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THE RULE OF LAW, THE SEPARATION OF POWERS, AND BIG TECH

Abstract: *The growing influence of Big Tech, backed by technological advancement and platformization, poses significant challenges to traditional concepts of the rule of law and the separation of powers. By privately accumulating functions typically reserved for the state, Big Tech now assumes functions traditionally assigned to the state. In light of this, this paper explores the limitations imposed on the rule of law and the separation of powers. It first revisits the classical understanding of these constitutional principles and then assesses the contemporary challenges posed by Big Tech. The analysis then shifts to the rising private (technological) power of Big Tech as a fourth pillar in the separation of powers. Finally, the paper argues for cooperation and coordinated governance between the state and Big Tech, ultimately concluding with final insights on the adaptiveness of the traditional concepts of the rule of law and the separation of powers.*

Key words: Rule of Law, Separation of Powers, Technology, Big Tech, Public and Private Power.

1. INTRODUCTION

The emergence of technology and pervasive entrenchment of large technological companies, collectively known as Big Tech, as a dominant force in contemporary global order has produced profound challenges to foundational constitutional principles, particularly the rule of law and the separation of powers. Moreover, it compels their reexamination. No longer confined to the realms of commerce or communication, Big Tech now exercises unprecedented influence over economic, as well as social, cultural, and political life beyond geographically defined state borders. By controlling infrastructure, intermediary platforms, and applications on a global scale, they wield gatekeeping, informational, and leveraging power. This allows them to take on roles traditionally held by the state effectively positioning themselves as quasi-sovereign entities.

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Traditionally, the rule of law and the separation of powers have functioned as conceptual pillars of constitutional order, designed to limit the concentration of power and ensure that government is held in check. The rule of law is concerned with the nonarbitrary exercise of power while the separation of powers distributes state authority across legislative, executive, and judicial branches to ensure mutual checks and balances. These principles emerged in response to the dangers of centralized power, however, they were developed within a state-centric framework, premised on the assumption that power resides primarily within public institutions. The rise of Big Tech has disrupted this assumption. These companies increasingly perform functions traditionally associated with state authority: they set rules (e.g., through terms of service and policies), enforce those rules (e.g., through content removal), and resolve disputes (e.g., through internal appeals processes). In doing so, they bypass public legal mechanisms. Consequently, Big Tech has come to exercise a form of power that is both institutionally and procedurally similar to that of public authority, yet remains formally private.

To gain a better insight into this, it is necessary to explore how Big Tech constitutes a challenge to a traditional constitutional order by evaluating its impact on the principles of the rule of law and the separation of powers; special focus is on how Big Tech disrupts the traditional boundaries between public and private power. Also, particular attention should be given to the structural characteristics of platformization, the accumulation of gatekeeping, informational, and leveraging powers, and the ways in which these capacities position Big Tech as an actor with legislative, executive, and judicial-like authority, and ultimately as a “fourth pillar” of power. While not formally recognized in constitutional theory, the emergence of this fourth pillar demands rethinking of the concepts and the constitutional order, given that traditional institutional and procedural instruments and mechanisms often fail in addressing the scale and the complexity of Big Tech’s influence. Yet, rather than dismantling the classical triadic structure, the goal should be to ensure that the rule of law and the separation of powers endure in the technological age, by preserving their foundational values while incorporating new mechanisms for cooperation and coordination.

2. THE RULE OF LAW

2.1. CONCEPTUALIZING THE RULE OF LAW

The concept of the rule of law is a foundational concept in constitutional law, but is also famously elusive. Although widely invoked in the constitutional framework and its related political discourse, it resists a universally agreed-upon definition. Despite numerous attempts over the

past decade to clarify what the rule of law means (or ought to mean), no single definition has reached consensus.¹ Definitions vary across time and context and reflect the evolving nature of the concept itself. As Bedner and Postema both point out, the term “rule of law” serves as shorthand for a broad family of legal traditions, including the British and American *rule of law*, the German and Dutch *Rechtsstaat*, and the French *état de droit*.² Indeed, as Scheppele puts it, “the rule of law has many lives”.³ Though these traditions differ, they share a common concern with the limitations and legitimate use of power under law. Yet it is not, as McKeown notes, “solely in the eye of the beholder”.⁴

Dicey, who popularized the term the rule of law, outlined its three interrelated principles: a government constrained by law, legal equality for all citizens, and the protection of fundamental rights.⁵ In this tradition, the rule of law is opposed to systems in which the government exercises wide, arbitrary, or discretionary powers.⁶ At its core, the rule of law is a normative ideal aimed at curbing the arbitrary and inequitable exercise of power.⁷ As such, the rule of law is designed to constrain power and guide its use through institutions and procedures that apply equally to all.⁸ This concern with preventing arbitrary rule is echoed by Bedner, who emphasizes that the rule of law exists to limit the unbalanced or arbitrary use of state power. Furthermore, the rule of law serves a protective function, shielding individuals from harm by both the state and fellow citizens,⁹ which resonates with due process. Postema reinforces this view by framing the rule of law as a bulwark against the imposition of will by the powerful.¹⁰ This way, the rule of law seeks to channel authority in non-arbitrary ways, guarding against its misuse and abuse in an understandable and predictable way, thus also invoking legal certainty.

1 Bedner, A., 2010, An Elementary Approach to the Rule of Law, *Hague Journal on the Rule of Law*, Vol. 2, No. 1, p. 48; Uvarova, O., 2025, The Rule of Law and Corporate Actors: Measuring Influence, *Hague Journal on the Rule of Law*, Vol. 17, No. 1, p. 4.

2 Bedner, A., 2010, p. 49; Postema, G. J., 2022, *Law's Rule: The Nature, Value, and Viability of the Rule of Law*, Oxford, Oxford University Press, p. 7.

3 Scheppele, K. L., 2024, The Life of the Rule of Law, *Annual Review of Law and Social Science*, Vol. 20, No. 1, p. 18.

4 McKeown, M. M., 2023, The Future of Democracy and the Rule of Law, *Virginia Journal of International Law Online*, Vol. 64, p. 2.

5 *Ibid.*

6 Dicey, A. V., Michener, R., 1982, *Introduction to the Study of the Law of the Constitution*, Indianapolis, Liberty Fund, Incorporated, p. 110.

7 Krygier, M., The Rule of Law: Legality, Teleology, Sociology, in: Palombella, G., Walker, N., (eds.), 2009, *Relocating the Rule of Law*, pp. 45, 60; Bedner, A., 2010, p. 50.

8 Krygier, M., 2009, pp. 45, 60.

9 Bedner, A., 2010, pp. 50–51.

10 Postema, G. J., 2022, p. 8.

2.2. PROCEDURAL AND SUBSTANTIVE APPROACH TO THE RULE OF LAW

The traditional conceptualization, as described in the previous sections, builds towards the procedural aspect of the concept of the rule of law, by which both the government and citizens are bound by and abide by the law.¹¹ In both his early and later work, Tamanaha equates the procedural aspect with legality.¹² This basic understanding is also echoed in Bingham's account, which stresses that state authorities must be both bound by and benefit from laws that are publicly promulgated, prospective, and administered in courts.¹³

This is a minimalist account of the concept of the rule of law,¹⁴ which views the rule of law primarily as a means to constrain arbitrary power by ensuring that state actions are governed by known, general, foreseeable, and equally applied rules, rather than by *ad hoc* discretion. In this view, the government may impose sanctions or confer benefits only through clear and understandable rules and due process, not arbitrary commands.¹⁵ Following the procedural aspect, the Venice Commission, for example, provides a structured checklist of rule-of-law benchmarks, including legality, legal certainty, prevention of abuse (misuse) of powers, equality before the law and non-discrimination, and access to justice.¹⁶ In this sense, the procedural aspect represents the most basic level of the legal order, as it is primarily concerned with issues such as the prohibition of arbitrariness, equality before the law, legal certainty, foreseeability, and due process. This baseline does not incorporate broader values like democracy or human rights (which Tamanaha, for example, argues should be treated as separate concerns).¹⁷ This aligns closely with classical legal theorists such as Fuller and Raz.¹⁸ This approach is favored by many legal

11 Tamanaha, B. Z., 2012, The History and Elements of the Rule of Law, *Singapore Journal of Legal Studies*, p. 233.

12 Moller, J., Skaaning, S.-E., 2012, Systematizing Thin and Thick Conceptions of the Rule of Law, *Justice System Journal*, Vol. 33, No. 2, p. 136.

13 Bingham, L., 2007, The Rule of Law, *The Cambridge Law Journal*, Vol. 66, No. 1, p. 69.

14 Moller, J., Skaaning, S.-E., 2012, p. 136. See also Moller, J., The Advantages of a Thin View, in: May, C., Winchester, A., (eds.), 2018, *Handbook on the Rule of Law*, Cheltenham, Edward Elgar Publishing Limited, pp. 21–33.

15 Boom, C. D., 2015, The Importance of the Thin Conception of the Rule of Law for International Development: A Decision-Theoretic Account, *Law and Development Review*, Vol. 8, No. 2, p. 295.

16 Council of Europe Venice Commission, 2016. Rule of Law Checklist, 11–12 March; Rosengrün, S., 2022, Why AI is a Threat to the Rule of Law, *Digital Society*, Vol. 1, p. 2.

17 Tamanaha, B. Z., 2012, pp. 233–234.

18 Boom, C. D., 2015, pp. 295–297; Tamanaha, B. Z., 2012, p. 233; Brownsword, R., 2020, *Law 3.0: Rules, Regulation, and Technology*, Abingdon, Taylor & Francis Group, p. 84.

theorists precisely because it avoids normative disputes and focuses on the technical features of law.¹⁹ However, confining the rule of law to procedural requirements alone can risk legitimizing threats to a constitutional system, such as discrimination, climate change, or the use of technology²⁰ (discussed further in text).

From a substantive aspect, the concept of the rule of law is positioned under much broader, sometimes even maximalist terms.²¹ The concept is understood as governance based on a sound public understanding of individual rights.²² In other words, the rule of law promotes fundamental rights²³ as rule-of-law systems must enable citizens to enjoy a core set of rights and freedoms, such as the right to privacy and freedom of expression. Another cornerstone of the substantive approach is also accountability, both vertical (of government to citizens) and horizontal (separation of powers across the branches of government), given that governments are subject to checks and balances that prevent abuse and misuse of power.²⁴ Apart from this, the substantive approach incorporates the principle of access to justice,²⁵ meaning that a rule-of-law system must ensure suitable avenues for individuals to claim their rights. This approach also requires that the government governs not only according to rules but also according to “good and/or just criteria”, i.e., those that reflect democratic participation and representation, among others.²⁶ Overall, the substantive aspect aims to incorporate not only legality but also broader political and moral goals, including separation of powers, accountability, checks and balances, participation, representation, fundamental rights, and access to justice.²⁷ As such, this approach aligns closely with philosophers Dworkin and Epstein.²⁸ Boom, indeed, emphasizes the instrumental benefits of this approach, which includes fostering compliance, as citizens are more likely to

19 Shaffer, G., Sandholtz, W., *The Rule of Law under Pressure: The Enmeshment of National and International Trends*, in: Shaffer, G., Sandholtz, W., (eds.), 2025, *The Rule of Law under Pressure: Transnational Challenge*, Cambridge, Cambridge University Press, p. 14.

20 See McKeown, M. M., 2023, p. 7.

21 Moller, J., Skaaning, S.-E., 2012, p. 136.

22 Dworkin, R., 1985, *A Matter of Principle*, Cambridge, Harvard University Press, pp. 11–12.

23 Bedner, A., *The Promise of a Thick View*, in: May, C., Winchester, A., (eds.), 2018, *Handbook on the Rule of Law*, Cheltenham, Edward Elgar Publishing Limited, pp. 66–67.

24 Postema, G. J., 2022, p. 115. Similarly Bedner, A., 2018, p. 46.

25 Bedner, A., 2010, pp. 67–69.

26 Boom, C. D., 2015, p. 297.

27 Shaffer, G., Sandholtz, W., 2025, p. 15.

28 Boom, C. D., 2015, pp. 295–297.

obey laws and engage with institutions they perceive as fair and protective of their rights.²⁹ At the same time, this approach mandates that no power is exempt from judicial scrutiny, in order to ensure compliance with fundamental constitutional values.³⁰ It is, however, true that this concept is inherently more contested,³¹ as it envisions the rule of law as a normative ideal, not just a governance mechanism.

2.3. THE THIN AND THICK RULE OF LAW

The formalist understanding captures the essence of what it means to be ruled by law and is central to many “thin” definitions of the rule of law. The focus here is on the legal order and courtrooms. The substantive approach, however, incorporates broader substantive values, thereby capturing broader, “thick” or *Rechtsstaat* dimensions of the rule of law. The focus here is on the legal system and the nature of the state. Also, while the thin view links to a “minimalist” understanding, the thick view roughly corresponds to a “maximalist” understanding of the concept.³²

This distinction between the “thin” (or formal) and “thick” (or substantive) concepts of the rule of law is one of the most persistent debates in the literature.³³ Obviously, these two perspectives differ not only in scope but also in the functions they emphasize, the values they incorporate, and the criteria by which they judge a legal system’s concept of the rule of law.³⁴ Still, beneath these elements lie two widely recognized functions that the rule of law is meant to fulfill: first, safeguarding against the potential abuse and misuse of state or public power – central to the development of the rule of law in the Western tradition; second, focusing on the overall legal system and social order – with particular prominence in the context of global rule of law promotion.³⁵

While the thin/thick divide is analytically useful, there is no linear progression from thin to thick.³⁶ Definitions of the rule of law often combine elements in unique ways, some emphasizing equality before the law or legal certainty, others prioritizing fundamental rights or access to jus-

29 *Ibid.*, p. 298.

30 Allan, T. R. S., *The Rule of Law: Philosophical Foundations of Constitutional Law*, in: Dyzenhaus, D., Thorburn, M., (eds.), 2016, *Oxford Constitutional Theory*, Oxford, Oxford University Press, p. 204.

31 Shaffer, G., Sandholtz, W., 2025, p. 15.

32 Moller, J., Skaaning, S.-E., 2012, p. 136.

33 Bedner, A., 2010, p. 54.

34 Rosengrün, S., 2022, p. 2.

35 Bedner, A., 2018, pp. 35–36.

36 *Ibid.*, p. 36.

tice. The range of definitions exists on a spectrum, but not all thick concepts build upon thin ones in neat sequence.³⁷

However, what has been discussed so far offers a framework for a structured list of rule-of-law benchmarks that aims to discover the main elements of the rule of law. The thin notion is linked to the American term “rule of law” and is a procedural and minimalist approach to the rule of law that focuses on legal order, for the purpose of enabling safeguards against the abuse and misuse of power. As such, it focuses on courtrooms and principles such as the prohibition of arbitrariness, equality before the law, legal certainty, foreseeability, and due process. The thick notion links to the German and Dutch term *Rechtsstaat*,³⁸ it is a substantive and maximalist approach that focuses on the legal system and the nature of the state to limit the power of the state, while upholding certain values. As such, it focuses on concepts that could be organized as four core values of the rule of law: (1) constitutional governance (legality, separation of powers, accountability, and checks and balances), (2) democracy (participation and representation), (3) respect for fundamental rights, and (5) access to justice.

3. CONCEPTUALIZING THE SEPARATION OF POWERS

One of the central pillars of the thick notion of the rule of law is the principle of constitutional governance – an ideal that is inconceivable without the concept of the separation of powers, along with legality, accountability, and checks and balances. Or, in other words, the separation of powers is an implicit requirement of the rule of law.³⁹ This concern echoes Locke’s assertion that “wherever law ends, tyranny begins.”⁴⁰ In this context, the separation of powers is not merely a structural preference but a constitutional safeguard, directly tied to the prevention and limitation of domination and arbitrariness of state or public power.⁴¹

The classical articulation of this doctrine is found in Montesquieu’s division of governmental power into three basic functions: legislative, executive, and judicial.⁴² Vile later refined this into the so-called pure doctrine

37 Bedner, A., 2010, p. 54.

38 Allan, T. R. S., 2016, p. 204.

39 *Ibid.*, p. 211.

40 Locke, J., (1690) 1988, *Second Treatise of Government*, Cambridge, Cambridge University Press, p. 400.

41 Allan, T. R. S., 2016, p. 203.

42 Barberis, M., Sardo, A., The Separation of Powers: Old, New, and Newest, in: Załuski, W., Bourgeois-Gironde, S., Dyrda, A., (eds.), 2024, *Research Handbook on Legal Evolution*, Cheltenham, Edward Elgar Publishing, p. 264.

of separation of powers, composed of the functional distinction between legislative, executive, and judicial, and the division of government into corresponding branches.⁴³ In practical terms, the separation of powers “means clear identification of the powers and duties of the executive, legislative, and the judiciary,”⁴⁴ which “should be organizationally divided from one another.”⁴⁵

Based on this, the separation of powers works primarily as a concept of prohibition of the usurpation of power, which bars any institution from exercising powers that have not been constitutionally assigned to it.⁴⁶ In practical terms, it aims to prevent or limit concentration or abuse and misuse of power, as it provides for the preservation of legitimacy by implying accountability for the usurpation, abuse, or misuse. On a similar note, the separation of powers also works as a prerequisite for checks and balances, given that, in addition to division, there is a system of mutual constraint.⁴⁷ In practical terms, this model, inspired by Montesquieu’s broader insight, aims to balance the power through checks.⁴⁸ Within this model, power is moderated through reciprocal oversight between the branches, enabling the safeguarding of fundamental rights and providing access to justice, in order to mitigate the causes and consequences of their potential infringement. Ultimately, the value of the concept lies in its utility as a framework for understanding and organizing state power.⁴⁹ This makes the division of power tightly connected to other benchmarks of the thick notion of the rule of law.

4. (CONTEMPORARY) CHALLENGE(S) TO THE RULE OF LAW AND THE SEPARATION OF POWERS

The rule of law is under mounting pressure today, from a range of challenges. The deep structural threats can be grouped into three categories: subversion, erosion, and weakness.⁵⁰ Subversion refers to threats

43 Vile, M. J. C., 1967, *Constitutionalism and the Separation of Powers*, Oxford, Clarendon Press, pp. 13–18.

44 Adewumi, T. A., 2025, Rule of Law, Corporate Governance and AI Humanoid Robots: Charting the Course for a Global Regulatory Framework, *Mizan Law Review*, Vol. 19, No. 1, p. 104.

45 Möllers, C., 2013, *The Three Branches: A Comparative Model of Separation of Powers*, *Oxford Constitutional Theory*, Oxford, Oxford University Press, pp. 43–44.

46 *Ibid.*, p. 48.

47 *Ibid.*, pp. 45–46.

48 *Ibid.*, pp. 45–48.

49 Dahrendorf, R., 1977, A Confusion of Powers: Politics and the Rule of Law, *Modern Law Review*, Vol. 40, No. 1, p. 11.

50 Postema, G. J., 2022, p. 152.

by individuals or groups aimed at undermining the rule of law. Erosion captures the gradual (democratic) decay of the commitment to support legal norms, institutions, and procedures. These two forces are often intertwined. Finally, weakness points to the fragility of the institutional and procedural structures, instruments, and mechanisms that uphold the rule of law, including a lack of adaptiveness.⁵¹ However, beyond these foundational vulnerabilities, there are global threats to the rule of law, which include, among others, sweeping issues such as discrimination, climate change, migration, technology, and pandemics.⁵²

Among the significant present-day challenges, one is a particular expression of structural vulnerability: the rise of the private (technological) power, encapsulated in Big Tech companies based on technological development.⁵³ Big Tech companies rely on their global economic power, in a mainly unregulated technological environment, to circumvent state institutions and procedures and to themselves regulate critical areas such as surveillance, privacy, freedom of expression, consumer behavior, market access, etc.⁵⁴ This brings forward the question of the arbitrariness in their behavior, which corresponds to a subversive threat to the rule of law. To that end, state or public power is now implicated in addressing how such private (technological) power can be checked.⁵⁵ However, the institutional and procedural structures, instruments and mechanisms seem to display weakness as they are not able to keep up with the speed of technological development. As a consequence, in technological conditions, the rule of law itself faces the challenge of adapting to include governance that extends beyond public, to private forms of regulation, and as such encompasses not only traditional legal rules created by the state or public power, but also rules created by the private (technological) power.⁵⁶ These expanded expectations add complexity to the already fragile framework of the rule of law in the modern era.

The vulnerabilities of the rule of law also point directly to growing tensions within the concept of the separation of powers. Building on the challenges already faced by the rule of law, one long-standing general challenge, involving the principle of the separation of powers, lies in the theoretical and practical difficulty of clearly distinguishing the different

51 *Ibid.*

52 McKeown, M. M., 2023, p. 7.

53 *Ibid.*

54 Barberis, M., Sardo, A., 2024, p. 264.

55 Pinelli, C., 2023, Separation of Powers: Past, Present and Future, *Rivista di Diritti Comparati*, Vol. 2023, No. 1, p. 316.

56 Brownsword, R., 2020, p. 84.

functions of government.⁵⁷ This is especially true in an age where roles between branches often overlap. More specific challenges include, for example, multilevel governance systems, where the separation of powers has expanded to accommodate autonomy at different (lower) levels. While this reflects an evolution of constitutional design, it also reveals how traditional state-centered models are being challenged and reshaped by newer configurations of power.⁵⁸ Another example is the rise of corporate power, which intersects with state authority through political processes, with the aim of accommodating corporate interests.⁵⁹

On this note, the challenge involving the separation of powers is especially intensified by the rise of private (technological) power, substantiated by the development of technology. The rise of private (technological) power subversively threatens public power by introducing its own rule-making capacity, acting as an executive authority and positioning itself as a judicial authority. The rapidly advancing and poorly regulated technology associated with the rise of Big Tech companies exposes the structural weakness of existing state or public institutions and procedures, as they are not able to keep up with challenges such as platformization, its related gatekeeper, information, and leveraging powers. Technology is giving rise to a “new species of power” that is challenging the separation of powers.⁶⁰ Importantly, the rise of private (technological) powers is pointing out a major shift: Big Tech companies are no longer just economic actors; they are now political and legal actors too, challenging the notion of the separation of powers and therefore the notion of the rule of law.⁶¹

5. RISING PRIVATE (TECHNOLOGICAL) POWER

To fully understand the scope of this major shift, it is necessary to examine how large technology companies, so-called Big Tech, exercise private (technological) power in ways that they compete and even surpass

57 Bellamy, R., *The Political Form of the Constitution: The Separation of Powers, Rights and Representative Democracy*, in: Bellamy, R., (ed.), 2005, *The Rule of Law and the Separation of Powers*, Abingdon, Ashgate Publishing, p. 256.

58 Pinelli, C., 2023, p. 313. See also Sahadžić, M., 2020, *Asymmetry, Multinationalism and Constitutional Law: Managing Legitimacy and Stability in Federalist States*, Abingdon, Routledge, pp. 10–16.

59 Uvarova, O., 2025, p. 8.

60 Crofts, P., Rijswijk, H. van, 2021, *Technology New Trajectories in Law*, Abingdon, Routledge, p. 52.

61 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*, Vol. 1, No. 2, p. 2.

traditional state or public powers.⁶² At this point in time, Big Tech encompasses companies, such as Alphabet (Google), Meta (Facebook), Amazon, Apple, and Microsoft, often referred to as GAFAM (Google, Apple, Facebook, Amazon, Microsoft) in the United States, and Baidu, Alibaba, and Tencent, or BAT (Baidu, Alibaba, Tencent), in China, have evolved far beyond their initial status as commercial enterprises. Thanks to the global expansion of the internet and advances in digital technologies, these companies have come to gain power in various sectors, including commerce and industry, but also education, media, entertainment, culture, and politics.⁶³ Their power does not stem from traditional control of territory and population, but from control of technologies – the power characterized as a contemporary Leviathan.⁶⁴ This form of power is exercised through digital infrastructure, digital data, and algorithmic systems, where lines of code embedded in search engines, marketplaces, and content curation platforms subtly but pervasively regulate what information is seen, what goods are bought, and even which social norms are reinforced.⁶⁵ They now operate as quasi-sovereign entities, functioning as both “modern public spaces” and “new governors” in the digital age.⁶⁶

For example, Google’s search algorithms and Amazon’s recommendation systems effectively function as market regulators, shaping consumer behavior, pricing, and business visibility. Google’s shift to mobile-first indexing, for example, significantly impacted the ability of small businesses to reach customers online, privileging those with the resources to optimize their web presence in a mobile-friendly format.⁶⁷ Moreover, the influence of Big Tech extends deep into the social and cultural fabric. Content platforms such as YouTube, Instagram, and TikTok affect how people communicate, relate, and perceive the world, with measurable effects on social norms and behavior.⁶⁸ At the same time, Big Tech acts as a data custodian by collecting, processing, analyzing, and ultimately monetizing massive

62 Corrado, S., 2023, *Leviathan vs Goliath or States vs Big Tech and What the Digital Services Act Can Do About It*, Forum Transregionale Studien, *Working Papers*, No. 25/2023, p. 4; Sun, X., Xiao, Y., 2024, pp. 1–2; Gregorio, G. De, 2019, From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society, *European Journal of Legal Studies*, Vol. 11, No. 2, pp. 66–68.

63 Corrado, S., 2023, p. 4.

64 Postema, G. J., 2022, p. 263.

65 Bayamlioglu, E., Peenes, R., 2018, The Rule of Law Implications of Data-Driven Decision-Making: A Techno-Regulatory Perspective, *Law, Innovation and Technology*, Vol. 10, No. 2, p. 295; Rosengrün, S., 2022, p. 6.

66 Barberis, M., Sardo, A., 2024, p. 272.

67 Rosengrün, S., 2022, p. 6.

68 *Ibid.*

amounts of (personal) information,⁶⁹ often making such data available to third parties, thereby blurring the line between private power and public regulation.⁷⁰ In doing so, Big Tech has transformed from mere enterprises into platform providers with critical infrastructure for economic life as well as for democratic discourse, raising urgent constitutional and legal questions about how such concentrated private power can be governed by the state or public power in the digital era.

To understand the full extent of private (technological) power, one has to look at the example of digital platforms, which serve as key technological and economic, but also social and political structures through which Big Tech expands and entrenches its power. The emergence of platform power is inseparable from the deployment of digital technology in commercial settings, resulting in private (technological) power.⁷¹ However, digital platforms have evolved beyond digital markets: through restructuring and reshaping, digital platforms have transformed into a technological arena that is a backbone of infrastructure, networks, search engines, algorithms, intermediary services, and service providers.⁷² This makes the Big Tech power deeply rooted in the infrastructural entanglements of platforms within the economic, social, and political orders – and ultimately constitutional and legal orders.

As Van Dijck illustrates using the metaphor of the “platformization tree”, digital platforms must be understood as multi-layered systems, comprising interconnected roots (infrastructure), trunks (intermediary services), and branches (applications). The roots of platform power are built on global digital infrastructure, consisting of undersea cables, satellites, data centers, microchips, semi-conductors, and coded internet protocols, among others, much of which is now privatized by major private (technological) powers, such as Google and Amazon, leaving states and governments to seek and compete for control of the infrastructure while Big Tech remains mostly unchecked.⁷³ The trunk represents intermediary platforms, such as search engines, browsers, operating systems, app stores, cloud services, login systems, payment systems, email, and messaging services. These serve as gatekeepers, mediating interactions not only between users and content but also between societal sectors and data flows.⁷⁴ Big Tech companies, such as Google and Apple, dominate this space through

69 Sun, X., Xiao, Y., 2024, p. 10.

70 Crofts, P., Rijswijk, H. van, 2021, p. 53.

71 Sun, X., Xiao, Y., 2024, p. 10.

72 Corrado, S., 2023, pp. 6–7.

73 Dijck, J. Van, 2021, *Seeing the Forest for the Trees: Visualizing Platformization and Its Governance*, *New Media & Society*, Vol. 23, No. 9, p. 2805.

74 *Ibid.*, pp. 2806–2808; Corrado, S., 2023, pp. 6–7; Gregorio, G. De, 2019, p. 78.

proprietary ecosystems (e.g. Google Suite, now Google Workspace, on Chromebooks or Apple Pay on iPhones), effectively creating an environment in which public activity is channeled into private systems,⁷⁵ often without accountability or proper oversight from the state or public power. Further up the tree, the branches represent the applications and services across various sectors, such as public sectors of education and healthcare and public administration, which are increasingly shaped by corporate platform logic.⁷⁶ While some platforms from this pool remain in the public domain, private (technological) powers, such as Google and Amazon, are dominant. For example, Amazon's entry into healthcare with Comprehend Medical and its acquisition of PillPack shows how platforms cross-sectorize their influence, connecting user data across formerly separate domains to underpin their private power in the public sector⁷⁷ mostly without accountability or checks and balances from the state or public power.

Based on this, and tracing Sun and Xiao, it is possible to identify at least three forms of private (technological) power based on platform power: gatekeeper, information, and leveraging power.⁷⁸ Gatekeeper power stems from the platform's control over essential digital infrastructure, allowing it to control how the users operate and participate in technological society.⁷⁹ For example, companies that rely on Apple's App Store are structurally dependent on this platform's architecture but also its rules and policies. Information power means that the platform collects and processes vast amounts of personal data, enabling it to engage in practices such as behavioral (micro) targeting or algorithmic content filtering.⁸⁰ Moreover, the platforms claim ownership over extracted personal data and shield their practices through, for example, trade secrecy and non-disclosure agreements,⁸¹ ultimately questioning fundamental rights. For example, platforms can use data to charge consumers different prices.⁸² Finally, leveraging power allows platforms to expand and integrate across the "platformization tree", often to the detriment of competitors who use the same infrastructure and who often do not have proper access to justice, given the position of Big Tech in the equation. For example, Amazon

75 Dijk, J. Van, 2021, pp. 2806–2808.

76 *Ibid.*, p. 2807; Corrado, S., 2023, pp. 6–7.

77 Dijk, J. Van, 2021, p. 2809.

78 Sun, X., Xiao, Y., 2024, pp. 11–12.

79 *Ibid.*

80 *Ibid.*

81 Postema, G. J., 2022, p. 267.

82 Sun, X., Xiao, Y., 2024, pp. 11–12.

can prioritize its own products over those of third-party sellers on its site, creating a systemic conflict of interest.⁸³

Based on the analysis of the platforms as multi-layered systems with gatekeeper, information, and leveraging power, it can be concluded that the rise and concentration of Big Tech's power lies in threefold dynamics: vertical integration, infrastructuralization, and cross-sectorization.⁸⁴ Vertical integration is the dynamics in which elements of the "platformization tree" are connected bottom-up and/or top-down. This way the platform can consolidate its own flows and prioritize its own products and services. As Van Dijck notices, Apple restricts access to its built-in NFC chip, reserving it for Apple Pay, and thereby excluding competitors. Infrastructuralization means that platforms have become essential intermediaries in technological life from a horizontal perspective.⁸⁵ For example, to sell products to mass customers, a seller is dependent on Amazon.⁸⁶ Finally, cross-sectorization suggests that platforms expand across sectors, such as health, education, and finance. For example, public services, even when state-governed, increasingly rely on proprietary systems controlled by private platforms, as seen in the educational use of Google's tools.⁸⁷

The dynamics described above collectively demonstrate how Big Tech companies consolidate their private power beyond its initial market boundaries and against the state or public power. Together, these dynamics imply that Big Tech seemingly constitutes a fourth pillar of power – not one held by public democratic institutions, but by private entities whose power is rooted in infrastructural ownership, technological control, and legal insulation. This raises critical questions about the rule of law, especially as platform power extends to every layer of public and private life, thus challenging the traditional notion of the separation of powers.

6. BIG TECH: FROM PRIVATE POWER TO THE FOURTH PILLAR

To fully grasp how private (technological) power interacts with the principles of the rule of law and the separation of powers – which have traditionally been the concern of public authority – it is necessary to first revisit the foundational distinction between public and private

83 *Ibid.*

84 Dijck, J. Van, 2021, p. 2808.

85 *Ibid.*

86 *Ibid.*, p. 2809.

87 *Ibid.*, pp. 2808–2809.

power. The traditional constitutional and political order has long rested on the assumption that the state is the central and most powerful actor in society. Historically, the concept of power in legal contexts has referred almost exclusively to public or state power.⁸⁸ This concept laid the groundwork for the concept of the rule of law and its pertinent instruments and mechanisms, such as the separation of powers, designed to divide and limit branches of power (legislative, executive, and judicial). Uvarova captures this historical assumption succinctly, stating that the rule of law has been understood largely in terms of what the state can and cannot do.⁸⁹ Legal frameworks were thus developed primarily with state or public power in mind.

However, this traditional framework is increasingly challenged in the face of the dramatic rise of private (technological) power. The growing power of Big Tech has prompted scholars to consider them as “quasi-states”.⁹⁰ As Postema argues, advances in technology have created “a new and radically different form of power”, one that transcends the boundaries of traditional governance.⁹¹ This is because Big Tech, such as GAFAM or BAT, operates not only as economic actors with global economic power,⁹² but also increasingly engages in rule-making and enforcement, which are the roles that traditionally fall within the scope of the legislative and executive powers of the state.⁹³ As suggested in the previous sections on platformization, this is perhaps most evident in the power held by digital platforms. Zuckerberg himself acknowledged that platforms are now acting “more like a government than a traditional company”, setting norms and enforcing rules in ways that affect billions of people.⁹⁴

This transformation poses profound challenges to the traditional understanding of the rule of law and consequently the separation of powers. Barberis and Sardo identify three dimensions of this transformation that coincide with the proposed rule-of-law benchmarks.⁹⁵ First, the communication functions, which are essential to democratic participation and representation, have shifted from the state to private platforms. Second, Big Tech’s cross-border reach renders national legal frameworks increas-

88 Sun, X., Xiao, Y., 2024, p. 2.

89 Uvarova, O., 2025, p. 2.

90 Corrado, S., 2023, p. 5.

91 Postema, G. J., 2022, p. 265.

92 *Ibid.*, p. 270.

93 Similarly: Sun, X., Xiao, Y., 2024, p. 12; Rosengrün, S., 2022, pp. 6–7.

94 Foer, F., 2017, *World Without Mind: The Existential Threat of Big Tech*, New York, Penguin Press. Quoted in: Rosengrün, S., 2022, pp. 6–7.

95 Barberis, M., Sardo, A., 2024, p. 272.

ingly ineffective, thus challenging their accountability and the checks and balances held over them,⁹⁶ and access to justice against them. Third, Big Tech has developed its own legal apparatus, with its own institutional and procedural instruments and mechanisms, beyond the state's separation of powers, to maintain control over infrastructure, intermediary platforms, and applications. This enables them to retain gatekeeper, information, and leveraging power, while operating beyond the scrutiny of state or public power, thus subversively exploiting the weaknesses inherent to institutional and procedural instruments and mechanisms resulting from rapid technological advancement.

On that note, state and public power seemingly can no longer be reduced to the Montesquieu's triad.⁹⁷ Although Möllers cautions against hastily declaring any new entity a "fourth power" in the separation of powers, arguing that such claims may be "intellectually lazy",⁹⁸ it is difficult to ignore the profound roles Big Tech plays across different dimensions of power. As Dahrendorf warned, the confusion of power creates vacuums that will inevitably be filled and it is clear that private (technological) power, Big Tech, has rushed in to occupy that space.⁹⁹

One of the striking ways that Big Tech imitates legislative power is through its rule-making capacity. As Coroado and De Gregorio both explain, the terms of service imposed on users (public or private) by platforms are not traditional contracts, but unilateral rules that regulate access to a platform or an app and its enforcement. Importantly, these rules cannot be negotiated, and users must accept them, often without an alternative.¹⁰⁰ This way, Big Tech creates a rather problematic quasi-legal framework, as it aims to privately regulate and govern public environments,¹⁰¹ such as commerce, education, and even healthcare. These rules are not reflective of democratic participation or representation, but of insular corporate logic. Ultimately, this means that Big Tech is not only inserting itself between public and private interests, but it is also blurring boundaries between the two, exerting control in a manner that challenges traditional lawmakers, which are confined to legal frameworks with limited reach.¹⁰²

96 See also Coroado, S., 2023, p. 5; Postema, G. J., 2022, p. 264.

97 Pinelli, C., 2023, p. 313.

98 Möllers, C., 2013, p. 232.

99 Dahrendorf, R., 1977, p. 5.

100 Coroado, S., 2023, p. 13; Gregorio, G. De, 2019, p. 69.

101 Gregorio, G. De, 2019, pp. 69, 82.

102 Dijck, J. Van, 2021, p. 2810.

Beyond adopting rules, Big Tech also enforces them by acting as the executive authorities in their own domains.¹⁰³ In the sea of examples, platforms hold unparalleled surveillance capabilities, a power traditionally reserved for law enforcement agencies and state intelligence. Big Tech argues that analytics can produce social good, although they centralize it with minimal checks.¹⁰⁴ This capacity places them in direct tension with the state of public power, which struggles to regulate or even oversee this across jurisdictions.

In replicating judicial processes, Big Tech increasingly positions itself as a judicial authority. Big Tech has so far developed internal instruments and mechanisms for dispute resolution which resemble the judicial environment.¹⁰⁵ As Corrado illustrates, Meta established an institutionalized appellate process through the Oversight Board, which mimics a judicial body and features the characteristics of the judicial system, regarding neutrality, impartiality, and access to justice, for example, although it serves private rather than public interests.¹⁰⁶ In effect, these mechanisms, busy dealing, for example, with freedom of speech, form an extralegal judiciary that operates outside of traditional constitutional frameworks.

Together, these legislative, executive, and judicial functions performed by Big Tech present a compelling case for viewing the industry as a de facto fourth pillar of power in modern governance. As Barberis and Sardo explain, existing regulatory tools, such as antitrust law or administrative interventions, operate on a case-by-case basis and are often insufficient to tackle the abovementioned challenges.¹⁰⁷ Enforcement bodies (national or transnational, such as the EU Commission), while playing vital roles, still remain constrained by institutional and procedural limits and their geographic boundaries.¹⁰⁸ Moreover, the judiciary currently plays a secondary role in addressing the excesses of digital power. Courts often defer to platforms' editorial autonomy. Meanwhile, the entrenchment of the platforms continues to grow. As Sun and Xiao point out, the suggestion that Big Tech companies should be regulated as public utilities reflects a growing recognition that their power is foundational, closer to the power once exclusively held only by states.¹⁰⁹

103 Gregorio, G. De, 2019, pp. 69–70, 82, 85.

104 Haber, E., Reichman, A., 2020, *The User, the Superuser, and the Regulator: Functional Separation of Powers and the Plurality of the State in Cyber*, *Berkeley Technology Law Journal*, Vol. 35, No. 2, p. 439.

105 Gregorio, G. De, 2019, p. 82.

106 Corrado, S., 2023, p. 13; Gregorio, G. De, 2019, pp. 86–87.

107 Barberis, M., Sardo, A., 2024, p. 273.

108 *Ibid.*, p. 272.

109 Sun, X., Xiao, Y., 2024, p. 17.

7. ENDURANCE OF THE CLASSICAL MODEL AND THE NEED FOR COORDINATED GOVERNANCE

The classical concept of the separation of powers, which posits a tripartite separation of powers into legislative, executive, and judicial branches, aimed at preventing the concentration of power, continues to serve as a critical tool for organizing and distributing power, even amid institutional and procedural diversity despite the influence of Big Tech.¹¹⁰ Indeed, theoretical and practical limitations of it exist, this indicates, however, that what should possibly occur more “is not strict separation but cooperation, coordination, and sometimes confusion.”¹¹¹ The classical model of the separation of powers seemingly requires complementary strategies – especially regarding cooperation and coordination – to remain functional under the challenges of Big Tech.

In this regard, Haber and Reichman propose a collaborative model of governance, built precisely on cooperation and coordination. They propose that cooperation between the state and Big Tech should be institutionalized through joint platforms or consortia, allowing for the participation and representation of diverse stakeholders, including regulators, users, and Big Tech, at all stages of digital policy formation. Of course, such an approach must include mechanisms of oversight to avoid consolidation and/or capture of power.¹¹²

One example of a joint initiative is Gaia-X, a Franco-German project designed to establish a federated and trusted data infrastructure in the EU that can foster an interoperable and secure digital environment. Its vision is to enable decentralized and trustworthy digital ecosystems, while its mission focuses on developing a standard through a framework of specifications, rules, policies, and verification mechanisms. An example of an oversight mechanism is the oversight component integrated into the Decidim platform (used in both public and private contexts such as city councils, universities, NGOs, and trade unions), which enables users to monitor the implementation of proposals and track institutional commitments. While neither Gaia-X nor Decidim represents a flawless solution, both serve as important early models in the evolving landscape of digital governance.

Globally, one of the major such collaborative efforts happened during the 2024 Olympics in Paris, between Big Tech and the French state. Major

110 Möllers, C., 2013, p. 232.

111 Dahrendorf, R., 1977, p. 11.

112 Haber, E., Reichman, A., 2020, pp. 440, 493–495.

technology firms like Atos, Orange, and Intel partnered with government bodies to deliver critical infrastructure for the Games, including digital scheduling, results, and immersive broadcasting, while the French government maintained oversight, ensuring transparency, ethical compliance, and public accountability. This coordination highlighted how technological expertise and state authority can work together.

8. CONCLUSION

Big Tech has not merely influenced the contemporary state – it has influenced the constitutional logic upon which it was built. By accumulating legislative, executive, and judicial-like powers, Big Tech companies have transcended the role of mere private actors. They are creating and enforcing rules, resolving disputes, or, in other words, performing functions that were once solely the purview of state or public power. Also, Big Tech increasingly acts in legally ambiguous spaces, shaping public discourse while remaining largely beyond the reach of traditional legal checks.¹¹³ In this sense, Big Tech is not simply challenging the traditional separation of powers, it is installing itself as a fourth, unaccountable pillar of power, demanding a radical rethinking of the rule of law.

To that end, it has been suggested that the concept of the rule of law and the separation of powers must be reevaluated to capture both state or public and private (technological) powers,¹¹⁴ to be able to hold Big Tech in check, accountable, and consistent with fundamental rights requirements.¹¹⁵ Importantly, while Big Tech presents a profound challenge to traditional constitutional arrangements, it does not make them obsolete. Rather, the rise of platform power reinforces the need to adapt the classical separation of powers, without abandoning its core principles. The classical model still remains a benchmark against which institutional and procedural overreach and encroachment can be assessed.¹¹⁶ First, as one of the benchmarks of the rule of law, the principle of separation of powers has withstood many transformations but continues to serve as a foundational reference point in most constitutional democracies. As such, it provides a framework through which emerging forms of institutional and procedural overreach and encroachment, such as those posed by Big Tech, can be mapped. In other words, as a tested yardstick, it enables us to evaluate

113 Crofts, P., Rijswijk, H. van, 2021, p. 51.

114 Uvarova, O., 2025, p. 6.

115 Postema, G. J., 2022, p. 270.

116 Moller, J., 2018, p. 17; Haber, E., Reichman, A., 2020, p. 439.

contemporary developments against the core elements of the rule of law. Second, relying on this established framework ensures the continuity of a stable comparative exercise, allowing shifts in power to be traced while preserving analytical clarity and consistency. Finally, the triadic structure provides a stable foundation upon which new forms of governance, such as cooperation and coordination, can be built.

Obviously, this innovation in governance is not incompatible with the endurance of the classical separation of powers model. On the contrary, its very resilience lies in its capacity for adaptation. In the face of rapidly evolving digital power, the goal should not be to dismantle the tripartite structure but to complement it with robust cooperation and well-coordinated partnerships between the state and Big Tech. In doing so, it can be ensured that technological governance remains grounded in the rule of law and the separation of powers.

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VLADAVINA PRAVA, PODELA VLASTI I BIG TECH

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APSTRAKT

Rastući uticaj velikih tehnoloških kompanija (Big Tech), podstaknut tehnološkim razvojem i platformizacijom, predstavlja izazov tradicionalnim shvatanjima vladavine prava i podele vlasti. Akumulacijom funkcija koje su tradicionalno bile rezervisane za državu, Big Tech deluje često izvan domašaja uobičajenih instrumenata i mehanizama kontrole i odgovornosti. U tom svetlu, ovaj rad kritički ispituje ograničenja koja uspon privatne (tehnološke) moći nameće vladavini prava i principu podele vlasti. Rad započinje analizom klasičnog razumevanja ovih ustavnih principa, nakon čega sledi razmatranje savremenih izazova koje nameće Big Tech. Analiza se zatim usmerava na rastuću privatnu (tehnološku) moć Big Tech-a kao četvrtog stuba podele vlasti. Na kraju, rad se završava diskusijom o potrebi za saradnjom i koordinisanim upravljanjem između države i Big Tech-a, zaključujući upućivanjem na prilagodljivost tradicionalnih koncepcija vladavine prava i podele vlasti.

Ključne reči: vladavina prava, podela vlasti, tehnologija, Big Tech, javna i privatna vlast.

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