DIGITAL CONSTITUTIONALISM – A PERSPECTIVE OVER THE INCREASING ROLE OF THE PRIVATE ACTORS IN SECURING THE EXERCISE OF HUMAN RIGHTS

Ph.D. student **Ruxandra Andreea LĂPĂDAT**[1]

Abstract

Digital constitutionalism is a notion that struggled to contour over the last decade, keeping the pace with the digitalization wave that hit the law field. The efforts did not emerge until this very moment, leaving enough space for both doctrine creation and practical initiatives' development. However, when trying to settle this concept to a definition, we will always keep in mind that the constitutional values can be translated only through the energy and power of the business sector. Private actors are now vested with some forms of power, that are no longer merely economic nature. Thus, being said, this new power brings along new responsibilities, including here the topic of human rights. This paper aims to show the unexpected, but much needed blend in the digital era between the business sector and the public sector. On a domestic level, we will analyze the increasing call and use of digital expertise in which private actors excel by the public sector, in order to respect the constitutional order. Secondly, by observing the shift that is being delivered between these areas on an international level, the transition from a liberal perspective to a constitutional strategy will be examined in detail.

Keywords: *digital constitutionalism, private actors, human rights, alternative dispute resolution methods.*

JEL Classification*:* K10, K38

1. Theoretical perspective on digital constitutionalism

Digital constitutionalism appeared as a notion in the early 2000s, coinciding with the beginning of the regular use of artificial intelligence in the field of public services, especially in justice systems. The notion has been used under multiple circumstances, with various meanings, imitating a ball that has rolled and incorporated over the two decades a non-unitary perspective of public law concepts. The notion continues to roll in the doctrine today, with an increasing speed with regard to its content, directly proportional to the expansion of the digitalization phenomenon.

Therefore, this paper aims to investigate the concept of digital constitutionalism at this time, the parameters that can define it in its future evolution, as well as the crucial importance of private actors in developing the constitutionalism.

It is first necessary to define the term constitutionalism, in a form as far as possible from the specific language of the legal field, given the involvement and the impact of both citizens and the private sector in defining the concept, and only after will be possible to identify its expression in the digital environment.

As an international definition, we propose the philosophical perspective presented by the Stanford Encyclopedia of Philosophy[2], according to which constitutionalism is the idea, often associated with the political theories of John Locke and the founders of the American republic, outlining a doctrine that government authority is determined by a body of laws or constitutions, as well as by the efforts to prevent arbitrary governance through fundamental legislation.

In parallel, the term constitutionalism is often used in reference to the sum of constitutional values and principles existing in a state, as well as their protection and exercise in practice.

Thus, digital constitutionalism would, at first sight, be a transposition of the authority of governments, their political expression, and constitutional values and rights into the digital environment. However, the doctrine could not accept such a simplistic definition, nor could it be consistent in providing a uniform definition.

We consider that this aspect is due to the complexity of the divergent perspectives of different legal systems (common law, continental law) and could reflect only a moment in the long history of

[1] Ruxandra Andreea Lăpădat - Doctoral Law School, Bucharest University of Economic Studies, Romania, ruxandrabanica@hotmail.com.

[2] Stanford Encyclopedia of Philosophy, available at https://plato.stanford.edu/entries/constitutionalism/, cit. 1.11.2021.

the term constitutionalism, and not an independent concept. Digital constitutionalism represents, in our opinion, a moment of expansion of constitutional values in another environment than the physical one, the only known until now, adding a new dimension.

However, in theory, the illusion of creating new rights or new constitutional values adapted to the current lifestyle, such as the law of the internet *lato sensu*, may arise. We are firmly opposing this issue at this time. We consider that we are only in front of a practical exercise to find a common language between the two environments, as the fundamental rights remain the same at their base, wearing only a new presentation coat. Following the example presented above, the right of the Internet can be translated as: an umbrella under which fundamental rights are sheltered, such as ensuring the right to information of public interest, when it is published only online, ensuring the right to a fair trial and the right to defense when one of the parties does not have access to both media, ensuring the right to vote if it is done only online *etcetera*.

At the same time, it is interesting to briefly disambiguate the terms of constitutionalism and constitutionalisation of the digital environment, the latter representing the set of values and ideals that inform and guide the process of translating the constitutional values of the digital environment. Although in Romania the terms are not consecrated, not being used very often, we consider the presentation of the two concepts very important, in order to meet the elaboration of the doctrine in the field.

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 this paper argues 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.

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[3].

In an attempt to define digital constitutionalism from a practical perspective, we propose to analyze a constellation of both legislative and practical initiatives, which aimed to create a set of political rights, governance rules, and limitations on the exercise of power through the Internet.

2. The aspects that can limit in practice the expression of the notion of digital constitutionalism

In order to find out the concepts that influence digital constitutionalism, a series of documents were analyzed that formed digital constitutionalism over time and that approached, in our conclusion, several directions:

- transposition and observance of constitutional values in the terms used by the digital environment:
- awareness of the change in the sphere of existence and exercise of constitutional rights;
- expressing government authority and its limitations in the digital environment;
- accepting the role of private actors in the exercise of digital constitutionalism.

[3] Edoardo Celeste, *Digital constitutionalism: a new systematic theorisation*, „International Review of Law, Computers & Technology", 33:1, 76-99, 2019, DOI: 10.1080/13600869.2019.1562604.

Therefore, we consider that the aspects that can delimit the vast notion of digital constitutionalism are closely related to the attitude of the state in the context of legal regulation of the digital environment, as well as its collaboration with private actors in the context of fulfilling these rigors.

A. ***The evolution of governmental authority in relation to the sphere of constitutional rights in the digital age.*** The digital age and its intense development in recent decades have positioned state power at a disadvantage in the context of the services it provides, putting in difficulty the parameters of protection that the state must provide to its citizens' rights. This is rooted in the limited resources available to the state compared to the private sector. However, state power retains the prerogatives to control this digital development existing in all branches, when the purpose for which it is used or its results adversely affects citizens.

This aspect also translates into an obligation for the state to intervene in the sense of protecting the constitutional order, as well as the civil rights. However, the intervention was delayed because the use of artificial intelligence required time for action and consequences, components necessary to carry out pertinent analysis to justify legislative interventions.

At the same time, the state included artificial intelligence in its activity in order to provide an increased degree of respect for constitutional rights, as well as to facilitate citizens' access to meet their own needs.

We mention in this sense as incipient actions various initiatives to open the data of public institutions in order to make transparent and increase access to information from the state[4], ensure the functioning of e-mail in order to ensure increased speed for citizens to solve their requests, and digitization initiatives in the field of justice, driven by the COVID-19 pandemic, where the electronic file, the usual use of electronic signatures in trials, and the multitude of information provided in the virtual environment by public institutions of justice are some essential aspects that define the beginnings of this deeply restructuring process.

Shortly after the successful use of these methods that justified the advantages of artificial intelligence, however, the negative effects began to be observed, as well as the need for state intervention. We mention here a neuralgic point, namely a derivative of the constitutional right to intimate, family and private life, namely the protection of personal data. The initiative was far-reaching, strictly regulated even on the European Union level by Regulation (EU) 2016/679 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[5].

Preliminarily, we consider that the state has so far had a passive, reactive attitude towards ensuring respect for constitutional rights in the digital environment. While this attitude could be justified so far, given the novelty of the environment and its initiatives, as well as the few existing factors that could anticipate the effects of digitalization on the state constitutional order, it can no longer continue. States must adopt an active trichotomous attitude, based on education, prevention and action in the context of digital constitutionalism. States must also be aware of the extent of the phenomenon, as well as the need for an active joint effort, through the direct involvement of the expertise of private actors, as well as the feedback of civil society.

On the same path, a similar analysis of this kind identified four dimensions that allow the characterization of digital constitutionalism on the basis of relevant documents. First, and most importantly, their substantive content addresses broad and fundamental political questions that have an inherently constitutional character; they explore rights (whether collective or individual), articulate limits on state power, and advance a range of governance norms. Second, the initiatives speak to a particular and defined political community, whether explicitly or implicitly. Third, the principles they advance aspire toward a formalized political recognition and legitimacy within that political community. Finally, efforts toward digital constitutionalism exhibit a degree of comprehensiveness.

[4] We mention in this sense the initiatives in the field of the Partnership for an Open Government, signed by the Romanian Government since 2011: http://ogp.gov.ro/nou/wp-content/uploads/2014/09/brosura_OGP.pdf, cit. 10.11.2021.

[5] The document can be found at https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32016R0679&from=EL, cit. 11.11.2021.

Together, these four criteria aim to provide a framework that is flexible and which accommodates the landscape's diversity[6].

According to the same study, it was observed that (1) freedom of expression and (2) privacy rights are addressed the most frequently (27 and 26 times respectively) closely followed by the right of access to the Internet (24 occurrences). These issues are rooted in some of the earliest initiatives studied and continue to persist even in the most recent documentation. Given its intimate connection to freedom of expression, it is not surprising that more than two-thirds (22) of the initiatives also explicitly seek to recognize freedom of information as a distinct right. Transparency and openness, both of Internet governance processes and of networks, were also cited as core principles in over two-thirds (22) of the documents. Conversely, certain rights which would appear fundamental in a broader human rights context (such as freedom of religious belief, which appears only twice) receive scare mention in the digital constitutionalism arena.

Therefore, paradoxically, digitalization in the constitutional environment has a bivalent effect on fundamental rights:

- on one hand, it amplifies the possibilities for individuals to exercise their fundamental rights, extending the possibility of transmitting information and creating new ways of exercising it;

- on the other hand, it increases the risk of threats to fundamental rights, increasing the possibility of exchanging information to enable the exercise of fundamental rights, which can also become a source of threats. Defamation, hate speech, cyberbullying, child pornography are some examples of how freedom of expression can be abused through digital tools. In addition, digital technology not only increases the possibility of transmitting information, but also allows: 1) blocking or limiting such transmission, 2) monitoring the content of the transmitted information and 3) recording other information about the persons involved in the transmission[7].

The unilateral constitutional balance, created so far by the state powers, is clearly affected, the state is outdated, creating confusion around the solutions that can be addressed in order to solve this problem. We consider that the way out of this labyrinth is in the hands of private actors, who have both the interest and the expertise to offer real solutions to the previously presented problem.

B. The need for expertise offered by the private environment - delegation of constitutional attributions - online dispute resolution. Historically, modern constitutional law has sought to provide mechanisms for balancing power. The state has been the main dominant player in politics and, as a result, existing constitutional instruments have established ways to limit its power to guarantee individual fundamental rights. Consequently, the legal obligation to respect individual rights has only bound to he state so far. Private entities are not directly subject to these standards. It is the duty of the state to ensure that such entities respect these rights[8].

However, expanding the use of the digital environment in all areas has meant a transformation of the exercise of fundamental rights, equivalent to expanding their content. This has brought with it the correlative need to provide increased protection of constitutional rights, as well as finding a new way to express this protection.

In this context, the state needs to conduct a deep analysis based on the reality of the 21st century in the digital age, to apply additional and updated measures, in line with the advancement of technology, all by using its own resources. Unfortunately, state resources have great limitations:

- the salaries offered to IT professionals are not competitive in relation to the private sector, thus we are encountering great difficulties in attracting the best specialists in the field;

- the state infrastructure is technologically outdated, requiring costly extensions, which also need implementation time, in addition to financial resources, and the state's control and public procurement procedures prolong this aspect;

- the professional training of the existing professionals in the field represents a solution, but

[6] Gill, Lex and Redeker, Dennis and Redeker, Dennis and Gasser, Urs, *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights* (November 9, 2015). Berkman Center Research Publication No. 2015-15, Available at SSRN: https://ssrn.com/abstract=2687120 or http://dx.doi.org/10.2139/ssrn.2687120.

[7] Edoardo Celeste, *op. cit.*, p. 3.

[8] Ibid, p. 4.

this also requires time, as well as a continuous training made also by the private actors;

- innovative technology solutions have very little chance to be proposed by the state, given the limited resources included for research.

Thus, all these aspects lead to the natural conclusion according to which the state has a growing need for the technical expertise of private actors in finding and implementing digital solutions. But at what price does this exchange of perception and effort take place?

We consider that there is an indirect delegation of powers in the field of constitutional rights offered by the state to the private sector, which acquires the obligation to respect fundamental rights, to control their exercise within legal parameters, to control their own actions so as not to violate, as well as the responsibility to provide them with protection. Through this delegation, the state also acquires additional powers to hold private actors accountable if the issues mentioned above are not met.

Some examples are needed to clarify the above.

Delegation of certain attributions of the right to defense, as well as access to justice. With the declaration of the COVID-19 pandemic, as well as the exceptional situation created by it, the justice systems had to resort to the use of digital methods in order to ensure an increased level of exercise of fundamental rights, despite the existing restrictions. The electronic file, the usual use of electronic signatures in trials, as well as the multitude of information provided in the virtual environment by public institutions of justice are some essential aspects that define the beginnings of this process that proves to be deeply restructuring.

However, a certain aspect stands out strongly in this context, namely the use of alternative methods of online dispute resolution, which is gaining new strength in these conditions. Alternative dispute resolution methods are governed by private actors and involve major changes in legal thinking, as well as tailor-made benefits. These include decongestion of courts, increased speed in obtaining justice and minimal consumption of resources for both parties.

Extending access to justice through alternative dispute resolution methods involves three major changes in dispute settlement practices. These are: the transition from a physical representation, face to face, to a virtual one; the transition from human intervention and decision-making in a classic way to software-supported processes and the shift from an emphasis on value to one on privacy, with a focus on data collection, use and reuse to prevent litigation. Thus, the first change is largely one of increased comfort, the second refers to the increased need for expertise from private actors, and the third a particular challenge in building trust between the public and private sectors[9].

Aspects regarding the right to work and the need for private law expertise. The right to work and social protection is a strongly impacted right by the digitalization in general. In this regard, the implementation by the employer of the technical and organizational conditions for the elaboration of work from home or telework norms, especially digital ones, has effects on the professional autonomy and monitoring of employees, as well as on personal data, the processing of these data, and in general on the privacy of employees, their private, social and family life.

Most of the resources that involve professional autonomy from this point of view remain in the hands of the expertise of private actors. The infrastructure that allows teleworking is built mainly on the knowledge of the private sector that has the resources to create the infrastructure, to ensure its security, as well as the control of the actions carried out inside it.

Thus, the responsibility for the correct functioning, which in this case generates the exercise of the right to work itself, falls on the private sector. If its representatives do not comply with: the obligations to ensure the possibility to connect to the network, the fact that the documents elaborated by the employee online reach the employer in the necessary time and form, legality and veracity of the electronic signature used, also procured by the private sector, security issues of labor relations and the means used, they will receive various sanctions depending on the level of delegation and the contract signed.

[9] Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice Technology and the Internet of Disputes*, Oxford University Press, 2017, ISBN 9780190675677.

Protection of personal data in the online environment. The protection of personal data was a taboo subject at the beginning of the present decade, in terms of the development of social networks, as well as the generalization of online commerce. The need to use personal data has been increasing, without substantial monitoring by States, which has led to unprecedented violations in this regard.

Violations took place mainly by private actors, so that the violation of related constitutional rights (e.g. the right to privacy) exposed the need to limit the power of private actors, despite the social and economic facilities that the development of social networks and trade brought it online. This is the first example of the need to limit the power of private actors in this field, while delegating constitutional powers in this regard. At the same time, the need for self-control is noticeable, private actors being obliged to create their own means in order to control the observance of fundamental rights, in order to avoid drastic sanctions.

In this area, we also find an example of solid legislative intervention by the States, which have adopted at European level the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to processing personal data and on the free movement of such data and repealing Directive 95/46/EC, also known as the GDPR (General Data Protection Regulation), a legislative document that has a well-documented analysis behind it. Despite the fact that this document also has its own shortcomings and is subject to improvement, we appreciate the community effort made as well as taking the initiative in the field, which responded to an aggressive need to protect fundamental rights during that period.

In conclusion, constitutionalism in the digital environment does not restrict the action of private actors in the digital age, on the contrary, it offers both an impetus for the development of the private sector, by increasing the demand for existing expertise in this sector, and a new motivation, expanding, which are based on enhanced cooperation between the public and private sectors. This should lead to greater awareness on the part of the private sector of its role in the 21st century and to increased awareness of the consequences of its own actions.

Contouring this idea, the state must offer greater respect to private actors' expertise and ensure the development of a functional and fair legal framework on rights, but also the obligations that the private sector receives in the context of its interference in respecting fundamental rights.

3. The national and international perspective on the notion of digital constitutionalism

Regarding the national perspective on this notion, we believe that it is not outlined or debated enough in the doctrine. A series of practical initiatives are needed to bring the topic to the table, in order to anticipate solid effects that the digital environment will present over the constitutional values in the coming years. A number of preliminary effects are already being felt, but they are scattered in different sectors, through different normative acts, without coagulating the attention as much as necessary.

With regard to the international perspective, the European Union's emphasis on transposing constitutional values into the digital environment is noteworthy. Over the last twenty years, the European Union's digital technology policy has shifted from a liberal perspective to a constitutional strategy aimed at increasing the protection of fundamental rights and democratic values, driven by European digital constitutionalism. This paradigm shift was triggered primarily by the intolerance of the European constitutional system in strengthening the competences of private actors in the field, by setting standards and procedures that compete with the rule of law.

The global COVID-19 pandemic has further highlighted the constitutional role of online platforms in society. On one hand, private platforms provided services (for example, information) that not even the state was able to provide promptly, while on the other hand, they contributed to the spread of misinformation, through the decisions relied only on automatic moderation. In other words, their central role during the pandemic, good or bad, has made private actors in the context of online platforms to be considered as public utilities or essential parts of social infrastructure, even more so than before.

Thus, the 21st century society faces not only the worry of legal uncertainty related to digital

technologies or the abuse of power by public authorities, but also to find solutions to align the legal order with private competences that define standards of protection and procedures, aided by artificial intelligence[10].

Consequently, what solutions are to be found in the international perspective?

We believe that the issue can be approached from two perspectives. The first concerns the horizontal application of fundamental rights to private parties; the second comes from the new phase of European digital constitutionalism, which involves transparency and accountability of the powers of the platforms.

The doctrine of the horizontal effect extends the constitutional obligations on private actors. Unlike the liberal spirit of the vertical approach, this theory rejects a rigid separation between public and private actors in constitutional law. This extension can take place, for example, through the adoption of the proposal for a regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act)[11].

However, from both perspectives, the EU has maintained a non-aggressive approach, keeping democratic parameters and limiting constitutional power. It also did not introduce drastic provisions about online content censorship or a ban on the use of data processing technologies. The EU strategy was based on the introduction of safeguards to promote transparency and accountability in moderating online content and data processing. This new phase of EU constitutionalism has not led to a dangerous escalation of authoritarian responses, but to regulatory solutions aimed at protecting fundamental rights in a societal environment that differs sharply from the end of the last century.

These statements should not be surprising but should highlight one of the key features of the EU, namely that the roots of European constitutionalism are based as a fundamental value on human dignity, counteracting the tendency to replace human beings with automated technologies. Consequently, *while digital constitutionalism has shown the talent to react to threats to fundamental rights raised by the exercise of private power in the digital environment, a more sophisticated phase of digital constitutionalism called digital humanism will be the basis for addressing new threats to human dignity, as a reaction to European constitutionalism against the challenges to human dignity arising from new technologies in algorithmic society*.

3. Conclusions

In conclusion, this paper aimed to bring the following results:

- clarifying the meaning of the terms of digital constitutionalism and digital constitutionalization;
- the parameters that can show the borders of the notions of constitutionalism in the digital age, with emphasis on the role of private actors in respecting fundamental rights in the online environment;
- exemplifying the need to use the expertise of the private sector in respecting fundamental rights;
- presenting the need to ensure an up-to-date legal framework regarding the rights and obligations of private actors when interfering with constitutional standards on respect for rights;
- national and international perspectives on the concept of digital constitutionalism.

Therefore, digital constitutionalism acts today in two ways: it acquires an evolved expression through the involvement of private actors, increasing the scope and the exercise of fundamental rights, but at the same time it retains a controlling role of the State over the initiatives in the field, which are undergoing a much faster expansion compared to the possibility of natural adaptation of philosophical principles in the legal field.

[10] Verfassungsblog on constitutional matters - *The European Constitutional Road to Address Platform Power*, https://verfassungsblog.de/power-dsa-dma-03/?fbclid=IwAR3vDPN2OORa2P2LeTocBCXDbPovLxSsdIPa4-lmuOT5d9UZ-AV0zye8XoU, cit. 08.11.2021

[11] The document can be found at https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN, cit. 29.10.2021.

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