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THE SIGNIFICANCE AND CONNECTION OF THE PRINCIPLES OF CONSTITUTIONALITY AND LEGALITY WITH THE LEGAL ORDER AND RULE OF LAW

ABSTRACT: The rule of law is one of the oldest and most significant ideas in the history of legal and political thought. Contemporary legal scholars widely emphasize that this concept occupies a central place in clearly articulated views concerning the state, law, politics, and economics. As an ideal worth striving toward, the rule of law has been addressed by leading figures in law, economics, and political theory.

The discourse on the principles of constitutionality and legality has consistently served as a cornerstone in affirming the importance of the rule of law in modern legal systems. This is particularly relevant given that these principles are essential to the existence of the legal state. In accordance with the focus of this paper, the authors analyze several key issues: how to determine the significance of the relationship between the principles of constitutionality and legality and the rule of law, how to conceptually present the essence of constitutionality, legality, the rule of law, and the legal state.

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1. Introduction

The rule of law, as an idea, is one of the oldest and the most important ideas in the history of legal and political thought.

The first ideas about a legal state and the rule of law and laws find their origin in "the deep past of legal and political thought. Greek philosophy represented fertile ground for the development of certain elements of these models" (Avramović, 2010, p. 424). Namely, Greek political and legal thought was initially on the stand that "the rule of law is not the rule of any law, but the laws which have been created by the men of thought whose goal was to achieve virtue and general good and well-being and freedom of the citizens in Greek polis" (Tadić, 1996, p. 23).

Later on, the legal thought in ancient Rome relied on Greek experience, based on the ideas of Plato, Solon, Perikles and Aristotle, which through the evolution of legal and political thought emphasized that the laws are necessary and more important than the rule of thought of distinguished wise men (for more, see: Čavoški, 1994, p. 16). In support of this opinion, Avramović (2010) pointed out that "in ancient Rome, Cicero came nearest to the idea of legal state and rule of law. According to him, the existance of good laws represented the guarantee of a good state order" (p. 424).

In the theory of new age, "human rights are viewed as natural, legally based rights of every human being. The mere purpose of a political community, within the scope of liberal thought, is essentially different from the one existing in ancient Greece and Rome; now the state needs to provide the protection of individual rights and set the boundaries that the members of community, including the members of ruling class, may not cross in their conduct and not only to worry about the virtue and moral of its citizens, as it was the case in ancient times. The idea of freedom, within the scope of liberal thought, is defined as freedom to act without causing damage to other people, with a clearly defined requirement that the boundaries for individual conduct must be set by law as a source of rules which regulates necessary rectrictions of individul freedom" (Zekavica, 2018, p. 13). Hence, we can underline that the idea of the rule of law also lies in the restriction of state power by its own laws and that it is not enough just to have a normative framework in order to fully apply the concept of the rule of law. Namely the existence of laws is the vital requirement for the realization of the idea of the rule of law, but in addition to a well established normative framework, it is imporatnt that it is

fully applied and that this application is substantive and value-based. In other words, "legal norms exist so that people can behave in compliance with them. Legal system functions well if the subjects, to whom these norms are directed, comply with them" (Kulić & Kulić, 2015, p. 167). This normative framework should reflect the importance of interconnection between the rule of law and the principles of constitutionality and legality in one state.

In this paper the authors, in the context of the headline theme, will discuss a few important questions – how to define the significance of mutual concord and connection, between the principles of constitutionality and legality and the rule of law, as well as between the rule of law and legal state and how to present the conceptual essence of constitutionality.

2. The significance of mutual concord and connection between the principles of constitutionality and legality and the rule of law

In legal theory, first there was an assumption that "law in external world was manifested as a set of rules of conduct prescribed by the dominant form of social organization (state)" (Mandić, 2017, p. 9). Legal theorists which support this stand are called normativists who, accordingly, "consider that lawfulness, as the key determinant of legal rules, can only be viewed as factual compliance with the rules of conduct prescribed the legal order and expressed though the disposition of legal norm" (Carbonnier, 1992, p. 141). However, a number of authors believe that law "should not be viewed as a set of norms, but as the actual conduct of people. The essence of their theory is that the existence of legal norms which regulate how individuals should behave is not what is important for the concept of law. According to them, what only matters is how people really behave in their everyday lives. Consequently, they believe that law is not a normative, but rather a factual science whose goal is to study human behavior and to norm it up" (Mandić, 2017, p. 9; also see: Kelzen, 1951, p. 64).

When analyzing different approaches in determining law and legal order, the authors also have noted the opinion according to which "law, before all, represents the order of subjects and their immanent law-making sources based on which, accordingly, a legal norm represents one of many elements of legal order" (Prica, 2018, p. 104). The authors also underline that "for the thought of a concrete legal order, "the order" does not mean a rule, or a set of rules, but, on the contrary, the rule is only its constituent part and a tool used by that order. Accordingly, the thought of norms and the thought of rules represent

just one part, the restricted and derived element, of comprehensive legal and scientific task and work" (Schmitt, 2003, p. 9).

Generally, legal order is based on the hierarchy of legal norms. Accordingly, "lower legal acts and material acts of human conduct, connected with the application of legal norms, i.e. to the conduct complying with the legal norms which are the part of these legal acts, must be in accord with the constitution and laws, as the supreme legal acts. It is of vital significance that all segments of legal order are mutually harmonized, since only when they are in a complete concord they can achieve desired goals" (Kulić & Kulić, 2015, p. 168). The authors often underline the importance and need that the conduct of the members of community should be in accord with the requirements prescribed by legal norms and that the legal acts of lower legal force must be in agreement with the legal acts of superior power. In this way we will obtain "the unity of legal order where conditions are created for efficient protection and successful realization of social values proclaimed by them. These values are connected with justice, freedom, human dignity, tolerance, etc." (Kulić & Kulić, 2015, p. 168).

However, the principle of the rule of law and legal state receives its full meaning in contemporary society and it is one of the most important heritage of civilization. The principle of the rule of law and legal state actually means that all citizens, institutions, and organizations, including the government bodies, are accountable to the legal order. The constitution and laws define the rules of conduct which are binding for all people. Here we should emphasize that according to the principle of the rule of law and legal state no power is above law and all citizens are equal before law.

As it is often pointed out in theory, in relation to the discourse on mutual concord and connection between the principle of constitutionality and legality and the rule of law, "the principle of constitutionality and legality is closely related to the rule of law and legal state. Without the application of this principle, the rule of law and legal state could not exist. On the other side, the rule of law has counter-influence on the application of the said principle. The same can be said for the principle of the rule of law. If the principle of constitutionality and legality is not consistently applied, there are no preconditions for the functioning of the legal state and rule of law. Moreover, legal state assumes the rule of law and the rule of law assumes the existence of legal state. In one word, these are the principles whose meaning is interconnected and whose application presumes the action on behalf of both. Otherwise, the goals and values of the legal order could not be achieved" (Kulić & Kulić, 2015, p. 168).

3. Constitutionality and legality

Constitutionality and legality are important legal principles "without which a legal state could not exist – they are the precondition, but also a tool (instrument) for achieving it. As the legal state has its legal and meta-legal meaning, thus these principles have their legal and political content. In legal sense, constitutionality and legality indicate that a legal order has certain character and quality where the constitution and laws are superior to all other lower legal acts and regulations. In such a legal order there is a hierarchy of legal acts and regulations; on the top of this hierarchy stands the constitution with laws as a supreme legal act, where the constitution itself is a law, the supreme law of the country" (Mihajlović, 2009, p. 568).

In accordance to Article 3 of the Constitution of the Republic of Serbia (2006), the rule of law is a fundamental prerequisite for the Constitution which is based on inalienable human rights. The rule of law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary and observance of Constitution and law by the authorities. Also, Article 1 of the Constitution of the Republic of Serbia foresees that Republic of Serbia is a state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values (see also: Radovanović, 2020, p. 87).

Therefore, the crucial characteristics of the principle of constitutionality are the need to harmonize laws and other internal legal acts with the Constitution and accountability of government bodies and their employees to the legal norms which constitute these legal acts. Nikolić (1997) believes that "constitutionality is just a higher form of legality, or legality raised to a higher level" (p. 351).

The new Constitution of the Republic of Serbia, according to Slavnić (2007) "was not accidently adopted in our new history, but it is rather a historical fact – it was adopted at the threshold of new era with the goal to contribute to the consolidation of Serbia as a modern European state" (p. 25). Today "we cannot imagine a single democratic order without constitution, but also without the struggle for more consistent application of adopted constitution which contains basic ideas and principles of the given society" (Kovačević, 2011, p. 217).

As we can conclude from the introductory words, the need to have clearly defined and transparent rules of conduct in a social community is "one

of key milestones in the development of humanity" (Ćupić, 2014, p. 1). The idea to establish and comply with generally accepted rules in a community became prominent in the 12th century when the first written constitutions were adopted across Europe and then in America. It is worth mentioning that the US Constitution from 1787 is considered, in theory, to be the first written constitution adopted by a modern state.

Constitutionality as a legal principle, in its normative meaning is the necessary prerequisite for establishing a legal state. It is binding for the state authority, it restricts and controls its actions, introduces obstacles for arbitrary actions, brings stability into legal order and creates basic conditions for equality and security of citizens in a legal system. Constitutionality as a legal principle, at the same time reflects an institutionalized demand for the protection of democracy and democratic order measured by human rights and freedoms enjoyed by its citizens" (Pajvančić, 2005, p. 7). Thus, "the creator of a normative theory, Hans Kelsen, understands constutionality as the principle of hierarchy of legal acts where lower legal norms are derived from superior ones, all the way up to the constitution, as the supreme legal norm" (Kovačević, 2011, p. 218).

The constitution is an "act of constituting a state on the principles of rule of law and legal state governed by the idea to have combined in one place, in one or more legal acts, all crucial rules related to the existence and functioning of one social and political organization. Although the initial role of the constitution was to regulate basic postulates, premises and principles of state's legal order, time has shown that it cannot survive without efficient system whose aim is to control and protect constitutionality and ensure complete and consistent compliance with both the essence and spirit of constitutional norms by preserving its supremacy and highest legal power" (Ćupić, 2014, p. 1). This is important to underline bearing in mind that "law in books and law in action can be two completely separate things" (Jovičić, 2006, p. 281).

As it has been emphasized by Petrović (2007), "legal and political nature of contemporary constitutions is the result of a long evolutionary development and increasing complexity of their characteristics which together have had great influence on creating and shaping the structure and character of the constitution as a legal act which, owing to being highly important for the functioning of a legal and political system, is often viewed as the indicator of the country's overall level of political culture, democratization and modern flows in its society" (p. 127). Therefore, Kovačević (2011) underlines that "the principle of constitutionality allows stability and security in a society" (p. 217).

Besides the principle of constitutionality, the principle of legality also plays an important role in all democracies.

The principle of legality has found an important place in many scientific reviews, discussions, doctrinary approaches, etc. It can be said that "legality either underlines the dynamic legal principle it pertains to, the efficiency of legal order, or the state and quality of the given law" (Mitrović, 2004, p. 57; see more on: Mitrović, 1996).

It is believed that the concept of legality in legal theory was originally established in German legal literature in 1873 by two theoreticians – Paul Laband and Karl Edwin Luthold (Garner, 1979).

Legality assumes "harmonization of bylaws and other (general and particular) legal acts with law, as well as compliance of people and legal subjects with legal norms contained in these acts. This harmonization must be achieved in both formal and material sense since law does not regulate only the form, but also the content of bylaws and other lower legal acts, both of general and particular nature. Of course, this harmonization is not always precise, particularly when we speak about the content of lower legal acts. In many cases it is done in principle. However, there are legal acts which are specific in nature and their form and content must be regulated in more details" (Kulić & Kulić, 2015, p. 169).

The most famous view on law and legality was presented by French legal scholar Leon Duguit in the first decades of the 20th century. According to him, "legal rule represents the basis of every legal system, while it is on the principle of legality to ensure its efficiency in such a way that no government body can pass a single decision which is not in compliance with previously adopted general norms, or, in another form, a single decision can be passed only within the scope which is determined by previously adopted substantive law. The essence of this principle is to provide protection of individual citizens whereas it does not make or cannot make, or must not make any exception" (Mitrović, 2014, p. 142).

Legality is "one of the key principles of legal order, which is the reason why it of crucial importance that we should take care of it and make sure that legal norms contained in the legal acts of lower legal force are harmonized with the norms from superior legal acts. If a legal act is unlawful, it means that it violates the legal order and interrupts its smooth functioning" (Kulić & Kulić, 2015, p. 170). Moreover, "long-term compliance with the principle of legality creates necessary stability of the state authority. Also, the consistent application of the principle of legality generates legal security. Legal security, in both subjective and objective sense, can exist only if the work of government

bodies and citizens' actions are regulated by previously prescribed rules which are being invariably applied" (Zekavica, 2018, p. 110).

In that context, "as a theoretical antipode of legal state, there is a police state which is most commonly defined as a state where the principle of legality has been replaced with the principle of purposefulness, a state in which the law is not applied to all people equally and where the authority and political decisions are not based on previously adopted rules, but on arbitrary will of individuals whose decisions in most cases are passed for political reasons. This state of facts leads to disappearance of elementary conditions for the establishment of a legal state with the rule of law" (Zekavica, 2018, p. 110).

Legality can be viewed in both formal and material sense. In order for a legal act to be considered lawful in a formal sense, it is necessary to be adopted by the authorized body in accordance to the rules governing its adoption and in an adequate legal form. On the other side, a legal act is lawful in a material sense if its legal norms are in compliance with the norms contained in the acts of superior legal force.

In addition to the fact that "legality assumes the relation with the particular law and that it reflects supremacy of law, it comprises (in all legal systems, including ours) some other legal elements and guarantees, such as: compliance of public and other office holders with law, publishing of laws and other legal acts before their entry into force, then, so called *vacatio legis,* the period between the announcement of the legal act and its entry into force, prohibition of retroactive application of law, the use of mother tongue in a legal proceeding, etc." (Nikolić, 1997, p. 355).

However, the principle of legality has "its political implications and meaning which is why it follows all constitutional and democratic political systems, or is one of prerequisites for democratism" (Đorđević, 1978, p. 346). In this "political and democratic sense, legality is the synonym for the rule of law which denies arbitrariness and calls for accountability of everyone whose actions are not in compliance with law" (Mihajlović, 2009, p. 571). This notion of legality, according to Đorđevića (1978), "is identified with such a legal system, or such a relationship between the authority and individuals (and such an exercise of public offices) that are based on the supremacy of law which opposes arbitrariness, as well as on the status of public authority as a public service, and the status of individuals who are allowed to do what they wish provided they do not violate laws and rights of other" (p. 347).

4. Instead of concluding remarks

As we have pointed out at the beginning of this paper, the rule of law as an idea, is one of the oldest and most significant ones in the history of legal and political thought. Contemporary understanding of the work of esteemed legal theoreticians underlines and upholds the stand that the idea of the rule of law has a significant position in the views that have been publicly expressed on the topics related to the state and law, politics and economy. The rule of law, as an ideal to strive towards, has been contemplated by all leading authors of contemporary thought – jurists, economists, politicians. However, general legitimacy of the principle of the rule of law, does not mean that it does not face multiple challenges and problems.

The discourse on the principles of constitutionality and legality has always been the cornerstone and pillar for emphasizing the importance of the rule of law in contemporary legal orders. This is particularly important if we take into account that constitutionality and legality are vital principles a state cannot exist without. They are the precondition, but also an instrument for achieving it. In that sense it should be underlined that the rule of law essentially presumes the strict compliance with the principles of constitutionality and legality, democratic elections and democratic organization of government which will consistently apply the principle of separation of power, independent judiciary, respect of human rights and freedoms and the existence of a moderate and power-restricted executive branch.

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ZNAČAJ I POVEZANOST NAČELA USTAVNOSTI I ZAKONITOSTI SA PRAVNIM PORETKOM I VLADAVINOM PRAVA

APSTRAKT: Vladavina prava kao ideja jedna je od najstarijih i najznačajnijih ideja u istoriji pravne i političke misli. Savremeno shvatanje uvaženih teoretičara uveliko je na stanovištu koje ističe i potvrđuje da ideja

vladavine prava zauzima ključno mesto u transparentno iznetim stavovima o državi i pravu, politici i ekonomiji. Vladavinu prava, kao ideal kome treba da se teži, vide svi vodeći autori savremene misli – i pravnici, i ekonomisti i političari. Diskurs o principima ustavnosti i zakonitosti uvek je oslonac i temelj u isticanju značaja vladavine prava u savremenom pravnom poretku. Ovo je naročito značajno ako se ima u vidu da su ustavnost i zakonitost bitni pravni principi bez kojih nema pravne države. U radu se, shodno temi, analizira nekoliko važnih pitanja – kako opredeliti značaj međusobnog saglasja i povezanosti načela ustavnosti i zakonitosti i vladavine prava, zatim, kako konceptualno predstaviti suštinu ustavnosti, potom zakonitosti, te vladavine prava i pravne države.

***Ključne reči**: vladavina prava, pravna država, ustavnost, zakonitost, teorija prava.*

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