Marin Keršić[*]

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LEGAL PRINCIPLES IN CROATIAN LEGAL SCIENCE:[1] FUNDAMENTAL CHARACTER AND INDETERMINACY

Summary: *The topic of legal principles has remained a well-discussed topic in legal theory since it first emerged from the discussions on the nature of legal norms and sources of law in the second half of the 20th century. Following the framework of the broader research on legal principles, this paper builds upon the analysis of how legal principles are understood in the Croatian legal science discourse. The fundamental character of legal principles has been recognized, but indeterminacy has not been given careful attention. This paper discusses open questions arising from the relationship between legal doctrine and legal theory in these aspects, with potential implications for solving conflicts among legal principles.*

Keywords: *legal norms, legal rules, legal principles, fundamental character, indeterminacy*

The topic of legal principles remains a well-discussed one in legal theory ever since it emerged from the discussion about the nature of legal norms and sources of law in the second half of the previous century. Many legal systems (especially in constitutions or civil codes) explicitly consider legal principles to be something different from legal rules. The importance of the topic can be also seen from the fact that the distinction has practical relevance because it is used to explain two different types of legal reasoning which follow from different types of

* Marin Keršić, mag. iur., LL. M. (Frankfurt am Main), Assistant, Faculty of Law, University of Split, Domovinskog rata 8, 21000 Split, Republic of Croatia. E-mail address: marin.kersic@pravst.hr. ORCID: https://orcid.org/0000-0002-0964-4625.

1 To be clear about the terminology, I use 'Croatian legal science' as a term encompassing both legal doctrine and legal theory, and in this sense, I follow Aleksander Peczenik. On legal doctrine: "There is one kind of legal research prominent in professional legal writings, such as handbooks, monographs, commentaries, and textbooks of law that implements a specific legal method consisting in the systematic, analytically evaluative exposition of the substance of private law, criminal law, public law etc. (...) One may call this kind of exposition of the law 'legal doctrine'." See Peczenik, A.: *Legal Doctrine and Legal Theory*. In: Roversi, C. (eds.): *A Treatise of Legal Philosophy and General Jurisprudence*, Dordrecht, Springer, 2005, p. 1. On legal theory: "It has many names: general theory of law, theory of state and law, *allgemeine Rechtslehre*, jurisprudence. Its content is a mixture of legal philosophy, methodology of law, sociology of law, logical analysis of normative concepts, some comparative law and some study of national positive law." See Peczenik, A.: *Legal Doctrine and Legal Theory*. In: Roversi, C. (eds.): *A Treatise of Legal Philosophy and General Jurisprudence*, Dordrecht, Springer, 2005, p. 12. The paper deals with the understandings of the concept of legal principle in Croatian legal science by analysing selected textbooks in the main areas of legal doctrine and in legal theory.

norms.[2] From this fact, it is interesting to follow the inquiry of what would be the difference, if any, between the two in the context of the Croatian legal science?

This paper deals with the topic of legal principles in Croatian legal science (both legal doctrine and legal theory) by posing the following question: are fundamental character and indeterminacy recognized as characteristics of legal principles in Croatian legal science? If they are, in what measure are they recognized? The focus is put on these two characteristics of legal principles since they are identified as characteristics of legal principles by Riccardo Guastini in his works and in works of some other authors. The choice of this approach, which indeed is a strong appeal to authority, will be justified by presenting a brief overview of the discussions regarding the distinction between rules and principles in the literature. In the terms of structure, a brief overview of the discussions regarding the distinction between legal rules and legal principles will be presented (§1), followed by the analysis of legal principles in Croatian legal science (§2), continuing with the determination of the degree, if any, of recognition of fundamental character and indeterminacy as characteristics of legal principles, and ending with some conclusions regarding the main question posed in the paper (§3). The anticipated contribution consists in determining the degree of recognition of fundamental character and indeterminacy as characteristics of legal principles in Croatian legal science by analysing the selected textbooks in the main areas of legal doctrine and legal theory.

1. THE CONCEPTUAL FRAMEWORK

The question of a possible distinction between legal rules and legal principles is an extensively discussed one in the literature. It is common for lawyers to see legal principles as something different from ordinary legal rules, but it usually remains unclear how exactly legal principles would be different or what would be their defining characteristics. A brief overview of the discussions regarding these discussions will be presented since it is necessary to determine what are, if any, distinctive features of legal principles when compared to legal rules.

The topic of legal principles appeared already in the 1950s in Germany in the work of Josef Esser,[3] and the authors which are usually considered in the literature as the most important ones for the discussion are Ronald Dworkin and Robert Alexy, and the latter two are well-known in legal theory for their rule-principle distinction.[4] Since the debate has now already spanned several decades, and many influential authors have expressed their view on the issue, very brief systematized discussions regarding the distinction between rules and principles will

2 Dworkin, R.: *The Model of Rules*, University of Chicago Law Review, Vol. 35, No. 1, 1967, pp. 22-29; Alexy, R.: *On Balancing and Subsumption. A Structural Comparison*, Ratio Juris, Vol. 16, No. 4, 2003 pp. 433-436. Dworkin states that "Rules are applicable in all-or-nothing fashion. If the facts a rule stipulates are given, the either the rule is valid, in which case the answer it supplies must be accepted or it is not, in which case it contributes nothing to the decision." (p. 25), while principles "states a reason that argues in one direction but does not necessitate a particular decision" (p. 26). See also Sartor, G: *A Formal Model of Legal Argumentation*, Ratio Juris, Vol. 7, No 2, 1994, pp. 177-211.

3 Esser, J., *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts*, Mohr, Tübingen, 1956, p. 39 ff.

4 Dworkin, R., *op. cit.,* note 2, pp. 22–29; Dworkin, R., *Taking Rights Seriously*, Harvard University Press, Cambridge, 1978, pp. 22–29; Alexy, R., *On the Structure of Legal Principles*, Ratio Juris, Vol. 13, No. 3, 2000, pp. 294–297; Alexy, R., *A Theory of Constitutional Rights* (translated by J. Rivers), Oxford University Press, Oxford, 2002, pp. 44–47.

be presented. Regarding the distinction between rules and principles, three positions can be distinguished: 1) a thesis that there are no solid grounds to make a distinction, 2) the *weak distinction* (the position that difference is a matter of only a degree of possessing certain characteristics)[5] thesis and 3) the *strong distinction* thesis (the position that there are qualitative, structural differences between the two).[6]

It is, of course, beyond the scope of this paper to present the varieties in these positions.[7] Amongst the authors who embraced the so-called *weak distinction* between rules and principles, we can mention H. L. A. Hart,[8] Joseph Raz,[9] Neil MacCormick,[10] Riccardo Guastini[11] and Andrei Marmor.[12] Among authors who hold the position that there exists a so-called *strong distinction* between rules and principles, we can mention Ronald Dworkin,[13] Robert Alexy,[14] Manuel Atienza and Juan Ruiz Manero[15] and Gustavo Zagrebelsky.[16]

This paper adopts a *weak distinction*, namely the one formulated by Riccardo Guastini. The reasons for embracing this position come from the fact that it can be convincingly argued that it is hard to establish qualitative differences which would enable us separation of rules from principles.[17] The characteristics ascribed to legal principles from the perspective of the so-called *strong distinction* can also be detected in norms considered as legal rules, which makes the point of structural or qualitative differences between legal rules and legal principles problematic.[18]

The concept of a legal principle, as it can be seen from the previous exposition, is a highly contested one in the literature. But it can be taken that legal principles, as Guastini notes, have the following two characteristics: first, fundamental character and, second, a peculiar type of

5 By 'degree' it is understood that 'rules' and 'principles', as two types of norms, can possess certain characteristics such as generality or vagueness, for example, and that they exhibit these characteristics in different degrees. But these characteristics can be ascribed to both types of norms, and they are not exclusive to one of them. See Pino, G., *I principi tra teoria della norma e teoria dell'argomentazione giuridica*, Diritto e questioni pubbliche, Vol. 11, 2012, p. 89 and pp. 83–87.

6 Moniz Lopes, P., *The Syntax of Principles: Genericity as a Logical Distinction between Rules and Principles*, Ratio Juris, Vol. 30, No. 4, 2017, p. 472. See also Guastini, R., *Teoria e dogmatica delle fonti*, Dott. A. Giuffrè editore, Milano, 1998, pp. 271–274; Pino, G., *Principi e argomentazione giuridica*, Ars Interpretandi. Annuario di ermeneutica giuridica, Vol. 14, 2009, pp. 133–137; Aarnio, A., *Essays on the Doctrinal Study of Law*, Springer Netherlands, Dordrecht, 2011, pp. 119–122; Barberis, M., *Il neocostituzionalismo, terza filosofia del diritto*, Rivista di Filosofia del diritto, Vol. 1, No. 1, 2012, pp. 158–159 for the 'weak' (*distinzione debole*) and 'strong (*distinzione forte*) terminology regarding distinction between rules and principles.

7 For a good summary of the general characteristics of the positions, see Pino, *op. cit.*, note 6, pp. 133–137.

8 Hart, H. L. A., *The Concept of Law* (3rd ed.), Oxford University Press, Oxford, 2012, pp. 259–263.

9 Raz, J., *Legal Principles and the Limits of Law*, Yale Law Journal, Vol. 1, No. 5, 1972, pp. 834–839.

10 MacCormick, N., *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, 1994, pp. 231–232.

11 Guastini, *op. cit.*, note 6, 1998, pp. 274–278; Guastini, R., *Interpretare e argomentare*, Dott. A. Giuffrè editore, Milano, 2011, pp. 173–180.

12 Marmor, A., *Positive Law and Objective Values*, Oxford, Clarendon Press, 2001, pp. 81–88.

13 Dworkin, *op. cit.*, note 2, 1967, pp. 22–29; Dworkin, *op. cit.*, note 4, 1978, pp. 22–29.

14 Alexy, *op. cit.*, note 4, 2000, pp. 294–297 and Alexy, *op. cit.*, note 4, 2002, pp. 44–47.

15 Atienza, M.; Ruiz Manero, J., *A Theory of Legal Sentences*, Kluwer, Dordrecht, 1998, pp. 162–164.

16 Zagrebelsky, G., *Il diritto mite: legge, diritti, giustizia*, Einaudi, Torino, 1992, pp. 147–150.

17 This position is, arguably, more prevalent in the literature. But more importantly, this position takes into account more elements of rules and principles taken into account by Croatian legal scientists.

18 See Poscher, R., *Insights, Errors and Self-Misconceptions of the Theory of Principles*, Ratio Juris, Vol. 22, No. 4, 2009, pp. 433–438.

indeterminacy.[19] These two characteristics need further elaboration. The first one, fundamental characters, is related to the position of the norm in a given legal system, while the second one is related to the "content of the norms and/or their logical structure".[20] Legal principles are "fundamental norms" in two meanings: first, they are fundamental because "they give foundation and/or axiological (ethical-political) justification to other norms" and second, because they "do not have or do not require axiological basis, no ethical-political justification, because in a given legal culture they are considered as evidently 'just' or 'correct' norms".[21] This point can be considered obvious, and numerous examples can be given to illustrate it.[22] It needs to be pointed out that this fundamental character of legal principles is "axiological, and not factual" and that ascribing fundamentality to a norm "depends on evaluation, namely on value-judgment about the relative importance of that norm within the legal system as a whole and/or within some particular part of the system".[23] Legal principles are also affected by a peculiar indeterminacy[24]: first, they are norms with open antecedent (or no antecedent at all, according to some), second, they are defeasible norms (they allow implicit exceptions) and, third, they are general norms (such norms "requires formulation of other norms – which concretize it (…) and without which it would not be suitable for solving concrete cases", but also, such norms "can be applied, executed or concretized in many different and alternative ways"[25]).

The second characteristic of legal principles is far less evident (if evident at all), so it will be further elaborated and illustrated with examples. The first aspect of peculiar indeterminacy (openness of the antecedent) of principles can be best presented when they are contrasted with rules[26]: while rules are norms with 'closed' antecedent (conditions of application), principles are norms with 'open' antecedent, which means that "their conditions of application are completely, or almost completely, indeterminate."[27] This means that the conditions under which respective legal consequences follow are not exhaustively enumerated in the norm.[28] The second aspect (defeasibility) means that principles are "subject to a number of unexpressed

19 Guastini, *op. cit.*, note 11, pp. 173–174, Guastini, R. *La sintassi del diritto* (2nd ed.), G. Giappichelli editore, Torino, 2014, pp. 67–68. For a similar position, see Poscher, R., *ibid.*, p. 438.

20 Guastini, *op. cit.*, note 11, p. 176.

21 Guastini, *op. cit.*, note 11, p. 176.

22 Take for example, the principles of legality (Article 5 of the Croatian Constitution), equality before the law (Article 14 of the Croatian Constitution), separation of powers (Article 4 of the Croatian Constitution), *nullum crimen nulla poena sine lege* (Article 31/1 of the Croatian Constitution) and legal certainty (an implicit principle derived from Article 3 of the Croatian Constitution which mentions 'rule of law' as one of the "highest values of the constitutional order of the Republic of Croatia and the basis for interpreting the Constitution." For this interpretation of the rule of law in the Article 3 of the Croatian Constitution, see, for example, the decision of the Constitutional Court of the Republic of Croatia U-I-722/2009 from 6th of April 2011 (Official Gazette 44/2001), point 5. Numerous comparative examples can be given, such as German and Italian Constitutions with *Die Grundrechte* ('Basic rights'), Articles 1–19 and *Principi fondamentali* ('Fundamental Principles'), Articles 1–12.

23 Guastini, R., *Applying Constitutional Principles*, Analisi e diritto, Vol. 9, 2016, p. 242.

24 Guastini, *op. cit.,* note 11, pp. 176–180.

25 Guastini, *ibid.*, p. 179.

26 Guastini, *ibid.*, p. 177.

27 Guastini, *op. cit.*, note 6, p. 242. A legal rule can be reconstructed (supposedly always) in the conditional form consisting of protasis and apodosis (if P, then Q, connecting legal consequence to a definite class of cases), legal principles are unsuitable for such reconstruction. See Guastini, *op. cit.*, note 23, p. 242. Take, for example, Article 14 of the Croatian Constitution which states that "All persons shall be equal before the law" or Article 22 of the Croatian Constitution which states that "Human liberty and personality shall be inviolable".

28 Guastini, *op. cit.*, note 11, p. 177.

('implicit') and unspecified exceptions, that can be detected only when facing a determinate particular case of application".[29] An important consequence of this is that defeasible norm cannot be applied by simple deductive reasoning.[30] The third aspect (generality) has a twofold meaning which was explained in the previous paragraph, but an example can be given.[31]

Guastini states that the essential characteristic of legal principles, as a type of norm distinct from legal rules, is their fundamental character.[32] The three aspects of peculiar indeterminacy can be detected in both types of norms.[33] The fundamental character of a norm is the result of the interpretation.[34] It is a characteristic which depends on an evaluation and "value-judgment about the relative 'importance' of that norm within the legal system as a whole and/or within some particular part of the system (...)".[35]

2. CROATIAN LEGAL SCIENCE

The analysis encompasses the following areas of Croatian legal doctrine: civil substantive law, civil procedural law, criminal substantive law, criminal procedural law, constitutional law and administrative law. Regarding Croatian legal theory, the analysis is based on the textbooks used or being up until recently used in law faculties. The work on legal principles in Croatia is mostly contained in them since there are no substantial works dealing with the topic of legal principles.

2.1. LEGAL DOCTRINE

In civil substantive law, two understandings of legal principles can be found. In the first one, legal principles are understood as "shared common characteristics of socio-economic relations regulated by civil law, formulated by civil law".[36] In other words, the doctrine of civil law formulates shared common characteristics of socio-economic relations as legal principles. Understood in this way, principles (as an example, the principles of party autonomy and equality of the parties) serve together as a "criterion on the basis which civil law can be separated

29 Guastini, *op. cit.*, note 23, p. 242.

30 Guastini, *op. cit.*, note 11, p. 178. There are authors who point out that legal rules are also defeasible and that the difference between rules and principles cannot be found in defeasibility. See, for example, Sampaio, J. S., *Proportionality in Its Narrow Sense and Measuring the Intensity of Restrictions on Fundamental Rights*, in: Duarte, D.; Sampaio, J. S.: *Proportionality in Law. An Analytical Perspective*, Springer, Dordrecht, 2018, pp. 76.

31 Take, for example, the right to a healthy life as a principle in the Article 69 of the Croatian Constitution ("Everyone shall have the right to a healthy life") says nothing about the compensation of damages to health.

32 Guastini, *op. cit.*, note 11, p. 180. See also Guastini, *op. cit.*, note 23, p. 242 and Moniz Lopes, P., *op. cit.*, note 6, pp. 486–487.

33 Guastini, *op. cit.*, note 11, p. 180.

34 *Ibid.*

35 Guastini, *op. cit.*, note 23, p. 242.

36 Klarić, P.; Vedriš, M., *Građansko pravo*, Narodne novine, Zagreb, 2014, p. 7.

from other areas of law".[37] According to the second view, legal principles are "guiding ideas, basis, sources of whole law of obligations"; "a point or place on which, from philosophical and ideological understandings smaller number of general legal rules are formulated, from which, then, and according to them, numerous individual legal rules are formulated".[38] Individual legal rules are, therefore, the results of the application of logical methods to this "guiding ideas, which depart from general understandings – philosophical and ideological"[39]. The process can also go the opposite way around, by deriving legal principles from individual legal rules through the process of abstraction.[40] Legal principles must be expressed in legal acts, and judges should take them into account when deciding cases, especially as a guide to interpretation.[41]

In civil procedural law, legal principles are defined as "directives, guidelines, guiding ideas, basic rules, postulates for work aimed at a certain result"; they are "criterions for agency and judgment, which determine the method of approach to reality which is the object of observation or analysis".[42] What is important to note is that the phrase 'fundamental principles' is used in the literature.[43] Legal principles are relevant both for the legislator, "as a framework for elaboration of legal system", and for the judge, as a "guideline for the interpretation, especially when there is no direct answer to the problem in the legal rule, or when grammatical and logical interpretation is not enough to find a solution".[44] The whole system of civil procedural law is built upon fundamental legal principles. Fundamental principles also "determine the character and the physiognomy" of the civil procedure.[45] Fundamental principles are implied in legal texts and legal texts should be, according to the authors, a reflection of fundamental principles.[46] It this area of legal doctrine implicit legal principles (the ones which are not explicitly stated in legal texts) are given recognition. Such principles are developed or "constructed" by the interpreters.[47]

In criminal substantive law, the topic of legal principles is dealt with through elaboration of the principle of legality, which is considered as a fundamental principle of modern criminal law, representing "an embodiment of many imperatives without which the functioning of legal

37 *Ibid.*

38 Slakoper, Z.; Gorenc, V., *Obvezno pravo: sklapanje, promjene i prestanak ugovora*, Novi informator, Zagreb, 2009, pp. 173–174. It seems plausible to state that this view of legal principles describes peculiar indeterminacy of legal principles in its third aspect – generality. This seems useful to point out, since "numerous individual legal rules" can be formulated from one principle. This claim might also seem obvious, but it is relevant when an intra-right conflict appears, e.g. when two conflicting rules can be derived or are claimed to be derived from the same legal principle. See Zucca, L., *Conflicts of Fundamental Rights as Constitutional Dilemmas*, in Brems, E. (ed.), *Conflicts between Fundamental Rights*, Intersentia, Antwerp, 2008, pp. 26–28.

39 *Ibid.*, p. 174.

40 *Ibid.*

41 *Ibid.*

42 Triva, S.; Dika, M., *Građansko parnično procesno pravo* (7th rev. ed.), Narodne novine, Zagreb, 2004, p. 114.

43 *Ibid.*, pp. 113–116.

44 *Ibid.*, p. 114.

45 *Ibid.*

46 *Ibid.*, p. 115.

47 An example of such principle in Croatian legal system is the principle of legitimate expectations. On the relation between 'interpretation' and 'legal construction', see Guastini, R., *Interpretación y construcción jurídica*, Isonomía, No. 43, 2015, p. 20.

systems in democratic states would be unimaginable".[48] Legal certainty is mentioned as one of those imperatives embodied by the principle of legality: "in order to adjust their behaviour with the law, citizens must know what the law prescribes".[49] According to the main proponents of the social contract theory, the principle of legality is derived from the social contract, with its purpose being "protection of the fundamental social values and the safety of the life in a community".[50] The principle of legality must be explicitly expressed in legal acts.[51] Legal principles are understood as fundamental normative formulations of legal values (the principle of legality as a normative formulation of legal certainty), which must be explicitly expressed in legal acts.

In criminal procedural law, legal principles are defined as "general rules created by the synthesis of procedural rules which can come from national (e.g. constitution or codes) or international law".[52] The view that legal principles are created by 'synthesis' of rules is standard one in the literature: legal principles are created by "abstraction (generalization), i.e. theoretical synthesis of particular procedural provisions";[53] "certain procedural provisions are reduced to some general principles, which would conceptually encompass those rules."[54] The function of legal principles is to serve as a "systematization of procedural rules, allowing for their better understanding";[55] they "give a clear overview of that whole area of law".[56] The addressees of legal principles (primarily courts), "use legal principles as a guide in the application of legal acts", and "as a measure for attaining the internal coherence of the legal system", as "a supplement to the conventional methods of interpretation of legal rules", and finally, as "criterions for decision-making in law".[57]

In constitutional law, the Constitution of the Republic of Croatia,[58] in its 'Basic provisions' (Article 1 – 13) "express the fundamental values of the Constitution", "resting upon common roots of Croatian, European and North American constitutional heritage, i.e. principles which present the basis of free society and its state".[59] Some of these provisions are qualified by the legislative body as 'principles', such as the principle of separation of powers (Article 4), principle of legality (Article 5), but there are also provisions which have nothing to do with principles (provisions regulating coat of arms, flag and national anthem, Article 11). Article 3

48 Horvatić, Ž.; Derenčinović, D.; Cvitanović, L., *Kazneno pravo – Opći dio I.*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, p. 126.

49 *Ibid.*

50 *Ibid.*, p. 127.

51 *Ibid.*, pp. 126–127, Novoselec, P., *Opći dio kaznenog prava*, Pravni fakultet Sveučilišta u Osijeku, Osijek, 2016, pp. 47–48.

52 Krapac, D., *Kazneno procesno pravo, Prva knjiga: Instituticije* (6th rev. ed.), Narodne novine, Zagreb, 2014, p. 84.

53 Tomašević, G., *Kazneno procesno pravo – Opći dio: Temeljni pojmovi* (2nd rev. ed.), Pravni fakultet, Sveučilište u Splitu, Split, 2011, p. 193.

54 Bayer, V., *Kazneno procesno pravo – odabrana poglavlja, Knjiga I. Uvod u teoriju kaznenog procesnog prava, Ministarstvo unutarnjih poslova Republike Hrvatske*, Zagreb, 1995, p. 101.

55 Krapac, *op. cit.,* note 52, p. 83.

56 Bayer, *op. cit.,* note 54, p. 101. Similarly, Pavišić, B., *Kazneno postupovno pravo*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2010, p. 58 and Tomašević, *op. cit.*, note 53, p. 194.

57 Krapac, *op. cit.,* note 52, p. 84.

58 The Constitution of the Republic of Croatia (Official Gazette 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 5/2014)

59 Smerdel, B., *Ustavno uređenje europske Hrvatske*, Narodne novine, Zagreb, 2013, p. 278.

expresses the "highest values of the constitutional order: freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and democratic multiparty system." These 'highest values of the constitutional order' are the "basis for the interpretation of the Constitution and its provisions".[60] In Chapter III of the Constitution, titled Protection of Human Rights and Fundamental Freedoms (Articles 14 – 70), these 'highest values of the constitutional orders' from Article 3 are further elaborated, for example, equality before the law (Article 14). Legal principles would, therefore, represent more detailed elaborations of the highest constitutional values, with their primary purpose being the protection of freedoms and rights. Indeterminacy as characteristic of legal principles has particular consequences in constitutional law since the majority of the authors hold a position that norms expressing fundamental rights, found in constitutions have the form of legal principles.[61] The consequences consist in problems and special methods proposed for solving conflicts between fundamental (constitutional) rights.[62] The methods adopted solving conflicts between fundamental rights, naturally, impact their resolution.[63]

In administrative law, legal principles are defined as "the basic lever of the whole administrative procedure", which must be strictly adhered to in the application of the law, with the purpose of "guaranteeing the correct application of the law" and "protecting the legitimate rights and interests of the parties".[64] The term 'fundamental legal principles' is used in the literature, and these principles "form the basis on which the General Administrative Procedure Act is founded".[65] To state the significance of the principles, they are not only located in the first articles of the General Administrative Procedure Act (which comes as a no surprise since it is a common nomotechnical standard), but their application is "guaranteed through legal provisions of the Act".[66]

Summarizing the understanding of legal principles in the analysed areas of Croatian legal doctrine, it can be said that legal principles are considered as norms hierarchically above other norms (often referring to them as 'fundamental'), expressing certain values and serving as a guidance in the application of law, as a supplement to interpretation of law, as a way of attaining coherence of the legal system and as criterions for decision making in law. It is important to note, regardless of this summarized view, that the understandings of legal principles in the analysed areas of Croatian legal doctrine are very differing. Depending on the area of the doctrine, it is considered that they need to be explicitly expressed in legal acts (civil substan-

60 *Ibid.*, p. 280.

61 Martínez-Zorilla, D., *The Structure of Conflict of Fundamental Legal Rights*, Law and Philosophy, Vol. 30, No. 6, 2011, pp. 729–731.

62 The relation between 'fundamental rights' and 'constitutional rights' is not so clear in the literature. It seems to me that a plausible position is the one which holds that fundamental rights are constitutional rights which "cannot be, or are not, derived from more basic constitutional protections". For this, see Himma, K., *On the Justification of Fundamental Constitutional Rights*, in: Himma, K. E., Spaić, B. (eds.): *Fundamental Rights: Justification and Interpretation*, Eleven International Publishing, The Hague, 2016, p. 95.

63 Think of, for example, the conflicts between privacy and free speech. The literature on the methods of solving conflicts between fundamental rights is vast, with the predominant author being Robert Alexy and his famous method of 'balancing'.

64 Borković, I., *Upravno pravo* (7th rev. ed.), Narodne novine, Zagreb, 2002, p. 403.

65 *Ibid.*, p. 402; General Administrative Procedure Act (Official Gazette 47/2009).

66 Borković, *op. cit.*, note 64, p. 403.

tive law and criminal substantive law), or they can be implicitly contained in legal acts (civil procedural law and criminal substantive law).

2.2. LEGAL THEORY

After presenting the understanding of legal principles in some areas of Croatian legal doctrine, an overview of the understanding of legal principles in Croatian legal theory will be presented. As mentioned earlier, the textbooks are the principal source of reference. The most prominent legal theorist in Croatia, Nikola Visković, defines legal principles as "the most abstract and fundamental rules of a given legal system, highest general legal norms, 'norms above norms', which express fundamental values to which the legal system serves, and as such they are important for guiding the creation and application (interpretation) of all other legal norms."[67] Visković classifies principles as a type of general legal norms (as opposed to individual legal norms, with the criterion being the definiteness of the addressees.[68] Visković also states that "general legal norms are also called 'rules', since they impose regularity in future behaviour in a certain type of legal relations".[69] As an example, principles of legality, national sovereignty, independence of the judiciary, justice, legal certainty and autonomy of will are mentioned.[70] It can be concluded, from the usage of the term 'rules' for general legal norms, and classifying principles under general legal norms, that the position regarding the distinction between rules and principles taken is the one of a degree (*weak distinction*).

The second view put forward by Berislav Perić, defines legal principles as "caryatids (girders) of a given legal system, supporting and maintaining the whole system ('building')".[71] Legal principles can be, according to this view, classified into the following categories: 1) general principles of law, also called *dictae et regulae iuris*, which "can even be seen above all other types of legal principles"; 2) general principles of a given legal system (the principles of equality before the law and legality, as an example) and 3) principles in particular areas of law of a given legal system.[72] Legal principles "guide a lawyer in his decision", so that he can "through deduction, arrive from general principles to a concrete decision".[73] This understanding could be amended in the last aspect with the one from Guastini by pointing to the meaning of generality of legal principles.[74]

According to the third view, put forward by Duško Vrban legal principles are defined as "theoretical generalizations made by the judicial practice, and accepted by legal theory".[75] Le-

67 Visković, N., *Teorija države i prava*, Birotehnika, Zagreb, 2006, p. 175.

68 *Ibid.*, p. 174.

69 *Ibid.*

70 *Ibid.*, p. 175.

71 Perić, B., *Država i pravni sustav*, Informator, Zagreb, 1994, p. 181.

72 *Ibid.*, pp. 181–182.

73 *Ibid.*, 1994, p. 182.

74 See footnotes 25 and 31.

75 Vrban, D., *Država i pravo*, Golden Marketing, Zagreb, 2003, p. 404.

gal principles serve as a "criterions for decision-making in law", being "applicable for every disputed case without exception, as a basis for legal practice and theory".[76] Author distinguishes between 1) constitutional principles (e.g. rule of law, equality before the law etc.); 2) general principles of private and international law (e.g. *bona fides*, *pacta sunt servanda* etc.), 3) principles of judiciary and procedure (principle of legality, *audiatur et altera pars* etc.) and 4) special legal principles (principles in particular areas of law, such as presumption of innocence and *in dubio pro reo*.[77]

Summarizing the understanding of legal principles in Croatian legal theory, it can be concluded that legal principles are considered as hierarchically highest legal norms of fundamental importance, which express legal values, and which are used in the application and interpretation of other legal norms, while also serving as guide to decision-making in law. The views on legal principles in Croatian legal theory are also differing, particularly regarding the classification of legal principles.[78] Although there are differing views, the most prominent author holds the so-called *weak distinction*, identifying abstractness (generality) and fundamentality as characteristics of legal principles. The amendment of the understandings from Croatian legal science with the one presented from Riccardo Guastini and Genoese school of legal realism[79] (which are compatible due to the acceptance of the *weak distinction*) seems useful in the aspect of indeterminacy, particularly defeasibility and generality in when principles come in conflict. This could contribute to the rationality of legal reasoning when applying legal principles and particularly when dealing with conflicts between legal principles.

3. CONCLUSION

Returning to the main question of the paper, some conclusions can be given from the previously presented analysis. As elaborated in §1, the fundamental character of legal principles has twofold meaning: first, it means that legal principles give foundation and justification to other norms and, second, that they themselves do not require foundation or justification, because they are considered as just or correct norms in a given legal system. It can be seen from the presentation in §2 that fundamental character has been generally widely recognized in the discourse of both Croatian legal doctrine and legal theory. But the recognition of this characteristic of legal principles comes as a no surprise and is a thing which could be anticipated. What is of greater importance, since it bears consequences in the field of interpretation and application of the law is the second characteristic. Regarding the peculiar indeterminacy of legal principles, elaborated in §2, legal principles are, first, norms with open antecedent (or no antecedent at all), second, defeasible norms (allowing implicit exceptions) and third, general norms (first, they require concretization – formulation of other norms to be applied to con-

76 *Ibid.*, pp. 405-406. It seems that here we can draw a parallel with indeterminacy of legal principles in its first aspect – openness of the antecedent, which means that the conditions of application of legal principles or completely, or almost completely, indeterminate. See footnote 27.

77 *Ibid.*, pp. 406–407.

78 Regarding the classification, see also Miličić, V., *Opća teorija prava i države*, self-publishing, Zagreb, 2008, pp. 62–66.

79 See Barberis, M.: *Genoa's Realism – A Guide for the Perplexed*, Revista brasileira de filosofia Vol. 240, 2013, pp. 13–25.

crete cases and second, they can be applied in different ways). Indeterminacy has not been given detailed attention in the discourse of Croatian legal science, particularly in its meaning (or aspect) of defeasibility and generality. In this sense, it is a novel issue in Croatian legal science. Why can this be considered relevant at all? First, by acknowledging indeterminacy of legal principles, particularly defeasibility and generality, reasoning with conflicting legal principles seems more rational. Secondly, since the law exists as a system of solving conflicts, we can draw parallel with conflicts which are especially burdening for the society – conflicts between fundamental rights, which exhibit the characteristics of legal principles.[80] By acknowledging these characteristics of legal principles (and the need for their concretisation as the most important consequence), a clearer understanding of such conflicts could be attained, with the consequences for resolving such conflicts in adjudication.[81]

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80 Take just for an example conflict between the right to life (Art. 21 of the Croatian Constitution) and the right to private life (Art. 35 of the Croatian Constitution) or conflict between or the conflict between the freedom of thought and expression (Art. 38 of the Croatian Constitution) and the right to private life (Art. 35 of the Croatian Constitution).

81 The topic of solving conflicts between fundamental rights has extensive literature on it. See, for example, Martínez-Zorilla, *op. cit.*, note 61 pp. 729–749; Moreso, Jose J., *Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism*, Ratio Juris, Vol. 25, No. 1, 2012, pp. 31–46; Zucca, *op. cit.*, note 38, pp. 19–37.

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Marin Keršić[*]

TEMELJNI KARAKTER I NEODREĐENOST KAO OBILJEŽJA PRAVNIH NAČELA U DISKURSU HRVATSKE PRAVNE ZNANOSTI

Sažetak

Tema pravnih načela još uvijek je tema razmatranja u teoriji prava, kao što je i bila kada se pojavila iz rasprava o prirodi pravnih normi i izvorima prava u drugoj polovici prošlog stoljeća. Nastavljajući u okviru šireg istraživanja o pravnim načelima, ovaj se rad temelji na analizi shvaćanja načela u diskursu hrvatske pravne znanosti. Temeljni karakter pravnih načela prepoznat je u diskursu hrvatske pravne znanosti, ali neodređenosti nije posvećena detaljna pozornost. U radu se razmatraju otvorena pitanja koja proizlaze iz odnosa pravne doktrine i pravne teorije u tim aspektima, s mogućim implikacijama za rješavanje sukoba između pravnih načela.

Ključne riječi: *pravne norme, pravna načela, temeljni karakter, neodređenost*

* Marin Keršić, mag. iur., LL.M. (Frankfurt am Main), asistent, Pravni fakultet Sveučilišta u Splitu, Domovinskog rata 8, 21000 Split, Republika Hrvatska. Adresa e-pošte: marin.kersic@pravst.hr. ORCID: https://orcid.org/0000-0002-0964-4625.