the limitation of either public or private power. Digital constitutionalism, indeed, is a concept which refers to a specific context, the digital environment, where private actors emerge beside nation states as potential infringers of fundamental rights. Such a peculiarity of the digital environment requires to dis-anchor the concept of constitutionalism from the state

⁶⁴ Maurice Cranston, ‘Ideology’ in *Encyclopaedia Britannica* (2014) <https://www.britannica.com/topic/ideology-society/Introduction>.

⁶⁵ Cranston (n 64).

⁶⁶ For example, the concept of digital constitutionalism does not correspond, as some scholars seem to suggest, to the documents of Internet bill of rights: see Padovani and Santaniello (n 62); Yilma (n 37); Monique Mann, Angela Daly, Michael Wilson, Nicolas Suzor, ‘The limits of (digital) constitutionalism: Exploring the privacy-security (im)balance in Australia’ (2018) 80(4) *International Communication Gazette* 369. As correctly specified by Redeker, Gill and Gasser, digital constitutionalism is “a common term to connect a constellation of initiatives”. Therefore, it *connects*, but it *is not* the constellation of initiatives analysed by Redeker, Gill and Gasser. Digital constitutionalism is the ideology which permeates, guides, informs the emergence of the Internet bills of rights – but not only of these documents, as I will illustrate in paragraph 5.

⁶⁷ Admittedly, their papers focus on private actors. Therefore, one could argue that these authors do not exclude that the concept of digital constitutionalism may be referred to the limitation of public actors. Evidence of that is the fact that Fitzgerald, Berman and Suzor are well conscious that they are adapting the concept of constitutionalism, traditionally associated with the context of public power, to the limitation of private power.

⁶⁸ Redeker, Gill and Gasser (n 39).

dimension in order to fully appreciate the emergence of the powers of private actors.

This interpretation is the result of a process of generalisation and subsequent re-specification of the concept of constitutionalism in relation to the digital environment.⁶⁹ The intellectual exercise of generalisation allows us to abstract the notion of constitutionalisation from the specific context in which it emerged – the state dimension – by identifying its quintessential functions, which, according to this paper, are the protection of fundamental rights and the balancing of existing powers. Subsequently, the exercise of re-specification allows us to re-contextualise these two functions in the digital environment. In this way, it is apparent that, in a context where both public and private actors can affect the protection of fundamental rights, the aim of digital constitutionalism does involve the limitation of the power of both these categories of actors.

A similar conception of digital constitutionalism frees itself from the ties anchoring it to the state dimension, in which the broader notion of constitutionalism emerged. As we will see in the last section, this interpretation of digital constitutionalism also implies to reconsider the kinds of normative counteractions that emerge in order to implement its values and principles. It will be possible to identify not only traditional normative answers belonging to the hierarchy of sources of the state-centric dimension, but also innovative instruments emerging in the transnational context.

4.3 Constitutionalism v constitutionalisation

This paper proposes to adopt the expression ‘constitutionalisation of the digital environment’ to identify the *process* of production of norms aiming to ensure the protection of fundamental rights and the balancing of powers within that context. In particular, I argue that, in this specific historical moment, such a process aims to produce a series of normative counteractions to address the alterations of the constitutional ecosystem generated by the advent of digital technology. In light of this definition, it is important to make a series of clarifications.

Firstly, it is necessary to understand the relationship between constitutionalisation of the digital environment and digital constitutionalism. The latter represents the set of values and ideals that permeate, inform and guide the process of constitutionalisation of the digital environment. Digital constitutionalism provides the imperative at the basis of the process of constitutionalisation as one of its corollary, imposing, in this way, the production of normative counteractions that address the challenges of digital technology.

Secondly, it is important to emphasise that constitutionalisation is a *process* composed of different stages. This term is not exclusively used to refer to the final stage(s) of such a process in which norms are institutionalised or constitutionalised. It is worth highlighting this aspect because, in contrast to part of the existing scholarship,⁷⁰ I argue that the mere elaboration of constitutional principles at societal level can mark the presence of a process of constitutionalisation in the digital environment, even if norms are not yet institutionalised or positivised in the hierarchy of legal sources.

⁶⁹ See Teubner (n 46).

⁷⁰ Padovani and Santaniello (n 62), for instance, exclude that the emergence of documents of Internet bills of rights could be the evidence of an ongoing process of constitutionalisation. However, in line with the other contributors to the special issue of the *International Communication Gazette*, they argue that the appearance of these texts is a necessary – but not sufficient – precondition for a process of constitutionalisation of the Internet. Conversely, in this paper I contend that a process of constitutionalisation starts from the theorisation of constitutional principles, and cannot be reduced to the final institutionalisation and positivisation of the latter.

Lastly, the process of constitutionalisation of the digital environment is not unitary. Even if from a conceptual point of view it is possible to identify common foundational values, motivations and aims, the process of constitutionalisation does not adopt a single modality, but it is translated into different normative answers, which sometimes are stratified, or even overlapping. The next section will propose a mapping of these different kinds of modalities.

5 MAPPING CONSTITUTIONAL RESPONSES

The bottom of the diagram presented above visualises the different categories of constitutional responses which have emerged so far and that could be regarded as parts of the process of constitutionalisation of the digital environment. It is important to stress that this paper does not aim to provide an exhaustive directory of all the constitutional responses which have emerged so far. Rather, its objective is to show that the proposed definition of the process of constitutionalisation of the digital environment can encompass all the constitutional instruments analysed by the existing scholarship, and, in this way, reconcile their positions. For this reason, rather than focusing on the substantive content of these normative counteractions, this section will look at their source and at the normative instruments they adopt. A series of examples will be provided for each category.

5.1 National dimension

Firstly, it is possible to identify a category of normative counteractions developed at *national* level, which we could define as ‘classic’ in the constitutional context. They integrate or modify the legal framework through legally binding texts belonging to the hierarchy of legal sources, such as constitutions and other texts with primary value,⁷¹ ordinary law with constitutional value⁷² as well as decisions of supreme/constitutional courts⁷³. In this category, we find the instruments taken into consideration by Fitzgerald (ordinary law), Berman (constitution, decisions of constitutional courts), and Suzor (constitution, ordinary law).

5.2 Regional and international organisations

Secondly, another ‘classic’ category of normative counteractions is that represented by norms developed at *transnational* level within the framework of regional or international governmental organisations. Also in this case, these counteractions integrate or modify the legal framework through legally binding instruments which correspond, in the respective regional or international organisations, to primary norms,⁷⁴ secondary

⁷¹ See, as an example of norm aiming to recognise an amplification of the possibility to exercise existing fundamental rights, the right to participate in the Information society enshrined in 2001 in Article 5A of the Greek constitution, <http://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>.

⁷² See, as an example of norm aiming to recognise an amplification of the possibility to exercise existing fundamental rights, the right to Internet access in Article 4 and 7 of the Brazilian Law no. 12.965/2014 (Marco Civil da Internet), <https://www.publicknowledge.org/assets/uploads/documents/APPROVED-MARCO-CIVIL-MAY-2014.pdf>.

⁷³ See, as an example of norm aiming to recognise an amplification of the possibility to exercise existing fundamental rights, the decision of the French Conseil constitutionnel no. 2009-580 DC of 10th June 2009, at 12, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc-2009580dc.pdf>.

⁷⁴ See, as an example of norm aiming to recognise an amplification of the possibility to exercise existing fundamental rights,

norms with primary value,⁷⁵ and decisions of courts of last instance.⁷⁶

5.3 Non state-centric dimension

Interestingly, it is possible to identify a third category of normative counteractions. They still emerge at *transnational* level, but this time not in a *state-centric* dimension, i.e. in a dimension in which nation-states represent the basic unit. Consequently, they do not take the form of the binding legal instruments observed in the first two categories.

5.3.1 Internet bills of rights

Within this group we can undoubtedly mention the instruments analysed by Redeker, Gill and Gasser. In fact, in the documents of Internet bill of rights it is possible to detect all the categories of norms identified in the third section of this paper as a potential expression of normative counteractions to the alteration of the constitutional ecosystem produced by the advent of digital technology. Namely: norms aiming to recognise the enhanced possibility of individuals to exercise their fundamental rights;⁷⁷ norms aiming to limit potential violations of fundamental rights;⁷⁸ and norms aiming to achieve a balance of the existing powers.⁷⁹

5.3.2 Decisions of ICANN's dispute resolution mechanism

In the 2018 version of their paper, Redeker, Gill and Gasser explicitly exclude from their analysis the decisions of dispute resolution mechanisms of transnational organisations related to the digital environment, like ICANN.⁸⁰ In particular, they argue that these instruments do not aim to transform Internet governance, but their objective is rather to define the rules of a particular organisation. Nevertheless, I think that this qualification does not prevent us to consider the norms developed within this specific organisation as a kind of constitutional counteraction. In fact, as rightly observed by Teubner and Karavas, the arbitrators of ICANN's dispute resolution mechanism have developed a series of new rules which are not directly taken from any state-centric constitutional document, especially by recognising the principle of freedom of expression in the context of disputes related to domain names.⁸¹

5.3.3 Internal rules of commercial actors

Lastly, in this paper I contend that it is possible to consider as a normative counteraction the emergence of

the right of persons with disabilities to access to ICT in Article 9(1) of the UN Convention on the Rights of Persons with Disabilities adopted in 2006, <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-9-accessibility.html>.

⁷⁵ See, as an example of norm aiming to limit potential violation of existing fundamental rights, the introduction in the EU of new data protection principles by Regulation (EU) 2016/679 (General Data Protection Regulation).

⁷⁶ See, as an example of norm aiming to recognise an amplification of the possibility to exercise existing fundamental rights, the recognition by the European Court of Human Rights of the crucial role that Internet plays as one the principal means to exercise the right to freedom of expression, in ECtHR, *Cengiz and Others v. Turkey* [2015] (Applications no. 48226/10 and 14027/11), para. 49.

⁷⁷ See, e.g., Principles 3 and 8 of "The 10 Internet Rights & Principles", http://internetrightsandprinciples.org/site/wp-content/uploads/2018/01/IRPC_english_5thedition.pdf.

⁷⁸ See, e.g., Principle 5 of "The 10 Internet Rights & Principles" (n 77).

⁷⁹ See, e.g., Principle 10 of "The 10 Internet Rights & Principles" (n 77).

⁸⁰ See *supra* (n 56).

⁸¹ Karavas and Teubner (n 18); see also Teubner (n 46).

specific norms in the internal rules of commercial actors operating in the digital environment, such as terms of use, terms of service, and binding corporate rules.⁸² For example, in relation to social media's terms of service, Suzor recognises that these instruments regulate the distribution of power as constitutional documents, even if, from a formal point of view, they are merely a contract between private parties.⁸³ In fact, if we follow the categorisation of normative counteractions proposed in the third section of this paper, we can identify in this category of texts: norms which recognise the amplification of the possibility to exercise a fundamental right, for example establishing a right to access to digital platforms without discriminations;⁸⁴ norms aiming to limit potential violation of fundamental rights, such as those specifying the extent to which users' personal data should be protected;⁸⁵ norms which attempt to balance the existing powers, for example requiring digital platforms to act in a transparent way⁸⁶ or allowing users to participate in the process of amendment of their terms of service.⁸⁷

6 CONCLUSION

The concept of digital constitutionalism is useful to explain the ongoing emergence of normative counteractions against the alterations produced by digital technology in the constitutional ecosystem. The existing scholarship does not offer a unitary picture of the notion of digital constitutionalism. This paper has analytically investigated the aspects of this doctrinal divergence in order to offer a theoretical systematisation which is able to reconcile the positions of the existing scholarship.

It has been argued that digital constitutionalism identifies the decline of modern constitutionalism which seeks to establish and ensure the existence of a normative framework for the protection of fundamental rights and the balance of powers in the digital environment. In particular, it has been contended that digital constitutionalism does not exclusively aim to limit the power of either public or private actors, as affirmed by part of the existing scholarship, but both of them. In fact, in the digital environment, private actors emerge beside nation-states as potential infringers of fundamental rights. Such a peculiarity therefore requires broadening the scope of the original concept of constitutionalism in order to appreciate also the existence of the power of private actors.

Moreover, it has been clarified that the notion of digital constitutionalism should not be used to term the concrete instruments which substantiate its values and ideals, as some scholars do. Digital constitutionalism is rather the set of values and ideals that permeate, guide and inform this series of instruments. In particular, it has been argued that digital constitutionalism imposes the emergence of a series of normative counteractions against the alterations of the constitutional equilibrium produced by digital technology.

The concept of constitutionalisation of the digital environment has been proposed to denote the current

⁸² See Celeste (n 38).

⁸³ Nicolas Suzor, 'The responsibilities of platforms: A new constitutionalism to promote the legitimacy of decentralized governance', Association of Internet Researchers Annual Conference, 5-8 October 2016, Berlin, <http://eprints.qut.edu.au/101953/>.

⁸⁴ See, e.g., Facebook's Principles no. 1, 3, 4, 5, 6, 7, and 10, <https://www.facebook.com/principles.php>.

⁸⁵ See, e.g., Facebook's Principles no. 2.

⁸⁶ See, e.g., Facebook's Principles no. 9.

⁸⁷ See, e.g., Facebook's Principles no. 9. Historically, Facebook went even further: in 2009 the company of Menlo Park announced for the first time to give its users the opportunity not only to comment, but even to vote the set of terms they preferred. See Jonathan Zittrain, 'A Bill of Rights for the Facebook Nation', *The Chronicle of Higher Education*, 20 April 2009, <https://www.chronicle.com/blogs/wiredcampus/jonathan-zittrain-a-bill-of-rights-for-the-facebook-nation/4635>; Celeste (n 38).

process of emergence of these counteractions. Such a process, differently from what some scholars affirm, starts from the phase of elaboration of new constitutional principles, and does not only involve their formal institutionalisation or codification.

Finally, it has been observed that there are different kinds of normative counteractions emerging to face the challenges of digital technology. Therefore, the process of constitutionalisation of the digital environment is not unitary, but involves different categories of instruments and actors. In particular, the mapping exercise carried out at the end of this paper has shown that it is possible to identify as parts of this process not only all the instruments analysed by the existing scholarship, such as ordinary law, constitutional law, and the Internet bills of rights, but also other kinds of normative responses, such as those developed at regional and international level, in the dispute resolution mechanisms of transnational organisations like ICANN, and as internal rules of commercial actors.

In light of this mapping, it is possible to notice that constitutional responses to the alterations produced by digital technology not only emerge in dimensions that we could define as ‘classic’ in constitutional law, such as at the national, regional and international level, in which the nation-state still represents the central player, but also in new contexts, which are conversely dominated by private actors.

For this reason, I propose as a future research pathway to analyse and compare the different forms through which the process of constitutionalisation of the digital environment is taking place. In particular, I believe that special attention should be devoted to the reasons why constitutional responses are emerging in non-traditional contexts outside the state-centric dimension.⁸⁸

⁸⁸ In Celeste (n 38), in relation to the social media environment, I have already started to reflect on the reasons why constitutional responses are emerging in non-traditional contexts outside the state. I argue that this phenomenon could be explained as a form of ‘compensatory constitutionalisation’. In this way, I develop a conception initially proposed by Anne Peters (n 2), arguing that the normative responses emerged in non-traditional contexts aim to compensate a series of points of failure of traditional state-centric constitutional instruments.

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