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DOI <https://doi.org/10.51989/NUL.2022.3.16>**THE ROLE OF LAW AND THE RULE OF LAW IN THE DIGITAL AGE¹****Razmetaeva Yulia Serhiivna,**

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The article highlights the changing role of law in the digital age, as well as the threats to such fundamental components as the rule of law, human rights and democracy. It is noted that some technologies and the consequences of their use can outstandingly transform and even replace the legal rules, which primarily affects justice. The article reveals the implications of the digital age that can undermine trust in law and public institutions, namely changes in the structure of communications, dispute resolution, the transition of trust from institutional to "metaphysical". The threats to the rule of law arising from the acquisition of normative and governance roles by digital platforms, as well as from the subtle or direct undermining of human rights, the mismatch of high rates of technological development and social processes to the slow reaction of democratic institutions regarding some dangers.

The article questions the argument that technology can cope with the consequences of using technological tools. Attention is drawn to the dilemma we face when we risk losing democracy and the rule of law in favor of an effective response to new challenges, or do not have time to respond effectively, and therefore do not cope with a significant increase in threats. The article emphasizes that in the digital age there may be an unprecedented crisis of the fundamentals of society and coexistence, and it will be necessary to find the right balance between old and new, so that innovation grows and the rule of law does not narrow. Finally, attacks are described that affect the very essence of law, including mistrust and growing frustration that law and its mechanisms seem incapable of responding adequately to the challenges of the digital age, as well as algorithmization and its profound impact on legal relations and understanding of law.

Key words: digital age, rule of law, law, technologies, democracy.

Разметаєва Юлія. Роль права та верховенство права у цифрову епоху

У статті висвітлюється зміна ролі права у цифрову епоху, а також загрози для таких фундаментальних складників, як верховенство права, права людини та демократія. Зазначається, що деякі технології та наслідки їх застосування можуть значно видозмінювати та підмінити собою правові правила, що передусім позначається на правосудді. У статті розкриваються такі імплікації цифрової ери, які здатні підірвати довіру до права та публічних інститутів, а саме зміни у структурі комунікацій, вирішення суперечок, перехід довіри від інституційної до «метафізичної». Аналізуються такі загрози для верховенства права, що виникають внаслідок набуття цифровими платформами нормативної та управлінської ролі, а також внаслідок тонкого або прямого підриву прав людини, невідповідності високого темпу розвитку технологій і суспільних процесів повільній реакції демократичних інститутів, що не дозволяє їм повною мірою застосовувати запобіжники певним загрозам.

У статті ставиться під сумнів аргумент про те, що технології можуть справитися з наслідками застосування технологічних інструментів. Звертається увага на дилему, яка ставить нас перед вибором, коли ми ризикуємо втратити демократію та верховенство права на користь ефективної відповіді на нові виклики, або не встигаємо дати цю ефективну відповідь, і, відповідно, не справляємося зі значним збільшенням рівня загроз. У статті наголошується на

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тому, що в цифрову епоху може настати безпрецедентна криза фундаментальних основ суспільства та співіснування, й потрібно буде знайти правильний баланс між старим і новим, щоб інновації зростали, а поле верховенства права не звужувалося. Нарешті, розглядаються атаки, які зачіпають саму сутність права, включно з недовірою та зростанням розчарування, що право та його механізми, здається, неспроможні адекватно реагувати на виклики цифрової ери, а також алгоритмізація та її глибокий вплив на правовідносини та розуміння права.

Ключові слова: цифрова епоха, верховенство права, право, технології, демократія.

The digital age is still not well understood, despite the fact that the impact of its features on the fundamental pillars of social order, such as human rights, the rule of law and democracy, is quite significant. We seem to have entered a time where technology affects law more than law affects technology. In particular, it is quite clear that we are not coping with the threats to human rights that voluntarily or unwittingly arise from digital transformation. We may also not have time to ride the wave of positive consequences of this transformation that could contribute to a better realization of fundamental rights. As a result, both jurisprudence and legal theory are often not good enough to offer a decent response to both types of change, both threatening and promising. It seems that one should take into account such implications of the digital age that affect all three fundamental pillars, changing both the way individuals act and communicate in the private and public spheres, as well as public decision-making and relationships with institutional trust. In order to analyze the extent and depth of these changes, this article focuses role of law and its important foundation such as rule of law faced the digital age challenges and treats.

When technologies and their consequences (or their owners and beneficiaries) change or replace legal rules, this can affect the law as a whole. The growing gap between legal and technological reality is becoming increasingly threatening. As Lon L. Fuller wrote, "Law, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials. The respect we owe to human laws must surely be something different from the respect we accord to the law of gravitation" [1, p. 632]. But if law is gradually replaced by rules of a different kind, and justice processes are replaced by purely technological tools for appealing decisions, this negatively affects respect for and trust in law.

Under the influence of the implications of the digital age, there is a substitution of fundamental openness with illusory freedom in cyberspace, changes in the structure of communications, resolution of disputes, a shift in trust from the institutional (when we trust legitimate public institutions) to the "metaphysical" in the sense of its abstract and even somewhat groundless nature (when we trust technologies as such, the platforms that promote them and the companies that produce them). Into the digital age "we are facing not only with the transformation of the structure of experience, but with the loss of experience as such, and the unprecedented crisis of law in today's world is perhaps the most alarming symptom of this process" [2, p. 135]. Changes occur both in the structure of individual experience and in general. Changes also take place in society as such, reflecting on public practices and procedures for making public decisions.

This transformation is also taking place against the backdrop of a general crisis of important values and institutions, including the rule of law. Brian Z. Tamanaha points out that the instrumental mindset towards law is becoming more and more influential, and this in itself is dangerous, since "an instrumental view of law means that law – encompassing legal rules, legal institutions, and legal processes – is consciously viewed by people and groups as a tool or means with which to achieve ends" [3, p. 5]. Perhaps this danger is all the more serious in the digital age, the more instrumentally we perceive reality, getting used to relying on accessible and convenient digital technologies, on the one hand, and ceasing to question complex issues, lost in endless streams of contradictory and often simplified information, on the other.

One of the major challenges to the rule of law in the digital age is the normative and governance role of digital platforms. Formally belonging to the private sector, they are increasingly obliging and powerful,

while not being bound by the constraints of the public sector. This manifests itself, for example, in an online environment that seems to be decentralized and free, but in fact a significant part of it is divided among the most influential platforms. According to Nicolas Suzor, "the rule of law framework provides a lens through which to evaluate the legitimacy of online governance and therefore to begin to articulate what limits societies should impose on the autonomy of platforms" [4]. He proposes three criteria that should be applied to platform management, namely (1) making decisions according to a set of rules, and not in a way that is arbitrary or capricious; (2) consistency and equality in the application of these rules and their clear, stable and understandable nature; (3) adequate due process safeguards, including an explanation of why a particular decision was made, and some form of appeal process allowing for an independent review and a fair dispute resolution [4]. However, in order to put platforms and companies in such a framework that is more characteristic of public institutions than private or pretending to be such, a major change in the rules of the game is needed. This applies both to the regulation of the activities of private actors who are the owners or main beneficiaries of certain technologies. This also applies to the desire of the actors themselves to adhere to a new ethical and legal framework, and not to seek profit in vulnerabilities, including gaps in the legal field.

Another challenge to the rule of law is what is happening to human rights in the digital age. Describing rule of law interpretations Jesús Fernández-Villaverde emphasizes that "a thick interpretation of the "rule of law" adds a number of substantive commitments to the formal conditions of the thin interpretation, in particular, the respect for individual liberties" [5, p. 23]. Respect for individual rights and freedoms cannot be ensured by the power of the state alone. It grows out of several sources: mutual individual recognition, values cultivated in society, proper institutions and procedures, not just legal ones. The subtle undermining of human rights in the digital age also stems from several sources: a change in communication style leading, among other things, to being trapped in opinion bubbles

and the subsequent rejection of otherness, doubts about shared values amid growing populism and polarization, weakening of public institutions due to poor coping with new challenges and significant changes in procedures, primarily automation and algorithmization. More direct threats to human rights are the ineffectiveness or low efficiency of mechanisms for their protection (for example, online), discrimination due to digital transformation (for example, improving access to public services for some groups and making access more difficult for others), the erosion of certain fundamental rights due to the activities of companies (for example, privacy and freedom of expression).

It should be noted that numerous attempts are being made to improve the human rights situation. The Declaration on European Digital Rights and Principles, proposed 26 January 2022, is one of the attempts to overcome these challenges. Among other things, this document affirms the need of further strengthened of the democratic oversight of the digital society and economy, in full respect of the rule of law principles, effective justice and law enforcement [6]. At the same time, connecting the oversight of the digital society with the requirements of the rule of law could be difficult. There could be a very thin line here between democratic oversight and non-democratic control. Digital cameras on the roads and streets were originally something to improve safety and make traffic more manageable. However, the number of cameras, the degree of recognition of details by them, the continuity of observation of people in all corners of the conditionally public space today force us to reconsider the previously permitted use. More alarmed voices say that the step from the pursuit of security to digital surveillance is very short.

Another challenge to the rule of law could be what Kebene Wodajo called "digitally mediated injustice" [7]. This is especially important in administration of justice. On the one hand, the use of digital tools and, above all, intelligent algorithms can improve access to justice, reduce the cost of legal proceedings, reduce the time for consideration of simple cases, and even increase impartiality. On the other hand, the

digital divide, algorithmic discrimination and errors in technology can significantly impair access to and administration of justice for both individuals and social groups. A similar situation develops in the field of public services. In particular, the development of technological tools "including the expansion of digital government, the use of artificial intelligence, and the ability to collect and analyze big data, promise to make public sector organizations leaner, more efficient, and more responsive to citizens' needs" [8]. At the same time, some needs of citizens may not be taken into account in automated processes, and any problem, being embedded in algorithmic decision making, can multiply many times over.

The common arguments in favor of technology from the owners of digital tools and platforms is the one that claims that "new technologies can solve the very problems they create" [9]. This argument seems to us at least simplistic, for two reasons. First, technology is not some magical artifact that automatically fixes what it has done. Second, the consequences of the introduction and deployment of technologies can be poorly predicted and not tracked in time until their negative effect becomes devastating. Particularly in the early days of social media, it was difficult to foresee that they would have such an overwhelming influence on opinion formation, that it would be possible to predict political preferences through profiling, or to successfully sell products people really don't need right in their own blog feeds. In addition, technologies do not fall on our heads from the sky again, like some kind of magical gifts. They have creators, developers and customers, and in this sense, technologies repeat the shortcomings of these creators, developers and customers, in whole or in part, intentionally or unintentionally.

Undoubtedly that technologies in the digital age is advancing incredibly fast, in some ways making it impossible for us to foresee some of the consequences. The signs of the digital age are this rapid development, as well as the accelerated pace of life of individuals and society. At the same time, as rightly noted, a high-speed society "is governed by a slow-motion democracy" [10]. This collision creates a dilemma when "either the political system

speeds up decision making at the cost of (slow) democracy (option 1), or it holds on to slow democracy at the cost of problem solving (option 2)" [10]. Thus, we either risk losing democracy in favor of an effective response to new challenges, or we do not have time to give this effective response and, accordingly, the threats to democracy, as well as to human rights and the rule of law, are greatly increased.

An unprecedented crisis in the fundamental foundations of society, such as democracy, human rights and the rule of law, as well as, to some extent, personal value foundations, this is what we may be facing in the digital age. This, in turn, may create a temptation to act in an efficient rather than legal manner. As I. Portela rightly pointed out, "the government's seizure of discretion creates a ratchet effect whereby the discretion and exceptions to the rule of law made during the crisis ossify and never return to pre-crisis levels" [11, p. 118]. Indeed, we could see that those legal foundations and public institutions that have passed the test of time and trust do not seem to be good enough in the digital age. Yet it is incredibly predominant not to deviate from the foundations that we understand as fundamental to our common coexistence.

It is important that the crisis mentioned above came into the digital age incredibly quickly. Where previously strengthening institutions, improving their quality and credibility could help, if we recall at least the success of some post-totalitarian states that returned to or developed democratic governance and ways of life based on human rights, now this strategy no longer seems to work. As noted, "Just like culture, institutions change only slowly, but the time frame with which institutions change is generally much shorter than that of culture" [12, p. 112]. Remarkably, that almost all attempts at institutional change look slow, clumsy and, more importantly, insufficient in our digital world, where the pace of life, decision-making, innovation and socio-cultural change have accelerated significantly. Therefore, we will need to find the right balance between old and new, so that innovation grows and the rule of law field does not shrink.

Last but not least, what we should pay attention to is the essence of law and the

rule of law, which also seems to be under attack. The first source of these attacks is on the surface and stems from a growing frustration that the law and its mechanisms seem incapable of responding adequately to the challenges of the digital age. The second source is deeper, these are groundwaters that are almost imperceptibly eroding the soil, and this is what will be the strongest threat in the coming years – an algorithmization. The number and influence of artificial agents included in all levels and types of relationships has increased significantly in the last few years. This creates a situation where we begin to rely more and more on such agents to make both every day, and more complex choices. Moreover, the ingrowth of smart algorithms into all spheres of private and public life makes it increasingly impossible to refuse them, even if at some point it turns out that the harm far outweighs the benefit. Algorithmization also gradually affects not only legal relations, but also how we understand law. Algorithmization also

gradually affects not only legal relations, but also how we understand law. For example, this is evidenced by the many times increased attempts to measure and subsequently improve justice, democracy, the rule of law by decomposing them into some mathematical, machine-readable components.

Exploring the deep roots of the rule of law, Jerg Gutmann and Stefan Voigt offer a new indicator of this based on “a weighted sum of the four subindicators with “checks and balances”, “standards in law enforcement» and “impartiality in law enforcement” each given one third of the weight of the subindicator for “universalizability” [13, p. 71]. However, no matter how successful we are in measuring and weighing the rule of law, there is something in it that is difficult to quantify, the spirit of law in other words. Preserving this spirit of law in the face of the unpredictable threats of the digital age is the common task of scholars, lawyers and legal philosophers, law makers and legislators.

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