

Introduction

This volume collects the contributions of the Workshop on 'Digital Constitutionalism: A Normative and Institutional Framework for Conflict Resolution Under Construction', held at Goethe University Frankfurt on March 3rd and 4th, 2023. To discuss and to address these important challenges, top legal experts from Germany, Brazil, and Europe gathered for a cross-disciplinary investigation into the pressing issues. This unique event, fostering a comparative law perspective, sought to unravel complexities and explore potential solutions in the realm of digital constitutionalism. By harnessing the collective wisdom and expertise of these esteemed scholars, the conference aimed to pave the way for collaborative efforts in shaping the evolution of constitutional law in the digital landscape.

The topic of digital constitutionalism is becoming increasingly important in the current debate on the effects of digitalization. Almost every fundamental right is in one or more aspects genuinely affected by the changes triggered by digitalization; old conflicts break out and new conflicts arise. Established legal understandings and hidden prerequisites on which constitutions are typically built are challenged. The fundaments on insights from philosophy, psychology, sociology and political science, among others, have been shattered. Established terms and normative concepts such as public sphere, media, administration, separation of public and non-public actors, and services of general interest or enforcement must be redefined under conditions of great technical dynamics creating significant legal uncertainty. The dichotomy between fostering innovation and preserving rights in digitized social and economic milieus gives rise to a number of fundamental dilemmas. And any formulation of rights in the digital age is encumbered by uncertainty, prompting a quest for optimal solutions for protection, safety and security which is impossible to fulfill by any state or society. Traditional mechanisms of enforcement face unprecedented challenges in establishing trust within a digitalized state, necessitating a reevaluation of their efficacy in a realm characterized by unparalleled technological dynamism. Ever-increasing means of surveillance contribute to fields of tension between just this security and the necessary freedom for a democratic, rule-of-law state guarding and governing autonomous, free and individual citizens.

Central to this discourse are the pressing questions that demand nuanced consideration within the realm of digital constitutionalism. The book addresses central questions: Are present concepts of the state and constitutionalization sufficient to define rights and duties within the dynamics and ubiquity of digital services and products, hardware and software, networks and platforms? How do we have to redefine law to solve new conflicts, possibly even to resolve them, especially in view of the new forms of enforcement and control? Are existing dogmatic notions of intervention, justification and practical concordance for resolution between conflicting individual rights still sufficient? Are the existing constitutional concepts equipped to effectively safeguard private rights and state obligations amidst the dynamic landscape of digital innovation with its inherent change of power and diffusion of responsibility? How can the role of platforms and intermediaries be redefined in terms of fundamental rights and specific digital constitutional law reflecting both their importance but also their vulnerabilities? How can we understand sovereignty in an environment where hidden normative values and technologically determined standards construe a reality which is quickly devoid of individual experience, even less control? How do we constitutionally cope with external effects of third parties when discussing infringements into individual rights? How must our conceptual frameworks surrounding intervention, justification, legitimation and conflict resolution adapt to the evolving digital terrain? How do we create trust in new services and new technologies and how do we determine the threshold for human intervention created when traditional legal mechanisms no longer seem as effective as in the analogue world and where transparency and individual control fails? What are the best solutions to reconcile innovation and dynamism with the protection of rights in the digital environment, when the very formulation of rights in the digital age is subject to uncertainty? Do we have to alter our view on infrastructure?

Closely related are the aspects of living constitutionalism when the constitutional foundations are transferred to regulation and administrative law: Does the European digital agenda, which encompasses pivotal legislative initiatives beginning with the General Data Protection Regulation and being enhanced with legislation such as the Digital Markets Act, Digital Services Act, AI Act, Data Governance Act, and Data Act, offer a viable pathway to navigate conflicts and address rights violations in the burgeoning digital socio-legal ecosystem including new digital social, market and legal orders in tune with the constitutional settings?

As one result of these complexities and challenges, some authors formulate special digital fundamental rights to meet new challenges. However, it is less than obvious that changes and challenges through digitization call for new fundamental rights and new institutional settings – in many cases, a thorough analysis of the existing understanding might just as well toughen up our existing constitutions for the digital turn and thus providing continued guidance for states and citizens alike.

The conference in March and the evolving chapters in this book provide a first analysis of the questions and also offer first answers and solutions. They reflect on the need to adapt existing constitutional norms, create new constitutional frameworks, and redefine the role of law in a changing digital, social and economic landscape. Our contributors shed light on the dynamic interplay between digital technologies and constitutional principles, exploring how legal frameworks adapt to the challenges and opportunities of the digital age. Through their insightful and complex, often interdisciplinary informed analyses, they highlight the evolving nature of digital constitutionalism and its implications for protection of rights, governance, and democratic normativity.

This volume, through its diverse contributions, makes a compelling case for the ongoing relevance and adaptability of constitutional principles in the face of digital transformation. It underscores the necessity of a nuanced, rights-based approach to digital governance, advocating for the development of digital fundamental rights as essential to upholding the constitutional order in the digital age. In doing so, it offers valuable insights for scholars, policymakers, and practitioners alike, charting a course for the future of digital constitutionalism.

Therefore, our authors deserve greatest appreciation for taking up these issues with us – and also for their patience. We are immensely grateful for a surrounding in which challenging and cutting-edge research is possible. The conference and the book were made possible by Frankfurt University's Research Initiative Contrast – Trust in Conflict, along with the generous support from the Alexander-von-Humboldt-Foundation. Profound and heartfelt appreciation is also owed to the invaluable assistance provided by the team Prof. Spiecker genannt Döhm's Chair of Administrative and Constitutional Law, Information Law, Environment, and Legal Theory at the University of Frankfurt. In the course of the production of this book, her team at her new Institute of Digitalisation at Cologne University also assisted tremendously. A very warm thank-you goes to the indispensable

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