DOI 10.51558/2490-3647.2022.7.3.169
UDK 340.12:342.4(497.6)

Primljeno: 06. 04. 2022.

Pregledni rad
Review paper

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RADBRUCH'S FORMULA IN THE CONSTITUTION OF BOSNIA AND HERZEGOVINA – UNTAPPED POTENTIAL FOR STRENGTHENING THE RULE OF LAW

The philosophy of Gustav Radbruch made an immeasurable contribution to the development of the concept of the rule of law. The part of Radbruch's philosophy that still has a great influence on thought about the relationship between justice and mere legality is certainly his Formula, which can be reduced to the venerable stance of lex injusta non est lex.[1] Simply put, according to Radbruch's Formula, any law that is 'unjust to an intolerable degree is not legally valid and should not be applied by courts. In this text, the author finds a similarity between Radbruch's Formula and provision VI/3(c) of the Constitution of Bosnia and Herzegovina (B&H) and analyzes the content of the aforementioned provision, which regulates the possibility of initiating a concrete review of the constitutionality of laws by ordinary courts. The text analyzes what the aforementioned provision of the B&H Constitution stipulates and what opportunities it offers to ordinary courts when applying the law. It also analyzes the extent to which the potential of the B&H Constitution has been used by ordinary courts in the legal system of B&H.

Keywords: Radbruch's Formula; the B&H Constitution; concrete constitutional(judicial) review; the rule of law.

1. INTRODUCTION – ON THE PHILOSOPHY OF GUSTAV RADBRUCH

As a prominent philosopher, Gustav Radbruch (1878-1949) had a significant influence on the understanding of the relationship between justness and legality, i.e. of the relationship between natural and positive law. For this text, the most critical part of Radbruch's philosophy is the part related to his Formula *lex injusta non est lex*. Before I start to analyze Radbruch's Formula and the relationship between the Formula and the B&H Constitution, I will, briefly, represent the paramount features of Radbruch's philosophy. It is valuable to notice that Radbruch lived in turbulent times and he witnessed the First and the Second World War, which definitely had an impact on the development of his philosophy.

Radbruch (1932/2019, §9: 95-100) argues that the idea of law contains three elements - expediency, justice, and legal certainty. It is requisite for the law to be just, expedient, and to guarantee legal certainty. What is prescribed by law must be enforced in reality.

Even though all of these elements are equally essential, on certain occasions they may be in collision. Certain elements of the idea of law can be favored to the detriment of other elements. As Radbruch (1932/2019, §9: 95-100) points out, the police state tried to make expediency the only ruling principle. On the other hand, in the period of domination of natural law, it was attempted in a mystical manner to equalize the principle of justness with law. In the period of domination of legal positivism, legal certainty had a key role in understanding the law, and in this period justness and expediency were discarded from law discourse. Therefore, philosophy of law and politics of law were silenced for long in this period of legal certainty domination.

The main aim of Radbruch's philosophy is to define the relationship between justice and legal certainty, i.e natural and positive law. For Radbruch (1932/2019, §1: 23) "[l]aw may be unjust; but it is law only because its meaning is to be just."Although for Radbruch legal certainty is as essential as justness and expediency, in the relationship between positive and natural law, he argues that "(...) value judgments, according to their source - nature, revelation, or reason - are of universal validity and unchangeable. They are susceptible of cognition. Once known, they prevail over conflicting enacted law: natural law is superior to positive law" (1932/2019, §3: 35). Based on this citation Radbrcuh can be understood as a "pure" jusnaturalist and so he only repeated Ciceron's thought who argues that positive law is legitimized by divine law. That implies that unwritten natural law and divine law are sources of posi-

tive law, and although positive law must adjust to local circumstances, it still must be in accordance with natural and divine law (Cicero according to Neumann 2002: 73-74). However, as Schünemann points out, Radbrcuh in pre-war philosophy argued a judge has never to examine whether authoritative command just, because he (the judge) must consider as valid every positive law (Šineman 2013: 89). In that sense, Radbruch (1932/2019, §10: 109) states:

> "Hence the judge, while subservient to the law without regard to its justice, nevertheless does not subserve mere accidental purposes of arbitrariness. Even when he ceases to be the servant of justice because that is the will of the law, he still remains the servant of legal certainty. We despise the parson who preaches in a sense contrary to his conviction, but we respect the judge who does not permit himself to be diverted from his loyalty to the law by his conflicting sense of the right. For the dogma is of value only as an expression of faith, while the law is of value not only as a precipitation of justice but also as a guarantee of legal certainty, and it is preeminently as the latter that it is entrusted to the judge."

In that context, Leawoods (2000) observes that "Radbruch attempts to create a legal philosophy that makes room for morality and legal positivism". Therefore, Radbruch was not a 'jusnaturalist' nor a 'radical positivist'. Radbruch's pre-war philosophy was between jusnaturalism and legal positivism. So, Radbruch (1932, §5: 59) clarifies the difference between morality and law, and observes that "(…) the distinction between law and morals is couched in the slogan: ´Law is outward, morals are inward´". Thus, Radbruch (1932/2019, §5: 63) points out:

> "Morality and legality, accordingly, do not involve a distinction of the modes of obligation, but mean precisely this, that the moral norm alone has a substratum that may be obliged, namely, the will, while the substratum of the law, namely, conduct, is of necessity insusceptible of obligation. The distinction, then, is merely one between the substrata, the fact that morals alone regard the individual and his motives while the law regards living together, which covers only the external (and but indirectly also the internal) conduct of the individual and not his motives as such."

Radbruch clarifies the difference between morality and law, both of these terms he regards as equally essential, and claims "[t]he relation between the two spheres of norms consists rather in this, that morals, on the one hand, constitute the end of the law and, on the other hand, for that very reason are the ground of its obligatory validity." (1932/2019, §5: 66). Hence, legal certainty is as equally essential as morality,

because without legal certainty morality is just an abstract principle and without morality, the law does not fulfill its basic purpose of being just.

> "Morals can only be rendered possible, and cannot be enforced, by the law, because of necessity the moral act can only be an act of freedom; but since law can render morals only possible, it inevitably must also render possible the immoral" (Radbruch 1932/2019, §5: 68).

Radbruch, therefore, argues that the legal order of a state ought to enable each individual to choose between morality and immorality. From the perspective of a state, as Radbruch explains, legal order is moral only if it enables freedom. Of course, the freedom of an individual ought to be constrained by the freedom of others. Thus, Radbruch argues

> "(…) that the law ought to serve the individual — the law ought to render possible individual morality — the law ought to effect individual freedom — as far as it can effect it, that is, not inner freedom but the outward liberty which inner freedom presupposes, the deliverance from the motivating force of societal surroundings, whether it consist in the terrorism of the fight of all against all or in the suggestions of the social environment" (1932, §8: 85).

However, as mentioned, Radbruch was not a 'jusnaturalist' nor a legal positivist, since he considered legal certainty and justice equally essential. "The law is valid not because it can be carried through effectively; rather, it is valid if it can be carried through effectively, because it is only then that it can afford legal certainty." (Radbruch 1932/2019, §10: 107). Additionally, he argues "(...) there may be 'shameful laws' which conscience will refuse to obey" (1932/2019, §10: 108), therefore, in order for a given state to have the attribute of a 'constitutional state' (*Rechtsstaat*), in addition to venerating the norms of positive law, it is also necessary to be bound by "(...) the rights of man antecedent to the state and to natural law above the state" (1932, §26: 222).

This short introduction to Radbruch's philosophy was necessary for a better understanding of Radbruch's Formula which represents 'the crown' of his thought on the relationship between justice and legal certainty. It is crucial to mention that previously analyzed Radbruch's philosophy represents his pre-war thought where he tried to balance two principles - justice and legal certainty. The ideal legal system incorporates both principles, equally, while not neglecting expediency. However, as I depict, Radbruch in the pre-war philosophy, in some statements 'favors' justice, while in other statements 'favors' legal certainty. Therefore, it would be methodologically incorrect to interpret certain Radbruch's statements as isolated from other statements. Hereof, in the previous part of this text, I offered Radbruch's statements where Rad-

bruch favors legal certainty, but as well as justice. Therefore, Radbruch was not a 'jusnaturalist', but neither a legal positivist (See Hon Tan 2021: 2)

2. RADBRUCH'S FORMULA - *LEX INJUSTA NON EST LEX*

Radbruch's Formula was created after World War II as a tool to face all crimes committed by the Nazi regime. As Haldemann points out, Radbruch's Formula has denoted as 'statutory lawlessness' every law that is 'unjust to an intolerable degree' (2005). As Schünemann explains, with the Formula he set in 1946, Radbruch somewise limited the radical legal positivism he advocated in his pre-war philosophy (Šineman 2013: 89). I cannot agree with the viewpoint that in 1932 Radbruch advocated the positions of radical legal positivism because as I have depicted, in the texts *Philosophy of Law*, Radbruch in various statements 'favors' both principles - the principle of justice and the principle of legal certainty, and thus Radbruch's pre-war philosophy cannot be considered radically legal-positivist. As Čavoški (2006: 73) observes, after World War II, Radburch abandoned the balanced emphasis on all three constituent ideas of law, consequently favoring the idea of justice.

However, Radburch's Formula was not a revolutionary turn in Radburch's philosophy, because as I have shown, even in pre-war philosophy, Radbruch considered that the purpose of the law is to be just. Though it is true that, in pre-war philosophy, Rabruch also considered that a judge should enforce an unjust law for the sake of legal certainty. However, it should be taken into consideration that at that time, Radbruch could not even imagine what consequences the radical positivist understanding, and enforcement of the law would leave. Therefore Radbruch's pre-war philosophy can be understood as an attempt to balance the three elements of the idea of law, while Radbruch's post-war philosophy can be characterized as favoring the principle of justice to the detriment of other elements of the idea of law so that primarily Nazi crimes would be adequately sanctioned. Radbruch (1946/2019: 266) states in his post-war writings that:

> "(…) it is true that the public benefit, along with justice, is an objective of the law. And of course laws have value in and of themselves, even bad laws: the value, namely, of securing the law against uncertainty. And of course it is true that, owing to human imperfection, the three values of the law — public benefit, legal certainty, and justice — are not always united harmoniously in laws, and the only recourse, then, is to weigh whether validity is to be granted even to bad, harmful, or unjust laws for the sake of legal certainty, or whether validity is to be withheld

> because of their injustice or social harmfulness. One thing, however, must be indelibly impressed on the consciousness of the people as well as of jurists: There can be laws that are so unjust and so socially harmful that validity, indeed legal character itself, must be denied them."

In such circumstances Radbruch's Formula of 'statutory lawlessness' (*lex iniusta non est lex*) arises, which declares laws that violate the fundamental principles of morality and justice to an intolerable degree 'unjust' (Haldemann 2005). More precisely, Radbruch (1946/2019: 273) did not consider every unjust law as 'statutory lawlessness', but only those laws that contradict the principle of justice to an intolerable degree. Radbruch himself admits that it is impossible to draw a sharp line between 'statutory lawlessness' and a law that is valid even though the content of that law is unjust. However, as he further explains, the sharpest line can be drawn in the case when the law does not even intend to be just, and in such case, the law is not only a 'flawed law', but also it does not even have the character of law (Ibid.). So, for Radbruch:

> "Legal character is also lacking in all the statutes that treated human beings as subhuman and denied them human rights, and it is lacking, too, in all the caveats that, governed solely by the momentary necessities of intimidation, disregarded the varying gravity of offences and threatened the same punishment, often death, for the slightest as well as the most serious of crimes. All these are examples of statutory lawlessness" (1946/2019: 274).

This raises the question of how to define the concept of 'unjust to an intolerable degree' in the contemporary context because it is clear that today we cannot talk about such degree of injustice that existed during the crimes of the Nazi regime. The answer to this question is offered by Borowski (2021), who concludes that 'unjust to an intolerable degree' would correspond to the concept of violation of human rights. This corresponds to Hasanbegović's thesis that:

> "(...) the modern understanding of justice is no longer an Aristotelian abstract, i.e. indeterminate in content. It is essentially determined by human rights, or the rights of man, as they were initially called. From the current point of view, prior and throughout the 21st century, the modern understanding of justice can be clearly reconstructed, so it is easy to see that in the modern age what is considered just is that which is in accordance with the rights of man – be it the constitution, law, judgment, or behavior – which is in accordance with the rights of man, later called human rights" (2021: 174).

Then, is it possible to say, from a contemporary point of view that Radbruch's Formula implies that a law that is contrary to human rights is 'statutory lawlessness'? If justice is to be defined in the way Hasanbegović suggests, Radbruch's Formula would support this standpoint. Also, support for this thesis can be found in Radbruch's view that "[l]egal character is also lacking in all the statutes that treated human beings as subhuman and denied them human rights" (1946/2019: 274).

Inevitably, according to Bix (2011), Radbruch's Formula is a kind of instruction to judges in their judicial reasoning. Therefore, according to the opinion of the same author, Radbruch's Formula can undermine the principle of the rule of law because it gives exorbitant authority to judges to decide what is 'law' and what is not 'law' (2013: 74). Radbruch's Formula allows courts to declare laws that they consider contrary to the principle of justice to be 'statutory lawlessness'. According to Hon Tan (2021), if there is a written constitution in the state that ought to have supremacy, and if the state is not in the process of transition, there is a possibility that resorting to Radbruch's Formula will contradict the ideals of constitutional democracy. However, it should be borne in mind that Radbruch's Formula was created in extraordinary circumstances as one of the solutions for trying Nazi leaders. In order to understand what influence Radbruch's Formula had on the proceedings of the courts after World War II in Germany, I will cite the example of a wife who, during the reign of the Nazi regime, reported her husband for making offensive remarks about Hitler's regime. Based on the laws of Nazi Germany, the husband was arrested and sentenced to death, but instead of the death penalty, he was sent to the front. After the end of World War II, in 1949, the wife was detained by the West German authorities and tried for unlawful deprivation of her husband's liberty based on the Penal Code of 1871. She referred to the fact that she was only following the laws of Nazi Germany and that she had not done anything illegal. In the specific case, the court found her guilty, and one of the arguments was that the fact that she acted in accordance with the law is not relevant considering that such a law cannot be considered a 'law' because it does not correspond to the principle of justice.[3] This was the *modus operandi* in later cases of West German courts.[4] Of course, these were extraordinary circumstances of German society's confrontation with the past, and the question whether it is possible to talk about Radbruch's formula today when human rights are recognized at the international level arises.

[3] See Hart (1957) for the aforementioned case and criticism of Radbruch's formula. Also, on the application of Radbruch's Formula in the case of guards who secured the border of East Germany, see Künzler (2012).

[4] See Ibid.

Radburch's Formula definitely revived the thinking of Thomas Aquinas (1990: 190), who points out that "(...) every human law only has the value of law (*habet de ratione legis*) if it is derived from natural law. If something differs from the natural law, then it is no longer a law, but an ex-communication of the law". However, today, as Hasanbegović points out, natural rights are

> "(...) legally positivized, not only as part of the national constitutional rights of individual states but also as the positive international law of both universal and regional type. Therefore, human rights are no longer (only) natural rights, nor mere political-ideological demands and ideals. Human rights law is part of positive law - both national, regional and universal international law" (2021: 174).

Therefore, as already explained, justice in the modern context is synonymous with veneration of human rights, and respect for human rights is clearly normed and defined primarily in international conventions on human rights, but also in national legal systems of states, which limits the courts, in the eventual application of Radbruch's Formula, because courts do not have 'total' freedom to interpret what is 'law' and what is not 'law'. Only a 'law' that is not in line with internationally recognized human rights could be considered 'statutory lawlessness'. In the modified contemporary Radbruch's Formula, the principle of justice is not favored over the principle of legal certainty, because the principle of justice is positivized by the standardization and definition of human rights at the international and national level. In the further text, I will offer one of the examples of the modified form of the Radrbuch's Formula in the the B&H Constitution.

2. RADBRUCH'S FORMULA IN THE B&H CONSTITUTION

After explaining the concept of Radbruch's Formula and the conditions in which it was created, I will analyze the modified concept of the Radbruch's Formula in the B&H Constitution. Concrete constitutional (judicial) review is contained in provision VI/3(c) of the B&H Constitution. This provision provides that:

> "The Constitutional Court shall have 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."[5]

This provision defines the concrete review of constitutionality within the constitutional system of B&H. As Trnka states (2006: 366):

> "By introducing this jurisdiction, the B&H Constitution combined the European solutions of the constitutional judiciary with the American system, according to which ordinary courts, when resolving concrete disputes, and when in doubt of the constitutionality and legality of the regulations they need to enforce, stop the procedure and ask the Constitutional Court to review its constitutionality and legality."

In fact, the model of concrete review of constitutionality contained in the B&H Constitution combines the American and European models of constitutionality. The part that contains an element of the American model of constitutionality review is present in the fact that any court can initiate the constitutionality review of the law, but unlike the classic American model of constitutionality review, the constitutionality of a law is resolved by the Constitutional Court of B&H as the central authority. It is the European element within the constitutionality review model, which stipulates that the issue of constitutionality at the state level is exclusively resolved by the Constitutional Court of B&H. The courts within the constitutional-legal system of B&H can refer the questions of the constitutionality of laws, which should be applied in a concrete case, to the Constitutional Court of B&H decision-making, before it is applied in a concrete case.[6] AsAdemović *et al*. (2012) state, when a certain court has a well-founded fear that the legal norm to be applied in a concrete case is not in accordance with the standards protected by the B&H Constitution, it can stop the procedure and start the constitutionality review procedure before the Constitutional Court of B&H. In that case, the Constitutional Court of B&H examines the constitutionality of the law, as well as in the case of abstract review of constitutionality. However, the concrete review of constitutionality is limited only to the question raised that is relevant to a concrete case before a concrete court that initiated the proceedings, and in this regard, the Constitutional Court of B&H does not generally examine the constitutionality of the law to be enforced (Ibid.).

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5 Article VI/3(c) of the B&H Constitution.

6 On the differences between the American (decentralized) model and the European (centralized) model, see Albrecht, Podolnjak (2009).

As I observed above, it is clear that ordinary courts in the constitutional system of B&H have the possibility, in case they doubt the constitutionality of the law they are supposed to enforce, to stop the proceedings and forward the law to the Constitutional Court of B&H (concrete constitutional review). Interestingly, in that case, the Constitutional Court of B&H not only examines whether a certain law is in line with the B&H Constitution but also whether that law is in accordance with the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the general rules of international public law. As Trnka explains (2006: 366), "[t]he Constitutional Court (...) may encounter difficulties in determining the existence of general rules of international public law because these rules are not codified anywhere". So, the term 'general rules of international public law' must be explained in more detail, although this text will certainly not provide a definitive answer to the question of what the general rules of public international law entail. General rules of international law are primarily *jus cogens* norms of international law and international customary law, but also, nowadays, with the progressive development of international treaty law, international treaties in the field of human rights also represent general rules of international law.[7] As Buergenthal (1998: 26) states:

> "(...) the large area of legal rules of international human rights that now exist - as well as international institutions, which sprout like mushrooms after the rain, and whose purpose is to apply these legal rules - has internationalized the issue of human rights beyond all expectations. (…) In other words, what we are witnessing today, as witnesses, is a human rights revolution that continues."

However, do all international human rights treaties represent general rules of international law? The human rights that everyone must respect today are determined by the Universal Declaration of Human Rights, which after a certain period of time became part of the international customary law and therefore mandatory for all states. Apart from the Universal Declaration of Human Rights, are there other international treaties on human rights whose content is also binding on those states that have not ratified international human rights treaties? I will not deal with that issue in detail in this text but I will note that, as Schabas states, there are international treaties in this area that have been ratified by almost all states, such as the Convention on the Rights of the Child (196 states), the International Convention on the Elimination of All Forms of Racial Discrimination (182 states), while the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural

[7] See Tunkin (1993) and compare with Lowe (1983). Also, see Degan (2011).

Rights have been ratified by 173 and 170 states of the world.[8] In this sense, international treaties that are close to being ratified by all states, according to Schabas (2021), represent convincing evidence of the existence of international custom. Of course, the general rules of international public law also include the question of the existence of *jus cogens* norms, which certainly represents a special topic, but, relevant to this text, the general rules of international law definitely include, among other things, the protection of internationally recognized human rights contained in the provisions of the Universal Declaration on Human Rights as well as other mentioned international treaties that have been ratified by almost all states of the world. Additionally, the practice of ordinary courts in B&H during the concrete review of constitutionality shows that when initiating a request for a concrete review, ordinary courts refer to non-compliance with international treaties besides the Universal Declaration of Human Rights.[9] Certainly, whether the term 'general rules of international law is interpreted in a restrictive or extensive manner, the provision of the B&H Constitution that regulates the issue of concrete review of constitutionality allows ordinary courts to refer to a wide range of human rights when initiating constitutional review before the Constitutional Court of B&H.

What is the connection between the provision that regulates the concrete review of constitutionality within the B&H Constitution and Radbruch's Formula? As stated, Radbruch's Formula was created in order to declare laws that are 'unjust to an intolerable degree' as 'statutory lawlessness'. In the modern context, 'unjust to an intolerable degree' implies a violation of human rights. On the other hand, ordinary courts in B&H can refer any law that they consider in a concrete case to violate the human rights of any party in the proceedings to the Constitutional Court of B&H for concrete constitutional review, where the Constitutional Court of B&H not only examines whether the law is in line with the B&H Constitution, but also whether it is in accordance with the ECHR and the general rules of international law. According to Radbruch's dictionary, ordinary courts in B&H have the jurisdiction in the case of 'injustice to an intolerable degree' to stop the proceedings and forward that law to the Constitutional Court of B&H for constitutionality review. In contrast to Radbruch's Formula, the B&H Constitution does not authorize ordinary courts to decide what is 'law' and what is not 'law', and also, ordinary courts have the right to be just, but only to the extent recognized by positive law (recognized human rights). Thus, ordinary courts can only refer to those human rights contained in the B&H Constitu-

[8] See Schabas (2021).

[9] See the Decision of the Constitutional Court of B&H U-22/18.

tion, the ECHR, and the general rules of international law, without the possibility of ordinary courts 'inventing' human rights. This, therefore, implies that the modified form of Radbruch's Formula in the B&H Constitution does not affect the balance between justness and legal certainty in favor of justness, as does the original form of Radbruch's Formula. *Vice versa*, legal certainty is satisfied by the fact that the central authority in the form of the Constitutional Court of B&H decides on the constitutionality of a certain law, and not the ordinary court arbitrarily. Also, ordinary courts do not refer to subjective justice, but instead refer to the principle of justness, which is positivized in the form of human rights. Additionally, ordinary courts can be just by refusing to enforce laws that are inconsistent with human rights ('injustice to an intolerable degree') until the Constitutional Court of B&H decides whether such a law is consistent with human rights. Such a model of a modified form of Radbruch's Formula within the B&H Constitution enables the principles of legal certainty and justice (protection of human rights) to be satisfied simultaneously.

3. THE UNTAPPED POTENTIAL OF RADBRUCH'S FORMULA IN THE B&H CONSTITUTION

Ordinary courts in the constitutional system of B&H generally do not utilize the possibility of initiating concrete constitutional review procedures before the Constitutional Court of B&H. By the end of 2020, the number of proceedings initiated before the Constitutional Court by ordinary courts was only 37,[10] while at the time of writing this text, the number had increased to 52.[11] According to Radbruch's dictionary, ordinary courts in the B&H legal system favor the principle of legal certainty over the principle of justness. As Sadurski (2014) points out, although the concrete review of constitutionality in the European model remains the only way for the active participation of ordinary courts in the review of constitutionality, the problem is that ordinary courts, both in B&H and in the states of Eastern Europe, have the lowest rate of requests for concrete constitutional review. This issue is characteristic of states that are transitioning from an authoritarian government to a democratic state. In all likelihood, the authoritarian past is also the reason why ordinary courts still do not understand their own role as the third pillar of power and as a corrective to the legislative and executive powers. Also, a culture of legal positivism has been developed in B&H, where ordinary courts enforce laws mechanically, and sometimes instrumentally,

[10] See Nurkić (2021).

[11] Data is available at: http://www.ccbh.ba/odluke/.

without a sense of fulfilling the principle of justice.[12] In this context, the small number of proceedings initiated before the Constitutional Court by ordinary courts is an indication that ordinary courts perceive their own role as the role of enforcer of legal regulations, and by no means the third pillar of power that ought to be corrective of unjust legal solutions.

Radbruch's Formula in the B&H Constitution frames the possibility for ordinary courts in B&H to be just in a positivist manner, i.e. ordinary courts cannot refer to the principles of natural law that are not written in international conventions, such as the ECHR and other mentioned international treaties, but can only refer to those human rights that are prescribed in the mentioned international conventions, which of course limits the role of ordinary courts in relation to the original concept of Radbruch's Formula, but it also reduces the scope of possible criticism of ordinary courts. Ordinary courts do not decide whether a law is 'law' or 'non-law', but leave that role to the Constitutional Court of B&H, which fully guarantees legal certainty. Thus, ordinary courts, in the case of initiating a concrete review of constitutionality, do not threaten the principle of legal certainty and contribute to the strengthening of the principle of justice. There is, however, no justified reason for not using the potential of the B&H Constitution in the form of the modified Radbruch's Formula, which simultaneously allows ordinary courts to be just, but also values the principle of legal certainty.

4. THE CONSEQUENCES OF THE UNTAPPED POTENTIAL OF RADBRUCH'S FORMULA IN THE CONSTITUTIONAL SYSTEM OF B&H

As Begić states (2021: 117), in B&H we have the case that "(...) laws once passed with provisions, that are contrary to constitutional norms, are applied for years, producing devastating effects on citizens and human rights and freedoms, thus calling into question the legality and the legitimacy of the entire system of institutions of public authority". What does the application of 'unjust' (contrary to human rights) laws lead to? A state where 'just' laws rule is the rule of law state. As Hasanbegović (2021) points out, the rule of law can be briefly described as the rule of human rights (or by the formula: rule of law = rule of human rights). Also a slightly longer formula can be used: rule of law = human rights + independent judiciary, which guarantees

[12] See Karčić (2020) and Uzelac (2010).

that human rights will not remain just a dead letter on paper. On the other hand, the rule of 'unjust' laws leads to rule by law, where the only thing that matters is that laws are enforced in accordance with legal procedures, regardless of whether these laws undermine human rights.[13] The B&H Constitution defines B&H as a state of the rule of law,[14] but do the actions of ordinary courts, *de facto*, support the principle of the rule of law? Definitely, actions of ordinary courts are more similar to rule by law than to the rule of law. In order for the rule of law to function, it is necessary to have 'just' laws (in accordance with human rights), and all branches of government ought to keep this under careful observation, from the legislative, and executive, to the most important in this context – the judiciary. However, in a society where the culture of the rule of law is not established, the legislative power often does not feel bound by the principle of the rule of law, so it usually neglects the limits set by the rule of law.[15] Such is the case with B&H, where due to a long authoritarian past and a transitional present characterized by the dominance of ethnic-nationalisms, there is no established culture of the rule of law among the members of the legislative bodies. That is why the ordinary courts within the constitutional system of B&H should have a more proactive role in limiting the legislative power when passing 'unjust' laws,[16] and since they do not have such a role, the ideal of the rule of law enshrined in the B&H Constitution is still far away.

Radbruch's Formula enabled post-Nazi Germany to confront the Nazi past. Germany managed to declare the laws that were passed during the Nazi regime as 'statutory lawlessness' and thus liberate the principle of justice from mere compliance with legality. This made it possible to build on new foundations a state based on the rule of law, that is, the principle of justice as the essence of the rule of law. On the other hand, the modified form of Radbruch's Formula still failed to initiate significant activity of ordinary courts that would remove unjust laws from the legal system of B&H. At the same time, the modified form of Radbruch's Formula in B&H does not attract ordinary courts to favor the principle of justness to the detriment of legal certainty,

[13] Rule by law argues that there is no more to law than what the holder of supreme legislative power chooses to enact, regardless of what the content is (Dyzenhaus 2021: 261). Rule by law "is accociated with a certain form of authoritarianism, whereby a strong man uses law as a means of subordinating citizens but refuse to acknow legde any legal constraints of his own actions. This is a fake rule of law, critics say, because it is not motivated by any real love of legality" (Waldron 2021: 96). Also see Moustafa, Ginsburg (2008).

[14] Article I(2) of the B&H Constitution.

[15] "It (the rule of law; B. N.) will be effective only in so far as the legislator feels bound by it. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestioningly accepted by the majority" (Hayek 1998: 181).

[16] See Begić (2015).

as the original form of Radbruch's Formula attracted the German courts after World War II. Unfortunately, even this did not contribute to the fact that ordinary courts in B&H use the possibilities of concrete review of constitutionality to a significant extent. This has the consequence that B&H, *de facto*, although constitutionally declared as a state of the rule of law, today is closer to a state in which there is a rule by law principle.

5. CONCLUSION

Radbruch's Formula is the revival of the idea that positive law must be in line with natural law. The concept of 'statutory lawlessness', which was established by Radbruch's Formula, declared only laws that were in extreme conflict ('unjust to an intolerable degree') with the principle of justice as 'unjust'. In this text, I tried to show that 'unjust to an intolerable degree' in the contemporary context implies a violation of human rights. This means that today Radbruch's Formula would imply that laws that contradict human rights do not constitute 'law'. In this context, the courts have the right to declare all laws that are contrary to human rights as 'statutory lawlessness' and thus reject their application. Radbruch's Formula gave the courts broad authority to assess what is 'unjust to an intolerable degree' and thus declare a certain law 'statutory lawlessness'. Nowadays, when the concept of human rights is internationally recognized, Radbruch's Formula can no longer be applied in such a manner that the courts at their own discretion decide what is 'justice' because the concept of justness is no longer a concept that can be interpreted subjectively and provisionally, given that that justice nowadays represents consistent veneration of human rights. Radbruch's Formula of declaring a certain law as 'statutory lawlessness' could only be used on a law that is contrary to the concept of human rights. Therefore, the principle of justice and the principle of legal certainty would be satisfied simultaneously.

Such a modified form of Radbruch's Formula, as shown, exists in the B&H Constitution. Ordinary courts in B&H do not have the jurisdiction to declare a certain law as 'statutory lawlessness', but if a certain law is suspected to be unjust, in the sense of contradiction with the B&H Constitution, the laws of B&H, the ECHR, and the general rules of international public law, that law can be forwarded to the Constitutional Court of B&H for concrete review of constitutionality, where the Constitutional Court of B&H reviews whether the provision of the law, which is relevant for a concrete case, is in accordance with the mentioned legal acts. This enables the Constitutional Court of B&H, as well as ordinary courts, to be 'just' and to declare laws

that are 'unjust to an intolerable degree' (contrary to human rights) unconstitutional ('statutory lawlessness') before their enforcement. Unfortunately, this potential of the B&H Constitution is still not utilized to the extent that would be significant to protect the citizens of B&H from 'unjust' laws. In the future, B&H's judiciary will have to advance in this sense for the constitutional commitment to the de facto rule of law to be fulfilled. Until then, B&H is closer to the rule by law principle than to the rule of law.

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RADBRUCHOVA FORMULA U USTAVU BOSNE I HERCEGOVINE – NEISKORIŠTENI POTENCIJAL ZA OSNAŽIVANJE VLADAVINE PRAVA

SAŽETAK:

Filozofija Gustava Radbrucha je imala nemjerljiv doprinos u razvoju koncepta vladavine prava. Dio Radbruchove filozofije koji i danas ima veliki utjecaj na promišljanje odnosa pravednosti i puke zakonitosti svakako je njegova formula, koja se može svesti na veoma stari stav *lex injusta non est lex.* Jednostavno kazano, prema Radbruchovoj formuli, svaki zakon koji je "nepodnošljivo nepravedan" ne predstavlja zakon, odnosno 'pravo', pa se u tom smislu ne bi trebao ni primjenjivati od strane sudova. Autor u ovom tekstu pronalazi sličnost između Radbruchove formule i odredbe VI/3(c) Ustava Bosne i Hercegovine (BiH) te analizira sadržaj navedene odredbe kojom je normirana mogućnost pokretanja konkretne kontrole ustavnosti zakona od strane redovnih sudova. U tekstu se analizira šta navedena odredba Ustava BiH predviđa i kakve mogućnosti nudi redovnim sudovima pri primjeni zakona. Također, analizira se i u kojoj je mjeri taj potencijal Ustava BiH iskorišten od strane redovnih sudova u pravnom sistemu BiH.

Ključne riječi: Radbruchova formula; Ustav BiH; konkretna kontrola ustavnosti; vladavina prava

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