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Constitutional Principles in Bosnia and Herzegovina: Legal Theory and Judicial Deciding

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The basic thesis of this essay is that constitutional principles and legal rules can have a meaning in judicial decision, when legal order imparts significance to judicial practice. Research and analysis of implementation of constitutional principles in the practice of courts in Bosnia and Herzegovina, especially in the practice of three constitutional courts, so far has not proved sufficient. To what amount the constitutional principles are used in direct implementation of constitutional principles, is just one of the questions that come up regarding this topic.

It is also interesting and important to explore in what way the practice of the Constitutional Court of Bosnia and Herzegovina in deciding on the abstract constitutionality of laws and in appellate jurisdiction shows the application of legal principles in the decisions of the supreme courts of entities and Appellate court of Brčko district of Bosnia and Herzegovina. That is because some general principles are a part of the human rights and fundamental freedoms mentioned in the Constitution of Bosnia and Herzegovina. It should also be added that the practice of the European Court of Human Rights through its decisions in applying the Convention for the Protection of Human Rights and Fundamental Freedoms affects the practice of the supreme courts of entities and the application of the legal principles that are part of the Convention.

Keywords: constitutional principle, constitutional court, legal doctrine, adjudication, judicial interpretation.

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Introduction

Legal principles have long been used by the law, not only within legal doctrine, but also often stated in the normative solutions of specific country. It is really

difficult to provide a definition of legal principles, because legal principles are sometimes identified as legal norms, at other times – as general legal norms, or as legal values... Firstly, we should define the concept "principle", its linguistic meaning. People's Dictionary defines it as *"A fundamental truth; a comprehensive law or doctrine, from which others are derived, or on which others are founded; a general truth; an elementary proposition; a maxim; an axiom; a postulate; The collectivity of moral or ethical standards or judgments; A basic truth, law, or assumption; A settled rule of action; a governing law of conduct; The collectivity of moral or ethical standards or judgments."*[1]

In the hierarchy of the scientific system of law, legal values (peace, tolerance, equality, solidarity...) are the highest.[2] Legal principles are the lower units in the scientific legal system, and legal norms are below them.[3] Legal values are the most abstract set of rules that does not have to be included in the written law. There is a consensus in a society about their supremacy. They exist before the law was written. Legal principles can sometimes crosscut the legal values (and mostly – legal norms). However, legal principles are more general than legal norms, because they always have a society in totality as the recipient of its cause. No matter how confusing it seems, legal values, legal principles and legal norms coexist in shared space.

Some authors, for example, Ronald Dworkin, write about legal principles with a deviation from conventional attitudes of legal theory, omitting the use of generality as a criteria of differentiation of legal principles and legal rules. He calls a "policy" "that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change)". He calls a "principle" a "standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality".[4]

According to Radomir Lukić (one the most influential legal theorists in the former Yugoslavia; he was a professor at the Faculty of Law, the University of Belgrade), the general legal principles are *"abstract norms, that are derived from the series of less abstract norms, and which apply to whole series of cases covered by legal standards"*.[5] Lukić, offered the examples of these principles – the principle of responsibility, principle of equality, principle of righteousness, principle of exploring of material truth. The good side of the legal principle is that it *"shows the meaning of a whole set of norms in a shorter and clearer way, thus enabling us to understand the norms deeper and more accurately."*[6] As with legal constructions, something is added to the principle, it draws more than what the concrete norms contain. If

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1 Available: http://www.dictionary.co.uk/browse.aspx?word=principle [last viewed 08.06.2018].

2 There are other views. For example, Joseph Raz classifies different rules of behaviour based on different understanding in angloamerican legal literature. The most general term, according to Raz, is "standard of behaviour", that can be "legal standards of behaviour" and "non-legal standards of behaviour". According to Raz, legal standards are: "legal norms" and "laws that are not norms", while legal norms can be general and individual. General legal norms, according to this author are legal rules and legal principles. See: *Raz, J.* Legal Principles and the Limits of Law. *The Yale Law Journal*, 81(5), 1972, p. 824.

3 Other view claims that there are "legal principles" and "legal rules", two basic types of legal norms. See, for example: *Ávila, H.* Theory of Legal Principles. Dordrecht, 2007.

4 *Dworkin, R.* The Model of Rules. *The University of Chicago Law Review*, 35(1), 1967, p. 23.

5 *Lukić, R.* Teorija države i prava – II. Teorija prava. Beograd: Naučna knjiga,1995, p. 281.

6 Ibid., p. 281.

this "addition" corresponds to the essence of the norms covered, it is useful; if that boundary is crossed, it becomes harmful and inadmissible. Lukić warns that *"borders are difficult to establish, and that's why it's easy to cross them."*[7]

Legal doctrine and judicial practice are found in the face of great challenges, whenever they determine the content and meaning of legal principles, as well as the relationship between them. Defining a legal principle does not mean just identifying the legal standards that confirm it and determine their common denominator. When the principle is on a higher level of generality and abstraction, the freedom to determine its content is greater. Therefore, it is not surprising that many principles during the multi-year evolution of the modern state and rights have gained the status of legal civilization, but the interpreters differ greatly when determining the essential elements of these principles. In this respect, the fact that the principle has a status of a general legal principle and a universal character (e.g., the principle of equality, the principle of legality, the principle of responsibility) does not mean that its content is determined forever. With the evolution of society, rights and politics, in a certain amount, the content of the principle is changed or it is interpreted differently in accordance with significantly changed circumstances.

The relationship between law and politics makes the nature of these principles a complex one. The question is whether, for example, the principle of democracy is a political or legal principle or a combination of both. The question is not purely doctrinal. Thus, in relation to the principle of supremacy of constitution, as a legal one, and the principles of democracy, as a predominantly political principle, the essence of the constitutional equilibrium is reflected, which must be rediscovered in order to make constitutional democracy effective. The answer that the legal state must take the lead over democracy or *vice versa*, when they are confronted with conflict, is too simplified to understand things. The role of the Constitutional Court would be much simpler than it is today, too.

The legal principles are "unreachable" creations. Some of them are only proclaimed in positively legal regulations, including the constitution; others, in a certain sense, are defined positively and legally; some of them are generally well-known, and they are assumed. Law is a living organism that is constantly evolving. New principles emerge from the existing principles, from the new social relations that regulate the new norms, new principles are derived – although there is no doubt that all the "great" principles, on which the construction of a modern constitutional state is based, have long been established.

It is not surprising that many principles during the multi-year evolution of the modern state and law have gained the status of legal civilization, but the interpreters differ greatly when they determine the essentials of elements of these principles. With the evolution of society, rights and politics, to a certain extent, the content of the principle is changed or is interpreted differently in accordance with the significantly changed circumstances.

1. Relationship Between Legal and Constitutional Principles and Categorization of Constitutional Principles

When it comes to the relationship between legal and constitutional principles, we need to highlight several elements. Firstly, legal principles are broader than

[7] *Lukić, R.* Teorija države i prava – II. Teorija prava. Beograd: Naučna knjiga,1995, p. 280 abd further, p. 281.

constitutional. Not all legal principles are constitutional, because they are not subject to the highest legal values that form the basis of constitutional law. Also, there are legal principles that apply in all branches of the law (for example, the principle of liability) and those, which apply only in constitutional law (the principle of political [legal] responsibility of the government). On the other hand, there are constitutional principles that are not purely legal, but rather more political by far. Therefore, the question is whether constitutional principles should be defined as a special category, not qualifying them as legal or political, but simply using the term "constitutional principles" (for example, the principle of division of power, the principle of national (civil) sovereignty).

Secondly, the highest legal principles are undoubtedly constitutional, regardless of whether they are proclaimed in the constitution or not (for example, the principle of equality, which is defined in the constitutions as a principle of legal equality or equality before the law – which is a narrow term). Constitutional principles can be categorized into two basic groups: (1) the principles proclaimed in the constitution (usually the principle of the rule of law, the principle of division of power, the principle of national – civil sovereignty, the principle of decentralization, the principle of judicial independence, etc.); (2) the principles that are not proclaimed in the constitution. Within the first group of principles, two subgroups can be distinguished: a) the principles that the constitution onlyproclaims; b) the principles that the constitution proclaims and defines, either directly or through higher constitutional norms.

Within the second group of principles, it is possible to distinguish between: a) the principles derived from several constitutional norms (for example, there is a constitution that does not proclaim the principle of division of power but can easily be derived from norms governing the system of government); b) the principles that the constitutional court "creates", "establishes", not with reference to concrete constitutional norms, but "in the whole Constitution", "the spirit of Constitution", "the continuity of constitutional law".

The very special constitutional principle – the nearest to category (2) a) – firstly and mostly developed in Germany. It is about the principle of supremacy, which is based on the content of the distinction between "basic", "fundamental" constitutional norms, which cannot be altered due to protection granted by Constitution, hence they are made (legally) fully protected (federal regulation, participation of countries in legislation and basic rights proclaimed in Art. 1–20), on the one hand, and other constitutional norms, which can be changed according to the revision procedure. This principle, based on the distinction between the two types of constitutional norms, created in practice by the Federal Constitutional Court, is realized as supreme fundamental constitutional norms in relation to other norms and is interpreted restrictively.

Constitutional principles can be of different levels of generality. For example, the principle of (representative) democracy is more general than the electoral principle or majority principle. There are also principles that are an integral part of general and abstract principles, but have, to a significant extent, independent autonomy. Such an example is the principle of a division of powers which, although independently, is an integral part of the principle of the rule of law.

Modern constitutionality has not only brought pluralism into the source of the constitutional law of the internal and international character, but also the pluralism of the interpretation of the constitution. Still, the ability to be different the

subjects interpret the constitution, this kind of "democratization" of constitutional interpretation did not put the constitutional court in a different plan. On the contrary, it emphasized its role as the first and authoritative interpreter of the constitution, the one whose interpretation legally binds all the subjects of the legal order. If constitutional court is made of "legal aristocracy", this body will, sooner or later, embark on "creation" and do without any stubborn interpretation of constitutional principles.

In the above division of constitutional principles, the most room for "creating" the constitutional court is vested in the category of principle (2) b), then (2) a) and (1) a), and finally in the category (1) b) (which does not mean that in the case of constitutional principles defined by the constitution there is no room for their more profound development).

We can conclude that constitutional principles form the basis for the entire system of legal principles in a specific country. Constitutional principles define the content of all the other legal principles and legal norms, including constitutional norms. Other constitutional norms can be interpreted only in the light of constitutional principles.

2. Bosnian-Herzegovinian Constitutional Legal Doctrine and Constitutional Principles

The doctrine of the BiH constitutional law has not yet occasioned a more extensive interest in studying the constitutional principles, especially in the relation of the Constitutional Court[8] to these principles.

According to professor Kasim Trnka, these are the key principles of constitutional system of Bosnia and Herzegovina: 1) Commitment to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina; 2) International – legal continuity of Bosnia and Herzegovina; 3) Internal legal continuity of Bosnia and Herzegovina; 4) Supremacy of Constitution of Bosnia and Herzegovina and unity of legal system of Bosnia and Herzegovina; 5) Obligation of implementation of democratic principles; 6) Complex state organization; 7) Implementation of principle of sharing of authority; 8) Sharing of competencies between state institutions and entities; 9) Existence of system of institutions on the level of state and entities 10) Unitary economic system; 11) State symbols of Bosnia and Herzegovina; 12) Citizenship.[9]

Most of these principles can be found in the normative part of the Constitution of BiH (only the first principle is the part of preamble), but they are not marked as principles. Professor Trnka does not give his definition of constitutional principles, and he also writes about "constitutional principles and values".[10] It is important to mention that this professor was a member of the Bosnian-Herzegovinian team in peace negotiations, concluded in Dayton (Ohio), and he took an active part of the

[8] As a result of a complex state administrative system of Bosnia and Herzegovina, there are three constitutional courts in Bosnia and Herzegovina – Constitutional Court of Bosnia and Herzegovina and two entity constitutional courts. Constitutional Court of Bosnia and Herzegovina is the one that obtained the abstract review of constitutionality, protection of human rights and fundamental freedoms, incidental review of constitutionality, etc. This court also interprets and creates the constitutional principles of constitutional system of Bosnia and Herzegovina.

[9] *Trnka, K.* Ustavno pravo. Sarajevo: Fakultet za javnu upravu, 2006, pp. 246–261.

[10] Ibid., p. 246.

constitution-making process (Annex 4 of the General Peace Agreement in Dayton is actually a Constitution of Bosnia and Herzegovina).

Professor Nedim Ademović, on the other hand, writes about: 1) principle of democracy; 2) principle of legal state; 3) principle of separation of powers (although the Constitution does not mention it), 4) principle of protection of human rights; 5) principle of constitutionality of peoples; 6) principle of complex state; 7) principle of unitary market.[11] This professor connects the constitutional principles with case law of Constitutional Court of BiH. Contrary to professor Trnka, professor Ademović finds some of these constitutional principles in the practice of Constitutional Court of BiH. This can be explained with the fact that this professor has worked in this constitutional institution (however, not as a judge).

Although constitutional law has a role of advising, encouraging and creating justification for such an approach to the issues, constitutional (and legal) principles should be sought in the insufficient "mobility" of the Constitutional Court, its sustainability and readiness to deal with "legal embryos" expressed only in the last few years as the legal (constitutional) principles.

On the other hand, the absence of a doctrinal approach or its presence in "traces" of the explanations of the Constitutional Court's decision is also conditioned by the lack of interest in the constitutional law of these questions. In addition to legal-dogmatic analysis, "borderless criticism", which, as a rule, is not based on a careful reading of decisions, but on the first impression gained from the means of public information, is supported by theoretical considerations of the role of the Constitutional Court from the period of its establishment. Thus, Constitutional Court's activity in Bosnia and Herzegovina is modest, but this can be counted among the achievements of BiH constitutional law, which stood at the "borders" of the 1980s at the collapse of the Yugoslavia.

By contrast, the comparative approach in this topic almost does not exist, because it would be extremely few, quite lonely examples from the jurisdiction of the Constitutional Court of Bosnia and Herzegovina that would be available to compare with the developed practice of Germany, in which the Constitution is parallel to the constitutional text and its constitutional-judicial interpretation of the Constitution.[12]

3. Constitutional Principles in Practice of the Constitutional Court of Bosnia and Herzegovina

There is no hierarchy between constitutional principles and other constitutional norms. "Regular" norms of constitution do not have to be in line with constitutional principles. That is the conclusion of the Constitutional Court of BiH No. U 5/98-I of 28, 29 and 30 January, 2000. The Constitutional Court of BiH went from the

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[11] *Ademović, N., Marko, J., Marković, G.* Ustavno pravo. Sarajevo: KAS, 2012, pp. 55–57.

[12] For example, in the German Basic Law, the term "legal state" is referred to in several places of Art. 20, para. 3, Art. 28 st. 1 t. 1. However, "what is astonishing in German constitutional court practice is the number of undefined norms (principles – authors) made by the constitutional judge under these provisions." *Fromont, M.* Justice constitutionnelle comparée. Paris: Dalloz-Sirey, 2013, p. 370.

fact that all norms have the same value.[13] This can be indirectly concluded from the decision in the case No. u 5/04 of 27 January 2006, in which the Constitutional Court rejected a request (made by an authorized proposer) for evaluation of compatibility of Articles IV/1, IV/1.a.), IV/3.b) and V/1 of Constitution of BiH with the Article 14 of the European Convention for Human Rights, and Article 3 of the Protocol 1 of ECHR, as inadmissible. Authorized proposer claimed that ECHR has a higher hierarchy-normative status from other constitutional norms. The Constitutional Court has concluded that provisions of ECHR do not have a superior status in relation to other provisions of the Constitution of BiH. Consequently, the Constitutional Court departed from the position that all the provisions have the same value.

Although the provisions are different in hierarchical-normative sense, some provisions have a higher meaning. Provisions of human rights, pursuant to the Article X/2 of Constitution of BiH are "unchangeable". Hence, there is a difference in the normative effect of some provisions with regard that human rights and freedoms are protected with "clause of unchangeability"/"eternity".

The Constitutional Court found that constitutional principles are not just a proclamation but they also have a normative content. They all produce rights and duties of legal subjects, are directly applicable and condition the proceedings of public authority (No. U 5/98-III).

It is hard to tell precisely, when one of these principles is violated and when it is applicable. Firstly, the normative content of every principle must be determined; it has to be explained what it means. The content of constitutional principles does not arise from the constitutional norm. It has to be interpreted taking into account the whole Constitution, and again is interpreted in accordance with the concrete models of democracy, legal state and other principles, which were the leading constitution-makers in creation of a Constitution of BiH (for example, the case No. U 106/03 – *"ordinary courts are in obligation to control the legality in a state, in a way that they can decide if they will send a matter of legality to a Constitutional Court of BiH"*[14]*)*. That is the principle of legal state.

Constitutional principles have an interpretative force – they serve for interpretation of other norms – dilemmas or uncertainties about the linguistic meaning of norm. In decision No. U 5/98-III, the Constitutional Court stated: *"Principles help in interpretation of constitutional text and description of sphere of competencies, scope of rights and duties and role of our political institutions"*.

In the sphere of human rights and fundamental freedoms, the Constitutional Court of Bosnia and Herzegovina decides on appeals on decisions of the Court of Bosnia and Herzegovina, supreme courts of entities, Appellate Court of Brčko district. Since most of human rights and fundamental freedoms, in my opinion, we can equalize with (international) legal principles, Constitutional Court of BiH acts on these regular courts, since they have a duty to respect and implement those principles. It is the same with the decision of European Court of Human Rights,

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[13] Many countries, for example, Austria, create a formal difference by assigning a greater meaning to constitutional principles than to other constitutional norms. In Austrian constitutional system, regular constitutional norms have to accord with the constitutional principles. Besides, that difference is expressed in amendments. It is harder to change constitutional principles (for example, to shape Austria as a monarchy, not as a republic), Federal constitutional law (Article 44, para. 3.) considers that kind of change a "total change of constitution", and that kind of change needs to be voted in a referendum.

[14] U 106/03 of 27 October 2004, para. 33.

whose effect is often indirect, since the Constitutional Court of BiH refers to the decisions of this court in its own decisions. Rarely, the Constitutional Court of BiH has an effect on the implementation of legal principles in decisions of supreme courts and their decisions in cases of abstract control of constitutionality.

Also, there is a competence of the Constitutional Court of BiH prescribed by Article VI/3.c) of the Constitution of BiH: *"The Constitutional Court shall have a jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision."* When regular courts refer this kind of question to the Constitutional Court of BiH, the Constitutional Court of BiH has an influence on legal certainty (which is also a general legal principle), when it decides that some norms of specific legal act (or a legal act in its totality, which is a rare occasion) are not in accordance with, for example, European Convention for Human Rights and Fundamental Freedoms.

Conclusions

In the first part of this paper, I attempted to present the legal principles as theory, and later discussed how the judicial practice in Bosnia and Herzegovina applies the legal principles, not entering much in normative elaborations and argumentation about certain way of court activity. Although this field is not analyzed in the ex-Yugoslav legal theory, it is certain that judicial practice in some branches of the law, particularly the Constitutional law, is mostly based on legal principles.

The values and principles are an integral part of the landscape of constitutional judgment, although their legal status is subject to significant controversy, and their significance and meaning for courts differ greatly, depending on the national boundaries.[15] In any case, no matter how the status of principles (those regulating the organization of state authority and those that govern compliance with human rights and fundamental freedoms) as a legitimate source of judicial interpretation is debatable, judges consider them "unavoidable and necessary essential element" of dispute settlement.[16] Quite recently, in the late 20th century, the constitutional principles (and legal principles in general) gained a new status and role in constitutional court process. Constitutional courts "find", "discover", "create" these principles, when they are not proclaimed by the constitution. They become a merit for assessing constitutionality alike, as well as positive constitutional norms, but because of its insufficient determination and flexibility they create a space for very creative interpretations of the constitution. In this way, constitutional law is expanding, not only solely regarding the constitutional text and the accompanying legal acts of constitutional character, but at times there is no immediate basis in the constitution – although constitutional courts are trying to create a fiction about their fundamentals in a positive law. Thus, a triangular constitutional text – constitutional court – constitutional principle is established, in which it is not easy to manage, but it is necessary in order to preserve the integrity and consistency of

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[15] *Jacobsohn, G. J.* Constitutional Values and Principals. In: *Rosenfeld, M., Sajó, A.* (eds.). The Oxford Handbook of Comparative Constitutional Law, Oxford, 2013, p. 777.

[16] Ibid., p. 779.

the constitutional law. The constitutional courts of stable (Germany) or relatively stable old and new constitutional democracies (France, Italy, Poland, etc.) have been doing so for several decades.

In Bosnia and Herzegovina, the Constitutional Court of BiH has begun to deal with the interpretation of constitutional (legal) principles in the last few years. Access to the Constitutional Court in this area is characterized by: 1) fragmentation; 2) insufficiently developed doctrine; 2) negligence. The Constitutional Court is still, for the most part, reserved to interpret those principles which have already defined by the Constitution or those that have been proclaimed, but the Constitution does not determine the basic content. When it attempts to find a principle that is not formulated in the Constitution, it does so gradually, but from the point of view of the legal argument it provides, insufficiently convincingly. Constitutional principles are used in the explanations of decisions yielded by Constitutional Court of Bosnia and Herzegovina, and thus form an integral part of legal standing and court practice created by this body. Pursuant to the Article III/3.b.) of the Constitution of Bosnia and Herzegovina, and as a part of the reasoning of the Constitutional Court of BiH decisions, the power of arguments and the authority of the Constitutional Court of BiH, which expresses their legal perceptions in their decisions, constitutional principles established in the practice of the Constitutional Court of BiH in turn become accepted by the ordinary courts in their practice.

The application of constitutional principles in the decisions of the Constitutional Court of BiH is present, but it can be concluded that this application is still rather an exception than a rule. I believe that the future application of the constitutional and legal principles in the decisions of the Constitutional Court of BiH will be more frequent due to application of EU law (when the time comes), and under the broader influence of the European Court of Human Rights.

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