

The Emergence of Digital Constitutionalism within the Historical Trajectory of Constitutionalism

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How to cite this paper: Maluf, P. J. L. (2024). The Emergence of Digital Constitutionalism within the Historical Trajectory of Constitutionalism. *Beijing Law Review*, 15, 1861-1881.

<https://doi.org/10.4236/blr.2024.154105>

Received: August 29, 2024

Accepted: October 15, 2024

Published: October 18, 2024

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Abstract

Constitutionalism is a legal-political concept essentially linked to the need to limit power. This concept presents continuous and important historical evolution, from Antiquity to Modernity. “Digital Constitutionalism” can be preliminarily presented as the projection of values of contemporary constitutionalism in the context of a digital society. The characterization of contemporary society as being “digital” is due to an increasingly marked presence, currently, of technological elements, especially artificial intelligence. Technology instrumentalizes interactions in both public and private spheres. As a result, technology resizes the relationships between individuals and between State and people. The growing rise of digital private powers challenges the traditional characteristics of constitutional powers, prompting a reflection on how Constitutional Law can contribute to solving some challenges of the Digital World. The article proposes a reflection on several questions: How does Digital Constitutionalism fit into the historical evolutionary process of Constitutionalism? How have States and private organizations acted to promote constitutional balance in digital spaces? What is the relationship between Digital Constitutionalism and fundamental rights? What are the main impacts of Digital Constitutionalism on Judicial Review and the democratic regime? The theme lies at the intersection of important fields such as the theory of constitutionalism and the constitution, the organization of powers, the Rule of Law, and fundamental rights, and holds significant centrality on the international public agenda. The analysis will be conducted from the perspective of Brazilian law, while also drawing on international literature and examining normative instruments adopted in various countries, such as the United States, the European Union, and China, in order to provide a comparative and comprehensive

view of the subject.

Keywords

Digital Constitutionalism, Fundamental Rights, Judicial Review, Democracy, Digital World

1. Introduction

Constitutionalism is a legal-political concept essentially linked to the necessity of limiting power—a technique of freedom against arbitrary power (Matteucci, 1998). It is a concept that has undergone continuous and significant historical evolution, from Antiquity to Modernity (Amaral Júnior, 2021).

The term “Digital Constitutionalism” can preliminarily be presented as the projection of contemporary constitutional values in the context of a digital society (Celeste, 2019).

This initial approach to the topic can be complemented by noting the evolution in the legal literature’s focus on the terminology of Digital Constitutionalism, which has shifted from an initial reference (more restricted) to “a constitutional movement aimed at limiting the private power of internet actors, in opposition to the idea of limiting state political power,” to a later notion (broader) of an “umbrella term that encompasses the most diverse legal and political initiatives, both state and non-state, aimed at affirming fundamental rights on the internet” (Mendes & Fernandes, 2020: p. 4).

The characterization of contemporary society as “digital” is due to the increasingly prominent presence of technological elements in our daily lives, particularly those associated with artificial intelligence.

This circumstance can be illustrated, more closely related to our reality, by the numerous “virtual assistants”—Alexa, Bixby, Sam, Siri, are some of the most well-known examples—already available to a large part of the population, accessible primarily through smartphones and personal computers.

The public or private provision of various essential services to the population already occurs with the assistance of virtual assistants, notably present in customer service provided by telephone and internet operators, companies that sell their products and services online, and public service concessionaires for the supply and distribution of water and electricity, which, for example, make use of so-called “chatbots”.

The progress in computing and the development of digital technologies in recent decades have profoundly transformed global society and its dynamics, altering the landscape of communications, public administration, education, access to knowledge, consumption, personal exchanges, and numerous other aspects of daily life (Francis, 2023).

The diffusion—intensified due to the COVID-19 pandemic—of electronic com-

munication and information tools, in constant technological advancement, is an evident phenomenon of contemporaneity. Technology has intensely facilitated interactions and their dimensions in both the private and public spheres (Cristóvam, Machado & Souza, 2022). In particular, artificial intelligence tools are becoming something akin to electricity and the internet, true infrastructures without which it is impossible to develop numerous human activities.

The rise of algorithmic society—and the reference to the term “algorithm society” is pertinent here (Balaguer Callejón, 2023)—has led to a paradigmatic shift where public power is no longer the only source of concern regarding respect for fundamental rights and the protection of democracy (Pollicino, 2020).

As a consequence, there has been a redefinition of relationships between individuals—whether personal, professional, or social—as well as the ties between States and people—both natural and legal persons.

As a result, there is a reconfiguration of the relationship between constitutional law and private law, including the duties to regulate the complex cyber environment, both within and outside jurisdictional boundaries.

In this context, concerns are amplified regarding online platforms—mostly operated by large transnational private groups—that often perform functions traditionally carried out by the public sector. In this new scenario, the traditionally detected risks to constitutional democracies, stemming almost exclusively from the abnormal actions of public powers, are now joined by new risks arising from the activities of private sectors, in spaces (still) formally private, but which, in practice, perform functions commonly attributed to public entities (De Gregorio, 2020; Golia & Teubner, 2021).

The increasing elevation of digital private powers challenges the traditional characteristics of constitutional powers, prompting reflection on how Constitutional Law can contribute to solving the challenges of the Digital World, specifically regarding Fundamental Rights, Constitutional Jurisdiction, and Democracy.

Identifying the main aspects of the relationship between technological innovations and each of these fields (Fundamental Rights, Constitutional Jurisdiction, Democracy) is a preliminary task for this broader reflection, which also includes an analysis of how so-called Digital Constitutionalism fits into the evolution of Constitutionalism.

Consequently, this topic holds considerable importance on the international public agenda, and in this article, it will be explored through a review of the most recent legal literature on the subject, along with an identification of the key regulatory documents that have been adopted to ensure constitutional balance in digital spaces. The analysis will be approached from the perspective of Brazilian law, incorporating international literature and evaluating regulatory frameworks implemented in different countries.

2. Two Important Guidelines

The reflection on how Constitutional Law can contribute to addressing the

challenges of the Digital World must be conducted considering certain guidelines.

A first aspect to be observed is that the contribution of Constitutional Law to the challenges of the Digital World is not limited to the protection of personal data and the rights to privacy and intimacy.

The characterization of a society as digital goes beyond the mere diffusion of technological innovations; it must consider, above all, the social impacts of those innovations. Information technology and data processing permeate all areas of individuals' and institutions' lives, to the extent that we can speak of a true ubiquity of information and communication technologies (Hoffmann-Riem, 2008).

An illustration of this point is the reference to the relevance of social networks not only in communication and information processes but also in the process of choosing lifestyles, cultural orientation, social values, and educational systems (Hoffmann-Riem, 2020)—for example, the discussion on homeschooling—which demonstrates their great aptitude for shaping the development of public opinion, including in political-electoral decision-making processes, as recent examples like Brexit and the presidential elections in the United States and Brazil have shown.

A second aspect to consider is the fact that risks and opportunities go hand in hand, even when it comes to the digitalization process of the State and society.

The benefits brought by technological innovations are undeniable. On the other hand, there are also sensitivities and challenges in protecting certain fundamental rights, such as intimacy, privacy, data confidentiality, the right to information, health, and work (Mendes & Fonseca, 2021; Bonilla, 2021).

The benefits brought by the use of technological innovations are numerous. Some of them include: better decision-making capacity in various areas of human knowledge; automation of activities that are too monotonous, exhausting, dangerous, or unhealthy for humans to perform; the notable evolution of language use by technological devices, facilitating personal and public communication; a greater number of tools for social mobilization; advances in research and innovation; application in sciences from other branches of knowledge, such as engineering and medicine; various applications in the justice system¹; and the wide dissemination of knowledge in the fields of education and culture (Barroso, 2024).

Alongside the opportunities of a digitized and interconnected daily life, risks emerge for individuals and society. Some of these include: increasing monitoring and surveillance of people; violation of intimacy and privacy; algorithmic discrimination; unwanted exposure or the creation of comprehensive personality profiles; mass dissemination of misinformation; impact on the job market; and the use of technological tools for war purposes (Mendes, 2019; Francis, 2023; Barroso, 2024).

The use of artificial intelligence adds a layer of complexity to this new reality, as it involves not only the collection and processing of personal data but also an

¹See Casimiro & Teixeira (2024) Artificial Intelligence Approaches within the Brazilian Judiciary's Contemporary Jurisdictional Model. *Beijing Law Review*, 15, 730-748. doi:10.4236/blr.2024.152044. This is an analysis of the use of Artificial Intelligence methods as a decision-support system in the Brazilian judiciary, within a jurisdictional system that combines characteristics of both civil law and common law.

analysis of that data that can serve to make an improper prognosis of an individual's future behavior. Thus, the form and purpose of the use of these technological applications can either expand or reduce the possibility of exercising fundamental rights, and therefore, require reflection on how these new technologies will be shaped so that they operate, as much as possible, for the benefit of society as a whole (Mendes, 2019).

Ultimately, technological innovations, especially those involving artificial intelligence, contribute to the process of expanding and disseminating human knowledge (Francis, 2024). Nonetheless, they also bring inevitable risks and challenges, which demand constant attention from all of humanity.

3. Ensuring Constitutional Balance in Digital Spaces

In recent years, there has been a growing production of regulatory norms, whether through formal laws or official declarations by international organizations², as well as through less traditional regulatory mechanisms, such as terms of use and regulations for digital platforms, among other instruments, with the aim of legally disciplining technological innovations in general.

An interesting example is the European Parliament Resolution of February 12, 2019, on a comprehensive European industrial policy in the field of artificial intelligence and robotics. It is worth noting that this formally infra-constitutional legislation may take on a “pre-” or “proto-constitutional” character (Gill, Redeker, & Gasser, 2015), as it could serve as a stimulus for its subsequent incorporation into a similar or identical provision in a formally constitutional framework³, or be integrated into the so-called “*bloc de constitutionalité*” (Favoreu & Philip, 1999; Favoreu, 2010)⁴ of a given legal system.

²Two simple examples: the (1) *Dichiarazione dei diritti in Internet* (https://www.camera.it/application/xmanager/projects/leg17/commissione_internet/dichiarazione_dei_diritti_internet_publicata.pdf), which has a more official character, and the (2) *Magna Carta for Digital Rights*, voted on by the public as part of an interesting initiative by the British Library, which can be viewed at: <https://www.bl.uk/my-digital-rights/magna-carta-2015>.

³In line with the Brazilian infraconstitutional regulation on data protection, which reached its peak so far with Law No. 12.965/2014 (*Marco Civil da Internet*) and the General Data Protection Law (*LGPD*), the Brazilian constitutional reform legislator, attentive to this reality, chose to formalize the inclusion of this right in Article 5, through Constitutional Amendment 115/2022, adding Section LXXIX—“the right to the protection of personal data, including in digital media, is guaranteed under the terms of the law.”

⁴The expression “*bloc de constitutionalité*” is traditionally used to designate the set of norms that the French Constitutional Council applies to the prior control of the constitutionality of laws and parliamentary regulations. This set, referred to in the Constitutional Council decision of July 8, 1966, is composed of the Constitution and, by reference in the Preamble to the 1958 Constitution, the Declaration of the Rights of Man and of the Citizen of 1789, and the Preamble to the 1946 Constitution. In the sense used by Louis Favoreu and Loic Philip, the “*bloc of constitutionality*” has a broader scope than the Constitution itself, encompassing all provisions endowed with constitutional density, covering “a whole series of rules and principles that modify the nature of rights and freedoms.” Therefore, the notion of the “*block of constitutionality*” is not limited to the individual provisions of positive constitutional law (Favoreu & Philip, 1999: p. 249; Favoreu, 2010: pp. 118-126 and pp. 769-771). In the Brazilian context, ADI 595-ES stands out, in which the Rapporteur, Justice Celso de Mello, while inquiring about the parameters to be used in the context of constitutional review within the Brazilian system, provides important references on the subject.

This growing production of norms does not negate—on the contrary, it requires and reaffirms—the obligation to question to what extent new concepts and legal regulation instruments that are fundamentally new or, at the very least, adapted to a new reality, now digital rather than analog, are necessary.

In the existing legal literature on the subject, there is no consensus on the instruments that should implement the projections of so-called digital constitutionalism (Celeste, 2019).

Initially, we observe the emergence of Internet Bills of Rights or Declarations of Rights for the Internet, which are not the result of a conventional legislative process but are documents without legally binding character, aimed at protecting fundamental rights and establishing constitutional principles for the digital society.

Due to their informal and non-binding nature, such documents allow for the participation of a vast number of stakeholders and increase their capacity to promote innovative ideas. It is argued, therefore, that such Bills or Declarations of Rights compensate for and simultaneously stimulate the ongoing process of constitutionalizing the digital society.

These documents are complemented by other regulatory frameworks that some authors consider to be part of the so-called digital constitutionalism. These include normative formulations by national states and transnational bodies, as well as formulations by private actors, in addition to the ordinary state legislation of national states, and also the regulatory framework established by private digital technology corporations themselves. Also considered part of the so-called digital constitutionalism are the decisions of state constitutional courts as well as multi-state transnational courts (Celeste, 2023, De Gregorio, 2020, Pollicino, 2020).

It is worth specifically listing, at this point, the main regulatory documents that have been proposed or effectively adopted in different countries or community blocs.

In Brazil, the *Civil Rights Framework for the Internet* (Law 12.965/2014) regulates the use of the internet, focusing on privacy, freedom of expression, and net neutrality. The *General Data Protection Law—LGPD* (Law 13.709/2018) regulates the processing of personal data, directly affecting artificial intelligence that processes this data. It is also worth mentioning several Bills that are under consideration, notably PL 5051/2019, which addresses the use of AI in the country; PL 21/2020, which establishes principles, rights, and duties for the development and use of AI; PL 2630/2020, which establishes the Brazilian Law of Freedom, Responsibility, and Transparency on the Internet; and PL 2338/2023, which regulates the use of AI, focusing on safety and transparency.

In Europe, notable examples include the *General Data Protection Regulation* (GDPR), which establishes rules for the protection of personal data and privacy, directly impacting the use of AI that handles this data. The proposed Regulation on AI (*Artificial Intelligence Act*) aims to regulate AI based on risk levels, imposing, in Article 52, the obligation to inform about the use of AI, with specific

mentions of chatbots and deepfakes. Additionally, the *Digital Services Act (DSA)* and the *Digital Markets Act (DMA)*, launched as part of the “Shaping Europe’s Digital Future” plan in December 2020, aim to create a safer digital space, protecting the fundamental rights of digital services users. It is important to note that these acts are based on the premise that what is considered illegal offline should also be considered illegal online or in the virtual realm. Furthermore, the recently adopted *Regulation 2024/1689* lays down harmonized rules on artificial intelligence, amending various existing regulations and directives, and consolidating the European Union’s approach to AI governance (Artificial Intelligence Act).

Also in Europe, the *Charter of Fundamental Digital Rights of the European Union* establishes a regulatory framework that allows the European Court of Justice to act as a “quasi-constitutional” court (De Gregorio, 2020). Other noteworthy examples include the *Portuguese Charter of Human Rights in the Digital Age*, established by Law 27/2021, the *Spanish Charter of Digital Rights*, of July 14, 2021, and the *German law Netzwerkdurchsetzungsgesetz (NetzDG)* of 2017, which imposes obligations on online service providers, requiring the removal of illegal content within strict deadlines. In the United Kingdom, the national strategy for AI (“UK AI Strategy”) includes guidelines on regulation, ethics, and governance, with the “*Online Safety Act*” enacted in 2023, establishing duties of care for online platforms, focusing on the removal of harmful content and the protection of minors.

In the United States, Section 230 of the *Communications Decency Act (CDA)* grants immunity to online intermediaries for third-party content, with exceptions for copyright violations. It is worth noting that this immunity has been the subject of judicial discussions regarding its limits. In October 2023, President Joe Biden issued the *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, which consolidates goals and principles for the government’s relationship with AI mechanisms. This Executive Order includes recommendations for Congress to draft specific privacy legislation. The *Algorithmic Accountability Act of 2022* addresses transparency and bias mitigation in automated decision systems, although it does not directly mention generative AI. Additionally, the *Blueprint for an AI Bill of Rights* serves as a guiding document for the ethical development of AI in the United States.

Given its population and economic size, it is also worth mentioning China’s approach⁵. The Cyberspace Administration of China (CAC) published, in April 2023, the *Measures for the Management of Generative Artificial Intelligence Services*, regulating generative AI in response to the growth of tools like ChatGPT and similar technologies developed in China. These measures were preceded by other regulations, such as the *Provisions on the Administration of Deep Synthesis*

⁵For more information about China’s case:

<https://digichina.stanford.edu/work/translation-measures-for-the-management-of-generative-artificial-intelligence-services-draft-for-comment-april-2023/>.

Internet Information Services, which regulate *Deep Synthesis* activities, including deepfakes and chatbots, and the *Internet Information Service Algorithmic Recommendation Management Provisions* of 2022, which standardize algorithmic recommendation activities, prohibiting the generation of false news and anti-competitive practices (Fazano Filho, Fico, & Grings, 2023).

It should be noted that in China, service providers are seen as content creators, even indirectly, when generative artificial intelligence produces outputs for third parties. This regulatory choice represents a significant divergence from the approach that legislators in the United States, Europe, and Brazil offer—or propose to offer—to platforms (Fazano Filho, Fico, & Grings, 2023).

In Canada⁶, the *Digital Charter Implementation Act* includes provisions on privacy and AI, emphasizing the ethical and transparent use of AI. The *Directive on Automated Decision-Making* regulates the use of automated systems for government decisions, ensuring transparency and bias mitigation.

In Australia⁷, the *AI Ethics Framework* provides guidelines for the ethical and transparent development and implementation of AI, while the *Online Safety Act 2021* regulates online safety, including the removal of harmful content and the protection of minors.

In Japan⁸, the government framework known as *Society 5.0* promotes the integrated use of AI and digital technologies in society, focusing on regulation and responsible innovation. The *Guidelines for AI Utilization* establish directives to ensure that AI is used safely and ethically.

Finally, on a multinational level⁹, UNESCO published the *Recommendation on the Ethics of Artificial Intelligence*, which sets global ethical standards for AI, while the Organization for Economic Co-operation and Development (OECD) defined the *AI Principles*, guiding the responsible use of AI worldwide.

This overview is important because the construction of regulatory models, whether national or aspiring to universality, can benefit from the knowledge of international experiences and Comparative Law.

In a quick tentative synthesis of these models, without any intention of delving into the peculiarities of each one, it is possible to point out the existence of two paradigms for regulating online freedom of expression (Mendes, 2023).

The first is the paradigm of protecting online content neutrality, structured around weak liability regimes for intermediaries concerning third-party content,

⁶Canada: <https://www.parl.ca/legisinfo/en/bill/44-1/c-27?view=about> and <https://www.tbs-sct.canada.ca/pol/doc-eng.aspx?id=32592>.

⁷Australia: <https://www.legislation.gov.au/C2021A00076/latest/text> and [https://www.industry.gov.au/publications/australias-artificial-intelligence-ethics-framework/australias-ai-ethics-principles#:~:text=Australia's%20Artificial%20Intelligence%20\(AI,those%20affected%20by%20AI%20applications](https://www.industry.gov.au/publications/australias-artificial-intelligence-ethics-framework/australias-ai-ethics-principles#:~:text=Australia's%20Artificial%20Intelligence%20(AI,those%20affected%20by%20AI%20applications)

⁸Japan: https://www8.cao.go.jp/cstp/english/society5_0/index.html and <https://oecd.ai/en/wonk/japans-ai-utilization-guidelines-an-initiative-for-implementing-the-oecd-ai-principles>

⁹Unesco: <https://unesdoc.unesco.org/ark:/48223/pf0000381137>. OECD: <https://oecd.ai/en/ai-principles>

and through which content moderation is primarily carried out by self-regulation mechanisms of the platforms themselves. An example of this conception is Article 19 of the *Civil Rights Framework for the Internet* (Law No. 12.965/2014) (Mendes, 2023).

The second is the paradigm of procedural regulation of online discourse, structured around the premise that freedom of expression on the internet requires not only protection against state intervention but also the existence of minimum conditions to protect the democratic nature of virtual spaces, to the social benefit of plurality. Recent European legislation seems to follow this conception (Mendes, 2023).

Whichever paradigm is predominantly followed, it seems important to seek solutions between a regime of total platform freedom and a regime of complete state control over content. In any case, the effectiveness of a future AI governance model in Brazil, both effective and democratic, will largely depend on the construction of an adaptable legal framework—capable of making adjustments and incorporating iterative learning concerning the technological changes that will undoubtedly pressure it along the way (Kira & Coutinho, 2023).

To conclude this topic on promoting constitutional balance in digital spaces, it is worth pointing out the considerable impact on the Brazilian Federal Public Administration, which is clearly evident both in executive projects and in recent regulatory production concerning technological innovations and their application in public service delivery, which may foster, including a productive legal debate on the protection of fundamental rights and guarantees.

In this regard, noteworthy Brazilian actions and projects—many aligned with the 2030 Agenda for Sustainable Development and the Digital Agenda for Latin American and Caribbean countries—include, for example, the creation of the central digital governance committee (Decree No. 10.046/2019), the digital transformation system (Decree No. 7.579/2011), the “GOV.BR” system, the new national civil identification (Law No. 13.144/2017), the mandatory collection of citizens’ biometric data, interoperability and data sharing between databases (Decrees No. 8.777/2016 and No. 8.789/2016), the integration of civil data (SIRC-Decree No. 8.270/2014), the integration of real estate registration data (SINTER-Decree No. 8.764/2016), and the electronic service invoice and “E-Social” (Decree No. 8.373/2014).

Various technology adoption incentives are also highlighted, inserted within the infraconstitutional scope, such as Law No. 12.965/2014 (Civil Rights Framework for the Internet), Law No. 13.303/2016 (Legal Statute of Public Companies and Mixed Economy Companies), Law No. 13.460/2017 (Protection of Public Service Users), Law No. 13.709/2018 (General Data Protection Law), Law No. 14.129/2021 (Digital Government), and Law No. 14.133/2021 (Public Procurement and Contracts Law), and Decree No. 11.856/2023 (National Cybersecurity Policy and National Cybersecurity Committee).

Finally, it is worth mentioning the Brazilian Civil Code Reform Project, which includes a specific Book titled “Digital Civil Law,” regulating people’s rights and legal situations in the digital environment, as well as provisions on the right to a transparent and secure digital environment. The Project also includes a specific chapter on artificial intelligence, stipulating that the development of artificial intelligence systems must respect fundamental rights and personality rights and ensure the implementation of safe and reliable systems, benefiting natural and legal persons and scientific and technological development, ensuring non-discrimination in decisions, data usage, and processes based on artificial intelligence, as well as conditions of transparency, auditability, explainability, traceability, human oversight, and governance.

4. Digital Constitutionalism: Fundamental Rights, Constitutional Jurisdiction and Democracy

At this point in the study, it is worth briefly outlining 1) the relationship between technological innovations and fundamental rights, 2) the impacts of Digital Constitutionalism on Constitutional Jurisdiction, and 3) the implications of Digital Constitutionalism on the democratic regime.

How can risks be prevented while providing legal certainty for the development of the Digital World, and at the same time promoting the rights and fundamental guarantees that structure a Democratic State of Law? To what extent can we speak of new fundamental rights? Is the theory of the horizontal effect of fundamental rights sufficient to provide adequate responses to the challenges posed by the adoption of new technologies?

The intention is not to answer all these questions in this article. However, some considerations can be made with the aim of serving as starting points for future responses to such questions.

It seems undeniable that technological advances bring significant challenges to the protection of certain fundamental rights, such as privacy, data protection, the right to information, health, and work (Luciani, 2018; Bonilla, 2021).

Equally undeniable is that a considerable obstacle to the protection of fundamental rights in this context lies in the decentralized governance of the Internet, which involves a multiplicity of actors (individuals, private corporations, public institutions) coexisting under a true monopoly of information held by a small number of large technology platforms with extensive access to an abundance of private and sensitive data of all those actors (Suzor, 2018).

It would not be an exaggeration to state that the technological revolution allows for a reinterpretation of a significant portion of the catalogue of fundamental rights, given that there currently exists an overlap of 1) classical rights—e.g., the right to honour and moral integrity, the right to the secrecy of communications, political rights—which can be easily adapted to the digital environment; 2) classical rights, but reformatted—e.g., freedom of expression, the right to information, copyright, access to justice—which have been redefined due to the specific

characteristics they assume in the digital environment; and 3) entirely new rights—e.g., the right to the Internet, data protection, the right to be forgotten—which arise precisely from digital threats previously unknown (Trindade & Antonelo, 2023). These latter rights, also known as digital fundamental rights, have been gathered, consolidated, and codified at the national, international, and transnational levels, as seen in the previous section.

In any case, it is always important to bear in mind the valuable lesson that “as important as or even more important than a new right is the actual effectiveness of existing rights, which should be enjoyed broadly and indiscriminately, without privileges, by the entire community” (Amaral Júnior, 2022: p. 175).

Whether due to the fact that the protection of fundamental rights is primarily the responsibility of constitutional courts, or due to the circumstance that in various legal systems it is these courts that must address the challenges arising from the lack of normative regulation on the matter, the Judiciary has been one of the most important agents in the constitutional shaping of such issues, particularly emphasizing the role of Constitutional Jurisdiction.

In this sense, the exercise of constitutional jurisdiction has been particularly affected with regard to the redefinition of the traditional perspective of the theory of the horizontal effect of fundamental rights and the expansion of constitutional review to include the understanding of the phenomenon of the reterritorialization of the Internet (Mendes & Fernandes, 2020).

In Brazil, two cases¹⁰ stand out: *ADC 51*, which discusses the possibility of national authorities requesting data directly from Internet providers headquartered abroad, and *RE 1.037.396—Topic 987*, which analyses the constitutionality of Article 19 of the Civil Rights Framework for the Internet, which imposes conditions for the civil liability of Internet providers, websites, and social media application managers for damages arising from third-party unlawful acts. Both cases are still pending a final decision by the Federal Supreme Court.

In the United States, the Supreme Court also has a series of cases¹¹ that could have significant impacts on the regulation of technology, artificial intelligence (AI), and social media platforms. One of the key cases is *Gonzalez v. Google LLC* (2023), which questions the extent of the protection afforded by Section 230 of the Communications Decency Act to social media platforms, particularly in the context of the use of recommendation algorithms. This case could redefine the responsibility of platforms for content generated by users and curated by AI. Another important case is *Twitter, Inc. v. Taamneh* (2023), which examines whether

¹⁰Brazilian Supreme Court Cases: <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5320379> and <https://portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=5160549&numeroProcesso=1037396&classeProcesso=RE&numeroTema=987>.

¹¹United States Supreme Court Cases: https://www.supremecourt.gov/opinions/22pdf/21-1333_6j7a.pdf, https://www.supremecourt.gov/opinions/22pdf/21-1496_d18f.pdf, <https://www.scotusblog.com/case-files/cases/netchoice-llc-v-paxton/>, <https://law.justia.com/cases/federal/appellate-courts/ca11/21-12355/21-12355-2022-05-23.html>

social media platforms can be held liable for “aiding and abetting” terrorist activities by allowing extremist groups to use their networks. The decision could affect how these platforms moderate content related to terrorism. The cases *NetChoice v. Paxton (Texas)* and *NetChoice v. Attorney General, State of Florida* are also important, as they involve state laws that restrict the ability of platforms to moderate content, which could violate the First Amendment. The Supreme Court’s decision in these cases could shape the relationship between digital platforms and state governments, as well as influence the role of AI in content moderation¹².

A third aspect worth mentioning is the impact of technological innovations on the democratic regime.

The classification of a political system as “constitutional democratic” depends on the existence of effective institutions through which the exercise of political power is distributed among power holders, and through which power holders are subject to the control of those to whom the power is ultimately directed, who are, in reality, the supreme holders of power (Loewenstein, 1979).

The debate on the meaning and scope of the so-called “electronic democracy” or “digital democracy” is not entirely new in political science literature. The question here is whether, through modern communication techniques, traditional democratic frameworks (especially participatory democracy) can be improved, or whether we are witnessing the emergence of a new decision-making and political will-formation scheme. The main technical issue is whether new communication technologies can underpin other forms of speech, discussion, and argumentation (videoconferencing, televised debates, polls) that could replace formally constitutionalized organization. Dialogic-democratic methods and active participation through electronic systems require adherence to principles such as universality and equality (Canotilho, 2003).

The possibilities for increasing democratic participation are considerable. Voters can use large language models’ technologies either to synthesize candidates’ electoral programmes, allowing for comparison, or to seek information about candidates and parties. Moreover, through the appropriate use of these technologies, adhering to ethical and security standards, it is possible to achieve a greater

¹²Additionally, the case of *Moore v. Harper (2023)*, although focused on the “independent state legislature doctrine,” may impact the way misinformation is managed on social media platforms during elections, particularly in the use of AI to moderate misleading content. Another potentially relevant case is *Atsuko Nakatani et al. v. United States (Google, Facebook, Twitter)*, which involves allegations that major social media platforms have cooperated with foreign governments in human rights violations through content censorship. This case raises questions about the responsibility of platforms in an international context and the use of AI in content moderation decisions. Furthermore, the case *Meta Platforms, Inc. v. Federal Trade Commission (FTC)* may involve a review of Meta’s acquisition and market practices, particularly regarding the use of AI to personalise ads and influence consumer behaviour. The decision could redefine competition rules in the technology sector. Although it has not yet reached the Supreme Court, litigation involving Clearview AI over the use of AI for facial recognition and privacy issues also has the potential to define the legal boundaries of AI use in surveillance technologies. Finally, the case *Apple Inc. v. Epic Games, Inc.*, which may reach the court, involves issues related to market practices and the use of AI in closed ecosystems like the App Store. These cases reflect the complex emerging legal issues in the field of technology and AI, and the Supreme Court’s decisions could significantly shape the future of these areas in the United States.

balance of power between candidates and parties, making electoral campaigns more uniform from a financial cost perspective.

On the other hand, political parties seem to be increasingly dependent on social networks in their activities. Their agendas are largely influenced by the debates that occur within them, and their directions are, to a great extent, shaped by the controversies launched in these spaces. While this could represent an increase in political participation, which would be positive, there are concerns that many of these debates are introduced into the networks by organized structures and agents seeking to direct and prioritize them according to hidden interests. Furthermore, this phenomenon is creating the risk of democratic regression, with the intervention of these agents in electoral processes to benefit certain parties and political choices.

It is also important to consider that the Internet provides a significant infrastructure for the defense of important causes at the global level, including for democratic transformation in authoritarian regimes. Additionally, it is necessary to acknowledge the experiences in the legislative or constitutional realm related to normative or constituent processes which, although still very preliminary, could open the door to future developments that favour democratic participation by citizens. There are many areas in which digital democracy can contribute to enhancing the democratic quality of our societies, not only in terms of citizens' participation in public debate or electoral processes (Balaguer Callejón, 2023).

However, there is also a negative aspect that must be addressed. Communication and participation channels have been monopolized by a few global companies, whose economic interest is primarily focused on advertising and the accumulation of users' personal data, and its subsequent monetization. To favour their business model, these companies promote increasingly intense user activity in their applications, which compels them to design these platforms with the aim of attracting and retaining users' attention. In the political sphere, this design is generating increasing aggression and tension in the public space, while also causing fragmentation that is fueled by disinformation and fake news (Balaguer Callejón, 2023).

In this context, electronic democracy emerges as a new fundamental principle that allows individuals to counterbalance state power through access to open data, electronic services, and electronic participation in democratic life. Providing solutions that make it possible to resolve the tension between the digital world and democracy, fundamental rights, and the constitution itself is one of the urgent tasks that legal science, particularly Constitutional Law, currently faces.

5. Digital Constitutionalism: A New (Cycle of) Constitutionalism?

At this stage, we must start from the premise that Digital Constitutionalism is a trend, or subfield, that encompasses a set of initiatives aimed at ensuring the exercise of rights, legitimizing governance norms, and establishing limits on private

powers in the digital environment (Mendes & Fernandes, 2020; Trindade & Antonelo, 2023).

Alternatively, it can be understood as a theoretical formulation that seeks to promote fundamental rights and ensure a balance of powers operating within the digital society, presenting itself as a new phase of contemporary constitutionalism (Gavião Filho, 2023).

Given this broader notion, the following questions arise: Does Digital Constitutionalism constitute a new normative paradigm, or does it designate a new legal theory capable of addressing the demands arising from technological innovations in an increasingly digital society? Does the use of the adjective “digital” attributed to constitutionalism merely indicate a trend reflecting the impact that new technologies currently exert on law? What is the scope of digital constitutionalism? Do its essence and purpose differ from those presented by historical constitutionalism (ancient, medieval, and modern)? Is there a difference between the constitutionalization of the digital environment and digital constitutionalism? Are we dealing with a new phase or a new historical cycle?

The intention is not to answer all these questions in this article. However, some considerations can be made to serve as starting points for future responses to such questions.

Edoardo Celeste (2019), perhaps the most specific theoretical reference on the subject, argues that Digital Constitutionalism is not engendering a constitutional revolution but represents a necessary evolution of contemporary constitutionalism in the context of the digital age. He also suggests that Digital Constitutionalism can be understood as an ideology that establishes and ensures a normative framework for the protection of fundamental rights and the balance of powers in the virtual environment, where the term “ideology” should be understood neutrally. Moreover, he adds that Digital Constitutionalism represents the set of values and ideals that permeate, inform, and guide the process of constitutionalizing the digital environment, necessitating the production of normative responses to the challenges of digital technology.

In the specific constitutional literature, it is observed that the various conceptions of Digital Constitutionalism share the same general idea of limiting power and protecting rights in a digital society: “articulating limits to the exercise of power in a networked society” (Padovani & Santaniello, 2018: p. 295); rethinking how the exercise of power should be limited (and legitimized) in the digital age (Suzor, 2010); “uniting the terms ‘constitutionalism’ and ‘digital’ implies a recognition of the influence of technology on the evolution of constitutionalism and how it can confront emerging digital powers” (De Gregorio, 2020: p. 41); “a theoretical current of contemporary Constitutional Law that is organized around common normative prescriptions for the recognition, affirmation, and protection of fundamental rights in cyberspace” (Mendes & Fernandes, 2020: p. 5).

From the analysis of these conceptions, it can be seen that there are reasonable doubts in specialized constitutional literature: 1) whether the structures of

traditional constitutionalism are sufficient to address the transformations of the Digital World; and 2) whether Digital Constitutionalism represents, strictly speaking, something entirely new in the historical evolution of constitutionalism.

To resolve these doubts, we must recall the essence of constitutionalism, already anticipated at the beginning of this article: a legal-political concept essentially linked to the need to limit power. Consequently, a constitution is, by its very nature, a “fundamental mechanism for controlling the power process” (Loewenstein, 1979: p. 149).

In more detail, in an ontological sense, the “telos” (the purpose) of every constitution should be considered as the creation of institutions to limit and control power, with each constitution having a “dual ideological significance”: to liberate the recipients of power from the absolute social control of their rulers and to grant them legitimate participation in the power process (Loewenstein, 1979: p. 151).

The history of constitutionalism is nothing more than the political man’s quest for limitations on the absolute power exercised by power holders, as well as the effort to establish a spiritual, moral, or ethical justification for authority, in place of blind submission to existing authority (Loewenstein, 1979: p. 150).

On the one hand, there is not just “one constitutionalism” but several “constitutionalisms” (the English constitutionalism, the American constitutionalism, the French constitutionalism, for example, to limit ourselves to the most influential). In this sense, it would be preferable to say that there are various constitutional movements in different nations, but also with some moments of convergence. On the other hand, this multiplicity does not deviate from the basic notion of constitutionalism as “the theory (or ideology) that elevates the principle of limited government, indispensable for guaranteeing rights, to a structuring dimension of the political-social organization of a community” (Canotilho, 2003: p. 51).

When analyzing the historical trajectory of constitutionalism, from Ancient Constitutionalism, through Medieval, to Modern Constitutionalism, the latter resulting from the English, American, and French Liberal Revolutions (Mcilwain, 1947), the legal challenges imposed on humanity have always found responses in adaptations—modernizations that are natural over time—of the basic formulation of constitutionalism: 1) the organization and limitation of power and 2) the protection and promotion of rights.

We do not ignore the varied terminology used by constitutional literature to characterize different moments or approaches to constitutionalism—Ancient, Medieval, and Modern Constitutionalism (Mcilwain, 1947; Loewenstein, 1979); Neo-constitutionalism (Barroso, 2005; in contrast, Horbach, 2007), Global Constitutionalism (Grimm, 2010, Kumm, Lang, Tully, & Wiener, 2014), Transconstitutionalism (Neves, 2009), Popular Constitutionalism (Tushnet, 2006), and so far.

We also do not overlook the very didactic exposition regarding the cycles of

constitutionalism (Biscaretti Di Ruffia, 1996)¹³.

Whether by one aspect—terminological variation—or another—cycles—the essence of constitutionalism remains the same across these perspectives.

A simple example illustrates the point: we are living through what is called the Fourth¹⁴ Industrial Revolution (Schwab, 2016; Barroso, 2024). The previous Industrial Revolutions also brought significant changes in various spheres of human relations, and yet there was no suggestion of the existence (or need) of an industrial constitutionalism to respond to the demands they brought.

Moreover, we do not disregard the emergence of new global power agents, both public and private, who do not adhere to the values that inspire constitutionalism. In the case of public agents, this is because they are authoritarian states where democratic structures either do not exist or are very weak. In the case of private agents, it is because their activities are tied to the exclusive logic of economic benefit, distorting the democratic values that have recently governed the public space. In a broader context, the phenomenon of globalization has displaced much of the real power from states, placing it in financial circuits, in its economic dimension, and in global communication agents, in its political dimension (Balaguer Callejón, 2019).

However, it must be taken into account that violations of fundamental rights by large non-state corporations are not exactly a novelty. The distinguishing factor of the digital age in the algorithmic society lies solely in the extraordinary and massive power of information dissemination, content generation, and data transmission by the major corporations of the technological age, which intensely control information and data, moderating, according to their own principles and values, the content of what can and cannot circulate in their respective digital environments (Gavião Filho, 2023).

The focus of constitutionalism on the technological innovations of the so-called Digital World and the responses of Constitutional Law to the challenges posed by the so-called Digital Society do not make Digital Constitutionalism a strictly new form of constitutionalism.

The various definitions of Digital Constitutionalism are not incompatible with the classical notion of constitutionalism. In a way, they are limited to recognizing

¹³The theoretical framework employed here is based on Paolo Biscaretti di Ruffia's categorization (1996, p. 503-512), which outlines ten cycles of constitutionalism, grouped into two major periods, as follows: First period: (1.1) Revolutionary Constitutions of the 18th Century (1776 to 1799); (1.2) Napoleonic Constitutions (1799 to 1815); (1.3) Legitimist Constitutions of the Restoration (1815 to 1830); (1.4) Liberal Constitutions (1830 to 1848); (1.5) Democratic Constitutions (1848 to 1919). Second period: (2.1) Rationalized Democratic Constitutions (1919 to 1937); (2.2) Democratic-Social Constitutions (1946 to the present); (2.3) Authoritarian Constitutions of the Interwar Period; (2.4) Socialist Constitutions; (2.5) Constitutions adopted in the so-called "Third World" States.

¹⁴There are some authors that point a fifth industrial revolution: Ali, S.H., Ayad, H., Al Rubaie, M. T. (2022). Fifth Industrial Revolution (New Perspectives). *International Journal of Business, Management, and Economics*, 3(3). 196-212. DOI: <https://doi.org/10.47747/ijbme.v3i3.694>. See also Sarai, Zockun, Cabral, & Zockun (2024) From Algorithms to Revolution 5.0: What Does Drive the Innovations?. *Beijing Law Review*, 15, 945-969. doi: 10.4236/blr.2024.152058: <https://www.scirp.org/journal/paperinformation?paperid=134270>

the addition of a new topic to the traditional constitutionalism agenda. It is not a truly innovative use but rather the recognition that constitutionalism is a dynamic phenomenon that historically tends to face new challenges and incorporate new agendas and content. In this sense, digital constitutionalism corresponds to the incorporation of a specific normative domain into constitutions—similar to what happened with historical phenomena that resulted in the emergence of social, economic, and environmental constitutionalisms (Pereira & Keller, 2022).

It seems more appropriate to view Digital Constitutionalism not as a form of surpassing traditional constitutionalism but as a means of drawing attention to relevant problems in contemporary society that require the State to undergo an adaptation process, taking into account, among other things, the interests of other States (Jardim, 2023).

The impacts that new technologies have on society in general and on the legal system in particular do not justify the expansion of the concept of Constitution and do not imply a substantial change in the essence of constitutionalism. Even in the face of the influences of globalization, the paradigm of democratic constitutionalism remains the prevailing theoretical and normative model to address the major challenges brought by technological innovations. This understanding aligns with the important lesson that “as important as or even more important than considering a ‘new’ constitutionalism is the persistence in improving the practices of limiting power, whether in relation to the organization of Powers or in the promotion of Fundamental Rights” (Amaral Júnior, 2021: p. 738).

6. Concluding Remarks

The matters explored in this article are central to shaping the current state of Constitutionalism and its proper structuring to meet the needs that the Digital World imposes to safeguard fundamental rights and guarantees, as well as the Democratic Rule of Law.

The conditions that allowed for the emergence of modern constitutions are changing. The expansion of state responsibilities and the creation of international organizations with sovereign powers transferred by states are making the boundaries between public and private, and between internal and external, increasingly porous.

To address these changes, the state, individuals, society, and a network of private actors must work together in coordination and harmony. The state—perspective of regulation—and individuals—perspective of self-determination—cannot alone manage the complexities arising from new technological applications, thus necessitating that this responsibility be shared with the entire network of private actors who utilize these technologies (Mendes, 2019).

Technological advances allow various types of machines and automations to perform assigned tasks with increasing efficiency, but the purpose and meaning of their operations will continue to be determined or enabled by human beings with their own universe of values (Francis, 2023).

Therefore, the immense expansion of technology must be accompanied by appropriate accountability for its development. Artificial intelligence will become increasingly important in our lives, and the challenges that arise are not only technical but also anthropological, educational, social, legal, and political (Francis, 2023).

In this sense, it is essential to ensure and strengthen measures for transparency and digital education. Education for the use of forms of artificial intelligence should primarily aim at promoting critical thinking, enabling the development of discernment for the good and healthy use of its potential (Francis, 2023).

Throughout its evolution, constitutionalism has dealt with considerable challenges, such as the erosion of public trust in constitutional institutions, the rise of populism, and the existence of wars and true human scourges, such as Nazism.

The emergence of new technological tools presents new challenges for constitutionalism, and traditional legal categories are sufficient to frame and govern the phenomenon. The real obstacles are ideological and economic. Economic in a dual sense: due to the relative scarcity of resources available to regulators and the resistance of large market operators who are reluctant to submit to the necessary rules to govern this market (Luciani, 2018).

Evidently, it is not denied that the emergence of new power structures and the political-economic strengthening of the respective actors, especially in a context of strong interdependence (interconnection) of legal orders, may force the characterization of a paradigmatic adaptation similar to those observed during the most acute moments of historical affirmation of social constitutionalism and post-World War II constitutionalism.

However, this is not currently observed, especially considering that, strictly speaking, the new constitutional challenges brought about by technological innovations are still structured and processed based on the same fundamental categories that enabled the emergence of the modern notion of constitution (and, consequently, of constitutionalism itself) as an evolutionary acquisition of modern civilization: limitation of power and promotion of fundamental rights.

Therefore, it does not seem the most prudent position to categorically recognize that Digital Constitutionalism represents a new and autonomous phase of constitutionalism as classically outlined—a legal-political movement for the structuring of power and protection of fundamental rights.

The evolution of constitutionalism seems (or at least should) to be guided by a constant search for a balance between the permanent interests and the momentary interests of a given society. For this reason, its evolution should be undertaken without detachment from the precepts of social justice and democracy.

It is also important to consider that the work of developing ethical guidelines for the production of forms of artificial intelligence cannot disregard deeper issues related to the meaning of human existence, the protection of fundamental human rights, the pursuit of justice and peace—fruits of relationships that recognize and embrace the other in their inalienable dignity, and of cooperation and commitment

in the pursuit of the integral development of all people and all peoples (Francis, 2023).

This propositional understanding of the legal impacts of the Digital World and its technological innovations on Constitutional Law, as presented throughout this article, provides reflections on the ideal conditions for the responses that Constitutionalism will offer to ensure fundamental rights and guarantees, the Rule of Law, and the democratic regime.

Acknowledgements

The author expresses gratitude to the Faculty of Law of the University of São Paulo, where he is about to conclude his Postdoctoral Research Program, and to the Faculty of Law of Unieuro (Brasília-DF) for its support.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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