Essays

Legal Principles and Values*

Pietro Perlingieri**

Abstract

This paper analyses in depth the distinction between values and principles in light of the process of legal interpretation. The logical and legal status of principles are examined from a conceptual standpoint at the outset, as well as the slippery border between principles and values and the interplay between law, politics and ethics. The above-mentioned interaction directly affects the outcome of the interpretive process: by focussing on the weight and appropriateness of legal principles, the present study highlights the width of the latter concept, which mainly lies in the hands of the interpreter when he is concretely applying them to the facts of a case in terms of his role. In light of the above, this paper argues that it is necessary to discard a presumptive approach to the issue in question: otherwise, the inherent appropriateness of a legal principle would be inevitably frustrated. Indeed, if the interpreter is afraid to contravene the sacrosanctity of legal certainty and thus refuse to employ legal principles, then he will not find a solution which is the best fit for the specific features of the actual case, since the 'law' is a broader experience than the mere application of rules. In this vein, the present study points out the need for the interpreter to use the entire toolbox at his disposal with confidence, so that the final decision can reasonably mirror the actual facts it concerns.

I. Legal Values Cannot Be Anything Other than Normative Principles

The distinction between 'principles' and 'values'[1] is proposed essentially with

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** Emeritus Professor of Private Law, University of Sannio.

[1] However, see P. Perlingieri, 'Relazione conclusiva', in Id and A. Tartaglia Polcini eds, *Novecento giuridico: i civilisti, La cultura del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2013), 351-362, disputing the position taken by N. Irti, 'La filosofia di una generazione', in Id and A. Tartaglia Polcini eds, *Novecento giuridico: i civilisti. La cultura del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2013), 333-350. See also P. Perlingieri, 'Editoriale. I valori e il sistema ordinamentale "aperto" ' *Rassegna di diritto civile*, 3 (2014), where 'a strictly dualist reading of the relationship between values and norms' is rejected: the two entities are of necessity dialectically opposed, but are not in any way mutually exclusive. By contrast both are necessary; if, and only if, both subsist *within* the legal system, as an open system adapted to reality, capable of learning from itself and evolving by reflecting on the outcome to previous applications of norms'. Values thus 'form part of the legal system' and 'when they are fixed as principles they become norms'. On this issue, see: P. Femia, 'Segni di valore', in L. Ruggeri ed, *Giurisprudenza della Corte europea dei diritti dell'uomo e influenza sul diritto interno* (Napoli: Edizioni Scientifiche

reference to two arguments.

A principle is asserted to be a '*structurally normative proposition*',[2] albeit '*functionally* very close to the axiological level';[3] thus, principles and values are supposed to be 'dogmatically distinct categories'.[4]

It is argued that principles never protect one single value, but always a '*range of values*';[5] they are '*the result of a balancing operation*', '*representative of a hierarchy of values*'.[6] A value is thus assumed by law, whilst a principle is constructed through law.[7]

However, it is difficult to exclude for example the possibility that informative pluralism, which is taken by the legal order to be a value in itself, may not be a principle (Art 21 Constitution).[8] The creation of a principle implies not only 'necessarily a choice as to which value must prevail and which must cede ground', but, 'prior still to that', 'a choice *regarding the very values that are considered to be in conflict*'.[9]

In actual fact however, whilst a legal principle is a norm – and in fact a norm 'of particular general application and/or particularly fundamental status, that is with a more intense meaning on the historical and legal level'[10] – so too a value that is incorporated into the legal order 'is not a pure 'value' capable of exerting influence merely through guidance',[11] but also a norm and as such a principle.[12] Thus, for a jurist the distinction between principles and values – 'both of which are necessary for the proper functioning of the legal system'[13] – proves to be a nominalistic issue,[14] and hence meaningless.[15]

Whether considered individually or as a whole, normative principles express fundamental general choices, inevitably expressing inter-related values and interests, which may in some cases be hierarchically ordered when compared with one another on an abstract level. Above all constitutional principles constitute

Italiane, 2012), 83-156; N. Lipari, 'Intorno ai "principi generali del diritto" ' *Rivista di diritto civile*, 28-39 (2016).

[2] A. Longo, *I valori costituzionali come categoria dogmatica. Problemi e ipotesi* (Napoli: Jovene, 2007), 358. Author's italics.

[3] ibid 358. Author's italics.

[4] ibid 358.

[5] ibid 372. Author's italics.

[6] ibid. Author's italics.

[7] ibid 373.

[8] ibid 374 et seq.

[9] ibid 384. Author's italics.

[10] A. Cerri, 'Ragionevolezza delle leggi' *Enciclopedia giuridica* (Roma: Treccani, 1991), XXIX, 4.

[11] ibid 4, according to whom, for example, the principle of 'legitimate expectation' is not a pure 'value' but a 'norm'.

[12] P. Perlingieri and P. Femia eds, *Nozioni introduttive e princípi fondamentali del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2004), 15.

[13] P. Perlingieri, 'Relazione conclusiva' n 1 above, 351-362.

[14] G. Scaccia, 'Il bilanciamento degli interessi come tecnica di controllo costituzionale' *Giurisprudenza costituzionale*, 3956 (1998).

[15] G. Zagrebelsky, *Il diritto mite. Legge, diritti, giustizia* (Torino: Einaudi, 1992), 161 et seq.

'the normative formalisation of values'. Just as a conflict between values, whilst legally significant, cannot but be resolved by recourse to the system of principles, similarly a conflict between principles

> 'cannot take the form of a logical alternative and thus cannot be resolved on a formal abstract level according to the *principle of non-contradiction*; on the contrary, it is only open to an axiological solution, which is almost always based on balancing operations'.[16]

The technique of balancing can be applied to principles, values and interests without distinction due to the simple fact that

> 'the only interests that are significant for legal practice are those derived from norms; similarly, the justification for norms lies in their adequacy for those interests, and thus in their suitability to represent them in a satisfactory manner'.[17]

The balancing operation takes on its full meaning 'on the basis of the demands manifested in individual cases and from the way in which these cases are treated by norms'.[18] Interests consist in a composite system of special requirements and normative provisions, which must constantly be related back to constitutional principles and the values expressed by them.[19] Thus, when ruling invalid a clause (in a lease) imposing a prohibition on guests on the grounds that it violated the duty of solidarity, the Supreme Court asserted that party autonomy cannot be detached from the nature of the interests which a given provision is destined to affect.[20] Moreover, if any interest can be associated

[16] G. Scaccia, n 14 above. On this matter, see P. Perlingieri, 'Il diritto come discorso? Dialogo con Aurelio Gentili' *Rassegna di diritto civile*, 770-786 (2014), and in P. Perlingieri et al, *Studi in onore di Giovanni Iudica* (Milano: Università Bocconi Editore, 2014), 1087-1104 and further bibliographical references therein.

[17] See A. Ruggeri, 'Principio di ragionevolezza e specificità dell'interpretazione costituzionale' *Ars interpretandi. Annuario di ermeneutica giuridica*, 314 (2002).

[18] ibid.

[19] ibid. The perspective is amply analysed in P. Perlingieri, *Il diritto civile nella legalità costituzionale secondo il sistema italo-comunitario delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2006), 111 et seq, and is authoritatively supported by P. Grossi, 'Il diritto civile nella legalità costituzionale' *Rassegna di diritto civile*, 919 (2009), who suggests a 'private law immersed within constitutional values construed as values of social and legal life', conceptualising the Constitution as 'a harmonious body not of commands but rather of principles and rules', which derive their normativity from the fact that they are an undoubted expression of 'values of historical culture' (again Id, 'La formazione del giurista e l'esigenza di un odierno ripensamento metodologico' *Quaderni fiorentini*, 32, 47 (2003)) and in P. Maddalena, 'Interpretazione sistematica e assiologica' *Giustizia civile*, 65-77 (2009) (see also in Id, 'I percorsi logici per l'interpretazione del diritto nei giudizi davanti la Corte costituzionale' (presentation to the XV Conference of European Constitutional Courts 'La giustizia costituzionale: funzioni e rapporti con le altre pubbliche autorità', Bucharest, 23-25 May 2011) *Federalismi.it*, 8-13 (2011)).

[20] Corte di Cassazione 19 June 2009 no 14343, *Rassegna di diritto civile*, 992 (2011), with

with at least one value, by analysing interests it should be possible to ascertain which of these express values that are recognised by and protected within the Constitution.[21]

The balancing of interests must be performed with due regard to the values and their hierarchy, which the system along with its life philosophy is capable of expressing. Where this hierarchy is precisely stated, it will be binding on the interpreters of the law, who will be held responsible for giving effect to it and prevented from making findings that are at odds with it. This occurs within the context of contemporary constitutionalism, both within Europe and beyond, specifically with regard to the indisputable absolute primacy which the value of the individual has over ownership or business. This primacy must inevitably direct and limit the discretion of the courts.[22]

While the balancing operation is performed solely upon interpretation and application, this does not mean that the legislature cannot make choices and stipulate the hierarchical structure for the principles asserted by it.[23] Otherwise, the legal system would by definition be neutral, without a soul, consisting in a mere list of propositions – none being incompatible with any other and all being equally appreciable – and without any 'hard core' of principles and values[24] which could be fleshed out upon application. On the other hand, to assert the overriding value of life and human dignity – which are, generally speaking, absolute interests that cannot be sacrificed – does not mean that they cannot be limited where justified by the specific circumstances. This does not refute, and in fact confirms, the utility of a hierarchy of values in terms of argumentative validity, albeit having regard to historical and cultural developments and the specific circumstances of each individual case in which a balancing operation is to be carried out. It is thus not appropriate to assert that

note by I. Prisco, 'Divieto di ospitalità e nullità per violazione del principio di solidarietà', in G. Perlingieri and G. Carapezza Figlia eds, *L'«interpretazione secondo Costituzione» nella giurisprudenza. Crestomazia di decisioni giuridiche* (Napoli: Edizioni Scientifiche Italiane, 2012), II, 369-378.

[21] See again Corte di Cassazione 19 June 2009 no 14343 n 20 above, 996, citing P. Perlingieri, *Manuale di diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2007), 344 et seq.

[22] Regarding this matter, see P. Perlingieri, 'Giustizia secondo Costituzione ed ermeneutica. L'interpretazione c.d. adeguatrice', in P. Femia ed, *Interpretazione a fini applicativi e legittimità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 1-72; Id, *Interpretazione e legalità costituzionale. Antologia per una didattica progredita* (Napoli: Edizioni Scientifiche Italiane, 2012), passim.

[23] See in fact M. Bin, *Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale* (Milano: Giuffrè, 1992), 33 et seq.

[24] However, see for example Corte costituzionale 23 April 1998 no 80, *Giurisprudenza costituzionale*, 1097 (1998), '(i)t falls to the interpreter to take account of the historical development of legal institutions that it is called upon to apply, attributing to them the meaning that is most in keeping with the overall structure of the applicable legal order, in the light of the principles and values expressed by the Constitution'; more recently, see the commendable reasons provided by the Corte di Cassazione-Sezioni Unite 11 July 2011 no 15144, *Foro italiano*, I, c 2254 (2011), rapporteur Mario Rosario Morelli.

> '(n)o authentically pluralist system (…) may bind itself to immutable socio-cultural paradigms, or to inflexible axiological hierarchies, without paralysing democratic dialectics, and along with these the progressive development of constitutional values'.[25]

Precisely pluralism, which is in itself a primary value, and democratic dialectics themselves presuppose respect for the individual and his inviolable rights (Arts 2 and 3 Constitution) – which in itself encapsulates a clear ideological choice – without which there would be no scope for the possible development of constitutional values, which thus cannot be classified as 'fundamentally destructive value tyranny'.[26] An inflexible axiological hierarchy asserted by the sources of law does not preclude balancing operations outright; in fact, it allows different values and principles to be combined for each specific situation, therefore providing a specific and adequate response. It also cannot be asserted that the dimension of the 'weight' or importance of principles 'must be measured on a case by case basis when one principle conflicts with another, having regard to the circumstances within which the collision occurs',[27] whilst at the same time holding the view that values transcend the legal order.[28]

The theory of values is not conceptualised as a simple 'technique to reconstruct and interpret the Constitution'[29] considered in isolation. This is because, whilst values may not comprise 'their own cultural hierarchy' *vis-à-vis* that asserted by the Constitution, the two hierarchies without doubt overlap during interpretation,[30] and one cannot purport to justify each provision 'in relation to a specific area of law' without the requisite coordination with other principles and values within a multi-faceted and open system such as our own.

II. Express and Implicit Legal Principles

[25] G. Scaccia, n 14 above, 3964.

[26] G. Zagrebelsky, n 15 above, 170; G. Pino, 'Conflitto e bilanciamento tra diritti fondamentali. Una mappa dei problemi' *Ragion pratica*, 219-276 (2007); however, see P. Perlingieri, ' "Dittatura del relativismo" e "tirannia dei valori" ' *Iustitia*, 225-247 (2011).

[27] L. Mengoni, 'L'argomentazione nel diritto costituzionale', in Id, *Ermeneutica e dogmatica giuridica. Saggi* (Milano: Giuffrè, 1996), 132.

[28] To that effect, see L. Mengoni, 'Problema e sistema nella controversia sul metodo giuridico' *Jus*, 3-40 (1976) and in Id, *Diritto e valori* (Bologna: il Mulino, 1985), 70; also Id, 'Dogmatica giuridica' (1988), in Id, *Ermeneutica e dogmatica giuridica. Saggi* n 27 above, 25 et seq, in particular 58; Id, 'Interpretazione e nuova dogmatica', in Id, *Ermeneutica e dogmatica giuridica. Saggi* n 27 above, 82 et seq; Id, 'Note sul rapporto tra diritto e morale' *Iustitia*, 305 et seq (1998), along with the polemical view of N. Irti, 'Diritto e tecnica' *Rivista trimestrale di diritto processuale civile*, 1 et seq (2001), in particular 7 et seq. See also N. Irti, 'La filosofia di una generazione' n 1 above, 228 and Id, 'Sugli interventi di Luigi Mengoni e Bruno Romano', note concerning N. Irti and E. Severino, *Dialogo su diritto e tecnica* (Roma-Bari: Laterza, 2001), 103 et seq.

[29] See however A. Baldassarre, 'Costituzione e teoria dei valori' *Politica del diritto*, 639-658 (1991).

[30] Clarification by ibid 657 et seq.

The assertion that only the algorithm of the rule demands all-or-nothing application is *a priori* and beyond question. It is not the algorithmic formulation that gives legal relevance to the proposition.[31] Moreover, rules do not apply as atomistic components of a system, but are always read and interpreted in conjunction with others, which enable them to take on meaning and render their application possible. It is sufficient to consider the rules on liability and joint liability. Strictly speaking, no norm, even if expressed within a rule and in relation to a specific factual situation, can be applied on an all-or-nothing basis.[32]

Moreover, there is a widely-held and accredited view that principles, which by their nature are not 'determinate, foreseeable or morally correct, have nothing to prescribe as norms', should not be referred to for any reason[33] and, insofar as they do not serve to 'coordinate behaviour',[34] lack normative significance. However, they are considered to be unattractive where 'they require outcomes that are different from those dictated by moral principles and legal rules', whilst they are not necessary where they dictate 'the same outcomes' as those resulting from legal rules or moral principles.[35] For example, the principle of freedom of thought (Art 21 Constitution), which is proclaimed without providing any instructions as to how it is to be applied, has been asserted to lack normative significance; on the other hand were it to be accompanied by such instructions, it would take on the form of a standard rule. Legal technique is thus stated to avail itself of only two types of norm – 'correct *moral principles* and posited *legal rules*'[36] – and to not require any legal principles.

This conception appears to be characterised by a variety of prejudices or reasons that do not appear to be well-founded.

A first prejudice is the assertion that legal principles, in contrast to moral principles, 'must be created by human lawmakers' and 'cannot create non-algorithmic norms that have weight', as no such thing exists, and that if 'anybody considers himself to be promulgating legal principles, then he will be mistaken'.[37] However, it still remains to be demonstrated that legal principles

[31] L. Alexander, 'Cosa sono i principi? Ed esistono?', in Id and K. Kress, *Una critica dei principi del diritto*, Italian translation by M. La Torre and N. Stamile (Napoli: Edizioni Scientifiche Italiane, 2014), 7.

[32] However, see N. Irti, *I 'cancelli delle parole'* (Napoli: Editoriale Scientifica, 2015), 13 et seq and 22, who, in responding to those who view rules as norms for guiding conduct, which lead to an 'all-or-nothing' approach (R. Dworkin, *I diritti presi sul serio* (1977), Italian translation by F. Oriana (Bologna: il Mulino, 1994), 93), asserts: '*a rule is one thing, a norm another*. A rule is a typical attitude as a means of achieving a purpose. A rule does not pertain to the legal world, but to the world of technical abilities. A norm means the legal command, which must be obeyed unconditionally'.

[33] L. Alexander, 'Cosa sono i principi?' n 31 above, 15.

[34] ibid.

[35] L. Alexander and K. Kress, 'Contro i principi del diritto', in Id, *Una critica dei principi del diritto* n 31 above, 62, fn 96.

[36] ibid 98.

[37] L. Alexander, 'Cosa sono i principi?' n 31 above, 13.

cannot be posited as such and that they may only be inferred indirectly from legal rules or decisions;[38] moreover, one must ask why it should only be these principles that have a 'weight', and thus a role capable of justifying a sufficient number of rules and decisions.

That legal principles cannot be posited directly as integral parts and qualifying elements of the legal system would appear to be at odds with the practical reality and with the techniques used within ordinary laws, and above all in constitutions and international conventions. Legal principles are introduced formally *into* law,[39] in some cases as parameters for establishing the legal validity of rules, and in other cases as rules of behaviour. It thus appears to be entirely gratuitous to assert – invoking a violation of the dogma of legal certainty – that 'when the courts purport to decide on cases by reference to principles and their relative weight, they are in fact making them up'.[40]

This conclusion is significantly influenced by the experience of 'binding' case law precedents as a self-standing and independent source of principles, providing reasons for the decisions reached. However, legal principles are used within all legal systems, and not only in those incorporating precedent, and it thus does not appear to be tenable to argue that they do not exist or, more prudently, that their use within judicial decision making is necessarily avoidable.[41]

Alongside the prejudice that legal principles cannot be posited or imposed,[42] in contrast to moral principles which have the virtue of moral correctness, they are purportedly not morally correct and not open to unequivocal application.[43] In truth, it is not clear why legal principles could not be morally correct and, since they are not applied unequivocally on an all-or-nothing basis, not capable of impinging upon or determining decisions. Principles that are associated with rules, and above all those that are fundamental to, and identificatory of, the legal system may indeed be morally attractive as moral principles: there is thus no *a priori* separation between law and morals.[44] In fact, the binary proposition whereby 'either legal principles are only (correct) moral principles or they are nothing'[45] is entirely unacceptable.

Legal principles provide an indication of politics and morals, although they

[38] This perspective is overly conditioned by a theory of sources from the common law tradition.

[39] R. Alexy, *A Theory of Constitutional Rights*, English translation by J. Rivers (Oxford: Oxford University Press, 2002), 47 et seq.

[40] L. Alexander, 'Cosa sono i principi?' n 31 above, 18.

[41] L. Alexander and K. Kress, n 31 above, 44, fn 67.

[42] See however ibid 45.

[43] ibid 45.

[44] P. Perlingieri, 'La 'grande dicotomia' diritto positivo-diritto naturale', in Id, *L'ordinamento vigente e i suoi valori* (Napoli: Edizioni Scientifiche Italiane, 2006), 553-562 and in Id, *Interpretazione e legalità costituzionale* n 22 above, 13-22; in P. Sirena ed, *Oltre il «positivismo giuridico» in onore di Angelo Falzea* (Napoli: Edizioni Scientifiche Italiane, 2012), 87-94.

[45] L. Alexander and K. Kress, n 31 above, 68.

are not necessarily moral or morally superior;[46] they express choices, assert value judgments and provide guidelines that are not extraneous to the legal system.[47]

III. The 'Weight' and 'Appropriateness' of Legal Principles

Amongst the arguments brought against the existence of legal principles, a distinction may be made between those that focus on 'weight' and those that focus on 'appropriateness'.[48]

With regard to the former, it is not convincing that principles can only arise out of other legal materials, such as rules or decisions, on the grounds that the typical 'weight' of principles cannot be established 'for all contexts'.[49] It is in fact acknowledged – although not entirely consistently – that principles can have an effect on results, 'adding normative weight to each result in opposition to another',[50] and that rules themselves have weight for they have a rationale and express or specify a principle. This means that, when reaching their decisions, the courts use legal arguments and their weighting more than formal legal rules; in other words they use both rules and principles at the same time depending upon the context. Consequently, interpreters will refer to the principles underlying the individual rules and the legal system as a whole, and not only in situations in which the rules are not conclusive. If rules are not devoid of weight, as where 'they apply, they assert that their weight is *infinite*',[51] principles too have their own weight – in fact their application is dependent 'on their weight'.[52] Rules themselves, whether as expressions of a rationale or of a principle, which in turn complies with principles on a higher level, are never applicable on an exclusively inflexible basis because they are never applied in isolation (rather applying in a coordinated fashion with other rules and other principles). Thus, the difference in weight between rules and principles is quantitative: both have weight on the decision. The existence of weight for principles is not necessarily and exclusively dependent upon the courts' rule-producing activity.[53] The approach to this issue risks becoming subjective, if not linguistic, if for example, when confronted with the official recognition in the Constitution of the principles of freedom of speech, one does not hesitate to discern within it 'a rule (with

[46] However, see R. Dworkin, n 32 above, 95 et seq.
[47] On this issue, ibid 118 et seq, 439 et seq, 446.
[48] L. Alexander and K. Kress, n 31 above, 64 et seq.
[49] ibid 24.
[50] ibid 25 and, to this effect, S. Burton, *Judging in Good Faith* (Cambridge: Cambridge University Press, 1992), 39 et seq.
[51] L. Alexander and K. Kress, n 31 above, 58, original italics.
[52] ibid 59.
[53] See *contra* ibid 60.

infinite weight within the scope of its own application)',[54] whereas the constituent lawmaking body should have clarified that 'it be applied whenever possible'.[55]

Rules and principles are norms, irrespective of their difference in weight and whether they are absolute or relative, or limited or unlimited. Both use language that expresses conventionally defined meaning, elastic meaning which may be determined from time to time as well as delineating concepts (known as standards) for the scale and quality of the acts or results. Standards and general clauses are mere techniques and, as such, may feature within both rules and principles. It is necessary to ascertain their consistency with one another in order to be interpreted, and hence applied.

That legal rules and principles are distinct does not mean that they are separate, nor less that they are different in nature: both are manifestations of juridicity, and as such do not constitute an ideal or metaphysical superstructure,[56] but rather supplement reality as one of its structural and ontological elements. For the sake of consistency, this should be confirmed by the acknowledgement that legal principles result from the combination of the factual world of legal rules with moral value.[57]

The appropriateness, or in other words the adequacy, of a principle, is particularly significant in interpreting and applying rules, and obviously all the more so – given their nature – also principles. Appropriateness cannot fail to entail adaptability to the specific case by respect for a variety of principles, which may be suitably and consistently balanced without any arbitrariness whatsoever in such a manner that 'principles and judgments reach a state of equilibrium'[58] that is compatible with the legal system and its sources.[59] It is principles more than rules that are more suited to adaptation to the specific facts of an individual case according to a methodology, which is certainly not that of subsumption. Moreover, it is not appropriateness, understood as a method, that gives rise to principles because – as clarified above – principles may also be asserted by the legislature. In such cases, appropriateness is dependent upon the proper assessment of the fact (*Tatsache*) to which principles are to be applied, and there is no need for the those who interpret the law to consider the problem that legal principles may collapse into moral principles.[60] This does not mean that there is not necessarily any relationship between appropriateness and moral acceptability. The correct reaction of moral disapproval does not entail

[54] ibid 60.
[55] ibid 61.
[56] See ibid 62, fn 96.
[57] This is also asserted ibid.
[58] ibid.
[59] However, see R. Dworkin, n 32 above, 159 et seq; on this point see L. Alexander and K. Kress, n 31 above, 67.
[60] On this problem see L. Alexander and K. Kress, n 31 above, 70 et seq and the references therein.

casting aside 'principles that are believed to be morally correct in favour of principles that nobody defends',[61] identifying the latter with legal principles.[62]

Furthermore, legal principles cannot be reduced to the role of guaranteeing equality between present and past decisions[63] from the perspective of a continuity view of justice[64] in which principles, which are considered to be inherent within past decisions, by a kind of pointless fiction guarantee continuity and protect individual rights from 'retrospective upheaval'.[65] The modern theory of inter-temporal law refutes this absolute assertion in the area of private law and relativises it in terms that are specific to the particular sources of the legal system.[66]

It is widely known that the development of experience, and in particular of legal experience, occurs along a scale of continuity and discontinuity[67] where, in line with developments in the culture of a community, new principles and new values may even be at odds with past principles, whilst the past principles seek to remain valid by attributing at times different meanings to legal rules that have, formally speaking, remained unchanged.

This does not mean[68] that legal decisions based on new general principles

[61] As clarified by ibid 97, disputing the position taken by R. Dworkin.

[62] See however ibid 99.

[63] R. Dworkin, *L'impero del diritto* (1986), Italian translation by L. Caracciolo di San Vito (Milano: Il Saggiatore, 1989), 176 et seq and 225 et seq, criticised by L. Alexander and K. Kress, n 31 above, 47.

[64] L. Alexander and K. Kress, n 31 above, 48.

[65] R. Dworkin, *I diritti presi sul serio* n 32 above, 90 et seq, 107 et seq and 148 et seq, cited and criticised by L. Alexander and K. Kress, n 31 above, 49.

[66] Inter-temporal law (*intertemporales Recht)* refers to the rules applicable to facts which occur during or shortly before a succession of laws in time. On this issue see A. Vonkilch, *Das Intertemporale Privatrecht: Übergangsfragen bei Gesetzes- und Rechtsprechungsänderungen im Privatrecht* (Wien-New York: Springer, 1999); F. Maisto, 'Diritto intertemporale', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2007), passim.

[67] P. Grossi, *Prima lezione di diritto* (Roma-Bari: Laterza, 2003), 20 et seq; Id, 'Storia di esperienze giuridiche e tradizione romanistica (a proposito della rinnovata e definitiva «Introduzione allo studio del diritto romano» di Riccardo Orestano)' *Quaderni fiorentini*, 533-552 (1988); Id, 'Storicità del diritto' *Diritti lavori mercati*, 217 et seq (2006), and again, literally, S. Pugliatti, 'La giurisprudenza come scienza pratica' (1950), in Id, *Grammatica e diritto* (Milano: Giuffrè, 1978), 74: the law 'in its birth and in its implementation is the (...) life and history of the people that created it and have lived according to it, as is the formation and development of legal thinking or dogmas, and the application of the law': 'those who legislate, who wait for the formation of the system, who implement the law in specific cases' reconstruct, recreate or relive 'the entire human history that is brought together in it'. Thus, 'innovative ruptures and capricious jumps (are not permitted): this is the deep sense of what is known as the legal continuity of a politically organised society'; A. Falzea, 'Dogmatica giuridica e diritto civile' *Rivista di diritto civile*, I, 773 (1990); P. Perlingieri, 'Lo studio del diritto e la storia', in N. Cipriani et al, *Annali della Facoltà di Economia di Benevento* (Napoli: Edizioni Scientifiche Italiane, 2006), XI, 127-139, also in Id, *L'ordinamento vigente e i suoi valori* n 44 above, 537-552 and in C. Cascione and C. Masi Doria eds, *Fides Humanitas Ius. Studi in onore di Luigi Labruna* (Napoli: Editoriale Scientifica, 2007), VI, 4163 et seq; N. Lipari, n 1 above, 37.

[68] As noted by L. Alexander and K. Kress, n 31 above, 50.

precisely by virtue of creative argumentation will result in the retroactive application of rights, mindful that principles cannot but be in 'continuous transformation',[69] irrespective of whether the decisions reached by the courts are correct or not.[70]

IV. The Myth of Reasoning by Syllogism and Wariness Towards Legal Principles and Their Variety

The widespread climate of mistrust towards legal principles does not have one single origin and appears to have arisen in part out of legal positivism and in part out of a continuing self-referential jurisprudence. It in any case expresses an underlying conservatism characterised by a certain degree of intellectual laziness, which will attract natural support from supporters of the dogma of legal certainty; however, this falls far short of the real problem of proposing new forms for the theory of legal interpretation.[71] Within this cultural climate, lawyers, including above all Italian private lawyers,[72] have had little sympathy for principles,

[69] On this point see R. Dworkin, *I diritti presi sul serio* n 32 above, 99 et seq.

[70] See *contra* S. Hurley, 'Coherence, Hypothetical Cases, and Precedent' 10 *Oxford Journal of Legal Studies*, 221 (1990), cited critically by L. Alexander and K. Kress, n 31 above, 54 et seq.

[71] See on this point A. Gentili, *Senso e consenso. Storia, teoria e tecnica dell'interpretazione dei contratti* (Torino: Giappichelli, 2015), I, 137 et seq, in particular 166 et seq, who, whilst stressing the presence of 'traditionalists for whom, since interpretation is regulated, it must be literal, without any possibility for those who interpret the law to ascribe any other meaning to the law', clearly highlights that 'also within our literature it is now stated within most textbooks that the text of the provisions does not represent normative content, that legal provisions often change with time, and that the interpreting body has discretion in choosing the meaning to be preferred, which exercises and justifies this through recourse to argument', thereby forcefully asserting 'the need' to take account 'of the content-based method'.

[72] F. Santoro Passarelli, 'Intervento', in F. Santoro Passarelli et al, *I principi generali di diritto. Atti del Convegno (Roma, 27-29 maggio 1991)* (Roma: Accademia Nazionale dei Lincei, 1992), 7; and more recently, albeit with more than one expression of openness, see the reports by: A. Jannarelli, 'I princípi nell'elaborazione del diritto privato moderno: un approccio storico', G. Alpa, 'I princípi generali. Una lettura giusrealistica', U. Breccia, 'Princípi: luci e ombre nel diritto contemporaneo', A. Gambaro, 'La dinamica dei princípi: due esempi e una ipotesi' and E. Del Prato, 'I princípi nell'esperienza civilistica: una panoramica I princípi nell'esperienza giuridica' (Atti del Convegno della Facoltà di Giurisprudenza della Sapienza, Roma, 14-15 novembre 2014) *Rivista italiana per le scienze giuridiche*, special issue, respectively 33-76, 77-120, 121-192, 209-228, 265-278 (2014). However, see in general N. Bobbio, 'Principi generali del diritto' *Novissimo Digesto italiano* (Torino: UTET, 1966), XIII, 887 et seq, who, at least cautiously, demonstrates his preference for the identification of principles in the various areas regulated by positive law, starting from the premise that they amount to a 'complex, obscure and fleeting concept' and not by any means 'a simple and unitary category' (ibid 889 and 893 et seq). See recently N. Lipari, n 1 above, 28. A greater openness is also found amongst commercial lawyers: see *inter alia*, G. Terranova, 'I princípi e il diritto commerciale' *Rivista di diritto commerciale e del diritto generale delle obbligazioni*, I, 183-223 (2015) who, in the clear awareness that principles may be subject to 'implicit limits' that do not depend upon the 'existence of a provision of equal standing although with opposite content', but on to the 'articulation of (different) scenarios and the different weight ascribed to the constellations of values in the various contexts' (ibid 202), stresses that 'it would be a pity (…) to have to give up the wealth generated by the creative capacity of the interpreting body solely in order to expound a faithfulness to the text

and have used them with particular caution, essentially displaying mistrust for them on account of the variety of meanings that they have, along with their vagueness and mutability, and thus the excessive discretion they leave to legal interpreters, which have traditionally – since the era of codification – been used to construing the law above all as a rule applicable to situations that are determined or are determinable *a priori*.

First of all, it cannot be contested that principles take on various forms. As regards the way in which they are formulated, they may be either explicit or implicit, thus being inferred through interpretation from the coordination of a variety of legal provisions; as regards their status and the scope of their applicability, principles are not only sectoral but also general and fundamental as they may identify and characterise either individual areas of the law or the legal system as a whole; they may also be external in origin and therefore, in our current experience, fall under European or transnational sources, and differ in value depending on the hierarchy permitted by the level of openness of the system.[73]

Principles are always in any case ascribed the role of attesting interests but above all values of legal culture,[74] of the dominant culture[75] and of European populations,[76] subject however to an express awareness of the need for prudence in identifying them, especially if they are innovative, as they are difficult to handle during application.[77]

and a purity of method, which will end up being strikingly refuted as soon as one moves from words (law in books) to an examination of the facts' (201). See also: G. Baralis, 'Atto primo (Il pensiero dogmatico e la complessità)', in Id and P. Spada, 'Dialogando su dogmatica e giurisprudenza (dopo aver letto un libro sull'ipoteca)' *Rivista di diritto privato*, 7-53, 21 (2013); M. Libertini, *I principi della correttezza professionale nella disciplina della concorrenza sleale* (Milano: Giuffrè, 1999), 21, 33 et seq and 42; V. Cariello, 'Osservazioni preliminari sull'argomentazione e sull'interpretazione "orientate alle conseguenze" e il "vincolo del diritto positivo per il giurista" ' *Rivista del diritto commerciale e del diritto generale delle obbligazioni,* I, 309-344 (2015). There has obviously been a lively debate between constitutional scholars since the paper by V. Crisafulli, 'Per la determinazione del concetto dei principi generali del diritto' *Rivista internazionale di filosofia del diritto,* 43 (1941); Id, 'A proposito dei principi generali del diritto e di una loro enunciazione legislativa' *Jus*, 207 and 213 et seq (1940). The axiological orientation in the solution to conflicts is also confirmed within the criminal law literature, which more clearly aims to demonstrate that, based on the 'identification' of the function of the penalty, it is 'possible to reconstruct the 'face' of the individual system under consideration': see S. Moccia, *Il diritto penale tra essere e valore. Funzione della pena e sistematica teleologica* (Napoli: Edizioni Scientifiche Italiane, 1992), 32 et seq, in particular 37.

[73] See G. Gorla, 'I princípi generali comuni nelle nazioni civili e l'art. 12 delle disposizioni preliminari del Codice civile italiano del 1942', in F. Santoro Passarelli et al, *I principi generali di diritto* n 72 above, 177 et seq, in particular 179.

[74] ibid 183.

[75] R. Sacco, 'I principi generali nei sistemi giuridici europei', in F. Santoro Passarelli et al, *I principi generali di diritto* n 72 above, 163 et seq.

[76] A. Trabucchi, 'I principi generali del diritto nell'esperienza comunitaria', in F. Santoro Passarelli et al, *I principi generali di diritto* n 72 above, 187 et seq.

[77] P. Rescigno, 'Relazione conclusiva', in F. Santoro Passarelli et al, *I principi generali di diritto* n 72 above, 331 et seq.

However, the founding fathers of Italian legal science did not by any means display this prudence, or even this mistrust towards principles.[78] This is not only due to the different levels of certainty and stability within the institutional framework, but also and above all to a methodological reason. This reason is separate from that framework and relates to the legal reasoning, which may be inductive in that it is sensitive to the process of generalisation with the goal of extracting broader norms from rules, but also deductive in that it is sensitive to provisions that are in themselves general, albeit adopted on a different level (constitutional, international, national, etc), and express values with expansive force. The appropriateness, and in fact the inevitability, of both ways of legal reasoning is based in the fact that the legal system cannot be comprised exclusively of syllogistic propositions. It is also based in the fact that the theoretical and practical elaboration of individual rules results inexorably in the adoption of common rationales, the formulation of generalisations, and thus the identification of principles within the necessary coordination with rules in terms of their impact on the variety of specific cases. It is equally inevitable that the legislature may express itself through more or less general assertions, attributing to them also roles that are broader in scope in order to guarantee sectoral or even pan-systemic requirements (such as the principle of *neminem laedere*: Art 2043 Civil Code), which in some cases may be of primary and inderogable standing (such as the principle of equality: Art 3 Constitution, or the republican form of the state: Art 139 Constitution). And it is singular to note that lawyers' contemporary concerns are focused more on principles that are expressly stated and manifest strong values than on those inferred through induction.

In factual fact, the syllogism in itself 'does not provide greater stability to legal structures' as it simply infers the logical consequences of the premise; thus, if the premise is vague and questionable, or in some sense ambiguous, it will only be possible to establish its scope through interpretation so as to give meaning to the aspects that are unclear, and this must inevitably involve principles along with the related values, both express and implicit.[79] Rules and principles complete one another. The problem issue is thus centred on the expansive force of principles which in some cases, amongst other things because they express heterogeneous values, are difficult to harmonise and reconcile (also) with one another and need to be supplemented by rules, the premises of which enable the consequences to be identified with greater precision. It is thus inevitable that a balance will always have to be struck between different principles and between principles and rules, which may represent different interests and values; this balance will have to be struck as part of the process of concretisation and will have some level of effect on the argumentative process. In fact, the task of those who interpret the law is to adopt solutions that are appropriate for the specific

[78] G. Terranova, n 72 above, 185 and the references contained therein.
[79] As noted also recently ibid 187.

case according to the system's guidelines, paying due attention to its not entirely flexible axiology and the social and cultural experience which in any case conditions its dynamic and likely evolution.[80]

Also explicit principles cannot be applied through syllogisms. This is the case irrespective of whether they have ordinary or elevated status, and thus applies not only for those that lack specificity[81] which, as for implicit principles, do not contain any reference within the series of specific provisions from which they originate (which may in any case be of assistance in identifying the scope of their applicability). Precisely because they are express, these indicate the conduct that is required or the value that is to be achieved[82] or concretised through the albeit gradual[83] cultural operation of interpretation, which is embedded within the culture of the time. This process of concretisation concerns both principles and rules within a balancing of interests and values for the purposes of application, inspired by reasonableness which may be shared or at least justified.[84] However, this does not mean that only values can be organized according to purely formal criteria,[85] nor less that the hierarchy of sources of law is not relevant in identifying the hierarchy of values,[86] with the result that the latter may be conceived of entirely separately from the former. It cannot be disputed that any hierarchy of values indicated within the formal sources of law must inevitably be fuelled by a community on a cultural level.[87]

[80] P. Perlingieri, 'Interpretazione ed evoluzione dell'ordinamento' *Rivista di diritto privato*, 2, 159-170 (2011); in Id, *Interpretazione e legalità costituzionale* n 22 above, 113 et seq; Id, 'Interpretazione assiologica e diritto civile' (PhD lesson held at the Department for International Studies in Law and Market Ethics, University of Salerno, 30 March 2012) *Corti salernitane*, 465 et seq (2013).

[81] G. Terranova, n 72 above, 197.

[82] C. Luzzati, *La vaghezza delle norme. Un'analisi del linguaggio giuridico* (Milano: Giuffrè, 1990), 262 et seq.

[83] E. Betti, *Interpretazione della legge e degli atti giuridici (teoria generale e dogmatica)* (Milano: Giuffrè, 2nd ed edited by G. Grifò, 1971), 310 et seq.

[84] For specific corroboration, see G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 95 et seq.

[85] See however G. Terranova, n 72 above, 203.

[86] See however ibid 203.

[87] On law as culture, see R. Treves, *Diritto e cultura* (Torino: G. Giappichelli, 1947), now in Id, *Il diritto come relazione. Saggi di filosofia della cultura* (Napoli: Edizioni Scientifiche Italiane, 1993), 99 et seq, and here Id, 'Il diritto come componente della cultura' (1979), 197 et seq; A. Falzea, 'Sistema culturale e sistema giuridico' *Rivista di diritto civile*, I, 1-17 (1988); Id, *Introduzione alle scienze giuridiche*, I, *Il concetto del diritto* (Milano: Giuffrè, 1996), 396 et seq; Id, 'La Costituzione e l'ordinamento' *Rivista di diritto civile*, 261-300 (1998)*;* V. Ferrari, M.L. Ghezzi and N. Gridelli Velicogna eds, *Diritto, cultura e libertà*, Atti del convegno in memoria di R. Treves, Milano 13-15 October 1994 (Milano: Giuffrè, 1997), passim. For an account of the law as a 'cultural phenomenon produced by man', see A. Kaufmann, *Filosofia del diritto ed ermeneutica* (Milano: Giuffrè, 2003), 54. According to G. Berti, 'Riflessioni su cultura ed esperienza del giurista' *Jus*, 352 (1983), '(l)aw without culture is not law, but a practice in the service of disputes or of power; it is thus dissociating'. See also: P. Grossi, 'La formazione del giurista' n 19 above, 44 et seq; P. Perlingieri, 'Complessità e unitarietà dell'ordinamento giuridico vigente' *Rassegna di diritto civile*, 188-214 (2005); Id, 'Il bagaglio culturale del giurista', in Id,

This account of principles, along with the necessary recourse to them 'even when the legal system does not make express provision to that effect' – which is also supported by an inherent notion of juridicity originating from the fact[88]– has no corroboration, not to speak of 'detailed' corroboration, in Art 12 of the Provisions on the Law in General (*preleggi*).[89] If principles have normative relevance this is certainly not because a provision, as interpreted, refers to them as a final canon, and all the more so to a specific and limited conception of them. It may be established that this corroboration is not decisive by asserting that factuality may also 'impose a limit on the scope of the principles, including those that are generally universal in scope'.[90]

Within this process, principles and values (which may be discerned as parts of the legal system) are fuelled by facts that are corroborated by the specific circumstances of the individual decision and within the context of which they fall to be applied.[91] This occurs without any aprioristic or simplifying limits imposed by the formal schemata of dogmatics[92] – which is justified by the certainty of legal relations[93] – and with the due openness towards the rules of experience,[94] adequately historicised. Thus, the jurist may aspire only to 'a certain level of reasonableness'[95] without any claim to truth or certainty.

L'ordinamento vigente e i suoi valori n 44 above, 239-246; Id, *Il diritto civile nella legalità costituzionale* n 19 above, 5 et seq.

[88] Juridicity means that the law is supposed to be 'immanent' to facts.

[89] Although this view is not followed by G. Terranova, n 72 above, 204. Under Art 12 of the Provisions on the Law in General, the only meaning that can be ascribed to the law is that which is made explicit by the terms' own meaning according to their connection, and by the lawmaker's intention. This rule is known as *in claris non fit interpretatio*. Some scholars argue that when the legal text is clear, it does not have to be interpreted; if the literal interpretation results in a clear norm, no further interpretation (be it logical, systematic etc) is necessary. However, this understanding of the *in claris non fit interpretatio* is both false and unacceptable. It is false, because no norm can be applied without interpreting the text of its source. It is unacceptable, because legal method requires that the interpretation be systematic and axiological. On this issue, from different points of view, cf N. Irti, *Testo e contesto. Una lettura dell'art. 1362 codice civile* (Padova: Cedam, 1996) and P. Perlingieri, 'L'interpretazione della legge come sistematica e assiologica. Il broccardo *in claris non fit interpretatio*, il ruolo dell'art. 12 disp. prel. cod. civ. e la nuova scuola dell'esegesi' *Rassegna di diritto civile*, 990 (1985).

[90] G. Terranova, n 72 above.

[91] ibid 192, 194, speaks of 'scenario'.

[92] However, see N. Luhmann, *Il diritto della società* (Torino: Giappicelli, 2012), 361, according to whom, since 'concepts must be used consistently and uniformly in relation to themselves and in relation to the distinctions marked out by them (such as the words of language)', one cannot 'rebel against concepts': this would be 'something meaningless, as would any attempt to arrive at a judgment based only on values and interests'.

[93] In this regard see: J. Raz, 'Legal Principles and the Limits of Law' 81 *The Yale Law Journal*, 823-854 (1972) who, as Hans Kelsen, regards the lawyer as a 'pure' expert regarding the normative system: see G. Terranova, n 72 above, 191; N. Irti, *L'età della codificazione* (Milano: Giuffrè, 1989), 144.

[94] G. Terranova, n 72 above, 195.

[95] ibid 196; see in fact G. Perlingieri, *Profili applicativi della ragionevolezza* n 84 above, 37 et seq: 'certainty is not a feature that is acquired by the system but rather an objective

V. Principles and General Clauses

It would appear to be out of place to ask whether or not the rules on the interpretation of the law are applicable to assertions which lay down and contain general clauses.[96] This is not only because canons of interpretation are not limited solely to those laid down in Art 12 of the Provisions on the Law in General,[97] but also because general clauses – as legislative techniques present in various guises within the formulation and definition of propositions – take on meanings within specific legislation and specific arrangements, although always in the light both of the principles of the relevant sector concerned and also, and above all, of the principles expressing the identity of the legal system. Whilst it may appear to be a matter of course that to interpret a general clause means to interpret the legal norms that established them,[98] it is also the case that general clauses are contained in the formulation of both rules and principles and may in some cases be asserted independently, to the point that they themselves take on the value of principles.[99]

Besides, every syntagma used by the lawmaker must be interpreted within the legal system (which is at the same time normative and factual), within a process of enshrining that cannot have the claim to end in syllogistic argumentation.[100] This is because the special circumstances of the individual case always require – on the basis of a convincing argumentation that is rooted in the legal system – adequate legislation, which thus also innovates on previous decisions. However, a general clause does not have a pre-existing objective meaning that is independent of the specific case[101] and of sectoral legislation.

towards which the lawyer's activity must be directed, also as the case may be in cases involving typical circumstances'; besides 'the assessment of reasonableness presupposes that the starting point for interpretation is not the text but rather a fact of life regarding which the system, which also comprises the individual text, is questioned in order to ascertain the most appropriate response to the requirements called into play' (ibid 150).

[96] S. Patti, 'L'interpretazione delle clausole generali' *Rivista di diritto civile*, 263-296 (2013).

[97] P. Perlingieri, 'L'interpretazione giuridica e i suoi canoni. Una lezione agli studenti della Statale di Milano' *Rassegna di diritto civile*, 405-434 (2014) and in D. Falconio et al eds, *Scritti in onore di Giancarlo Laurini* (Napoli: Edizioni Scientifiche Italiane, 2015), II, 1465.

[98] S. Patti, n 96 above, 266.

[99] See n 101 below concerning Art 2043 of the Civil Code. On this point, see in particular S. Pugliatti, 'Alterum non laedere', in Id, *Responsabilità civile* (Milano: Giuffrè, 1968), II, 66 et seq, according to whom that provision must be construed not as a 'summary of specific duties' but as a 'general clause', which must be provided with content in the specific case depending upon the protected interests, which however have been infringed.

[100] For example, the syntagma 'social function of ownership' 'shows its enduring "utility" towards the normative proposition which, precisely for this reason, takes on a renewed meaning': see P. Perlingieri, '«Funzione sociale» della proprietà e sua attualità', in S. Ciccarello et al eds, *Salvatore Pugliatti*, I, *I Maestri italiani del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2016), 187 et seq, in particular § 4 for detailed references to legislation and case law. See *contra* S. Patti, n 96 above, 266 et seq.

[101] A. Falzea, 'La Costituzione e l'ordinamento' n 87 above, 285 et seq; S. Patti, n 96 above, 273.

An emblematic instance of this is the general clause on 'unfair loss' contained in Art 2043 of the Civil Code.[102] This is a provision that expresses a principle formulated using (also) the technique of the general clause. It does not make sense to ask whether or not this principle and general clause are to be interpreted by subsumption reasoning when in actual fact interpretation can never be relegated to syllogistic reasoning.[103]

Similarly, it would appear to be begging the question to assert that the clause requiring good faith and fair dealing is already in itself an expression of a duty of solidarity between creditors and debtors or between contracting parties (Arts 1175 and 1375 Civil Code) with the result that it is not necessary to supplement it with the duty of solidarity provided for under the Constitution.[104] Solidarity under the Code is not the same as constitutional solidarity; without the constitutional 'crutches', good faith and fair dealing are different things. Similarly, there is no full overlap between the hierarchy of values present within the European treaties and those present within the Italian Constitution. Also the more traditional literature considers the process of concretisation of general clauses to represent 'a secure linkage for values within the sequence dignity-freedom-equality-solidarity, within which precisely the value of dignity has particular significance'.[105] Thus, in a kind of schizophrenic manner, values at

[102] P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Napoli: Edizioni Scientifiche Italiane, 1972), 175 et seq; Id, 'La responsabilità civile tra indennizzo e risarcimento' *Rassegna di diritto civile*, 1061-1087, 1063 (2004); Id, 'L'art. 2059 c.c. uno e bino: una interpretazione che non convince' *Rassegna di diritto civile*, 775-783 (2003); Id, 'L'onnipresente art. 2059 c.c. e la "tipicità" del danno alla persona' *Rassegna di diritto civile*, 520-529, 528 (2009); see also S. Rodotà, *Il problema della responsabilità civile* (Milano: Giuffrè, 1964), 79 et seq; F.D. Busnelli, in Id and S. Patti, *Danno e responsabilità civile* (Torino: Giappichelli, 2013), 87 et seq.

[103] See in fact S. Patti, n 96 above, 278, according to whom 'the element that is most characteristic of the interpretation of general clauses (…) consists in the fact that the aim is not so much to classify specific conduct under a provision that stipulates an abstract model but rather to identify, in the light of the directions provided by the norm and the circumstances of the case, which conduct must be regarded as correct'. But – at a later stage – it is noted that '(t)he court called upon to resolve the case will refer to the provision laying down the general clause, but in actual fact it applies the rule governing the group of cases under which that brought before it for examination has been subsumed, without prejudice to the possibility of referring to the general clause in order to adapt the specific rule to the requirements of the new case or in order to elaborate a new rule' (290). However, there cannot be one single interpretation if there is one single system: see P. Perlingieri, 'Il diritto come discorso? Dialogo con Aurelio Gentili' *Rassegna di diritto civile*, 781 (2014). On the requirement that the courts must not consider that it is possible to resolve disputes only according to logic, see T. Ascarelli, 'L'idea di codice nel diritto privato e la funzione dell'interpretazione', in Id, *Saggi giuridici* (Milano: Giuffrè, 1949), 41 et seq; Id, 'Norma giuridica e realtà sociale', in Id, *Problemi giuridici* (Milano: Giuffrè, 1959), I, 74; Id, *Antigone e Porzia*, in Id, *Problemi giuridici* (Milano: Giuffrè, 1959), I, 156 et seq.

[104] L. Mengoni, 'Autonomia privata e Costituzione' *Banca borsa e titoli di credito*, I, 9 (1997), whose thoughts are revisited by F. Benatti, 'Un giurista complesso e unitario' *Europa e diritto privato*, 47-61 (2012).

[105] C. Scognamiglio, 'Principi generali, clausole generali e nuove tecniche di controllo

times act as 'crutches' and at times as fundamental criteria for argumentation depending upon whether they pertain to the European Charter of Fundamental Rights or the Italian Constitution, subject to the clarification that it is necessary to avoid 'any overly easy direct reliance on constitutional principles as an argumentative support for decisions that may be based directly on the principle of good faith'.[106]

In reality, despite a certain reluctance and mistrust in relation to principles, the process of concretising general clauses cannot be detached from the class of values, depending upon whether they are expressed by constitutional principles[107] or laid down in European law[108] yet nonetheless integral parts of 'constitutional legality'. Given that there is thus no justification, it turns into an ideological prejudice to admit that this class of values includes some values and not others, and that some may be included if present at European level but not at constitutional level. Either the axiological approach must be excluded, as is argued by the more traditionally minded,[109] or, if it is to be allowed, it must not entail any entitlement to make arbitrary choices, but it is subject to a requirement of respect for the various values inferred from the various and complex sources of law as a whole. Once it has been established that it is useful and necessary to rely on a value as a pair of 'crutches', for the sake of consistency this must never be refused.

In terms of content it must be admitted quite singularly that there has been 'particularly intense axiological intervention on the level of principles',[110] as in the Nice Charter, whilst at the same time seeking to reject or downplay the scope of constitutional values and European constitutional traditions that pointed in the direction of personalism[111] and solidarism even earlier and with greater

dell'autonomia privata', in V. Roppo and A. D'Angelo eds, *Annuario del contratto 2010* (Torino: Giappichelli, 2011), 42.

[106] C. Scognamiglio, n 105 above, 46, fn 71.

[107] S. Rodotà, *Le fonti di integrazione del contratto* (Milano: Giuffrè, 1965), 109 et seq; see in fact also S. Patti, n 96 above, 270 and 296.

[108] C. Scognamiglio, n 105 above, 17 et seq.

[109] G. D'Amico, 'Applicazione diretta dei principi costituzionali e nullità della caparra confirmatoria "eccessiva" ' *Contratti*, 933 (2014), who, concerned about the destabilising function brought about by axiological interpretation, asserts that: 'if constitutional "principles" (and general clauses) are directly capable of shaping the power of party autonomy, this will "relativise" in one fell sweep any legal regulation of the exercise of that power, because any limit may (more or less easily) be traced back to a constitutional principle (or a general clause), with the result that its explicit enactment by the legislature would not add anything that was not already inherent within the "system", and conversely the failure to make express provision would by no means preclude the assertion that a limit existed (which may be inferred from principles and general clauses)'.

[110] C. Scognamiglio, n 105 above, 17, 26 and 29.

[111] The Italian legal system is founded on the protection of the human personality (Art 2 Constitution). It is a supreme constitutional principle, which gives legitimacy to the legal system and to the State's sovereignty. The human persona is an open value not implying a specific right or duty provided for by the law, but appearing in an endless, potentially atypical series of

vigour and consistency. To detach constitutional principles from the general framework of principles turns into an intellectualist apriorism; it is not consistent not even when one refuses to provide general clauses with the content of constitutional values,[112] applying them moreover also in the area of corporate law[113] or – for the Charter of Rights – to the abuse of rights,[114] and concluding that such values cannot be inferred from a pure market logic.[115] These stances are manifestly contradictory and contribute to the creation of significant uncertainty and confusion!

To dismiss indeterminacy and vagueness, the usual tyranny of values or the hegemony of principles as mere sabre-rattling by timid interpreters who prefer to give a role and significance in the area of contract law to general clauses in isolation from principles is to presuppose that such clauses exist in order to delineate principles, and not vice versa, or that these clauses cannot be delineated.

In determining the content of general clauses it is also considered appropriate to refer to general principles. This is confirmed precisely by the examples provided as scenarios that do not involve a reference to 'legal concepts':[116] good faith refers to the principle of solidarity or that of loyal cooperation, public morality refers to the principle of human dignity, and equity refers to the system's values, as has been clarified in the case law of the Constitutional Court.[117]

The process of enshrining is thus achieved by reference both to the evolution of the *societas* – using also statistical results[118] – and to principles and values which can be inferred from the formal sources of law, without drawing any positivist distinction between elements that are external or internal to the legal system, whilst respecting the (albeit pluralist) culture of a community.[119] The

situations connected with the existential aspects of humankind: P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Università degli Studi di Camerino. Scuola di perfezionamento in diritto civile, 1982), 174-175.

[112] S. Rodotà, 'Le clausole generali nel tempo del diritto flessibile', in A. Orestano ed, *Lezioni sul contratto* (Torino: Giappichelli, 2009), 106.

[113] C. Scognamiglio, n 105 above, 27 and 31.

[114] ibid 30.

[115] As in S. Rodotà, 'Introduzione', in Id, *Le fonti di integrazione del contratto* (1969) (Milano: Giuffrè, 2004), unaltered reprint, XII et seq; see also: P. Perlingieri, 'Equilibrio delle posizioni contrattuali ed autonomia privata. Sintesi di un Convegno', in Id, *Il diritto dei contratti fra persona e mercato. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2003), 471; Id, *Il diritto civile nella legalità costituzionale* n 19 above, in particular 398 et seq and 416 et seq.

[116] S. Patti, n 96 above, 289.

[117] Corte costituzionale 6 July 2004 no 206, *Rassegna di diritto civile*, 1149 et seq (2004), with a note by P. Perlingieri, 'Equità e ordinamento giuridico'. See also C. Tenella Sillani, *L'arbitrato di equità. Modelli, regole, prassi* (Milano: Giuffrè, 2006), 359 et seq, who likewise endorses the decision to rule unconstitutional Art 113 para 2 of the Code of Civil Procedure.

[118] G. Teubner, *Standards und Direktiven in Generalklauseln* (Frankfurt: Athenäum-Verlag, 1971), 9 et seq.

[119] See on this point P. Rescigno, 'Appunti sulle "clausole gener*ali*" ' *Rivista di diritto commerciale*, I, 1-8 (1998). See above all P. Femia, *Interessi e conflitti culturali nell'autonomia privata e nella responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 1996), 300 et seq,

judiciary must always draw on these principles and values when determining the legal framework taken as a parameter for its decisions. It is thus relatively important to stress whether there is a qualitative or quantitative difference within the argumentative process.[120]

Even where they express rationales or rules of conduct in a formally independent manner or as parts of propositions of normative significance, general clauses supplement the legislation, which is systematically identified with a focus on the *societas* and on the *ius*, the latter understood not as *lex* but as a legal experience characterised by the historicity of its values, and thus of its principles. Clauses and principles contribute to the process of concretisation, having due regard to the specific circumstances.

VI. Concluding Remarks

On the basis of the analyses carried out above, it is possible here to summarise several considerations, which are set out in schematic form:

1) it is impossible to reduce principles to the implicit propositions that can be inferred from the body of rules comprising the legal system;[121]

2) the principles to which normative significance is ascribed also have that significance independently, and not exclusively and predominantly with reference to the application of one or more rules;

3) principles are valuable not only when interpreting rules but also in their own right, albeit to differing extents depending upon the hierarchical level of the sources to which they pertain;[122]

4) it is not acceptable to consider the recourse to legal principles to be residual, justifying their use through interpretation only in cases involving gaps or where there are no suitable rules for the specific case;[123]

according to whom the Constitution proves to be an 'instrument for the perennial supplementation and constant construction of the greatest pluralism and greatest freedom possible'; Id and P. Perlingieri, *Nozioni introduttive e princípi fondamentali del diritto civile* n 12 above, 30 et seq.

[120] See however C. Castronovo, 'L'avventura delle clausole generali' *Rivista critica di diritto privato*, 25 et seq (1986).

[121] N. Lipari, n 1 above, 34 and also N. Bobbio, 'Principi generali del diritto' n 72 above, 895, cited therein.

[122] N. Lipari, n 1 above, 35. On the direct applicability of principles, see first and foremost P. Perlingieri, 'Norme costituzionali e rapporti di diritto civile' *Rassegna di diritto civile*, 95 et seq (1980), now in Id, *Scuole tendenze e metodi. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 1989), 109 et seq, in particular 120 et seq*:* '(c)onstitutional provisions (…) are substantive law, and not merely interpretative'; thus 'the recourse to them, including during interpretation, is justified, in the same way as for any other norm, as the expression of a value which that interpretation cannot disregard' (ibid 122); see again Id, *Il diritto civile nella legalità costituzionale* n 19 above, 205 et seq.

[123] As in U. Natoli, 'Note preliminari ad una teoria dell'abuso del diritto nell'ordinamento giuridico italiano' *Rivista trimestrale di diritto e procedura civile*, 23 (1958); see also N. Lipari, n 1 above, 37 et seq: 'Whilst from a constitutional perspective reference to the principle amounts

5) principles, which express the values on which the Italian Constitution is based – as characteristic features of the system, albeit historically conditioned – perform the role of rationales for bodies of rules according to a mode of argument that can no longer be classified under the technique of syllogistic reasoning, but according to a balancing operation involving an assessment of the specific circumstances of the case;

6) consequently, legal principles and values have eliminated the false problem of gaps within the legal system;[124]

7) within the relationship between principles and general clauses it does not appear that the perspective that general clauses feature a 'limit' which will contain the expansive force of principles can be privileged[125] whilst on the other hand general clauses represent a legislative technique that draws content from principles, whilst in some cases contributing to the definition of a principle. The standard itself of fair dealing cannot be conceptualised without recourse to principles (for example the principle of solidarity: Art 2 Constitution);

8) it is not possible to conceptualise a clear separation between questions that may be dealt with by a formalist interpretation[126] (ie without recourse to principles) and questions for which principles are preferred. There are principles and principles, and supreme principles – which are inspired by particularly protected and guaranteed values – cannot remain immune to interpretation, construed as the identification of the applicable legislation and thus as a balancing operation. This is the case throughout any sector or area of law, irrespective of the interpretative traditions of each sector;[127]

9) the normative relevance of principles, which is conditioned by the context and therefore by their application, does not constitute justification for the autonomy of individual sectors of the law where the unitary of the system – and of the primary values on which it is based – extends to all sectors, in keeping with their specific features, which are often recognised and guaranteed by supreme principles (such as for example family law: Arts 2, 29, 30 and 31 Constitution);

10) legal certainty and efficiency, understood objectively, are not guaranteed even by specific and detailed rules – which besides could collide with principles

to the guiding criterion for that interpretative procedure, a criterion that may only be obtained following a dialectical analysis of texts and contexts cannot – in spite of the persistent argumentative schemata contained in many judgments derived from university paradigms that are undoubtedly threadbare – be regarded as a merely contingent reference'.

[124] N. Irti, 'La crisi della fattispecie' *Rivista di diritto processuale*, 42 (2014), where it is asserted that 'values, be they historian or meta-historian, express the totality of meaning, and thus dominate the unforeseeable, ignoring empty spaces, and providing an answer to all questions. The theory of values has cancelled from our debate the problem of gaps in the law. Everything has now been filled in" with the result that it would be inconsistent to assert that they exist "beyond norms and principles, being characterised by their *transcendence* vis-à-vis the positivity of the law' (Id, *I 'cancelli delle parole'* n 32 above, 18).

[125] G. Terranova, n 72 above, 204.

[126] ibid 222.

[127] ibid, citing G. Gorla and R. Sacco.

– with the result that it is relatively meaningful to speak of 'certainty in broad terms or successive approximation'[128] whilst at the same time, in order to ensure that the court's decision is sufficiently supported by reasons, allowing it to have recourse to the 'fundamental canon of reasonableness';[129]

11) more generally, whilst legal certainty and the protection of legitimate expectations – which requirements are strongly felt in some areas of the law, such as for example financial and business relations characterised by the swift conclusion of contracts and the circulation of wealth[130] – are not regarded as values to be defended at all costs by the enactment of detailed legislative rules (and not principles), equally valid requirements obtain in relation to inviolable human rights, which by contrast – not by chance – it is preferred to enumerate as principles (Art 2 Constitution),[131] without any particular sensitivity to the critical nature of legal certainty;

12) legal certainty, construed as a dogma, is irreconcilable with the recognition that a variety of meanings can be attributed to legal rules – which meanings will besides have been heavily influenced during the process of determining the facts of the individual case[132] – and transforms into a myth which does not take account of the fact that the theoretical foundations for the law have changed significantly;[133]

13) the restriction to positive law to which those who interpret the law are subject cannot be regarded, according to paleo-positivist dogmatics, as the origin of the restriction to following the letter of the 'law' without recognising that, through their argumentation, those who interpret the law are capable of clarifying the reasons for their decisions by a convincing and strong intellectual contribution – although certainly not that of a free thinker – not only from rules but also from principles, including above all fundamental principles;[134]

[128] G. Terranova, n 72 above.

[129] ibid.

[130] ibid.

[131] P. Perlingieri, *La personalità umana nell'ordinamento giuridico* n 102 above, 20-21, 74, 150 et seq.

[132] For example, see Corte di Cassazione 11 July 2011 no 15144, *Foro italiano*, I, c 2254 et seq (2011).

[133] See n 94 above. 'The law (…) cannot without doubt admit lawyers who are insensitive to the problematics and complexity of legal issues, and who are steeped in dogmatism and logical-deductive sciolism': see again G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* n 84 above, 147; see also Id, 'Venticinque anni della Rassegna di diritto civile e la «polemica sui concetti giuridici»', in P. Perlingieri ed, *Temi e problemi della civilistica contemporanea (Atti del Convegno per i Venticinque anni della Rassegna di diritto civile, 16-18 dicembre 2004)* (Napoli: Edizioni Scientifiche Italiane, 2005), 543 et seq.

[134] On this issue see the volume P. Costa et al, *Giudici e giuristi. Il problema del diritto giurisprudenziale fra Otto e Novecento, Quaderni fiorentini*, XL (Milano: Giuffrè, 2011). See also: M. Libertini, 'Il vincolo del diritto positivo per il giurista', in G. Zaccaria ed, *Diritto positivo e positività del diritto* (Torino: Giappichelli, 1991), 385 et seq; V. Cariello, 'Osservazioni preliminari sull'argomentazione e sull'interpretazione "orientate alle conseguenze" e il "vincolo del diritto

14) within our legal system, the principles adopted by the Constitutional Court or the Court of Cassation in their respective functions of centralised control of constitutionality or respectively of the uniform interpretation of the law have persuasive effect, due to the authoritativeness of those courts and also to a procedural choice, which has preclusive effect (Art 366 Code of Criminal Procedure) for the purposes of the very exercise of the right of action;

15) even the explicit reference within the system to 'principles of Community law' is a clear indication for those who interpret the law that they cannot decline to infer principles from the experience and provisions of those sources of law, also taking account of the reasons provided as a basis for decisions taken within European case law, above all by the Court of Justice;

16) finally, the decisions of the European Court of Human Rights must be regarded as having persuasive significance.

positivo per il giurista" ', in V. Di Cataldo et al eds, *Impresa e mercato. Scritti dedicati a Mario Libertini, III, Crisi d'impresa. Scritti vari* (Milano: Giuffrè, 2015), 1713 et seq.