Principles versus Rules in the Emerging European Contract Law

Pietro Sirena
Yehuda Adar, University of Haifa

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RULES AND PRINCIPLES IN EUROPEAN CONTRACT LAW

Edited by

Jacobien Rutgers
Pietro Sirena
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IN THE EMERGING EUROPEAN CONTRACT LAW

Yehuda Adar and Pietro Sirena

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Principles of law play an important role in any legal system. Both in common law and civil law jurisdictions, courts not only plead 'principles' to interpret statutory provisions, but also apply them while adjudicating specific cases. Academics often attempt to describe or explain the essence of a certain field of law by reference to a number of underlying 'principles'. Lawyers frequently construct legal arguments, either positive or normative, relying on presumably established 'principles'. Finally, and more recently, legislators have come to accept that their power is restricted by 'principles' of law. In particular, in the wake of the Second World War, 'general principles' have been formally acknowledged and solemnly embraced by many national constitutions, as well as by international conventions on human rights.

At the European level, the Court of Justice has, in recent decades, developed a rich jurisprudence of 'principles', which at first have mostly concerned the definition and limits of the Union's powers (i.e. the principles of primacy, effectiveness, proportionality, etc.).

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1. See e.g. A. Scalia, 'The Rule of Law as a Rule of Law' (1999) 58 UChiLRev (University of Chicago Law Review) 1175, 1183: 'the establishment of broad applicable general principles is an essential component of the judicial process'. In his famous Dieux préliminaires, Jean-François-Marie Portalis, one of the fathers of the French Code civil, made this illuminating statement: 'Fait de causes son susceptibles d'être décidé par un texte précisé, c'est par les principes généraux, par la doctrine, par la science du droit qu'en a toujours procédé par la pluralité des conceptions. Le Code civil ne dispense pas de ces connaissances; au contraire il les suppose.'

2. See e.g. Constitution of the Republic of South Africa (the term 'principles' or 'principle appearing 14 times); Canadian Charter of Rights and Freedoms (3 times); Constitution of the Italian Republic (17 times); France Constitution (14 times); Basic Law for the Federal Republic of Germany (5 times); Constitution of the Republic of China (7 times). Constitution of the Argentine Nation (9 times).


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Such principles have therefore been described by scholars as 'institutional', being understood as rooted in and pertaining to the domain of public law. Not surprisingly, most of them have later on found their way into the Treaties of the Union.

Starting from the 1970s, however, the Court of Justice has declared and enforced more substantive principles, which concern the protection of human rights (i.e. dignity, equality, freedom of religion, etc.) and are (at least partially) applicable to the sphere of private law.

More recently, the Court of Justice has even shown an increasing willingness to acknowledge and declare 'general principles of civil law', relying upon values which traditionally have been thought of as strictly inherent to private law. Relevance has been therefore given to the principles of full compensation, good faith, restitution of unjustified enrichment, etc.

In the meanwhile, important 'soft' law instruments, which aim at streamlining the 'common core' of European private law, have made explicit reference to 'principles', shared by all or at least most European legal systems. Indeed, the Principles of European Contract Law (PECL) were given by their drafters such a denomination to emphasize that they consist of a set of rules which are not in themselves legal norms stricte sensu, but may nonetheless be chosen by contracting parties as the law governing their transaction. Beyond
the European context, something of the kind happened with the UNIDROIT Principles of International Commercial Contracts (PICC).15

The notion of 'underlying principles' has played a significant role in the unification instrument known as the Draft Common Frame of Reference (DCFR). This project collects Principles, Definitions and Model Rules of European Private Law. Its final Outline Edition, published in 2009, differs from its predecessor, the Outline Interim Edition, in that it includes a self-contained section of four 'underlying principles', namely freedom, sincerity, justice and efficiency.16 They represent the underpinning of the whole body of rules contained in the following section of the DCFR.17

Last but not least, the project of a Common European Sales Law (CESL) opened with a separate chapter dedicated to 'General Principles' (freedom of contract, good faith and cooperation), which were meant to govern the interpretation and implementation of this proposed instrument.17

The pervasive use of principles, both in judicature of the Court of Justice and in projects of 'soft' or 'hard' law, has given rise to a wide literature, which over time is naturally growing.18 Although they had already been widely discussed acts, but also to fill their gaps. In a more general perspective, see A. Hartkamp, 'Principles of Contract Law' in A. Hartkamp et al. (eds.), Towards a European Civil Code, 2nd ed., Arq Arqui Libri, Niemegen 2004, p. 129.

15 See section V.1 below.


18 The project had been drafted in the Proposal for the Draft Agreement of the European Parliament and of the Council on a Common European Sales Law, 11 October 2011 (COM (2011) 635 final). See also the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Common European Sales Law to facilitate cross-border transactions in the Single Market (COM(2011) 636 final), however, in the annex to the Work Program for 2015, which on 16 December 2014 the European Commission presented to Parliament, such proposed a regulation is listed among those which have been withdrawn by the Commission. The reason thereof is reported as follows: Modified proposal in order to fully address the issue of e-commerce in the Digital Single Market (the document is available at http://ec.europa.eu/ownwork/pdf/wp2015_wk6digitalw.pdf). See section V.3 below.


Therefore, the commonly accepted (or better, presumed) view of ‘principles’, as it has been mainly developed at the national level, will be critically discussed in section II.

Then, in section III, a theoretical descriptive model of the nature of principles will be developed. The proposed model argues that, while principles do often differ from rules in their normative content and analytical structure (moral versus neutral evaluations of human behaviour; general and vague versus specific and sharp norms), these common distinctions fail to capture the most essential difference between principles and rules. Instead, the proposed model claims that the distinctive trait of principles is that they are acknowledged by a legal order as preceding the legislative power. Therefore, principles are here understood as having an anti-positivist nature, in that they impose an external (or a self-imposed) limitation on the legislative power (national or supranational). While some norms are the expression of a fairly concrete will of the legislator (‘rules’), other norms (‘principles’) represent instead the declaration and recognition by the political sovereign of certain legal (or constitutional) limits to that will. Such limits dwell in assumptions of human rationality, as historically embodied and reflected in the social experience of a given time.

Section IV applies this general thesis in the context of the multi-level architecture of the Union’s law and comes to the conclusion that principles of European law are the legal norms which are common to the Member States (ius commune Europaeum), notwithstanding whether they are classified as ‘principles’ or ‘rules’ at the national level.

In section V, European contract law (both ‘soft’ and ‘hard’) will be scrutinised on the basis of the previous discussion.

Finally, in section VI, are sketched the subtle and challenging implications that the ‘principles-versus-rules’ distinction might have on the future development of European law. In particular, the use of rules and principles is seen as enabling dynamic shifts from legislature to judiciary (or vice versa), as well as the fine-tuning of the level of regulation between the national and the supranational level. The role played by the ‘principle of subsidiarity’ is deemed crucial in this context.

II. THE SUBSTANTIVE CONTENT AND ANALYTICAL STRUCTURE OF A PRINCIPLE: A CRITIQUE OF THE COMMON VIEW

According to a widely accepted opinion, principles represent the underpinning of a whole set of norms, or of a certain branch, of the legal system (e.g. restitution of unjustified enrichment).

Principles traditionally consist of unwritten maxims, which in civil law are not rooted in the legacy of thought, practice and sometimes language of Roman law. Also because of this historical origin, they have been meant to cast light on the norms set by the legislator, but not to be themselves in force as norms (at least, not applicable to single cases).

Therefore, the primary function attributed to principles has traditionally been to assist courts in the interpretation of legislative rules. Nevertheless, it has been widely acknowledged that they may also have a creative function, as when they serve to remove inconsistencies between sources of law or to fill gaps in the formal body of rules. To a lesser extent, they have played a more


22 Several civil law principles stem from the compilation by Justinian, known in the Middle Ages as Corpus iuris civilis. See P. STEN, Regular iuris. From ius exercendi to legal norms, Edinburgh University Press, Edinburgh 1966. Even after the birth of national laws, such principles have been retained by lawyers and scholars of each European state and even regarded as norms of some kind (possibly eternal) natural law. See H. CONING, Grundzüge der Rechtstheorie, 4th ed., de Gruyter, Berlin 1983, pp. 296-305, esp. 296-297. A. KELLER, Der Staat als willensbildendes Problem, Berlin, Wiesbaden 1965, pp. 22 et seq.


25 T. TROXERUS, n. 21 above, p. 1. A principle is a general proposition of law of some importance from which concrete rules derive. See also, T. RAM, n. 25 above, pp. 840-841.

26 The connection between general principles of law and lack of completeness of legal systems is already evident in the national civil codes of the 19th century, which strive to reduce this problematic base to the familiar device of analogy. At the first level, gaps of legislation shall be therefore filled through the application of legal rules relating to similar cases (analogia legis); when not possible, through the direct application of general principles of law (analogia iuris); see A. FOSSA, Relazione introduttiva a Il principio generale del diritto. Atti del Convegno Internazionale del 27-29 maggio 1991, Accademia dei Lincei, Roma 1991, p. 11, esp. p. 18. The forerunner
aggressive role, as when they are used to challenge the validity of a certain legal rule (often by shrinking its scope of application).^28

After the Second World War, the normative nature of principles has been increasingly admitted. Predominant scholarship has therefore come to focus on the distinction between them and the remaining norms, which in this respect have been denominated as 'rules'.^29

From a substantive point of view, principles are widely supposed to contain normative imperatives which overlap considerably with basic moral or social values respected by most citizens in a given society.^30

of this tendency has been the Austrian ABGB of 1811, whose 57 refers to the principles of nature law as the first criteria to decide a case not taken into consideration by specific legal provisions (Licht die Rechtssachen besser aus den Werten, nach dem natuerlichen Sinne einer Gesetzestenoten, in anse aufs richtliche, in den Gesetzen beendete, end auch auf die Grundregeln der allgemeinen Gestalt genommenen). Bein Rechtsbegriffen zwei zweckhaft, so muß solcher mit Hinsicht auf die vorgelagerten Gesetze und rechts erzeugten Umständen nach den natürlichen Rechtsgrundsätzen entschieden werden.

That model has been followed by the Codec civile degli Stati di Sua Maestà, il Re di Sardegna of 1838 (Article 15 of the Introductory chapter), later by the Italian Civil Code of 1865 (Art. 5 of the Preliminary provisions) and finally by the actual Italian Civil Code of 1942 (Article 12, paragraph 2, of the Preliminary Provisions). 'Se una contravvenzione non può essere decisa con una precisa disposizione, si ha riguardo alle disposizioni che regolano casi simili a maniera analogica: se il caso rimane ancora dubbio, si decide secondo i principi generali dell'ordinamento giuridico dello Stato'; see N. SACCORI, 'I principi generali n. sistemi giuridici pensate', in I principi generali del diritto, this n. above, pp. 163 et seq. Much more outspoken is the Codec civile della P.R. of 1908, whose Título preliminar, art. 1, mentions the general principles among the sources of Spanish law (paragraph 1: 'Las fuente del ordenamiento jurídico español son la ley, la costumbre y los principios generales del derecho'), although immediately adding that they are applicable only when a specific legal rule or a specific use is lacking (paragraph 4: 'Los principios generales del derecho se aplican en defecto de la ley o costumbre, sin perjuicio de su carácter inmutable del ordenamiento jurídico'). Interestingly, the Governmental law by Mussolini attempted to make general principles of law enumerated in a preliminary chapter of the drafting of the Italian Civil Code of 1942, because they were meant to become more consistent with the tenets of fascist doctrine and the precepts of the dominant ideology. However, in the 1940 Congress of Tiza 'Formazione legislativa del principio generali del Diritto', the operative position was successfully advanced by a young (but already authoritative) scholar, namely Francisco Santoro-Pasquetti. He was later to become one of the most influential Italian scholars of the 20th century. See P. REISCHERI, 'Conclusioni I principi generali del diritto', this n. above, pp. 331 et seq.

See J. R. A. n. 28 above, p. 460. In the celebrated American case of Riggs v. Palmer, 115 NY 536 (1889), the moral principle that no one shall profit from his own wrong led the Court to restrict the application of a specific rule which apparently governed the question, and which essentially was the rule sought to be extended. Compare CA 964-97, KITTEL & GOSCHKE, International Practice, 285, where the Supreme Court of Israel relied on the principle of good faith to enforce an oral agreement to sell a parcel of land, notwithstanding a statutory requirement that such agreements be made in writing.


The General Principles of EU law constitute deeply rooted principles, without which a civilized society would not exist. With regard to national

2. A CRITIQUE OF THE COMMON VIEW

In what follows, a critique of the common view of principles is proposed. First, the proposed model claims that the most commonly accepted attributes of principles (namely vagueness, conclusiveness and moral content) do not capture their most essential quality. Second, the proposed model explains as well why, notwithstanding this claim, the conventional view of principles is quite entrenched. The reason is that, in a national legal order, a strong affinity or correlation will very often exist between the essential feature of a principle and the other presumed attributes of it. This common correlation obscures the fact that moral content, abstractness and conclusiveness are only typical but not essential attributes of legal principles.

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From a structural (or analytical) point of view, principles are assumed to be relatively vague, while rules are expected to usually contain rather specific normative imperatives. Closely related to the last feature is the common presumption that the normative message conveyed by a legal principle is often vague and uncertain, compared to that of other legal norms.

Furthermore and closely related to the features mentioned above, principles are often thought of as having a high normative status within the legal system. Describing a certain legal norm or institution as a 'principle' will most often reflect an underlying presumption that for some reason or another the norm concerned is highly regarded compared to other legal norms within the legal system. This may be either because principles are deemed to embody a fundamental moral or social value, because they reflect a time-honoured and thus entrenched legal norm or practice, or because of the belief that they have an important impact on other legal norms.

This consensus over the common traits of legal principles does not exempt jurists from further investigations regarding the nature of principles, both at the national and the supranational European level. In fact, while evident in many principles, these purported characteristics are by no means universal or necessary.
a) The Substantive Level: Are Principles Necessarily Moral?

In the common understanding of national lawyers, to rely on a ‘principle’ is to justify a decision by reference to a pre-existing moral ideal of society, rather than by reference to any desirable future outcome which may result from that decision (e.g. deterrence, economic growth, social stability, etc.).

In that way, principles are supposed to reflect time-honoured and entrenched legal norms or practices, which are allegedly derived from basic moral values of a given society.

If principles were to be identified with social traditions or habits or beliefs, however, their own nature and function would be evident in practice, by reducing law to a fact. On the contrary, principles are the arena in which social traditions and habits and beliefs shall be critically and rationally revised under the force of legal norms.

At a first glance, the possible divergence between morality (in the strict sense of moral deontology) and the concept of a legal principle emerges in the domain of public administrative law. In most Western states, administrative law (and often constitutional law as well) restricts the government’s freedom of action by subjecting it to norms such as proportionality, equal treatment, transparency, and various norms of procedural justice (i.e. the right to be heard). While these norms are often perceived as legal principles, they do not necessarily flow from any deontological moral value. This example also demonstrates that while a strong correlation definitely exists between principles and morality, morality is but one of the substantive sources of legal principles.

The lack of necessary connection of ‘principles’ to morality is evident as well when we move from the national to the supranational level. Take for example the so-called principles of subsidiarity, primacy and sincere cooperation. Notwithstanding their vital importance for the proper functioning of the European Union and their comprehensive character, it would seem unintuitive, if not altogether artificial, to conceptualize them as shreds of fundamental moral or social values.

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35 The question of which moral values a principle should or could legitimately reflect is a difficult and controversial issue. A non-positivist will clearly prefer the view that it is only the common morality of society rather than the personal morality of the agent employing the principle that is relevant (see H. WELLSTON, n. 34 above, p. 240). Some positivists, on the other hand, may prefer the view that when a court is asked to rely on a moral principle, it should inevitably require a court to employ its own morality (see E. J. RAZ, n. 25 above, p. 247). “What is ‘justified’ or ‘for the general good’ is a matter of opinion and the courts or officials concerned are instructed to draw on their own views. The law does not impose its own views of justice or the common good.”

36 Some authors suggest viewing these principles as setting a distinct category of ‘institutional principles’. See E. de WITT, n. 5 above. On our understanding of subsidiarity, primacy and sincere cooperation and their role in the European Union see section V.5 below.

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38 To some the idea that such a common morality ever exists is a delusion. See e.g. J. RAZ, n. 25 above, p. 450, describing it as a ‘false notion’ the belief that there is a considerable body of specific moral values shared by the population of a large and modern country. Admittedly, a certain rule or a certain judicial decision may often be justified by reference to both deontological and consequentialist reasoning. In such cases, the rule or decision will reflect both a principle and a policy. H. WELLSTON, n. 34 above, pp. 222-223, The correlation between deontology and policy-thinking is recognized by this author at p. 223, n. 4, it was clearly presumed by Dworkin. See R.M. DWORKIN, n. 18 above, p. 224 (‘call a “policy” that kind of standard that is to be reached, generally an improvement in some economic, political, or social status deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality).
To put it differently, the discussion about legal principles may be only approached on the basis (not of their morality, but) of their rationality. This does not mean that they are eternal and immutable, since in the field of social experience human rationality is not self-evident, but shows itself through a never-ending quest for the truth.40

To conclude, the connection of principles to conventional morality, however strong and frequent, is nevertheless not necessary or inevitable, and therefore not an essential feature of the concept of a ‘principle’.

b) The Analytical Level: The Formal Structure of Principles and Rules

As noted above,41 it is a commonplace that principles differentiate from rules in so far as they give vague directives of law, which as such are not applicable to single cases.42

Intuitive as it may sound, however, such assumption does not (at least entirely) correspond to the actual state of European laws, not (and even less) to the trend of their developments.

In fact, many a principle is not less specific than rules and, similarly to the latter, capable of direct application in single cases. Take the duty to compensate for loss wrongfully caused (sometimes known as full compensation or of restitution in integrum), which is considered a basic tenet of tort law in most legal systems. It is also fairly abstract, as its scope of application depends on vague concepts such as ‘unlawfulness’, ‘reasonableness’, ‘damage’, etc. On the other hand, the norm does include a relatively concrete command (to pay compensation) and defines, if only in very broad terms, the conditions under which this command becomes operative. In this respect, the norm seems more a general rule (or a standard) rather than a principle.

The same consideration may be advanced for the principle of restitution of unjustified enrichment, which integrate compensation for damages in order to satisfy the Aristotelian demand of corrective (rectificatory) justice.43

In turn, some norms which are regarded like rules are somewhat as vague as principles and their application to single cases depends on a very wide discretion by courts.

This may happen because any of the requirements of (even traditional) norms stands as an unixed criterion of technical or material assessment of a fact, which may widely vary in single cases.

Take the common rule pursuant to which the breach of contract by one of the parties triggers the other’s termination remedy only if it is ‘fundamental’ (or ‘essential’). The question whether a breach of contract is or not fundamental (or ‘essential’) is a question of fact which is assessed by the judge according to criteria which have not been fixed in advance by the legislator.

Furthermore, some norms which are regarded as rules (and not as principles) give courts the power of balancing interests normally entrenched in the exercise of a right or a freedom and therefore doomed to collide (e.g. freedom of contract of each contracting party is potentially in contrast with the other’s). According to the German tradition, such norms are defined as ‘general clauses’ (Generalklauseln) and the most prominent among them is notoriously that of ‘good faith’ which is embodied in §312 BGB.44

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41 See section b.1 above.
42 See e.g. F. Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life, Clarendon Press, Oxford 1991, p. 13: ‘For many, a principle is a principle and not something else just because it is general rather than specific’. An important philosopher who based the distinction between rules and principles on their relative degree of specificity is Joseph Raz. See J. Raz, n. 25 above, p. 558: ‘Rules prescribe relatively specific acts; principles prescribe highly unspecific actions’. Notably, Raz admits that the distinction is not a sharp one, but one of degree (ibid.). Compare N. MacCormick, Legal Reasoning and Legal Theory, Clarendon Press, Oxford 1983, p. 155, noting that ‘the difference is exaggerated’.

III. PRINCIPLES AND RULES

I. THE DISTINCTION REDEFINED

The distinction between principles and rules represents the opposition of two kinds of norms, which are not only different, but also mutually exclusive, thus embracing the whole legal order.

In this framework, it has been pointed out that rules are to be applied according to an 'all-or-nothing' logic, either they are fully applicable to a case, or they are not at all. Instead, principles are capable of a discrete application and, in a sense, require it necessarily, since each of them always needs balancing with (one or more of) the others. For this reason, principles have been defined as 'valid', none of them logically excluding the others or setting them aside.

The single most important feature of legal principles has to do neither with their analytical structure, nor with their substantive content. Rather, it has to do with their distinctive function within a legal system and with their source. Principles are norms which are acknowledged by a legal system as pre-existing the exercise of the legislative power. They are not the expression of a distinctive will of the legislator, but they precede it and, when constitutionally relevant, may also bind it.

At the European level, the principles consist of the core which is common to the constitutional traditions of the Member States (human rights) and to the entirety of their private law (good faith, restitution of unjustified enrichment, etc.).

Rules represent a radically different technique of legislation. Unlike a principle, announcing a rule is not merely an act of declaration. Rather, by its very nature, a rule represents an imposition. By enacting a rule, the political sovereign, through its authorized representatives, constitutes a new binding norm, regardless of the degree to which that norm has already been accepted by...

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the concreteness subject to the ruler's laws. Put differently, a rule may be defined as the product of a process through which a competent agent (typically a legislator or a court) manifests its will to impose on its subject(s) a norm which may well contradict their practices, customs, values and beliefs.

A brief look at the semantics and etymology of the terms 'rule' and 'principle' renders some support for the propositions just made. To 'rule', in the English language, is to govern, to reign or to control other people. A principle, on the other hand, is a word of Latin origin (princípiunc), which means an origin or a beginning. The close semantic connection between the literal meaning and the definition we here propose is almost self-evident. To enact a principle is to look backwards at the origins of the norm merely restated by the principle. To rely on a principle is merely to approve and acknowledge what is presumably already a recognised truth. Enacting a rule, on the other hand, is a forward-looking process. It reflects the sovereign will not to declare, but rather to dictate and impose a constitutive norm upon the subjects. A rule is not primarily intended to reinforce an existing norm or practice, but rather to bring about a change in the conduct of those subject to the sovereign's laws.

2. THE POLITICAL ROLE OF PRINCIPLES AS LEGITIMISING INSTRUMENTS OF A LEGAL ORDER

Human law-making is a social process through which a sovereign political entity aims to achieve certain goals by influencing the conduct of those subject to its laws. In order to do so, the political sovereign must lay down effective norms of conduct in other words, normative imperatives that will be widely obeyed by those at which they are directed.

The simplest and most direct way to affect human conduct by legal norms is to formulate and enforce what H.L.A. Hart called 'primary rules' or 'rules of duty'. Rules of duty are specific conditional orders or norms defining the circumstances or conditions under which a certain person (or class of persons) is required to act (or to refrain from acting) in a certain predetermined way. A more sophisticated method by which a legal system may influence human conduct is to lay down 'secondary rules' or 'rules of power'. These norms do not demand action (or inaction). Rather, they enable agents (either private or public) to bring about an effective change in their own legal position or the legal position of others, provided that certain requirements are met. Thus, while the tort duty to compensate for wrongfully caused loss is a primary rule or a rule of duty, the...
norm limiting the power of termination to fundamental breach is a secondary rule or a rule of power.\(^{50}\)

To achieve obedience and effectiveness, both duty norms and norms granting legal power must be backed by a corresponding legal outcome, which will create a sufficiently strong incentive to fulfill the duty imposed or to take into account the relevant rules of power. In regard to duty rules, most frequently the outcome will be a negative sanction, ideally imposed for any failing to fulfill one's duties.\(^{51}\) Similarly, certain outcomes must attach to one's following — or one's failing to follow — the rules of power. For example, failing to follow the rules on formation of contracts will result in a failure to bring about a voluntary change in one's legal position, while following these rules of power will enable contracting parties to create or modify enforceable rights and duties.

In practice, however, no sanctioning system is ever perfect. The incentives created by the sovereign's norms and by the operation of the mechanisms established for their enforcement are often insufficient to guarantee a satisfactory level of compliance. A legal system, especially one based on a liberal philosophy, cannot rely solely on deterrence. It must look for additional ways to encourage obedience to and reliance on the law. One such technique is to install a sense of respect for the law in general, as well as for its concrete imperatives in the society (i.e. the primary and secondary rules).\(^{52}\)

From a political point of view, the principles attain this sense of respect and legitimacy towards the legal system, because they establish a highly visible link between the legislator's will and the 'good reasons' which lay behind it. In other words, principles do not only link a number of scattered, single decisions by the competent agent (rules) into a consistent and organic whole (legal order), but provide also that they are reasonable, i.e. rationally acceptable by citizens.

A citizen bound tightly by an effective system of rules will probably obey those rules, if only for fear of being sanctioned for not doing so. When such system is rationalised by way of principles of law, instead, a citizen may feel less obliged

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51 This is not to imply that the sanction will necessarily be defined as in the rule itself. Thus, the concrete sanction for a certain violation of a rule may be defined only as in post, in which case often a principle will be involved in order to justify the imposition of the sanction (e.g. the principle of *what is earned is mine*). The key role of sanctions in any theory of law was emphasised by eminent philosophers such as John Austin and Ernst Kelsen, which defined law as a system of concrete orders backed with organised social sanctions.

52 This insight, namely, that law requires legitimacy and general acceptance by those subject to it lies at the heart of H. A. Hart's criticism of John Austin's command theory, which defined law as a system of commands backed with threats. H. A. Hart, *S. 50 above, op. ch. 1 (pp. 49–76).\(^{50}\)

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And more-obligated — to obey the rules and to accept the social institutions creating, modifying and enforcing them.

This legitimising function of legal principles represents the political reason why modern legal orders have come to acknowledge them as limits to legislative power. If not linked to some basic tenets of human reason, the legislator's will would become arbitrary and, in the long run, lose its capacity of obedience by citizens. Only if such will is rationally 'understandable' is it proved to citizens that it is reasonable as well and therefore worth social respect.\(^{53}\)

Conversely, this fact explains the comprehensiveness and abstruseness which commonly affect principles, as well as their tendency to converge with highly regarded moral or social values because such features prevent norms which declare principles from (frequent) modifications.

Indeed, in order to achieve the goal of legitimising a legal order, the norms declaring principles shall be as stable and firm as possible.

Changing 'rules' of a legal order is not only ordinary, but even desirable in due course, because it serves to provide for the modernity and the efficiency of legislature.

Changing 'norms' declaring principles, instead, is a traumatic event, because it generally marks a crisis of legitimacy or effectivity of a legal order (as a consequence of a revolution, a civil war, etc.).

IV. PRINCIPLES OF EUROPEAN LAW

1. A FORMAL PERSPECTIVE

In order to examine the question of principles in the framework of European law, the starting point is the Treaty on European Union. Indeed, together with the Treaty on the Functioning of the European Union and some key decisions rendered by the Court of Justice, it represents the constitutional underpinning of the entirety of the European legal order.

In the Preamble of the Treaty on European Union, it is explicitly declared the 'attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.

This hint as to the status and nature of European principles finds its decisive elucidation in Article 6(3) of the same Treaty, which acknowledges human rights and fundamental freedoms as general principles of law and derive them from the European Convention of 1950, as well as from the 'constitutional traditions common to the Member States'. This legislative provision consists of a plain

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53 About the connection between comprehensiveness and legitimacy of a legal order, see J. Eister, *Grundzüge und Normen in der römisclchen Fortbildung des Privatrechts*, Munich, Tübingen 1956, passim.
2. A SUBSTANTIVE PERSPECTIVE

It follows from the foregoing general part of this work that the multi-level architecture of the Union’s law is highly relevant to the issue of its general principles, both in order to identify and to define them.77

The constitutional foundation of general principles, which is to be found in the Preamble and in Article 6(3) of the Treaty on European Union, tells a lot not only about their nature, but also about their roots.

Footnotes:
74 The first statement of the kind may be traced in case 117/70, Internationale Handelsgeellschaft mbH v. Sieghart and Partnerschaft für Getreide und Futtermittel (1970) ECR 1324, para. 4: “In fact respect for fundamental rights forms an integral part of the general principles of European law as interpreted by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.”
75 It should be noted that Article 51(1)(e) of the Statute of the International Court of Justice, which is annexed to the Charter of the United Nations, of which it forms an integral part, foresee that the Court shall apply “the general principles of law recognized by civilized nations”.
to subsidiarity and proportionality) create the conditions for it to be applied at the European level, especially by the Court of Justice. In contrast, rules are those norms of the Union’s law which impose a will of the European legislator, irrespectively of the laws of the Member States, or even against them.

Principles promote the goal of European legal unity by reinforcing what national laws already share in common. Rules do so by cancelling divergences among national laws.

V. PRINCIPLES IN THE EVOLVING EUROPEAN CONTRACT LAW

1. THE PRINCIPLES OF EUROPEAN CONTRACT LAW

According to the previous general assumptions, the Principles of European Contract Law (PECL) and the UNIDROIT Principles of International Commercial Contracts (PICC) are to be taken seriously when they qualify themselves as principles.60

Both of them do not properly give, but rather imply a definition of principles. Article 1:101(1) PECL states that they are ‘intended to be applied as general rules of contract law in the European Union’. In the Preamble (Purpose of Principles) of the PICC, first paragraph, it is similarly announced that they ‘set forth general rules for international commercial contracts’.61

Such provisions apparently stress the generality of the rules set forth by the PECL and the PICC as a criterion to qualify them as principles. However, the decisive reason why they deserve this qualification is that the PECL have been drafted as a written consolidation of a common core of national legal traditions (regarding contracts), as well as the PICC are purporting to collect legal practices established in international commerce, i.e. the so-called lex mercatoria.

In other words, both the PECL and the PICC aim at reflecting a jus commune (Europaeum, or even on a larger scale), which as such exists beyond the power of a sovereign legislator.


63 DCFR, n. 16 above, p. 9.

64 EEC, n. 16 above.

65 See sections 1.1 and 11.2 above.


Even if 'good faith' and 'fair dealing' as well have that peculiar vagueness and elasticity making them immediately look like principles, it should be questioned whether they have been actually regarded as such by European legislator. Instead, the enhancement of 'good faith' and 'fair dealing' in the Union's legislation aims at imposing some specific policies, which are pursued on Member States.

In the directive on unfair terms, 'good faith' is used to implement a policy of consumer protection, as well as 'fair dealing' is a legislative tool to pursue protection of competition and market freedom.

This legislative technique is akin to that of principles only with regard to the vagueness and elasticity of the norm, but with towards its settlement the attitude of the legislator is completely different. 'Good faith' and 'fair dealing' have so far been regarded in European legislation not as 'principles', but as 'rules' (or better, as 'general clauses').

A different consideration applies to the project of a common European sales law (CESL).

According to its hierarchical structure, which proceeds from the more general to the more specific, the CESL started by explicitly mentioning and providing its own general principles, which were identified in freedom of contract (Article 1), good faith and fair dealing (Article 2), and cooperation (Article 3).

In Article 2 CESL 'good faith' and 'fair dealing' were not taken into consideration as general clauses or legal standards (as European directives and regulations had done so far), but as genuine (general) principles. They were not expressions of some specific policies pursued by the supranational regulation, but rather marked the switch from the rules enacted by European legislator to the common core of the national laws.

Particularly relevant is the provision about the interpretation of the CESL, which was to be autonomous and 'in accordance with its objectives and the principles underlying it' (Article 4(1)). The reference to the 'principles underlying it' meant that, in case of uncertainty as to the meaning of the CESL, its provisions had to be interpreted in accordance with the common core of the laws of the Member States, because it is them which identify the principles of European law.

It is true that Article 4(2) CESL at once added that the interpretation of the CESL in accordance to its objectives and underlying principles should be carried out 'without recourse to the national law that would be applicable in the absence of an agreement to use the CESL or to any other law'. For several reasons, however, this final restriction did not apply to the common core of the laws of the Member States.

First, such a common core is not 'national law', because it is not enacted by any legislative power and may not be said to be in force in any national legal order. On the contrary, it belongs to the legal traditions which are common to the Member States and therefore forms part of the set of principles of European law.

Secondly, and similarly, such a common core may not be said to be 'applicable in the absence of an agreement to use the CESL'.

As it was designed, the project of the CESL was able to recognize the centrality of principles in European contract law and to balance them more attentively with rules.

This shift of European law is becoming increasingly necessary to the extent that its scope is not yet limited to some specific policies (like consumer protection or competition), however relevant they may be from a social, economic and political point of view. If the European Union intend to create a general private law, the evocation of its principles, and therefore the common laws of the Member States, becomes a vital necessity, as has already been made evident by the DCFR.

VI. THE BALANCE BETWEEN PRINCIPLES
AND RULES

1. THE LAW WHICH IS COMMON TO THE MEMBER STATES

The distinction between principles and rules will be finally scrutinised as a question of fine-tuning the level of regulation between national and international law.


66 See section IV above.

67 See section I above.

68 Part I (Introductory provisions), ch. 1 (General principles and application), sec. 1 (General principles), Articles 1-3.
supranational legislators, and also of shifting power from legislature to judicature (and vice versa). Because of its extreme complexity, the topic can only be superficially sketched in this chapter.

By acknowledging principles, the European legislator promotes legal unity among Member States by enhancing the coordination and also the competition among them and among their laws. In order to achieve the institutional goals of the European Union, it is however to be remarked that the common core of national laws should not be the outcome of a static or passive recognition of what at the first glance looks already to be shared. Such method would lead in fact to the lowest point of possible convergence among the Member States, according to the logic of the minimum minimurn. But the aim of promoting legal unity by way of the Union’s law should instead impose an obligation to maximise the convergence and therefore to pursue the logic of the minimum maximurn. In other words, it is therefore necessary to also include in the common core the principles of European law implicit and potential consistencies among Member States, with the only impassable limit of the not inconsiderable divergences, set out by the Court of Justice in the Hoeckx case.

Pursuant to the principle of subsidiarity (Article 5 of the Treaty on European Union), the best way to avoid the risk that national differences, which have been created by centuries of legal positivism, will harm the social and the economic well-being of Europe is to push forward the core of the common tradition of laws. This permits the legislature to opt for solutions which are and have been for centuries under the sharp criticism of scholarship and under the pressure of market, both of them permanently forcing the national laws into the quest for better regulation.

However, a European law consisting of principles alone would be neither possible nor desirable.

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77 Most illuminating is W. Beckert, Grundsätze der Wirtschaftspolitik, 6th ed., Mohr, Tübingen 1990, pp. 245 et seq.

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2. THE RISK OF A DEMOCRATIC DEFICIT AS A RESTRICTION ON LAW-MAKING THROUGH PRINCIPLES

Making law through principles creates a shift of power from parliaments to courts, or, which is the same thing, undermines the legislature in favour of the judicature.

According to the constitutional foundation of modern democracies, the long run this shift of power cannot but create an unbearable democratic deficit, because courts do not have a mandate from the people and do not express their sovereignty.

3. THE RISK OF REGULATORY FAILURE AS A RESTRICTION ON LAW-MAKING THROUGH RULES

Coordination and competition among Member States and among their laws do not always improve the social and economic well-being of Europe, because in some specific and well-recognisable contexts such coordination and competition are exposed to the risk of failing.

In this sense, the principle of subsidiarity is aimed not only at defending national States from a possible subtraction of their sovereignty by the European Union, but also, and perhaps even more so, at tuning the best level of legislation, especially in front of the distinction between principles and rules. The tool of subsidiarity fixes the breaking point beyond which making law through principles shall shift to making law through rules.

At the European level, rules, as opposed to principles, promote legal unity among Member States by cancelling out the national differences among them. However, and as elucidated so many times by scholars studying European integration from an economic point of view, this way of making law hides dangers, too.

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Unlike national laws, the Union's law does not have to cope so much with actual criticism from scholarship, which is still mainly national. It also does not have to cope so much with market pressure, because the level of regulation is too high and too far from the players, and tends to be politically irresponsible as well.

4. THE PRINCIPLE OF SUBSIDIARITY AS A TOOL FOR ADJUSTING THE LEVEL OF REGULATION

The tool for adjusting the level of regulation between principles and rules at the European level is that of subsidiarity, which however should be taken even more seriously than in the past, especially by the Court of Justice when controlling the validity of the legislative acts of the Union.

This issue goes far beyond the limits which are necessarily appropriate for this chapter.

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THE ECJ AND GENERAL PRINCIPLES DERIVED FROM THE ACQUIS COMMUNAUTAIRE

Elise Poilloy

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According to Giuseppe Mazzini, "[h]e politics, as in any other field, a principle inevitably leads to a system, a series of consequences, a process of applications easy to anticipate for persons with common sense." This assertion certainly applies to European contract law. This contribution aims at demonstrating that the ECJ played an important role in such a process. To understand how such a process started, one must get back to the foundations of European Union law.

In the beginning was the EEC. And from the very beginning, the EEC was both a market and a political system. Any political agreement, leading to a legal consensus was aimed at building a market. This economical approach is obvious in the Treaties. Before building a common law a common market had to be built. The goal was to increase trade between Member States. The creation of this common market led to the adoption of common legislation. As a consequence the market preceded the law. In this respect, all the general principles set down in the Treaties are market-oriented. In this respect general principles were predestined to leave the field of what a continental lawyer would call 'public law' to enter the field

\footnote{G. Mazzini: Repubblica e Manovra, ch. 1.}