XXII International Scientific Conference „Legal days – Prof. Slavko Carić"
"LAW AND JUSTICE"

The University of Business Academy in Novi Sad
The Faculty of Law for Commerce and Judiciary in Novi Sad
October 10th and 11th 2025 in Novi Sad

Proceedings of XXII International Scientific Conference
"Legal days – Prof. Slavko Carić"
"LAW AND JUSTICE"
October 10th and 11th 2025 in Novi Sad
Organized by the University of Business Academy in Novi Sad
The Faculty of Law for Commerce and Judiciary in Novi Sad

The Publisher:
The University of Business Academy in Novi Sad
The Faculty of Law for Commerce and Judiciary in Novi Sad
Geri Karolja Street no.1, telephone: 021/ 400 - 499
Web: www.pravni-fakultet.info

For the Publisher:
Milan Počuča, PhD, Full Professor

The Editor-in-Chief:
Milan Počuča, PhD, Full Professor

Printed by:
Štamparija FELJTON

Circulation:
100

ISBN 978-86-86121-84-4

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LAW, ECONOMY, AND DIGITALIZATION

UDC:004:340.132.6:342.7
DOI: 10.5937/PDSC25516S

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RULE OF LAW IN DIGITAL SOCIETY – DIGITAL RULE OF LAW EMERGING[1]

Abstract:

Digitalization as a social and legal process is the engine of fundamental changes in society, even considering the very core postulates of the functioning of democracy. The beginning of the creation of a digital society is accompanied by a reexamination and redefinition of basic social values, constitutional principles and overall legal framework. Today, the personal freedom of an individual is conditioned or to a certain extent limited by the dominance of technology, in the context of building a system of digital economy, digital society and digital governments. Technology itself and the modalities of its use shape new forms of government and new modalities of the rule of law. How close are we to the so-called digital rule of law? This paper aims to take a wide-angle perspective to comprehensively examine impacts of digital technology on traditional rule of law, as well as to discuss significance and content of emerging digital rule of law.

Key words: *digital technology, rule of law, digital rule of law, human rights*

INTRODUCTION

Digitalization, as a social and legal process, nowadays is the engine of fundamental changes in society, including the very postulates of the functioning of democracy. The beginning of the creation of a digital society is accompanied by a reexamination and redefinition of basic social values, constitutional principles and the legal framework, at the local, regional and global levels. The use of digital technology changes the basic paradigms of society, to the extent that today there is no activity or social factor that does not, to a greater or lesser extent, rely on some form of digital technology or method of its usage. The usage of digital technology changes the economic environment, with the emergence of new

1 The paper is the result of a long-term scientific research project "Progressive development of law in modern digital society" ,which is financed by the Provincial Secretariat for Higher Education and Scientific Research activity (decision number 003069523 2024 09418 003 000 000 001-01003069523 2024 09418 003 000 000 001-01, 21.11.2024).

market structures, the offer of new, innovative products, the treatment of data as the most important input in the global, regional and local economy. The information society operates according to a different dynamic set than the industrial society, which, among other things, implies that the digitalization of society also affects the sustainability of society[2] .

At the intersection of ecosystems and digital society, a new parallel system is emerging – the digital ecosystem (tech ecosystem), which, unlike the original ecosystem, was created by human action and over it, and its components, ownership can be established. The elements that make up the infrastructure of this new digital ecosystem are owned by multinational corporations (software, hardware, network connections, optical cables, cloud centers), which conditions various forms of digital capitalism, which operates on the principle of concentrating wealth and which uses digital technologies to organize the community, such as the Silicon Valley model. Transnational companies colonize the digital environment and the global economy, creating a new trend of the so-called digital colonialism[3]. Digital colonialism is defined as the created state of ownership and control over the digital ecosystem for the purpose of political, economic and social domination over a foreign territory. The development of such social trends leads to new forms of digital revolutions, as a kind of modern forms of social revolutions, which consequently affect public policies, sensitive social groups, the economy, environmental sustainability, economic development, etc. At the same time, new social paradigms are emerging, such as digital constitutionalism in the European Union[4] . The most obvious example of the impact of digital technology on already existing and thoroughly established social, legal, economic and political postulates is the creation of the trend of digital constitutionalism in the European Union, as a primary social postulate. The European Union's policy regarding digital technology has, in the last 20 years, reoriented from a liberal-economic perspective to a constitutional approach. Initially, in the context of community regulation, digital technologies were seen as an opportunity for the growth and development of the common market, and the future impact on fundamental rights and the emergence of entities that would be new competitors to state power was not visible. The increasing use of digital technology in all spheres of society and the economy had two major consequences that were observed in the community order. Namely, the use of digital technology has become a significant challenge for the protection of human rights (especially in terms of freedom of expression and data protection), while at the same time transnational companies operating in the digital environment as service providers through online platforms have increasingly taken on the performance of quasi-public functions in a transnational context. In this sense, the phase of modern constitutionalism in the European Union is referred to as digital constitutionalism, which is a consequence of the conceptual transfer of digital technologies to the public legal sphere[5]. The modern understanding of constitutionalism implies the achievement of two goals: protecting the fundamental rights of citizens and preventing the exercise of power without any control. In this sense, digital constitutionalism functions as a shield against the discretionary exercise of power by online platforms in the digital environment.

2 Stojšić Dabetić, J., Mirković, P. (2021). The role of digital technology in keeping modern digital society sustainable, International Scientific Forum "Danube – River of Cooperation", 135-147, 137.

3 De Gregorio, G. (2021). The Rise of Digital Constitutionalism in the European Union, International Journal of Constitutional Law, Volume 19, Issue 1, January 2021, 41–70, 45.

4 Padovani, C., Santaniello, M. (2018). Digital Constitutionalism: Fundamental Rights and Power Limitation in the Internet Eco-System, 80 Int'l Comm. Gazette, 295.

5 Ibidem.

The use of digital technology requires the creation of new forms of restrictions on the abuse of power in a system based on the actions of governments, companies and civil society organizations, i.e., it requires new ways of articulating the boundaries of power in a networked society. The fundamental postulates of the rule of law are being adapted to the new reality, and the content of the rule of law is being redefined to respond to the challenges of the digital environment. This paper aims to take a wide-angle perspective to comprehensively examine the impacts of digital technology on traditional rule of law, as well as to discuss the significance and content of emerging digital rule of law, in order to offer an answer to the rising question - how close are we to the so-called digital rule of law?

Digital environment and (digital) rule of law

New technologies and social structures related to Internet and digital technologies created new means for human activity, and new forms of traditional activities such as political activism, cultural exchange and realization of human rights. At the same time, influence on human rights that results from restrictions in access to Internet and other digital media, monitoring online activities and electronic communications of individuals, shows patterns of restrictions on freedom of expression, freedom of association, right to privacy and other civil rights. New opportunities for illegal activities are emerging, such as cases of hate speech, child pornography, serious copyright violations, fraud, identity theft, money laundering, new forms of attacks on the infrastructure of electronic communications as objects of protection. Issues of cyber security and cyber crimes and special forms of terrorism in cyberspace, which have a transnational aspect, come into focus.

The increasing degree of availability of personal data facilitates and accelerates the identification of individuals, while data itself becomes a form of capital, including activities whose acceptability is not precise, such as BigData mining. Profiling activities through personal data, using different algorithms, can be more or less discriminatory in their results. If profiling algorithms are used as a basis for making decisions that have an impact on the property and other assets of individuals (e.g. prohibition of activities, confiscation of goods), this can lead to undermining the very system of responsibility for decision-making[6] (The rule of law on the Internet and in the wider digital world, 2014).

The physical infrastructure of the Internet implies a network of switches, cables and routers through which data and information traffic takes place, which forms a system of electronic communications that is transnational and global, but at the same time the very infrastructure on which it rests is physical, analog, and located in real places. High-capacity optical fiber cables run under the sea and ocean, and are connected to ground cables and routers, but at the same time are owned by private entities (primarily in the USA and the UK), which therefore have control over the largest part of the Internet infrastructure and this inevitably enables a high degree of potential, and real, control over data. Those entities, as owners of parts of the physical infrastructure, are not bound by international acts on the protection of human rights, due to the fact that they are not signatories to these acts, they are only bound by national regulations, which do not necessarily have to be in all aspects harmonized with international standards, since Internet activities are regulated differently at national levels (legal restrictions on Internet access, different forms of monitoring of electronic communications are known). For example, the restrictions on human rights provided for in the US Constitution apply only to

6 The rule of law on the Internet and in the wider digital world, Issue paper published by the Council of Europe Commissioner for Human Rights, Council of Europe, December 2014.

US persons and non-US persons residing in the US, while at the same time the US government formally rejects the application of the international body of human rights, which is problematic considering that the US has predominance in the digital environment.

The efforts of states to control access to the Internet and the distribution of materials on the Internet, in practice, lead to situations where web pages that are treated as having illegal content are blocked or restricted, while at the same time there are failures to block or limit pages that really have illegal or problematic content. Such anomalies are the result of criteria for blocking or limiting which are secret, or arbitrary or subjective, usually there is no appeal process or other possibilities to review decisions. At the same time, technological progress is such that all restrictive measures can be bypassed more or less easily, and thus the measures taken do not affect the cause itself or the harmful effect. Certainly, it can be justifiably argued that leaving the determination and application of measures to block or restrict content, from the aspect of legal security and the rule of law, to private bodies, with the support of the state which at the same time denies its responsibility in such an arrangement, is legally questionable, while at the same time the number of court proceedings related to the digital sector is growing, especially from the aspect of security and mass surveillance and the use of social networks. These circumstances undoubtedly show the increasing influence of digital technology in the field of rule of law.

The processing of citizens' personal and private data, as well as the enormous possibilities for content creation, activities that are predominantly in the hands of non-state actors or transnational corporations, are creating a new form of digital private power, which is predominantly global[7]. In this context, digital refers to Internet-based technologies used for data processing and content creation, and constitutionalism refers to the tendency that power, whatever its origin, should be limited by law and that legitimacy depends on respect for limitations. Digital constitutionalism is defined as a new field of theory and practice that is based on the dialectic of the impact of digital technology on constitutionalism and the relationship of constitutional law to the powers exercised through the implementation of digital technology in the public and private sectors[8]. The European Court of Human Rights (ECtHR) itself has pointed out the constitutional challenges that arise with the use of new technologies, and its practice has significantly influenced the creation of legal regulations for data protection and content creation, in the sense that the rights and freedoms of the Charter have been interpreted in a special way for the purposes of implementing constitutional principles in the functioning of the digital society. With the inclusion of the Charter of Fundamental Rights in the set of primary community sources and the simultaneous growth of the importance of data in the information society, the European Court of Human Rights has abandoned the economic-functional dimension in its practice and adopted a constitutional approach. The test of the (non)existence of the rule of law in the practice of the European Court of Human Rights implies that all restrictions on human rights must be based on clear, precise, publicly available and predictable legal rules and on legitimate goals. There must be a necessary, proportionate and effective legal remedy in the case of human rights violations in the legal system. In addition, the validity of human rights for all, without discrimination must be achieved in every case. The guarantees of human rights refer to the theory of the sovereign power of the addressee states, but understood functionally rather than territorially,

7 Sun, X. & Xiao, Y. (2024). How Digital Power Shapes the Rule of Law: The Logic and Mission of Digital Rule of Law. International Journal of Digital Law and Governance, 1(2), 207-243. https://doi.org/10.1515/ijdlg-2024-0017, 208.

8 Suzor, N. (2018).Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms. Social Media + Society 4 (3): 2056305118787812.

that is, valid for all persons under the physical control of the government of one state, even when acting extraterritorially. The Internet also indicates the need to redefine the "territory" of a country, that is, how do territorial borders complement the digital space? In the case of Yildirim v Turkey[9], the ECtHR characterized the blocking of access to all sites hosted by Google Sites from Turkey in order to block one deemed disrespectful to Ataturk as a violation of Article 10 of the Convention. The recommendations of the Commissioner for Human Rights of the Council of Europe refer to the preservation of the universality of human rights and their equal application in online and offline contexts, data protection, cybercrime and the question of jurisdiction.

The basis of democratic rules applicable in the digital community emerges as a result of collective private action, in the form of decentralized and ad hoc law[10]. When creating a legal framework in the digital environment, the bottom-up principle is applied, i.e. the digital environment is not regulated by traditional norm-makers, but each segment of the digital community participates in creating rules. The digital environment itself is such that it constantly creates the need for free market regulation, i.e. every attempt to legally regulate some aspect of the online or digital environment results in a new modality by which previously adopted rules are changed or replaced or redefined. The freedoms of online platforms, in relation to the supervision of the content placed through them, have been transformed into new forms of power and are leading the European Union to replace the liberal approach with a regulatory one, in terms of regulating a new way of data processing and content creation, via GDPR (2016), Artficial Inteligence Act (2021), Digital Market Act (2022) and Digital Services Act (2022). The risks that have become apparent, and which threaten to undermine the concepts of responsibility and transparency, represent in this context the material sources of law[11]. At the same time, normative processes of revision of the basic postulates of freedom of expression and protection of personal data are also taking place. Digital companies, in the sense of online providers or online platforms, are replacing, in aspects of processing and storing personal data, as well as the placement and creation of content, the role of the state and the concept of territorial sovereignty, which is replaced by the concept of functional sovereignty. The expression of control over the online space is contained in the designation of digital companies as "gate-keepers", who decide on the ways in which people will communicate and how they will exercise their rights through the regulation of digital infrastructure. Through digital constitutionalism, business choices related to the operation of platforms have the role of law in the digital environment at a global level. Users, legal and natural persons, act as subjects of the exercise of a private form of power by online platforms, through a unique mix of private legal rules and automated technologies, which is referred to as the so-called platform law[12]. The terms of use unilaterally determine what users can do, how their data is processed, and de facto online intermediaries perform the tasks of public authority. In this way, a process is taking place that is described as the constitutionalization of the multiplicity of autonomous subsystems of world society, as defined by Teubner[13]. It should be noted that in this constellation

9 CASE OF AHMET YILDIRIM v. TURKEY (Application no. 3111/10) JUDGMENT STRASBOURG 18 December 2012 FINAL 18/03/2013.

10 Verstein, A. (2019). "Privatizing Personalized Law." The University of Chicago Law Review 86 (2): 551–80, 557.

11 Suznor, supra note. 7.

12 Engel A. Groussot, X. (2025). New Directions in Digitalisation: An Introduction, in: New Directions in Digitalisation Perspectives from EU Competition Law and the Charter of Fundamental Rights (Editors: Annegret Engel, Xavier Groussot, Gunnar Thor Petursson), 1-9.

13 Teubner G. (2006). The Anonymous Matrix: Human Rights Violations by "Private" Transnational

of power, it is not translational digital companies that have arbitrarily taken power, but there is a significant connection between them and public authorities. Governments and administrations rely on large technology companies to establish and operate national public services, as well as to improve public services. In this way, technology corporations gain access to a large amount of data that was previously only available to the public sector, while public authorities, at the same time, become dependent on technology companies that can impose their own terms of business. Legal norms are replaced by technological or contractual standards established by transnational private entities.

The rule of law in the digital society implies the need to apply the rules and principles of international public law and international human rights equally in the offline and online domains. All private and public actors have an obligation to respect the basic postulates of human rights in their operations and activities, as well as when designing new technologies, services and applications. The rule of law implies the principle according to which all persons, institutions and entities, private or public, as well as the state itself, are responsible for compliance with the laws in force, for their equal implementation, independent judicial settlement of disputes and compliance with international human rights and human rights protection standards. It implies the rule of law, equality before the law, responsibility before the law, fairness in the application of law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, procedural and legal transparency.

There is no global agreement on Internet governance, while at the same time there is a danger of a kind of fragmentation of the Internet in the sense that countries and certain regions try to broadcast data created on their territories only through local infrastructure (cables and routers), which de facto creates national obstacles to the global network. Legal or natural persons who make certain information available from their place of residence or seat must comply only with the laws of the country in which they operate. Persons who obtain material or information from foreign websites that they know is treated as illegal in their country may be held liable under the laws of their country, regardless of the origin of the material or information obtained. A general agreement was reached that it is the host country's obligation to respond to human rights violations by companies operating in them[14].

Freedom of expression in the digital context implies the possibility of responsibility for placing certain content via the Internet if that content is placed on the territory or in the Internet space of another country, according to the laws of that country. The rule of law would imply that actors in digital traffic adhere to internationally accepted standards of content permissibility. Without diminishing the possibilities of responsibility of the owner or the holder of the platform for the content that has been placed, according to the seat or place of registration or the place of occurrence of damage or undertaking of harmful action. Legal entities or corporate entities in the digital space act in terms of privatized law enforcement[15]. They can introduce certain prohibitions, and if they are not bound by constitutional or other international legal restrictions, based on regulations or a decision of a national authority, this would not amount to rule of law.

The European data protection system, which consists of established principles, guaranteed rights and legal remedies, includes international human rights standards.

Actors, The Modern Law Review, Vol. 69, No. 3, 327-346, 327.

14 The Ruggie Principles - UN Guiding Principles on Business and Human Rights : Implementing the United Nations "Protect, Respect and Remedy" Framework (2011) [ST/]HR/PUB/11/4.

15 Gowder, P. 2018."Transformative Legal Technology and the Rule of Law." University of Toronto Law Journal 68, no. S1: 82–105.

For example, surveillance programs that are secret in nature or general in scope or non-discriminatory in principle are not in accordance with the postulates of the European Convention for the Protection of Human Rights and cannot be justified by the needs of the fight against terrorism or other threats to security. Any measure of surveillance that is applied must be only to the extent that is necessary in a democratic society and proportionate to the legitimate goal that is sought to be achieved by the applied measures.

The basis of the rule of law on the Internet is the system of protection of individuals in connection with the automatic processing of personal data. In this context, mass suspension of communication data is fundamentally contrary to the rule of law. It is expected that the rules on data protection will be applied to all activities in which the data of natural persons are processed. The right to privacy and family life and freedom of expression cannot be covered by the decisions of private bodies that have control over the content that is placed on the Internet[16]. Efforts are being made to ensure that non-European countries respect the European standards for the protection of fundamental rights. A state may not access data in another state without its consent, unless it has a legal basis (clear, explicit, based on law) in international law, and the access itself under those conditions must be in accordance with the standards of data protection and human rights. Internal affairs authorities cannot obtain data from servers and other infrastructure in another country on the basis of informal agreements, but only on the basis of mutual cooperation mechanisms (eg the Council of Europe Convention on Cybercrime). In terms of jurisdiction, the extraterritorial exercise of jurisdiction for transnational cyber crimes is limited, except in the case of content prohibited by international law. States can have jurisdiction over foreign digital material only in limited cases, when the connection of the material or disseminator to the state is effective and real.

All restrictions on access to content on the Internet must be based on strict and predictable legal frameworks in relation to the scope of the restrictions themselves, with the possibility of judicial review during which domestic courts must mark the measures taken as necessary, effective and proportionate and such as to affect the very content in question that needs to be blocked or restricted. To the greatest extent possible, such measures should be restricted from being implemented by private bodies without public authority. National security can be the basis for interfering with human rights when the very essence of the basic institutions of the state is threatened, and the threat itself cannot be effectively removed by regular criminal law means.

In the previous part, the most obvious challenges that are posed to the standards of the rule of law in the modern digital environment were listed and elaborated. The intention is to build a system of digital sovereignty in terms of security, which is related to state power, in terms of a defense principle that establishes a mechanism that ensures security, in parallel with a system of digital transparency, in terms of the principle of responsibility and limitation of power, which establishes and promotes the rights of individuals. Together, the two principles should act synergistically as a system of protection and promotion of European liberal and democratic values.

16 Lynskey, O. 2019. "Grappling with 'Data Power': Normative Nudges from Data Protection and Privacy." Theoretical Inquiries in Law 20 (1): 189–220.

CONCLUSION

Digital rule of law emerges as a new form of rule of law, which is a consequence of the digital technological revolution. It shows the innovative development of the traditional rule of law, in the context of technological dominance. From the very beginning as a legal principle, the rule of law was understood in the earliest period as state power, i.e. control. With modern revolutions and the ideas of human rights and separation of powers, it was conceived as a true rule of law, not the rule of state power. With the emergence of the Internet and the advent of the digital age and the creation of a digital society, it is undergoing fundamental changes resulting from technological dominance - digital power. When speaking of digital power, it is necessary to shift focus from the technology itself to its social impacts. Nevertheless, law as a social discipline has always lagged behind the technological development, but at the same time law can anticipate the effects of technology application, and that is maneuvering space for the development of digital rule of law. Key challenges in development of digital rule of law, as mentioned, is the absence of Internet governance and the fact of private-sector control over infrastructure and data flow, as well as non-compliance of national regulations.

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VLADAVINA PRAVA U DIGITALNOM DRUŠTVU – STVARANJE DIGITALNE VLADAVINE PRAVA

Sažetak:

Digitalizacija kao društveni i pravni proces je motor fundamentalnih promena u društvu, čak i ako se uzmu u obzir sami temeljni postulati funkcionisanja demokratije. Početak stvaranja digitalnog društva prati preispitivanje i redefinisanje osnovnih društvenih vrednosti, ustavnih principa i ukupnog pravnog okvira. Danas je lična sloboda pojedinca uslovljena ili donekle ograničena dominacijom tehnologije, u kontekstu izgradnje sistema digitalne ekonomije, digitalnog društva i digitalnih vlada. Sama tehnologija i modaliteti njenog korišćenja oblikuju nove oblike vladavine i nove modalitete vladavine prava. Koliko smo blizu takozvanoj digitalnoj vladavini prava? Ovaj rad ima za cilj da iz široke perspektive sveobuhvatno ispita uticaje digitalne tehnologije na tradicionalnu vladavinu prava, kao i da razmotri značaj i sadržaj nastajuće digitalne vladavine prava.

Ključne reči: *digitalna tehnologija, vladavina prava, digitalna vladavina prava, ljudska prava.*

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CIP - Каталогизација у публикацији
Библиотеке Матице српске, Нови Сад

34:316.3”20”(082)

INTERNATIONAL Scientific Conference “Legal days - Prof. Slavko Carić” (22 ; 2025 ; Novi Sad)
XXII International Scientific Conference “Legal days - Prof. Slavko Carić”, “Law and Justice”, October 10th and 11th 2025 in Novi Sad : [proceedings] / [The Editor-in-Chief Milan Počuča]. - Novi Sad : The University of Business Academy, The Faculty of Law for Commerce and Judiciary, 2025 (Novi Sad : Feljton). - 614 str. : tabele, graf. prikazi ; 24 cm

Radovi na engl. jeziku. - Tiraž 100. - Str. 15: Introductiory remarks / Milan Počuča. - Napomene i bibliografske reference uz tekst. - Bibliografija uz svaki rad. - Rezime na srp. jeziku uz svaki rad.

ISBN 978-86-86121-84-4

a) Правна наука -- Савремено друштво -- 21. в. -- Зборници

COBISS.SR-ID 176461065