Bridging Legislation and Jurisprudence in Democratic Digital Constitutionalism: A Look at the Brazilian Supreme Court's Approach

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Abstract: While digital constitutionalism has traditionally centered on private governance systems, Brazil's recent jurisprudence signals reassertion of rights-based judicial review to counter threats in increasingly digitized societies. This paper analyzes how the Brazilian Supreme Court has built upon legislation encapsulating digital constitutionalism values to catalyze a paradigm shift constraining state surveillance and citizen data exploitation through renewed fundamental rights. By interpreting open-textured statutory embodiments of "proto-constitutional" internet protections, the Court has legitimized innovation as directly responsive to legislative signals. Thereby rather than substituting its own value judgments, these landmark decisions apply digital constitutionalism values to questions raised by Brazil's rights-centric internet governance regime. The analysis counters claims that digital constitutionalism broadly serves to legitimize corporate self-interest or dilute accountability through "legal talisman" rhetoric removed from genuine rights protection.

A. Introduction

Over the past decade, the digital constitutionalism movement has gained considerable recognition within academic circles. As the prevailing body of literature indicates[1], the term "ideological current" commonly refers to a

1 Edoardo Celeste, 'Digital Constitutionalism: A New Systematic Theorisation' (2019) 33 International Review of Law, Computers and Technology 76, 89; Claudia Padovani and Mauro Santaniello, 'Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Eco-System' (2018) ("*digital constitutionalism is an effort to bring political concerns and perspective back into the governance of the Internet, deeply informed by economic and technical rationalities*") 80 International Communication Gazette 295; Meryem Marzouki, 'A Decade of CoE Digital Constitutionalism Efforts: Human Rights and Principles Facing Privatized Regulation and Multistakeholder Gov-

systematic framework defined by shared principles and guidelines aimed at recognizing, asserting, and safeguarding fundamental rights within the domain of cyberspace[2]. The label digital constitutionalism serves as a succinct representation of a dynamic intellectual movement, encompassing theoretical frameworks proposing the adaptation of foundational tenets of constitutionalism to the sphere of digital society. This school of thought advocates for the extension of traditional constitutional rights, obligations, and limitations to online interactions and virtual spaces, arguing that constitutional norms must evolve to remain relevant in an increasingly digitized world. Proponents emphasize that digital constitutionalism is essential to protect citizens' rights and regulate the powers of both state and corporate actors in the digital era. Broadly, the expression emphasizes the functioning of private self-regulatory frameworks that purportedly mirror constitutional values.

While scholars broadly agree on these core elements of digital constitutionalism concept, close inspection reveals limitations in this apparent clarity. After nearly a decade, it has become evident that the label lacks a uniform meaning and encompasses varied, potentially conflicting interpretations[3]. Some descriptive accounts have shifted the debate on platform regulation towards governmental solutions. Other scholars critique the strategic use of the term by private companies as a "marketing ploy" or "legal talisman" to divert scrutiny of unfair service terms[4]. As Costello concisely underscored, "the majority of online governance structures that have embraced constitutionalist rhetoric to self-describe should be viewed not as authentically constitutionalist, but rather as manifesting 'private policy' architectures" [5].

The prevalence of these self-legitimizing narratives from private entities highlights the need to examine the normative dimensions of digital

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ernance' (2019) July International Association for Media and communication Research Conference (IAMCR).

2 Gilmar Ferreira Mendes & Victor Oliveira Fernandes, *Digital Constitutionalism and Constitutional Jurisdiction: A Research Agenda for the Brazilian Case*, *in* The Rule of Law in Cyberspace. Law, Governance and Thecnology Series. Volume 49 65, 67 (2022).

3 Jane Reis Gonçalves Pereira & Clara Iglesias Keller, *Constitucionalismo Digital: contradições de um conceito impreciso*, 13 Rev. Direito e Prax. 2648 (2022).

4 Edoardo Celeste, Digital Constitutionalism: The Role of Internet Bills of Rights 52 (2023). (referring to the expression adopted by Kendra Albert).

5 Róisín Á Costello, *Faux ami? Interrogating the normative coherence of ' digital constitutionalism ,'* Glob. Const. 1, 4 (2023).

constitutionalism more closely. This trend features prominently in recent European scholarship. Authors such as Gregorio[6] and Pollicino[7] have proposed that digital constitutionalism is undergoing a new democratic phase, characterized by the affirmation of novel fundamental rights via European Court of Justice (ECJ) decisions and European Parliament legislation constraining the private authority of large platforms[8].

Compared to Europe, developments in Brazil offer important insights for shaping this emergent phase of digital constitutionalism. In recent years, digital constitutionalism principles of safeguarding fundamental rights online have guided the Brazilian Supreme Court (STF) in reviewing the constitutionality of legislation. Rather than legitimizing self-regulation, this jurisprudential evolution has established constitutional duties for both state and private entities to protect rights in the digital realm. The Brazilian experience demonstrates how judicial review grounded in digital constitutionalism can delineate obligations, not just for the state, but also for non-state actors.

This paper will be structured in two main parts. Section 1 will chart the evolution of digital constitutionalism scholarship, highlighting the initial neglect of constitutional judicial review in protecting fundamental rights. It will analyze seminal works focusing on private self-regulation frameworks with limited state oversight. Section 2 will detail the Brazilian Supreme Court's recent case law demonstrating digital constitutionalism's democratic turn. It will examine landmark decisions constraining both public and private power to safeguard novel fundamental digital rights. This case law will be situated as affirming rights legislation envisioned by digital constitutionalism proponents. Finally, the conclusion will summarize how the Brazilian experience illuminates digital constitutionalism's emerging rights-centric phase with a more balanced approach to governing online spaces.

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6 Giovanni de Gregorio, Digital Constitutionalism in Europe Reframing: Reframing Rights and Powers in the Algorithmic Society (2022).

7 Oreste Pollicino, Judicial Protection of Fundamental Rights on the Internet: A Road Towards Digital Constitutionalism? (2021).

8 Gregorio, *supra* note 6 at 65.("*two primary drivers have characterized the rise of the democratic phase of European digital constitutionalism. Firstly, the Union codified some of the ECJ's judicial lessons. Secondly, the Union introduced new limits to private powers by adopting legal instruments by increasing the degree of transparency and accountability in content moderation and data processing*").

B. The neglected role of judicial review in Digital constitutionalism early scholarship

The digital constitutionalism movement was originally meant to denote a movement to constrain the private authority of internet actors, as distinct from limiting state power[9]. In this vein, Fitzgerald[10] highlighted the existence of an "informational constitutionalism" in which both public and private entities would participate in constructing the legal order. The author's initial theorization practically restricted the state's role to issuing private law statutes (such as intellectual property and contract law) that would somehow steer private self-regulation. Similarly, Suzor first employed the term "digital constitutionalism" to emphasize that the actions of private agents would be bounded by the contractual frameworks forming virtual communities[11]. Still focused on private ordering, Karavas invoked Teubner's concept of societal constitutionalism to underline the state's inability to regulate the fragmented complexity of digital domains[12].

These foundational studies of the intellectual movement strongly neglected the role of nation-states as both regulatory actors and adjudicators. As previously highlighted, digital constitutionalism appears to have confined its analytical gaze to the implementation of fundamental rights in abstract legal planes, disregarding the function of courts and constitutional tribunals. In fact, Berman[13] seems to have been the sole pioneer of the academic movement to contemplate the subjection of private entities to constitutional review. He conceived that constitutional courts could employ the constitution as a benchmark to elaborate fundamental values and resolve politically contentious issues in cyberspace[14]. However, Berman discounted the prospect of ordinary legislation reflecting constitutional principles that

9 Mendes and Fernandes, *supra* note 2 at 66.

10 Brian F. Fitzgerald, *Software as Discourse - A Constitutionalism for Information Society*, 24 Altern. Law J. 144 (1999).

11 Nicolas Suzor, *The Role of the Rule of Law in Virtual Communities.*, Tese de doutoramento - Queensland University of Technology 1 (2010), http://search.ebscohost.com/login.aspx?direct=true&db=bth&AN=63481022&site=ehost-live.

12 Vagias Karavas, Digitale Grundrechte: Elemente einer Verfassung des Informationsflusses im Internet (2007).

13 Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 759 Univ. Color. Law Rev. (2005).

14 *Id.* at 1269.

bind private actors[15]. Thus, his perspective on constitutional adjudication remained drastically circumscribed.

The studies conducted by Gill et al.[16] fail to address the significance of constitutional courts. They use the term "digital constitutionalism" to describe the increasing number of normative reactions from both national and non-national entities. These reactions play a vital role in modern constitutionalism by effectively articulating constitutional principles and beliefs in order to secure political rights and restrict authority in the online domain. Hence, it is understandable that the authors opted to employ this framework to highlight the process of developing these standards through the collective consciousness of society. Nevertheless, Gill et al.'s methodology is restricted to the rise of internet bills of rights, treating them as the exclusive and genuine source for restraining private power in the digital realm. Their focus on constitutional law is limited to the understanding that certain formal digital legislation possesses a "pre-" or "proto-constitutional" nature, serving as intellectual foundations for the interpretation of formal constitutions[17].

The increasing significance of constitutional courts' rulings in shaping the understanding of online fundamental rights, particularly in the United States and the European Union, has created a new area of research focused on studying constitutional adjudication. Works such as Morelli and Pollicino, for example, started examining the use of metaphors by courts to convey constitutional values and principles in the context of digital media. Nevertheless, these authors seem to prioritize the argumentative framework of judicial decisions rather than their influence on the governance of cyberspace.

The literature's timid approach to constitutional review can be attributed to early digital constitutionalism scholarship, which held the belief that the internet's proliferation would lead to a crisis in the traditional constitutional model. This model is deeply entrenched in the sovereign authority of nation-states and primarily concerned with power dynamics within national boundaries. Recent years have shown that the prediction of the decline of the constitutional state paradigm has been diminished, as it is now

15 Celeste, *supra* note 1 at 8.

16 Lex Gill, Dennis Redeker & Urs Gasser, *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights*, 7641 Res. Publ. No. 2015-15 Novemb. 9, 2015 (2015).

17 *Id.* at 6.

recognized that traditional forms of government still play a significant role in shaping online norms. In this vein, works such as Goldsmith and Wu[18] notably demonstrated that national legislation and regulations remain pivotal sources of normativity in the internet era. Thus, even in online disputes, the territorial criterion of jurisdiction is far more significant than one might assume.

For various reasons, digital constitutionalism narratives centered on private agency have become obsolete in the face of a new "democratic" phase, as authors like Gregorio[19] have identified emerging within the context of European digital constitutionalism. As this scholar explains, the gap between public and private power exercising has recently spurred the European Union to abandon digital liberalism, based on the consensus that consolidation of private authority jeopardizes democratic systems and the rule of law principle. In this paradigmatic shift, Gregorio notes, "the ECJ's judicial activism paved the way from an early approach based on digital liberalism to a new phase of digital constitutionalism characterized by the reframing of fundamental rights and the injection of democratic values into the digital environment"[20].

The democratic aspects of digital constitutionalism shed new light on this emerging concept. Given Brazil's unique circumstances, the normative dimensions of this movement have been especially influential in shaping the recent jurisprudence of the Brazilian Supreme Court. The Brazilian case clearly demonstrates how digital constitutionalism can direct constitutional courts to articulate the boundaries of fundamental rights in the digital realm by channeling core constitutional values and principles. Through examples like Brazil, we see how digital constitutionalism provides a framework for courts to apply constitutional rights to new digital contexts.

C. Strengthening democratic digital constitutionalism: lessons from the Brazilian experience

In contrast to jurisdictions that only witnessed non-binding declarations of counter-normative reactions, Brazil incorporated digital constitutionalism

18 Jack Goldsmith & Tim Wu, Who Controls the Internet? lllusions of Borderless World (2006).

19 Oreste Pollicino & Giovanni De Gregorio, *Constitutional Law in the Algorithmic Society*, *in* Constitutional Challenges in the Algorithmic Society 3 (2021).

20 Gregorio, *supra* note 6 at 64.

general clauses directly into legislation, particularly in the Marco Civil da Internet. The law's incorporation of fundamental principles regarding privacy, autonomy, and transparency played a crucial role in facilitating subsequent judicial review.

Through the inclusion of ambiguous criteria in enforceable laws, the Brazilian Congress granted the STF the dual role of interpreting and determining the extent of digital rights safeguards. The Court willingly accepted this assigned responsibility in interpreting ambiguous legal provisions. In Brazil, the combination of legislation and STF decisions has promoted the development of digital constitutionalism. The presence of unclear laws has allowed the Constitutional Court to interpret and apply constitutional rights in a specific manner.

The Brazil's Marco Civil da Internet (MCI) established general clauses and principles to shape individual rights online that subsequently guided judicial interpretation. The law prioritized general precepts protecting freedom of expression (art. 3, item I), privacy (art. 3, item II), and preserving the participatory architecture of the network (art. 3, item VII), delineating limits on safeguarding these rights vis-à-vis both public and private entities. At the same time, the open-ended nature of the MCI and related legislation has raised constitutional questions before STF, in recent years.

Some key cases adjudicated by the STF demonstrate how Digital constitutionalism has guided the construction of constitutional standards to safeguard emerging online rights. The inherent ambiguity of the MCI legal framework has resulted in judicial review centered on digital constitutionalism principles for preserving fundamental rights in the cyberspace. Significant legal cases like ADI 6,389 (2020) and ADI 6649 have upheld independent digital rights based on the constitutional values of the MCI as interpreted through the lens of Digital constitutionalism.

I. Approaching data protection as a novel fundamental right under Brazilian Constitution

In 2020, the Court issued a landmark decision in Direct Action of Unconstitutionality (ADI) 6,389, which challenged a provisional presidential decree. This decree compelled all telecom providers to share users' personal data like phone numbers and addresses with IBGE, the national census agency. The government claimed this unprecedented data sharing was necessary to enable remote census surveys during the COVID-19 pandemic.

The STF ruled the law unconstitutional for lacking minimal safeguards on data purpose and proportionality. The rapporteur, Justice Rosa Weber, affirmed Brazil's evolving recognition of data protection as an autonomous fundamental right. She held the law violated this right by authorizing mass data sharing absent any purpose or proportionality principles.

The STF rooted data protection in safeguarding human dignity against the endless exposure of informational self-determination in modern societies. Crucially, the Court situated this new right not as judicial overreach, but rather as built upon recent Brazilian digital legislation. The MCI notably enshrined data protection among key internet use principles in Brazil. The MCI's rights-based approach reflects the counter-norm generation of digital constitutionalism. The 2018 Data Protection Law further entrenched autonomous digital rights governing public and private data processing.

Significantly, by treating the MCI and Data Protection Law as emblematic of digital constitutionalism, the STF declared data protection an autonomous right requiring constitutional protection. Thereby the Court concretized a core right of this constitutional movement. The STF leveraged these legislative symbols of constitutional values to chart an unanticipated expansion of rights online.

This reasoning countered accusations of undemocratic judicial activism detached from legislation. Instead, the Court portrayed its ruling as directly flowing from recent Brazilian law symbolizing awakening threats to fundamental rights. Rather than substituting its own values, the STF anchored expanded rights in counter-normative reactions from Brazil's democratic branches, consistent with digital constitutionalism's multi-institutional nature.

In articulating this new fundamental right, the STF stressed the diffusion of digital constitutionalism principles into jurisprudence. It characterized its ruling as judicial concretization of rights following the MCI's proto-constitutional digital rights agenda. Thereby, pioneering digital legislation in Brazil catalyzed reinterpreting enduring rights, viewed by proponents as the genesis of a new constitutional paradigm adapted to the digital age.

It is worth to mention that this decision recognized an autonomous data protection right before its formal constitutional enshrinement in 2022's Amendment 115. Hence the STF articulated a new fundamental right absent from the constitutional text, establishing jurisprudential foundations for subsequent constitutional reform.

II. Articulating constitutional data protection duties upon governmental entities

In 2021, the Court ruled a Federal Decree (Decree 10,046 of 2019) enabling unrestrained personal data sharing across Public Administration entities as unconstitutional. This Decree had instituted a "common public database," supposedly to streamline public services. It effectively created a governmental "data lake" consolidating the various personal information citizens furnish to federal agencies, including biographical, electoral, and social security data.

The STF held that indiscriminately pooling sensitive personal information failed fundamental rights protections. By enabling unrestricted state data analysis without purpose limitations or safeguards for citizens' informational autonomy, the Decree violated core data protection principles. Thereby the Court again affirmed the constitutional right of data protection in invalidating governmental data mining absent considerations of digital rights.

This case reached the STF after the government shared 76 million Brazilians' data between intelligence agencies and the National Traffic Department. The stated purpose was providing access to citizens' driver's license information for intelligence analysis. The Brazilian Bar Association consequently challenged the Federal Decree enabling this mass data pooling as unconstitutional.

The ruling filled a critical legislative gap, as Brazil's 2018 Data Protection Law only partially binds the public sector. The STF held that absent comprehensive statutory protections, data sharing and collection still requires an explicit legal basis and cannot be indiscriminate. Moreover, the Court outlined principles limiting governmental data use, including specified purposes, transparency, accountability, and proportionality. Though Brazil lacks robust public sector data protection legislation, the STF affirmed Constitutional due process principles forbid unfettered state data mining. In imposing rights-based restrictions, the Court advanced Constitutional safeguards adapted from digital constitutionalism to check governmental data collection and analysis.

The Federal Decree violated these Constitutional principles. Absent a specific legislative mandate, the broad data sharing authorized infringed on Constitutional data protection rights per Article 5, Section LXXIX. Moreover, enabling free policy-oriented data use without processing safeguards or specifications disregarded rights limitations. The lack of traceability

mechanisms for citizen monitoring further failed Constitutional due process.

Justice Gilmar Mendes' report vote concluded that the Decree failed to adequately safeguard the fundamental right to data protection, as it still relied on an antiquated logic of secrecy. The Federal Government's Decree did not establish procedural safeguards for citizen control. Instead, it simply limited the sharing of data that had been classified by other legal provisions. The Court determined that the distinction between "public" and "private" nature of the data was insignificant when compared to the fundamental right, which primarily safeguards the data owner's authority to control the data.

D. Final remarks

Digital constitutionalism has rapidly emerged as an influential framework for conceptualizing rights and regulation adapted to the digital age. While early theorization focused extensively on private governance systems and self-regulatory initiatives, the past decade's proliferation of constitutional litigation has revealed the enduring primacy of judicial review in this constitutional paradigm shift. Thereby through landmark decisions, courts are elucidating how constitutional rights, duties and proportionality standards apply within online architectures just as in analogue spaces.

As explored in this analysis, recent Brazilian Supreme Court judgments demonstrate how digital constitutionalism is catalyzing a rights-centric jurisprudence constraining both state and corporate power in cyberspace. The Court has built upon the Marco Civil da Internet's crystallization of proto-constitutional principles to affirm an autonomous right to data protection with duties applicable to public and private entities. In articulating this evolved understanding, the STF has repeatedly invoked legislative embodiments of Digital constitutionalism values to legitimize its constitutional innovation as flowing directly from Brazil's uniquely rights-focused internet governance model.

Crucially, these decisions have established proportionality tests and contextual standards that qualify the application of digital rights protections. Through purpose specifications, data minimization requirements, and transparency mechanisms, the Court has set baselines to balance privacy, autonomy, and dignity with countervailing public interests in security, innovation, and effective administration. Thereby the STF has advanced a

contextualized articulation of rights avoiding absolutist conceptions that would fail to adapt enduring constitutional guarantees to the distinct logics of online spaces.

As the first jurisdiction to constitutionalize internet principles through formal legislation, Brazil's digital constitutionalism jurisprudence provides lessons for similarly situated countries facing governance deficits in increasingly digitized societies. As the landmark decisions surveyed in this analysis attest, adapting fundamental rights to changing technological realities is no longer an aspirational academic vision but an emergent judicial practice with enormous influence potential. This opens new horizons for digital constitutionalism under a democratic judicial review approach which warrants further examination in the scholarship.