

Legal Aspects of the Principal of “Rule of Law” as an Element of Constitutionalism

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Abstract

The paper analyzes the relation between the principle of “rule of law” and the concept of constitutionalism. In this context, the paper elaborates the concept of rule of law and its varieties of definitions. The author emphasizes that although there are different approaches in defining the concept of constitutionalism, they all include the principle of rule of law. The paper also brings up the issue of some legal aspects of the principal of rule of law – hierarchy of acts in the legal system (Kelzen-Merkel Stoffentheorie), and the limits and boundaries of the powers of the norm makers, in the process of materialization of the law. The paper analyzes the problem of (pan)juridisation and polyferation as deviation / hybridization of the legal system in practice.

Keywords: constitutionalism, rule of law, constitutionality, legality, materiae constitutionis, materia legis, materiae sublegalis, paniuridistion, polyferation.

1. The rule of law as an element of constitutionalism

The rule of law is neither a rule, nor a law. It is more a political or moral principle. The rule of law is probably one of the most challenging concepts of constitution and one that may be interpreted in different ways. It is not the concept with one accepted meaning.

The rule of law is generally understood as a doctrine which concentrates on the role of law in securing the correct balance in rights and powers between individuals and the state. The rule of law may be interpreted as a philosophy which lays down fundamental requirements for the law or a procedural device by which those with power rule under law. Generally, two aspects are emphasized for the principle of rule of law. The first one refers to the substance of the relationship between citizens and government. The second, deals with the processes through which that relationship is conducted. Or, phrased more simply as Ian Loveland pointed out, “the rule of law is concerned with what the government can do-and how government can do it.”¹

¹ Loveland, Ian. *Constitutional law, administrative law and human rights*. Oxford University Press. London, 2006, p. 56.

In connection with the above mentioned, procedurally oriented version of the concept of rule of law by Joseph Raz, is in relation with 8 specific postulates:

- (a) The law should be general, prospective, open and clear,
- (b) The law should be relatively stable (not subject to frequent and unnecessary changes),
- (c) The law should identify the jurisdictional limits to the exercise of delegated legislative powers,
- (d) The independence of the judiciary should be guaranteed,
- (e) The application of the law should accord with the rules of natural justice,
- (f) The courts should have a power of review over law-making and administrative action,
- (g) The courts should be easily accessible,
- (h) Crime preventing agencies should not be able to choose which law to enforce and when.²

For Raz, the rule of law is a political ideal which a legal system may lack or possess and by which it can be judged. It is a virtue of the legal system, but it must not be confused with the constitutionalism, democracy, justice or equality. It does not necessarily mean that the legal system that respects the above mentioned postulates is necessarily “morally good”. That is why his doctrine is morally neutral.³ Raz draws an analogy between the principle of rule of law and a knife. One quality of a good knife is a sharpness. However, the quality of sharpness says nothing as to the use to which the knife might be put: murder or beneficial surgery⁴. The same is with the rule of law. That is why this principle must be put in the greater perspective or it might be misused.

Other interpretations of the doctrine go beyond the procedural and formal requirements and face certain values that this principle should protect. Alex Carroll emphasizes that the purpose of all law should be to respect “for the supreme value of human personality” and that the observance of the rule of law should entail:

- (a) The existence of representative government,
- (b) Respect of the human rights and freedoms,
- (c) Absence of retrospective penal laws,
- (d) The right to bring proceedings against the state,
- (e) The right to a fair trial,
- (f) An independent judiciary,
- (g) Adequate control of delegated legislation.⁵

According to Berman, the rule of law means that the respective heads of each body would be bound by the law which they themselves had enacted, they could change it lawfully, but until they did, so they must obey it—they must rule under law.⁶

² Raz, Joseph. *The rule of law and its virtue*. In A. Carroll (Ed.), *Constitutional and administrative law*. Pearson Longman. London, 2007, p. 46.

³ Barnett, Hilaire. *Constitutional and administrative law*. Routledge Cavendish, 2006, p. 77.

⁴ *Ibid.*, p. 78.

⁵ Carroll Alex. *Constitutional and administrative law*. Pearson Longman. London, 2007, p. 47.

⁶ Berman, H. J. *Law and revolution: The formation of the Western legal tradition*. Cambridge Mass. Harvard University Press. 1983, 292. In Whittington, K. E., Kelemen R. D., Caldeira G. A. *The Oxford Handbook of law and politics*. Oxford University Press, 2008, p. 64.

Although the concept of the rule of law is a comprehensive and broad concept that can be analyzed from several different aspects, this paper will address several legal aspects that enable the rule of law in a state and constitutionalism.

2. Some legal aspects of the principal of “rule of law”

2.1 *Hierarchy of legal acts in the legal system*

Each legal system is constructed from a number of legal acts. These acts are passed by different organs, occur in different forms and have their own content. All of these regulations are part of one system and represent a set of legally binding rules of conduct. The main feature of the legal system and *conditio sine qua non* for its functioning is its monolithicity and consistency of the legal acts that make it up. Thus, every legal act, *per se*, must be an authentic part of that whole.

2.1.1

The trichotomy of established political systems, on the other hand, entails the trichotomy of the general legal acts adopted by these bodies. The constitutional government enacts the constitution, the legislature enacts the laws, and the executive enacts the bylaws. Kelsen's theoretical views and the theory of degrees in law start from a basic premise that in the system of state bodies, there is an appropriate hierarchy in which two basic organs stand out – the parliament and the executive. Namely, the theory of the legal nature of state functions and the degree and hierarchical structure of legal regulations (Stuffentheorie) is developed in the direction that state, functions (legislation and execution) are not two coordinated state functions, but two degrees in the process of creating law, which are in a hierarchical relationship. The process of creating the legal acts neither begins nor ends the process of creating the law. It develops upwards (towards the constitution) and downwards (towards the bylaws). In such a degree and hierarchy, the lower act is always the application of the higher, and the higher, always the act of creation and foundation. This process is a constant concretization of the law. Finally, in order for this to be realized, special legal and technical guarantees are needed for the legality of the bylaws and the constitutionality of the laws. Given that the guarantees of the constitution are in fact “*guarantees for the protection of the legal framework under the constitution*”, superimposed on these guarantees is the “*guarantee of the constitutionality of laws*”.

Jovičić's theoretical views are almost on the same line as the aforementioned Stuffentheorie. He points out that “in accordance with the democratic tradition, parliament as a direct expression of the will of the citizens is a hierarchically higher body, while the government as a body arising from parliament and suited to it, is a hierarchically lower body.”⁷ Consequently, this arrangement is reflected in the acts adopted by these bodies. Hence, the determination of the legal force of the legal acts, of the body that adopts them, as well as their mutual placement in the legal system, is understandable.

These legal acts, analyzed not only from a formal but also a material point of view, differ in terms of the content and the material they regulate. Based on this criterion, there are legal acts that regulate *materia constitutionis*, *materia legis* and *materia sublegalis*, following the line of generality and principle, as *differentia specifica* of constitutional provisions, to the precise regulation of certain social relations, which is characteristic of bylaws.

⁷ Jovičić, M. *Ustav i ustavnost*. Beograd, 2006, p. 333.

2.1.2

The existence of a hierarchy of legal acts determines the position of the legal act in the system, the degree of its legal force, the relationship of this act with the other acts and the priority in the application for regulation of certain social relations.

The hierarchy of legal acts is a reflection of the hierarchy of state bodies and other entities that create the law, and finally a reflection of the social forces behind them. “It is a reflection, and at the same time a means of strengthening the schedule of social forces and an expression and a means of social organization and order.”⁸

The essence of the principle of hierarchy of legal acts indicates that:

- Determining the hierarchy of legal acts within a given legal system is a necessary condition for the establishment and functioning of the system itself and for the implementation of constitutionalism, or more precise implementation of the principles of rule of law and the principle of constitutionality and legality, wrapped in the veil of constitutionalism in its broadest meaning.
- The hierarchy of legal acts is primarily conditioned by two formal criteria, organic (related to the entity that adopts the legal act) and procedural (related to the procedure for adoption and its revision). These two formal criteria would be meaningful only if the material criterion is satisfied, i.e. the meaning and character of the social relations regulated by the legal act.
- Finally, the essence of the hierarchy of legal acts consists in the existence of greater legal force of one at the expense of other legal acts which implies that, in case of conflict of two legal regulations, preference and legal obligation will be provided to the legal regulation with greater legal force.

Merkel-Kelzen’s theory of degrees (*Stufentheorie*) emphasizes that the legal order is not a system of coordinated norms, but a degree order of various types of norms through which the concretization of law is realized. The process of exercising the law starts from the constitution as (*lex superior*), the law (acts), the decree (and other bylaws), court decisions and administrative acts to the acts of execution. Each of these degrees represents the creation and application of law.

The classical theory of law, on the other hand, insists on a legal order that presupposes internal harmony and integration. The hierarchy of legal acts is important for the functioning of law on the one hand, and the organization of social life with the help of law, on the other. Through this principle, all acts represent a logical and indisputable whole and enable the harmonious action of the entire legal order. The hierarchization of legal acts requires that, the lower ones be harmonized with the higher ones, because only in that way can the legal order be seen as a “monolithic bloc in which all legal acts must be in mutual harmony.”⁹

2.2 *Materialization of the law – Limits of the powers of the norm maker*

The state has a monopoly on the adoption of legal acts and the legal regulation of social relations. State bodies do so on its behalf. The pre-determined position of the state bodies in the system of the organization of the government, and the predetermined competencies of these bodies, determine the limits within which they can act and create the right. Namely, the legal effect

⁸ Radomir D. Lukić. *Teorija države i prava*. Beograd, 1958, p. 147.

⁹ Jovičić, M. Hijerarhija pravnih propisa. In *Ustav i ustavnost*. Beograd, Službeni glasnik, 2006, str. 331.

of the acts, as well as their legal force, depend on a very important constant and formal criterion – which body adopts the legal act.

In theory, it seems that in parallel with the analysis of the process of materialization of law, the question of the limitations of norm-makers in that materialization of law, is additionally raised.

Therefore, following the line of concretization of the law and the general legal rules, it is expected that the boundaries of the norm-maker will be developed by analyzing the individual degrees in the process of materialization and creation of the law.

2.2.1 *Boundaries of the constitution-maker*

R. Kay emphasizes that “the special virtue of constitutionalism lies not merely in reducing the power of the state, but in effecting that reduction may the advance imposition of rules”.¹⁰ In modern conditions, constitutionalism, understood as a state of mind for effectively limited state power, is unthinkable without a constitution.

“It was in the late 18th century that the word constitution first came to be identified with a single document, mainly as a result of American and French Revolutions.”¹¹ The Constitution as a *lex superior*, an act with the greatest legal force in the legal system, an act that determines the legal force of all other regulations in the system, an act that imposes a necessity for compliance of all legal acts with its provisions, is the first stage of the materialization process of the law.

Around the written constitution will evolve a wide variety of customary rules and practices which adjust the operation of the constitution to changing conditions.¹² However, the constitution as an act is subject to revision. It is not a once and for all adopted document. The mentioned customary rules and practices ensure the flexibility of the constitution and its adaptation to the changing constellation of social relations. In addition, the longevity of the constitution is ensured by the interpretation of the constitutional provisions by those who directly apply them, especially by the constitutional courts. However, the basic specificity of the constitution as *lex superior* is the difficult, complex, multi-stage, procedure for amending the constitutional text. This is especially so, because the core of the constitution is maintained by norms that are usually standard constitutional matter (*constitutional materiae*). Which issues will be covered and regulated by the constitutional norms, and thus will represent *materia constitutionis*, depends on the constitutional maker (“founding fathers”).

The constitutional maker is the original government and the only one responsible for passing and changing the constitution. It is the highest, superior and legally unlimited in the procedure of creating and adopting the constitution. Constitutional legal theory advocates that, given that the constitution is the highest act in the hierarchical pyramid of acts in the legal system, the constitutional creator is not in a position to reconcile the constitutional text with any other legal act. Therefore, the constitution as a creation, in its form and content, can be conceived in a way most appropriate to the will, expertise, experience and creativity of the constitutional creator. “He can conceive of his work as he wants.”¹³ “*Quod principi placuit legis habet vigorem.*”

¹⁰ Alexander, L. *Constitutionalism Philosophical Foundations*, 1998, p. 16.

¹¹ A. W. Bradley and K. D. Ewing. *Constitutional and Administrative Law*, 2007, p. 5.

¹² *Ibid.*

¹³ Jovičić, M. *Ustav i ustavnost*, 2006, p. 396.

The mentioned principled theoretical position is the subject of analysis and debate, because it raises the question of whether the creator of the constitution in the process of creating constitutional norms, is still bound by certain values or meta-legal rules that deserve to enjoy special constitutional protection. On the other hand, although legally unlimited, the constitutional process in the process of creating the constitutional text is bound by certain factual restrictions, which can be of various natures: political, historical, international, economic, legal, etc.

Thus, the proponents of Jus naturalism insist on the necessity of certain values on which a society is based and this values must be subject to constitutional and legal protection. Considering that these are values that are rooted in the DNA material of society, the constitution must ensure their protection. Namely, human rights, justice, fairness, freedom, equality and some other eternal, meta-legal values and principles limit the absolute freedom of the constitutional creator. The German Constitution of 1946 points to “the existence of inviolable and inalienable rights as the basis of every community, peace and justice in the world.”

Another example of restricting the freedom of the constitution-maker in the constitutional review process is the ban on changing the form of government. Encouraged by a number of political, legal and historical factors, there are examples when the constitutional government, in an attempt to limit the next constitutional creator, envisions an explicit prohibition in the constitutional text to change the form of government. The French Constitution of 1958 determines a ban on changing the republican form of government. A reflection on how legally binding the constitutional norm is for a ban on changing the established form of government, is the legal principle “*lex posterior derogat priori*” as well as the example of the Greek Constitution of 1968 which provided that the provisions of the constitution which regulate the form of government as a monarchical democracy can never be subject to change.

A special type of restrictions for the creator of the constitution are the prohibitions for constitutional revision in conditions of occurrence of special circumstances, such as military or state of emergency. Namely, in the comparative constitutional law, there are different solutions for when the constitutional revision should not be approached, i.e. what are the circumstances when *lege artis* could not consistently implement the procedure for changing the constitution. Thus, the 1946 Constitution of Brazil provides for a ban on its replacement in military conditions. De Gaulle's 1958 constitution stipulates the impossibility of implementing the procedure for changing the Constitution “at a time when the territorial integrity of the country is at stake.”¹⁴ A similar constitutional solution is envisaged in the Constitutions of Spain¹⁵ and Portugal,¹⁶ which provide for the impossibility of changing the constitution in conditions of martial law, state of emergency or a state of siege of the country.

The factual limitations of the absolute legal freedom of the constitutional creator in creating or changing the constitutional norms also exist for the established form of state organization. Namely, the creator of the federal constitution, in the offered solutions for constitutional revision, is limited to the issue of organizing the federation and the relations between the union and the federal units.

Finally, Rajko Kuzmanović points out that the so called fetishism of legal, especially constitutional norms, should be understood *cum grano salis*, because it is true that the

¹⁴ Constitution of France, 1958, art. 89/4.

¹⁵ Constitution of Spain, 1978, art. 169.

¹⁶ Constitution of Portuguese Republic, 1976, art. 289.

constitution as an act cannot be changed by whoever feels like changing it, but it is still an act that does not is intangible and must be changed when incomplete or historically exceeded.¹⁷

Jovičić points out that, “not ignoring the importance of the actual restrictions of the constitutional creator in the process of constitutional revision, it must be emphasized that the constitutional creator, however, is not subject to legal restrictions.”¹⁸ All of the above is a premise from which the conclusion is drawn, that the prohibitions on absolute changing the constitution as a basic legal construction, and the absolute restrictions on the creator of the constitution, cannot have a binding character, but only political significance and political value.¹⁹

2.2.2 Boundaries of the legislature

The legislator in the role of a norm-maker is bound by the Constitution. The Constitution is a higher legal act than the Acts, in the Kelzen hierarchy of legal acts, and thus it is an act of creation and a basis for its adoption. The Constitution is the first stage from which the materialization of law begins. The law, although an act with legal effect *erga omnes*, is a concretization of the constitutional provisions in an attempt to regulate social relations.

On the other hand, the powers of the legislature are fixed, clear and precisely provided for in the constitution. The legislator must not exceed them, nor must he violate them in the implementation of the procedure for passing the laws. Namely, the legislator must respect the constitutional provisions by which concrete action or non-compliance is envisaged for mandatory or prohibited.

Thus, from a theoretical point of view, the limitations of the legislator in the process of materialization of the law are related to the procedure of creation of the law. In the context of this issue, the theory seems to emphasize the clash of two dominant concepts, the Laband-Yelneck-Anschitz theory and Henel's theory. The first, which gives priority to the form of the law, but not the essence, and the second, which is based on the thesis that “the law has a form, because of the content that is necessary for it.”²⁰ However, Kelzen points out that, “according to the constitutional principle, the form of the law is what emphasizes its basic features: a decision of the parliament (expression of will), sanction, promotion and publication.” Namely, for him, what the state “wants” as the legal behavior of the “subjects of Laband” is important, but it seems that in terms of imperative theory, not the law in a formal sense, but the form of the law and more importantly the body of adoption, are the key moments that determine the law as an act.

In the context of the constitutional norms that stipulate what the legislator must and must not do, he has no absolute freedom of action and is obliged to act in accordance with the stated constitutional provision. However, the constitutional legal literature represents the view, that if the legislator does not respect the constitutional norm that requires legal regulation of a certain matter, those social relations will remain unregulated, but no legal consequence will be realized on the legislator. This is especially because the essence of the existence of the legislature is the adoption of laws and accordingly, it independently determines which relations, when and in what way should regulate them by law. On the other hand, in the constitutional literature there is

¹⁷ R. Kuzmanović. *Značaj prava i pojave koje narušavaju pravni sistem*. https://www.anurs.org/sajt/doc/File/govori_besjede/2011-05-31_znacaj_prava_predsjednik_spanija.pdf. p. 10.

¹⁸ Jovičić M. *Ustav i ustavnost*. Beograd, 2006, p. 399.

¹⁹ S. Klimovski, R. Deskoska i T. Karakamiseva. *Ustavno pravo*. Skopje, 2009, p. 103.

²⁰ Kelzen, H. *Glavni problemi teorije državnog prava*. Beograd, 2001.

an English phrase that implies that, the legislature can regulate everything except turning a man into a woman and vice versa. Nowadays, that can be regulated too.

The constitutional provisions allow for broad powers of parliament in the exercise of normative powers. The only restriction is that it be done from both a formal and a material aspect in accordance with the constitution. Hence, the first and basic limitation of the legislature in the normative regulation of the so-called *materia legis* is that it be done in accordance with the constitution.

Other types of restrictions for the legislator regarding the exercise of legislative competence are the need to comply with certain principles such as the ban on retroactive effect of laws, the ban on changing final court decisions by law, the ban on restricting already acquired rights, the ban on introduction of provisions that violate the provisions of international agreements, etc.

Countries with a complex form of government have an additional factor that affects the legislator's restrictions on the exercise of normative powers – the established relationship between the union and the federal units and the degree of autonomy they enjoy. Therefore, the tendency of the federal constitution to determine and regulate in detail the issue of the legislative competence of the parliaments of the federal units is obvious. Probably the most appropriate examples of the extremely different approach to regulating this issue are the US Constitution of 1787 and the 1988 Constitution of Brazil with the 2010 constitutional amendments.

Finally, in the context of the issue of legal obligation of the legislator with the constitution, in the realization of the legislative (normative) competence, the issue of the legal consequence of the violation of the constitutional norms is added. Hence, countries with an established system of institutionalized assessment of the constitutionality of legal norms provide for a sanction for violation of constitutional powers. In case the legal norms adopted by the legislator violate of the constitutional provisions and are in collision with them, the decision of the competent body (constitutional courts) may declare that legal norm unconstitutional and remove it from the legal system. Such action in the institutionalized systems of controlling the constitutionality of legal norms is extremely important because of its dual effect. On the one hand, it disables the legal effect of unconstitutional legal norms and the occurrence of harmful consequences, but on the other hand, no less important, it keeps the legislator in the pre-determined restrictions provided by the constitution.

2.2.3 *Limits of the ordinance maker*

The third stage in the Kelzen hierarchical arrangement of the general legal acts, which materializes the law, is the ordinance and other bylaws. The process of creation of the law and the more detailed regulation of the social relations is possible only if the editor in his action is completely bound by the law and indirectly bound by the constitutional provisions. Therefore, the basis for the enactment of bylaws is always the law as a degree superior to them, and the constitution as a second higher degree. Hence, the freedom of action of the ordinance-maker is far more limited than that of the legislature.

In principle, in the process of creating the law, the ordinance-maker concretizes the law, and therefore always moves within the act that is the basis for their adoption. However, a deviation from this classical conception of the realization of the normative activity of the state exists when the authorization for enactment of the by-laws (the regulation) arises directly from the constitution. Consequently, the limitations of the ordinance-maker are quite different if his powers arise *ex constitutionem or ex lege*. In the first case, the powers of the ordinance-maker are similar to those of the legislature, as the legal regulation of relations seems to be original, primary and principled. In the latter case, the theory insists on the direct connection of the legislature with

the law and of course the constitution, but insists on initially limiting the legislature to the law which is primarily the basis for the enactment of the bylaw. This means that the freedom of his action is limited exclusively to the concretization and more detailed elaboration of the legal norm.

3. Deviation / hybridization of the legal system in practice

The antithesis of the concept of constitutionality is unconstitutionality, and the antithesis of the concept of legality is illegality. Illegality is an unacceptable phenomenon for the legal system. It implies non-compliance of the lower legal regulations with the law. Stable legal systems seek to suppress and eliminate them because they undermine their monolithic nature.

The two dominant forms of the occurrence of illegality are the (pan)juridisation and the polyferation of the legal system. Both phenomena are a consequence of the modernization of the legal system and are characteristic of modern social development. However, they are undesirable, because behind the scenes, they hide the danger of legal uncertainty of the citizens.

1. (Pan)juridisation is a phenomenon of expanding the domain of legal regulation. Classical legal theory points out that the desire for any relationship to be legally regulated and gradually develops the awareness that only what has a legal form is legally obligatory. (Pan)juridisation is undesirable because it hides the dependence on the transformation of the principle of the rule of law into tyranny of law. Giving too much importance to the written legal norm and the necessity of each relationship to be regulated with it leads to over-regulation. However, even though the law is a living and dynamic category, social relations are still more dynamic, so it cannot be expected that only those relations that are legally regulated would be recognized. The beginnings of (pan)juridisation in the 1970s, when Đorđević warned that “it is better for some relations to remain unregulated than wrongly, prematurely and irrationally regulated”, seem to be gaining momentum in the period of the 90s in transition countries, which abandon existing political systems and establish new ones. The development of technological and digital systems on the other hand seems to impose an additional need to regulate the new forms of relations faced by social, legal, political and economic systems. These phenomena obscure the danger posed by Gordana Gasmi, according to which panjuridization leads to “bulky, expensive and inefficient state apparatus and slow traffic of legal entities.”²¹ Probably the most vivid appearance of (pan)juridisation is portrayed by Jovicic, for whom, “the lawmakers are like a huge spider knitting their web, continuously cover a wider range of issues, both important and unimportant, and eligible and ineligible for legal regulation.”²²

Modern legal systems appear to be facing the challenge of overcoming the emergence of (pan)juridisation of law, on the path to its harmonization with EU law, too.

2. Reflection of the (pan)juridisation is the appearance of polyferation. It seems that the panjuridization and polyferation of law are occurrences which disrupt the established legal system and which per se cause the emergence of legal insecurity. Polyferation is the overproduction or multiplication of legal regulations. It can appear in the form when every higher legal regulation creates space and is the basis for creating a whole group – family of legal regulations or when in an attempt to regulate in detail the changing social relations, the legal acts, especially laws, are changed very often, thoughtlessly and unsystematically.

The law does not benefit from a frenetic atmosphere, nor in such atmosphere should the legal regulations be amended. Probably the most appropriate representation of this is the change of laws that have not yet begun to be applied or to produce any legal effect in the system.

²¹ Gasmi, G. *Pravo i osnovi prava Evropske Unije*. Beograd, 2010, p. 75.

²² M. Jovičić. *Ustav i ustavnost*. Beograd, 2006, p. 436.

This phenomenon is absolutely undesirable, because there is no possibility, nor a certain time interval has passed in which the effects of the application of the law, its advantages and disadvantages, would be perceived.

The polyferation of law is particularly undesirable if it is essentially a hyper creation of rules that cannot be applied or should be applied *pro futuro*. Gasmi points out that “excessive mobility and variability of the law are also serious forms of illegality.”²³

The law must change. Its change has been imposed as a need to regulate and regulate the altered social phenomena and relationships. However, that change of the law, expressed through amendments to the laws, must be thought out and moderate. Otherwise, it leads to vague norms, ambiguous rules, inappropriate constructions and phrases and inadequate language, and all this ultimately results in the inapplicability of the law and the creation of legal insecurity.

Finally, if (pan)iuridisation is tied to social relations and the attempt to make absolutely every relation legally regulated, polyferation is tied to hyper production of regulations. Both phenomena are undesirable for the legal system and represent forms of illegality. They pose challenges for modern legal systems in striving to modernize and adapt to changing constellation of social relations.

It seems that maintaining a balance in the necessity for the existence of the law and the norm and the actual materialization-creation of the law, is an art. Maintaining such a balance is a prerequisite for the existence of a monolithic harmonized legal system without norms that would be in mutual collision. Namely, the request for the existence of such a system is also a request for the constitutionalism.

4. Conclusion

The Constitutionalism is an idea, ideology, and state of mind of the need of a limited, limited, and controlled government by legal means. There is no single definition of the term constitutionalism in constitutional literature. Its most appropriate explanation is possible only by analyzing its basic elements. One of these elements is the rule of law.

The constitutionalism and the rule of law are not synonymous, and there should be no equalization between them. The principle of the rule of law is embedded in the idea of constitutionalism as a broader term. Therefore, it would seem that without the rule of law, constitutionalism in one state would be impossible. Namely, it is one of those basic legal mechanisms, instruments and means that enable the restriction of state power.

The principle of the rule of law is included in the so-called “chameleon” concepts, as well as the concept of constitutionalism and democracy. This further complicates its definition. Although this concept covers so many things, it is important to emphasize some of its legal aspects, which seem to have been forgotten. Lowland points out that the rule of law is concerned with what the government can do, but of no less importance is the question – how the government can do it.²⁴ Hence, the analysis of some forgotten issues such as the hierarchy of legal acts, the boundaries of the norm-maker in the creation of the law, the concept of illegality and the danger of the emergence of (pan)iuridisation and polyferation, seem a good reminder.

²³ Gasmi, G. *Pravo i osnovi prava Evropske Unije*. Beograd. 2010, p. 75.

²⁴ Loveland, Ian. *Constitutional law, administrative law and human rights*. London, Oxford University Press, 2006, p. 56.

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