

Mikić Vladimir*
<https://orcid.org/0009-0001-8706-4175>

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RECENT DEVELOPMENTS OF DIGITAL CONSTITUTIONALISM IN EUROPE

ABSTRACT: The influence of modern digital technologies on contemporary constitutional law, both at the national and comparative level, has been steadily increasing. Having emerged in the early 21st century, digital constitutionalism, although one of the youngest categories of public law, significantly affects constitutional principles and values, particularly in Europe. Digital constitutionalism is especially significant because its existence and original development require at least a partial redefinition of constitutional law, particularly in the context of protecting fundamental rights and freedoms. This paper examines the normative framework for the European Digital Constitution (EDC), which encompasses the extensive set of digital law regulations adopted by the European Union (EU) and the Council of Europe (CoE). The paper also analyzes the Venice Commission's Principles for a Fundamental Rights–Compliant Use of Digital Technologies in Electoral Processes. The concept of the EDC is elaborated, along with its main objectives.

Keywords: European digital constitution, digital constitutionalism, European Union, digital law.

Introduction

Digital constitutionalism represents one of the most recent notions in the field of constitutional law. If it tends to remain in appropriate relation with

* PhD Research Associate, Institute for Comparative Law, Belgrade, Serbia, e-mail: v.mikic@iup.rs
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modern societal tendencies, constitutionalism must necessarily convolute with digital transformations and innovations. However, there remains an urgent need to explore what the phrase actually englobes. In order to find the answer, the existing normative framework needs to be explored, as well as the more-than-ever-important notion of artificial intelligence (hereinafter: AI), an area in which the protection of basic rights “have shaped Europe’s digital constitution” (Bradford, 2023, p. 18). The task is of particular significance because determining what digital constitutionalism *is* represents a part of a much more composed assignment – partial redefinition of constitutional law in general.

Expressed perhaps in the most accurate and concise way, by the words of De Gregorio and Radu (2022), “digital technologies are profoundly intertwined with constitutionalism” (p. 68). Digital constitutionalism, in fact, “does not advocate a *tabula rasa* of our core constitutional values”, because it is “deeply rooted in these foundational principles” (Celeste, 2020, p. 23). We can assume that principal constitutional values englobe the rule of law, the separation of powers, effective guarantees and mechanisms for the protection of human rights, as well as a legally pre-ordained ways to enable a society to peacefully evolve and prosper. The advancing digital world and the constitutionalism mutually communicate in the process of the creation of a “digital constitutional law” (Teubner & Golia, 2023, p. 2). Both key components of the term are designed to be gradually transformed, one (the digital realm) presumably faster than the other (constitutional law). Constitutionalism is “a historical concept, whose main values and principles have constantly evolved, and are still evolving today”, whereas digital constitutionalism is also characterized by “the transformative character” (Celeste, 2020, p. 23). The tendency of internationalization of the constitutional law addresses one of the more impressive puzzles in the direction of these transformations, and it is a duty of digital constitutionalism “to look beyond the still dominant state-centricity of constitutional principles” (Teubner & Golia, 2023, p. 3).

In addition to numerous other factors, constitutional law has been modified by the existence and constate evolvement of the Internet, including its unwelcome abuses. The Internet “provides a societal foundation for connecting humans, advancing relationships and embedding social values” (De Gregorio & Radu, 2022, p. 80). Because of the rising importance of the Internet, it appears to be necessary to search for “ways to re-frame the fundamental institutions of constitutionalism in the digital sphere” (Teubner & Golia, 2023, p. 12). Constitutional scholars need to bear in mind that “the governance of platforms raises fundamental constitutional concerns”, particularly because of ways “how these social spaces are constituted and how the exercise of power ought to be constrained” (Suzor, 2018, p. 2). Digital revolution is

“violently shaking the existing constitutional architecture”, because “existing constitutional norms, which were shaped for an analogue society, are under unprecedented stress” (Celeste, 2020, p. 32). Expansive regulation of digital law is activating the transformative potential of constitutionalism. But the pace needs to be kept because “analogue constitutional principles cannot anymore solve all the challenges of the digital society” (Celeste, 2020, p. 29), clearing the ground for the “digital space” to become a “new non-state sector of global society that needs comprehensive constitutionalization” (Teubner & Golia, 2023, p. 3). These facts call the science of constitutional law to adapt to the growing dynamism of developments in cyber-space.

This paper is based on research of challenges imposed to the exercise of fundamental rights and freedoms in the context of digitization of society, when it comes to enhancing democracy and the rule of law. Relationships between European digital constitutionalism and restrictions of the Internet content are also explored. The aim of the paper is to explore whether digital constitutionalism in Europe is put in the global comparative perspective, with particular regard to the relevant United Nations’ (hereinafter: the UN) and regional organizations’ legal framework, but also to assess the state of the actual tendencies occurring in the United States of America (hereinafter: the US), as the leading international political, economic, and technological innovation actor. Global influence of the European digital constitution is elaborated, as is the regulatory soft power of the EU.

1. Normative Framework for the European Digital Constitution

The basis for legal nourishment of the dichotomous perspective of the digital constitutionalism is laid in the ever-extending EU normative framework. Relevant documents include: the EU Charter of Fundamental Rights from 2000 (hereinafter: the Charter), the EU General Data Protection Regulation, from 2016 (hereinafter: the GDPR), and the two acts adopted in 2022 – the European Declaration on Digital Rights and Principles for the Digital Decade (hereinafter: the European Declaration), and the EU Regulation on a Single Market For Digital Services, dubbed the Digital Services Act (2022) (hereinafter: the DSA). These represent the essential ingredients of the EDC, the EU’s “expansive set of digital regulations”, which “engrains Europe’s human-centric, rights-preserving, democracy-enhancing, and redistributive vision for the digital economy into binding law” (Bradford, 2023, p. 1).

The list of relevant legal acts starts with *the Charter*. Although it was adopted in 2000, its legal effects had to wait until 2009 and the entry into force of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (hereinafter: the TEU). The Charter's effects were recognized by the TEU as a true EU "bill of rights" (De Gregorio, 2023). Its Preamble (Para. 2) claims that the EU "places the individual at the heart of its activities". The Charter also states that there is a necessity "to strengthen the protection of fundamental rights in the light of (...) technological developments by making those rights more visible" (Preamble, Para. 4). It guarantees the right to the integrity of the person (Article 3), and respect for private and family life (Article 7). Protection of personal data is *also* guaranteed by the Charter (Article 8), as is the consumer protection (Article 18). While the GDPR (2016) has served to introduce further safeguards and increase accountability in the field of personal data (De Gregorio, 2023), the European Declaration (2022) states that "digital transformation (...) presents challenges for our democratic societies, our economies and for individuals", which, in response, create the duty for the EU to apply "its values and fundamental rights applicable offline" in "the digital environment" (Para. 3 of the Preamble). Article 1 of the European Declaration (2022) reminds that "technology should serve and benefit all people living in the EU and empower them to pursue their aspirations, in full security and respect for their fundamental rights". Similarly, "[AI] should serve as a tool for people, with the ultimate aim of increasing human well-being" (Article 8). Finally, in addition to enhancing transparency, the DSA's main aim is "to modernize the regulatory framework for digital services, addressing the challenges and opportunities presented by the evolving digital landscape" (Frosio & Geiger, 2024).

Besides the four enumerated documents, we have to outline a specific contribution of the Venice Commission. This advisory body of the CoE adopted in 2020 a document named *Principles for a Fundamental Rights-Compliant Use of Digital Technologies in Electoral Processes* (hereinafter: the Principles). Composed of nine bedrock propositions in the field of digital law, and recognizing the shifting context of digital constitutionalism, the Principles specifically outline the *freedom of expression in digital space* and the *right to data privacy* (Venice Commission, 2020, p. 3). The document stresses that "the borderless nature of the Internet and the private ownership of the information highways render the current challenges to democracy and electoral processes particularly complex" (Venice Commission, 2020, p. 11). In addition, "international cooperation and involvement of the relevant

private actors are (...) indispensable to face these challenges and to ensure the right to free elections and the functioning of democracy in the future" (Venice Commission, 2020, p. 12). As digital constitutionalism remains an open-textured term, one can justifiably expect that the coming developments can be expected to be followed by further and even more advanced commentaries and propositions of the Venice Commission.

The rights and freedoms, whose protection is necessary in the context of the EDC, include the *freedom of information*, which may easily be endangered "by misleading, manipulative and false information" (Venice Commission, 2020, p. 7). No less paramount is the *privacy* as one of the constitutionally guaranteed rights which are exceptionally threatened in the digital age. The right to privacy of individuals encompasses "a right to share – and decline to share – information about themselves, know and control who has access to that information, and understand how it is used" (Gill, Redeker & Gasser, 2015, p. 8). Citizens also enjoy the *right to be forgotten*, a sort of a corollary of the right to privacy, recognized by the Article 17 of the GDPR (2016). This is "a right to request the removal of personal information from websites or search engines, particularly when that information is irrelevant, outdated, harmful, or violates an individual's privacy or dignity" (Gill, Redeker & Gasser, 2015, p. 8). Also, more meaningful protection and enhanced transparency of the *consumer protection* might provide a higher degree of "control over [consumers'] digital experiences and improved safeguarding of their rights" (Frosio & Geiger, 2024). The *consent* users give to advertisers in order for them to explore their personal data might endanger their privacy in a very direct and menacing way. Therefore, while allocating "a great deal of power" to the operators, "contractual Terms of Service play an important constitutional role in the governance of everyday life", having for result that "users have very little legal redress for complaints about how platforms are governed" (Suzor, 2018, p. 3). The same is the case with the *secrecy of voting, free elections, and the accuracy and legitimacy of election results*. An effective right to vote is scarcely efficient in the age in which "new digital tools may be used against elections [,] political parties, (...) traditional and social media to spread disinformation and propaganda, hampering transparency and secrecy of vote" (Venice Commission, 2020, p. 4). Thus, the election process becomes "thwarted by the creation and mass dissemination of false information (Venice Commission, 2020, p. 8). It can be summed up that the EDC directly aims, among other perspectives it offers, at the maintenance of democracy, particularly in times when it seems imperiled globally.

2. Digital Law as a Tool of Transforming European Constitutionalism

Digital constitutionalism englobes “constellation of initiatives that have sought to articulate a set of political rights, governance norms, and limitations on the exercise of power on the Internet” (Gill, Redeker & Gasser, 2015, p. 2). It serves to answer to the dilemma whether fundamental principles of constitutionalism “can also be established in the digital world” (Teubner & Golia, 2023, p. 1). Its purpose is “to realise a common aim: translating the core principles of contemporary constitutionalism in the context of the digital society” (Celeste, 2020, p. 24), or to achieve a “more responsible digital environment”, by “advancing a process of constitutionalisation of Internet governance” (Frosio & Geiger, 2024).

From the perspective of basic rights’ protection, the main purpose of EDC is to recognize “the existence of a plurality of normative instruments translating constitutional values in the digital society” (Celeste, 2020, p. 28). It serves as “a long-term, proactive strategy to protect democratic values in the algorithmic society from being eroded by unaccountable powers” (De Gregorio, 2023), and it reminds us that digital developments do not generate a “secluded world where individuals are not entitled to their quintessential guarantees”, because EDC is “a reconfiguration of the constitutional framework” (Celeste, 2020, p. 31). EDC does not take precedence over digital development, nor the two have competing claims of authority. Rather, they are intercoupled and mutually supportive.

Besides the protection of potentially (or actually) curtailed freedoms and human rights, EDC needs to be based on certain *values*, which represent the foundation of the European political project, and which are enumerated in Article 2 of the TEU, and in Para. 3 of the Preamble of the CoE Statute (1949). These include: protection of fundamental rights and freedoms, rule of law, separation of powers, and other core ingredients of the European political identity. Obviously, the assertion that “European digital regulation reflects a host of values consistent with the ethos of the broader European economic and political project” (Bradford, 2023, p. 8), represents a claim which must be accorded weight. These values provide certain parameters through which one can “evaluate the legitimacy of online governance”, particularly when it comes to the apparition of the Terms of Service on numerous Internet platforms, which “are almost universally designed to maximize their discretionary power and minimize their accountability” (Suzor, 2018, pp. 1–2 and 8). Similarly, *corporations* are responsible “to deal fairly and honestly with

users and respect their rights on the Internet”, and to “engage in transparent contractual practices and make terms available in plain, accessible language” (Gill, Redeker & Gasser, 2015, p. 10). In addition, European values “call for restricting online content whenever such restrictions are needed to protect human dignity, data privacy, or democratic discourse”, although “Europe’s digital constitution reflects the belief that excessive content removal can lead to harmful censorship that is inconsistent with the EU’s commitment to democracy and freedoms” (Bradford, 2023, p. 3 & 26). Core constitutional values need to be rendered useful to restrict content on the Internet which intrudes the area of personal privacy, democracy, and the rule of law. It is exactly the Terms of service (notorious *cookies* on websites) that may easily be exploited by large firms. This is the point at which EDC needs to take a firm stand in the direction of protecting basic rights. EDC serves as a prototype for raising global awareness of the risks on the field of the enjoyment of individual rights and freedoms which are to be curtailed by digital law.

3. European Digital Constitutionalism put into Global Perspective

The statement that “adaptations and transformations have always been integral components of the vital cycle of constitutionalism” (Celeste, 2020, p. 32) invites the necessity for constitutionalism to evolve and modify. Constitutional law transforms in various specific ways *inter alia* by mutual influences carried out between national constitutions. It also gains new structures, content, and perspectives by the methods of its internalization. National legal regimes and international normative framework are probably starting to get indissolubly linked together, especially because a national “state (and its law) is slowly replaced by supranational rules defined by new institutions based on principles and values that transcend territorial borders” (De Gregorio & Radu, 2022, p. 77).

Digital constitutionalism can not avoid its own frame of reference being redefined once in a while by combining “nation-state, global, and societal perspectives” (Teubner & Golia, 2023, p. 2). The magnitude of this tendency should not be overstated, but it is far from being negligible. In this part of the paper a summarized insight into the following list of international documents is constructed: the Universal Declaration of Human Rights (hereinafter: the UDHR), the Charter of Human Rights and Principles for the Internet (2014) (hereinafter: the HR Charter), the African Declaration on Internet Rights

and Freedoms (2013) (hereinafter: the African Declaration), and the “Joint Declaration: Challenges to Freedom of Expression in the Next Decade” (2019) (hereinafter: the Joint Declaration). In addition, influences of EDC on the digital law of the US and China are examined.

The UDHR is one of the most significant UN documents to be in touch with silhouettes of a *future* digital constitutionalism, although mostly in a vague manner. It indirectly introduces the notion of “the inherent dignity” of “all members of the human family” in the constitutional vocabulary, but, more importantly, reminds that, “whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression”, human rights “should be protected by the rule of law”; the UDHR reminds the UN member states that they “have pledged themselves to achieve, in co-operation with [the UN], the promotion of universal respect for and observance of human rights and fundamental freedoms” (Preamble, Paras. 1, 3 and 6). From the perspective of digital constitutionalism, fundamental rights protected by the UDHR include: the dignity of human beings, the right to security of person, the right to an effective remedy for acts violating the fundamental rights, the right to freedom of opinion and expression, and the right to participate in the cultural life of the community (Articles 1, 3, 8, 19, and 27 respectively). Probably the most noticeable provision of the UDHR in this regard is the protection of everyone from “arbitrary interference with his privacy, family, home or correspondence”, coupled with the “right to the protection of the law against such interference or attacks” (Article 12).

Digital constitutionalism has not yet achieved comparable status worldwide. The HR Charter, drafted by a UN Internet Governance Forum-led group of experts, contains principles in the field of personal protection from unwanted Internet interference. It invites caution regarding “increasing public concern” about the protection of human rights in the online environment, which calls for providing “a coherent and necessary framework for developing internet governance principles” (Charter of Human Rights and Principles for the Internet, 2014, p. 3). The properly reminds its readers that “online we have rights too”, and continues with setting out some more authentic formulations contained in the 10 principles it enshrines, as is the “right to access and use a secure and open Internet”, “the right to seek, receive, and impart information freely on the Internet without censorship or other interference”, “freedom from surveillance, the right to use encryption”, and the prohibition of “filtering or traffic control on commercial, political or other grounds, followed by the concluding proclamation in accordance to which “human rights and social

justice must form the legal and normative foundations upon which the Internet operates and is governed" (Principles 3, 4, 5, 8 & 10 respectively).

Particular importance of the African Declaration pertains to the fact that "access to the Internet is increasing rapidly across the African continent", leading to a heavily influenced Internet environment throughout the continent (African Declaration on Internet Rights and Freedoms, 2013, p. 3). The document establishes and promotes 13 distinct principles in the field of realization of human rights online. Its most important recommendations aim at establishing foundations for "an open and distributed architecture" of the Internet, freedom of unrestricted *online* expression, and the right of individuals and communities to development and to relevant knowledge accessible in the Internet; the document also calls for a "democratic multi-stakeholder Internet governance" (Principles 1, 3, 7, & 12 respectively). The most recent international document adopted in relation to digital constitutionalism is the Joint Declaration (2019). It is stated in it that the basic principles stand in connection to "democracy, sustainable development, the protection of all other rights, and efforts to counter terrorism, propaganda and incitement to violence", within the context of the growing "concern about the ongoing and deepening threats to media diversity and independence" (Preamble, Paras. 4 & 8). The text sets explicit demands in order for relevant actions to be made for: promoting media diversity in the Internet, and prohibition of unlawful or arbitrary surveillance (Article 1 ("c" & "h")), "building and maintaining a free, open and inclusive Internet" (Article 2), and limiting "private control as a threat to freedom of expression" (Article 3). In an interesting choice of words, the right "to access and use the Internet" is explicitly recognised as "a human right" and "an essential condition for the exercise of the right to freedom of expression" (Article 2 ("a")).

Finally, EDC needs to be observed from the point of view of its comparison with entanglements between the digital transformations of another significantly important political and economic actor – the US. Namely, EDC is "in stark contrast to the US, which has traditionally protected markets' self-regulation", and has been based on "a technolibertarian view, which emphasizes the primacy of free markets, free speech, and the free internet (Bradford, 2023, p. 1). Cognizant of this difference in approach, EDC sets "a paradigm shift that could potentially widen a transatlantic divide", by trying to "modernize the digital market's regulatory framework, addressing contemporary challenges like online harm and platform influence" (Frosio & Geiger, 2024). Pointing at the mutual differences between the two concepts of digital regulation, one author reminds that the US "liberal approach leads [technological] giants to

dominate digital markets, and continue to extend their power to new sectors according to their business logic”, whereas “the European approach reflects a strategy that primarily focuses on the protection of fundamental rights and democratic values” (De Gregorio, 2023). In addition, “creating a global standard for digital governance remains a formidable challenge, given the divergent legal and cultural contexts across regions” (Frosio & Geiger, 2024), in the context in which another influential world power (China) “is pursuing a model of technological developments oriented towards surveillance and public control” (De Gregorio, 2023).

Universally organized digital governance may not be as unimaginable as the patchwork of national constitutions looking as much similar one to another as possible. Still, from the global vantage point, EDC reflects the highest actual attainment achieved so far in the field of strengthening constitutionalism by the means of restraining perils brought upon by ongoing digital transformations. At the same time, the enumerated international documents “are increasingly advanced by prominent international bodies” (Gill, Redeker & Gasser, 2015, p. 11), while, up to 2023, “nearly 150 countries have adopted domestic privacy laws, most of them resembling the GDPR” (Bradford, 2023, p. 6). This is an encouraging thought in the context of the possible internalization of constitutional law in the field of online protection of the rule of law, democracy, and basic rights, and in gaining a territorially expanded influence of EDC, as a piece of the EU regulatory softpower.

4. Conclusion

Digital constitutionalism is a recently constructed public law category. Still, it is destined to make a sensible influence on the values and principles of European constitutionalism, which must cope with the innovations of the digital world, as well as with its perils. This tendency will inevitably lead to redefining of the constitutional law, in particular when it comes to protecting basic individual rights, which are, almost with no exception, widely guaranteed by constitutions, regional and universal legal acts.

Promoting human rights in relation to the development of the Internet, ever more subtle digital technologies, and AI, resiliently remains the core element of the European digital constitutionalism. Even from the wider, international perspective, the unease concerning the safeguarding personal rights and liberties has increased. This is evidenced by a growing list of supranational documents related to the bringing into being of digital constitutionalism and its perpetuation and firmer establishment.

Digital transformations are swiftly changing the constitutional landscape on European soil. European constitutionalism has so far been more or less entrenched within firmly set contours that have evolved over traditional liberal and democratic concepts. Enrichment of the constitutional substance might not always appear to be a menacing occurrence. Strengthening the instruments for protection of fundamental rights, the rule of law, and democracy, by the means of cautiously established and constantly reinvigorated connection between the constitutionalism and the growing digital world may appear to be more than welcome a development. The velocity of digital tools' evolution tacitly invites constitutional scholars and political decision-makers to prepare a well-measured basis for a favorable development of events in the field of digital law.

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Conflict of Interest

The author declares no conflict of interest.

Mikić Vladimir

Institut za uporedno pravo, Beograd, Srbija

NEDAVNI RAZVOJ DIGITALNE USTAVNOSTI U EVROPI

APSTRAKT: Svedočimo stabilnom porastu uticaja savremenih digitalnih tehnologija na ustavno pravo, kako na državnom tako i na uporednom nivou. Premda je digitalna ustavnost, nastala u ranom 21. veku, jedna od najmlađih kategorija javnog prava, ona vrši značajan uticaj na ustavna načela i vrednosti, naročito u Evropi. Digitalna ustavnost ispoljava svoj

uticaj jer njeno postojanje i izvorni razvoj zahtevaju delimičnu redefiniciju ustavnog prava, posebno u kontekstu zaštite temeljnih prava i sloboda.

U radu se istražuje pravni okvir za evropski digitalni ustav, koji uključuje širok spisak propisa Evropske unije i Saveta Evrope u oblasti digitalnog prava. Izložena je i analiza *Načela za upotrebu digitalnih tehnologija u izbornim postupcima u skladu sa zaštitom temeljnih prava*, koja je usvojila Venecijanska komisija. Takođe, obraduje se pojam evropskog digitalnog ustava, kao i njegovi glavni ciljevi.

Ključne reči: evropski digitalni ustav, digitalna ustavnost, Evropska unija, digitalno pravo.

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