**GUIDO ALPA**

# "Principles of law": history of a controversial concept in Italian legal culture

## 1.The Italian model: preliminary dispositions to the civil code of 1942

General principles are mentioned in the preliminary dispositions to the Italian Civil Code and in numerous other legislative texts in the national legal system (special laws, regional statutes, regional laws, city and provincial statutes). In the Community legal system, explicit reference is made to the general principles common to the legal systems of member states on the subject of extra-contractual responsibility (Art 340(2) TFEU). In the international legal system, reference is made to the recognised principles of the civilised nations (Art 38(1) of the Statute of the International Court of Justice). The compilers of the texts have not always employed the same formulas; one can speak of principles of the legal system, fundamental principles, and the principles of civilised nations.

Art 12 of the *preleggi* ('prelaws') merits more thorough comment for a variety of reasons. It contains the most well-known, widespread, and tortured text in Italian law. It is a disposition that fulfils the task of dictating the criteria for the interpretation and application of legislative texts. It is therefore placed on a different plane with respect to the other dispositions that refer to specific concrete cases. It is a norm about norms, and for that reason, it precedes all others from both interpretive and prescriptive points of view.

Art 12 of the prelaws presents a particularity with respect to the other provisons. It is the disposition regulating the interpretative process, and dictates (or claims to dictate) the behaviour of the interpreter and the limits of interpretation. This disposition has a complex history whose development must be known in order to fully understand it. It contains similarities with rules of other legal systems to which we must refer in order to understand this peculiarity. Moreover, it represents one of the possible models for tracing the boundaries of the authority of the interpreter, and therefore it poses problems for the theory of law in general.

The heading of Art 12 is entitled "the interpretation of the law", and the text is comprised of two paragraphs. The first governs literal and teleological interpretation. The second adds "If the dispute cannot be decided by a provision, one will have regard to provisions that regulate similar cases or analogous subjects; if the case remains in doubt, one will decide it according to the general principles of the legal system of the State."

Above all, it is necessary to consider the existence of Art 12, and the need for a written rule that orders principles, as noted by drafters of the 1942 codification.

Let us pose the question in a different way. If the final paragraph of Art 12 had not been inserted into the preliminary dispositions, would interpreters have been equally able to have recourse to principles, and if so, with what limits and methods?

Not all systems of written law provide such a provision. It has already been duly noted that nothing like it can be found in the 'father' code (that is, the Napoleonic Code), the German code, or in the common law. This does not mean that the principles, or some interpretive technique, have not been noted or applied in France, Germany or in the common law. We can therefore go beyond this first elementary question, responding that the disposition is useful but

not necessary. In an interpretative and systematic way, one arrives at the recognition and employment of general principles. Some hold that the disposition is superfluous because the interpretation of texts is exhausted by their 'analogous' application. However, this extreme thesis has no basis, as is revealed in the following discussion.

The provision was introduced into the prelaws for many reasons: for historical reasons (inasmuch as a disposition of a similar nature had already existed in the publication, interpretation and application of laws in general (Art 3) in the code previously in force since 1865); for political reasons (inasmuch as it was felt important to reaffirm, through law, the unity and completeness of the legal system and to render more precise discussion on the efficacy of natural law); and for ideological reasons (inasmuch as it was desired to give only those norms "established" by the state, the law in force, the task of governing Italian society in an exclusive way).

The location of this disposition within the prelaws is also for logical reasons. The world of principles is brought back into the interpretive dimension; a specific and circumscribed role is assigned to principles through laws that aid the interpreter in ascertaining the meaning and in applying the dispositions.

The legislator is not content to refer to principles and to determine their function; he is also given the responsibility to establish when recourse may be had to them.

Art 12 is formulated in the impersonal; commands are made in the third person ("one will have regard to", "one will decide"). They therefore concern all interpreters: the judge, the administration, or whoever in general has the task of applying the law. Principles are norms in the true sense and therefore must be respected by everyone, and in particular, by those who institutionally interpret the law. However, the normative area of Art 12, second paragraph has boundaries that are more circumscribed because it is aimed not at the moment of interpretation, but rather at the point of deciding a dispute.

From this it is deduced that the 'judging' interpreter must make recourse to the principles in cases, within the limits indicated in the provision. It refers to the 'judge,' and thus not just the judge concerned with the dispute, but also an arbitrator who may make decisions in proceedings. In all other cases where one does not have to decide a dispute (that is, where the same judge makes pronouncements according to equity, or in the case of the arbitrator of equity or contract, or the case of a scientist-interpreter) there would be a freedom to use principles in the most appropriate and opportune way. Obviously, the judge of equity, the regular arbitrator of equity or contract is not allowed to decide in an illogical or unjust fashion; the interpreter assisted by scientific rigour cannot operate according to fantasy, but must concern himself with rules of doctrinal interpretation.

The letter of this provision seems to approve an order for these criteria: literal criteria (the true meaning of the words), psychological criteria (the intention of the legislator), teleological criteria (the will of the legislator and of the law), and analogical criteria (for similar cases or analogous materials '*analogia legis*'; for recourse to principles '*analogia juris*').

One notes that in this succession of criteria, principles can be applied to resolve doubtful cases only as a residual and last resort; the use of 'integration' is only residual, and is a surrogate to interpretation. The interpreter (the judge and other figures) therefore decides whether or not to turn to principles; the choice is up to him because it is he who decides whether

a case is doubtful. If not, then it is not necessary to turn to the application of principles, as applying the written provisions would be sufficient.

The apparent crystalline and pyramidal structure of criteria for legal interpretation become, however, more opaque with regard to the practice that belies both legislation and also the technique of interpretation which would logically presuppose that the singling out of principles comes before any other criteria.

In practice, principles receive a very extended application that is not subordinate to hierarchical criteria, and that is wider than the role foreseen and prescribed ingenuously by the legislator. Yet more ingenuous still is the belief that gaps can be filled, and that these can be found in the text directly rather than as the fruit of an interpretative process. In the interpretative technique, the norm – fruit of verifying the meaning of the disposition as determined by the interpreter and filtered through his cultural baggage – is always framed and frameable as a principle.

But even the rule presupposed by Art 12, *in claris non fit interpretatio*, can be denied. The decision as to whether a provision is doubtful belongs to the same interpretative process. Whenever the interpreter prepares himself to fulfil his role, he performs an operation that is not (and cannot be) mechanical. The fact of distinguishing clear cases from unclear cases is already fruit of a pre-comprehension that leaves no doubt as to the active nature of his role.

Interpreted literally, Art 12 thus reveals the innocence of a legislator fearful of betrayal by interpreters. On the other hand, this is not new; Napoleon never liked commentary on the rules of his code. In fact, it is said that when he was brought the first work of interpretation and commentary, he is thought to have murmured, "*mon Dieu, mon code est perdu!*"

In conclusion, even if we wanted to conform strictly to the requirements of Art 12 of the prelaws, we would not be able to do so without turning to principles. This is because the use of principles is inherent in the interpretive process.

## 2. The identification of principles

Since principles are mentioned in the scope of criteria for the interpretation and application of law, their legal nature can be founded on this textual argument: principles are also laws, and they are norms with different characteristics from written rules. We can consider the consolidated assumptions in light of the guidelines provided by Italian doctrine. The following characteristics are generally assigned to principles: they are vague and imprecise (yet it is not the case that written dispositions are, on the contrary, always clear and precise); they entail the use of an interpreter (yet neither is it the case that other dispositions do not require interpretive choices); they encompass a wider range of normative content than other dispositions (yet it is again not the case that equally broad dispositions are not found elsewhere in the legal system).

There are discussions as to whether principles obtained from written dispositions by the inductive method are directly applicable to specific concrete cases. The affirmative response is based on textual reasons (the formula of Art 12, paragraph 2), alongside logical reasons; if they are norms, then as with all norms, they are directly applicable to concrete cases.

With some authoritative exceptions, such as Betti, the doctrinal position agrees that principles are "norms".

On the other hand, if principles are extracted from rules by way of a process generalisation and abstraction, nothing but a norm is born from a norm. This, with greater reason, applies to the fundamental principles expressed. It is a positivist canon. However, modern supporters of natural law also agree on the legal nature of principles. He who holds that principles are founded on ethics and therefore have a meta-juridical origin, inspiring and shaping rights and therefore their epiphany (that is, the whole complex of rules which comprises the system), cannot but consider the observance of principles as binding. Otherwise, the judge who ignores them or directly violates them would produce a decision contrary to natural rights.

Legal realists, however, express doubts about the legal nature of principles: a principle would be observed not because it is binding in itself, but because it is held to be such in the collective imagination. A principle is a ductile instrument that serves to cover, legitimately, the work of an interpreter.

The impersonal formulation of Art 12, which would limit the task of applying principles to judges, clashes however with another logical need. Even before it is put into practice, the legislator has not enumerated the principles that one can or must apply. One wonders then whether principles are a 'source' of rights with characteristics similar to common law, as this would not be a written rule but a rule referred to and observed in practice, both in terms of interpretation and application. In contrast to common law, which in modern systems does not precede but follows the written norm and is subordinate to it, principles come before other norms (if one wants to go beyond the rigid scheme of Art 12) because other norms presuppose principles. However, while common law is observed, inasmuch as it is held binding (*opinio iuris ac necessitas*), principles are observed because in the mitigating of interests, these offer the solutions that are most consonant with law – that is, to the culture and sensibilities of the interpreter.

Here, then, is the second illusion of the legislator: that principles would be a *numerus clausus*, operating within well-defined boundaries. This is because principles are inferred from the norms, and thus cannot exist (legally) if they do not have a foundation in these norms.

The legislator here has also forgotten, or has pretended to forget, the role of the interpreter, who can create principles and anchor them to norms.

There is not a closed list of principles, and therefore they cannot be catalogued. This is an ancient consideration that finds ample confirmation in practice.

The introduction of principles can have three origins: the legislator, the judge, and the legal scholar.

Examples of the first origin are: Art 1 (on the law on abortion) according to which abortion cannot be used as a means of birth control; Art 7 (on the law on administrative procedures), according to which the administration must operate effectively and efficiently; provisions on military discipline; provisions concerning workers and those contained in the laws on parity; and the other examples quoted in Ch 1, paragraph 4.

The majority of judgments deciding cases by applying a principle are examples of the second origin. It is enough to think of the application of the principles *pacta sunt servanda*, *rebus sic stantibus* and principles such as supposition theory in the employment context, unjust enrichment, acquisitive prescription, the protection of minors in custody cases involving parental separation, and all the other cases which are the subject of analysis in the second part of this work.

The legal scholar identifies principles, drawing them from practice, the politics of law as followed by the legislature, and drawing on elaboration and commentary, proposing principles that organise diverse and scattered norms in a systematic way or introducing new principles in adapting the legal system to new concerns (such as consumer protection, the protection of savings, transparency of contracts, etc).

Today, the legal nature of principles is universally recognised. It could appear contradictory to deny commentary and doctrine a role as a source of law whilst assigning doctrine with the task of describing principles. Legal positivists escape the contradiction by sustaining that the principles in force are those extracted from norms.

Can we place boundaries on the will of the interpreter which would ensure that principles are not transformed into an authentic Trojan horse, allowing interpretative subjectivity to reenter areas from which it had previously been banished, and transforming the judge into a legislator? Even those skeptical of constraining interpretation admit some limitation, such as logical consistency and the reducibility of the subject.

Principles can in fact be classified, ordered hierarchically and analysed historically. Since the fundamental values of a legal system are contained in its fundamental law, these serve to render the Constitution compatible with the rules in force. In this way, they can have a more general importance if found in the Constitution, the civil code, or in regional statutes, and a more circumscribed importance if expressed in special legislation giving rise to ‘microsystems’.

## 3. The origins of the Italian codified formula

A history of positivist fact requires us to consider the formulas prior to those codified in Art 12 of the prelaws. But it also requires analysis of the questions elaborated by the doctrine and jurisprudence surrounding that positivist fact.

A textual comparison apparently yields meagre results. As has been revealed, a disposition that makes reference to general principles as such, understood as a technique of stating values and guidelines that a interpreter must refer to in given situations, is not found in the Napoleonic Code, the ‘father code’ of legal systems belonging to the Romano-French family. *Individual* general principles are codified (such as the principle *alterum non laedere*, the principle of the bindingness of contracts, and so on).

This is an important fact in political history and the history of law. This is the period of time between the end of the eighteenth century and the beginning of this century, which we can define as the era of codifications and of the "positivisation of general principles".

In the Napoleonic codification as well as in the Austrian codification, evidence of natural law can be identified. In the latter, this is more distinct because it corresponds to rules in the code that explicitly reference the values of natural law. However, such values are 'encapsulated' in the code, and are thus rendered positivist rights in force, and translated into either explicit rules or general principles. Predating the code in permeating legal science, general principles in the new era that express a new way of conceiving legality are applicable in so far as they are referenced by the code. In short, general principles take inspiration from natural law, predate the legal system, and enters to form part of it only when called upon.

In the *code civil*, it is often said, principles are not spoken of explicitly. Napoleon's concern was to set out clear rules that the judge, as the "*bouche de la loi*", must apply in a literal way; not even comment was permitted, for fear that the legislative intent would be diminished or distorted.

It is not for this reason that doctrine dares to elaborate on general principles. This is instead due to the survival of Roman studies. It should be noted that the Italian translation of the civil code, that is, the civil code of the Kingdom of Italy for the Italian provinces conquered by Napoleon, entered into force in 1806, placing an obligation on university professors to comment in their courses and lectures on the civil code with the aide of Roman law. Even the typically French tendency towards classification and abstraction was a potent spur towards the identification, coordination, criticism and application of principles. In the private law textbooks of Laurent, Toullier and Zacharie, an ample use of principles is made, in contrast with the original legislative intent but in conformity with the doctrinal needs and logic of every legal system.

Conversely, an explicit mention of the expression 'general principles' is found in the Austrian Civil Code of 1811, in force in Italy from 1816 in the Italian provinces under Austrian control. Section 7 is formulated as follows: "whenever a case can be neither decided according to the words nor the natural sense of the law, one will have regard to other similar cases decided by the laws and to other analogous laws. If despite this the case remains doubtful, the case will be decided according to the principles of natural law, having regard to the relevant circumstances with care and consideration." Few references can be found in the legal systems of the other Italian states prior to the Napoleonic conquest. In some states, as in the Kingdom of Sardinia, the situation after the fall of Napoleon and the Restoration was even more complicated.

In 1837, at the moment of unification of the civil laws of the states of Piemonte (Piemonte and Savoia, where Savoy constitutions were in force; Liguria, where the Napoleonic Code remained in force; and Sardinia, where particular laws were in force), the compilers of the code (then called the Albertine code) were beset by a problem: should they use the expression 'general principles'? And if so, should they copy the Austrian expression which made reference to natural law? The solution was curious yet at the same time illuminating: the subtle meaning in the phrase "principles of law" was preferred.

And it is this expression that was passed on to Art 3 of the prelaws to the 1865 civil that unified the civil laws of the new Kingdom of Italy. From that moment on, the history of positivist fact became the history of doctrinal techniques and jurisprudence whose purposes were to escape the literal and restrictive application of legal provisions, to enrich positive rules, and above all, to satisfy the needs and problems of reality and to find a response to these in positive rules of law.

This position is sustained primarily by scholars of commercial law, the area which, before any other areas of the legal system, is affected by the latest market developments among those coming from abroad and international relations. Here, principles – besides being the skeletal framework of the sector – are seen as tools that allow the rapid adaptation of the legal system to the new reality. It was in 'the nature of things' that rejuvenation of commercial code of 1865 was required; however, the code of 1882 also left the door open to principles, and therefore to new interpretation.

After the First World War, jurists warned that a turning point had been reached. The centuries-old empires had fallen, and the world of the nineteenth century had vanished with its exaltation of the individual and private property. The growing industrialisation, state intervention in the economy, and new social circumstances rendered the code, already grown old, inadequate for new realities.

## 4. General principles in the Italian Civil Code of 1865: the statist thesis

Historians of Italian law have not yet deepened their analysis of the jurisprudence of the last century to enable us to know how principles were used in the reasoning behind decisions. Moreover, a work such as that of Broom, which would allow us to understand the role of principles in 'living law', does not exist in the Italian literature. But from an analysis of current legal scholars who have investigated individual sectors or institutions of private law, one can comprehend that these principles were applied in a manner not very dissimilar from the way in which they are applied today. Even the problems of a practical nature of general theory posed to the interpreter are very similar to those posed today. Retracing history then has a dual purpose: it serves to reconstruct the origin of texts, but also to avoid repeating errors of the past.

In an Italy divided by cultures and traditions very different from one another, the legislative unification that cemented the political unification had to be integrated by the uniform application of the law. Moreover, the victory of positivism (the modern technique of organising knowledge) in the natural sciences and the philosophical and social sciences led to the marginalisation, by the science and practice of law, of values not explicitly recognised by the law. Political reasons in conjunction with scientific reasons (beyond, obviously, the observance of Art 3 of the prelaws) thus militated in favor of a positivist conception of law, and therefore one of general principles of law identifiable in the provisions of the code.

Vittorio Scialoja was the author of this conception. In his inaugural speech for the 1879-1880 academic year at the University of Camerino, Vittorio Scialoja, who had just been given the chair of Roman law and the civil code, enunciated a sort of manifesto for Italian jurists that would remain dynamic and persuasive for more than half a century. The speech bears the title "positivist law and equity", but its content was much more broad. In fact, the structure of the speech was as follows: the role of moral and physical forces in the creation of law; the consensual nature of law (that could be also expressed in terms of the original contract of the state); the necessity of legal forms; common law, written law, and the law of judges; and the tempering of written law (*strictum jus*) on the part of judge-made law and the legal force given to equity.

Following this structure, Scialoja focuses on the points of intersection in the speech, and these form the development of his thesis: there is nothing outside of law, and everything is within the legal system. Equity is not an 'alternative system'; equity is a (material) source of law. From this perspective, general principles (such as the principle of equality, the principle of citizenship, the principle of protection for foreigners) are constructed in the context of law. These do not derive from natural law, as though they were in a latent or unconscious state, but are the fruit of convention and of the will.

The idea of equity understood as a natural foundation of the sense of justice is to be refuted because it falls into subjectivity. It may be justified only as a response to formalism and the crude, thin, and insidious application of law, but not because it proposes an alternative system of rules with respect to the law in force. According to this illustrious jurist, this latter idea is dangerous because it encourages the judge not to apply the positivist rights considered unjust, and instead to choose a solution that no longer adheres to the positivist fact but that adheres to his own sense of justice. Since this sense of justice is subjective, the risk of falling into arbitrary interpretation is too high.

In the same way, he rejected the idea of equity as a "subsidy and correction of positivist law".

Here too the judge, unless authorised by the legislator, may not substitute the legislation with his own view. Equity, in compelling a judge to attend to the concrete circumstances of the case and to consider all the rules together, is not 'equity' in the true sense, but expresses the task of the interpreter. In other words, the judge is not free to interpret the rule but must seek out the intent of the legislator. He can modify his application of the rule only where he finds himself using expressions that the provisions define as having a relative meaning (and that we would call *clausole generali* or 'general clauses') such as public order, good faith, or correctness. In these cases, the legislative intention is that these norms are interpreted according to the ideas, sentiments, and conditions of various cases and various times. But here we are not dealing with a free choice, entrusted to the interpreter; the legislator is the one who explicitly authorises and makes use of 'general clauses', designed to survive for a century.

Scialoja here arrives at the conclusion of the speech, now pointing to general principles. Principles are not mathematical formulas and nor are they elastic formulas "such as to allow them to stray from the laws: a law does not propose principles, it dictates commands (...) from these commands one may extract principles, but the supreme difficulty consists in formulating them."

The legal positivist and statist credo regarding general principles is contained within these few lines. Laws are understood as an ensemble of commands. Consequently, a general principle is understood as a secondary norm that is extracted by way of abstraction from a written rule or from custom.

How, then, should we interpret Art 3 of the prelaws to the Civil Code of 1865, where it makes reference to 'general principles of law'? Currently, given what has been argued on this point, Scialoja excludes that such an expression alludes directly to Roman law, natural law, or to equity, as held by some of his contemporaries. Such formulas are suitable in legal systems where they are used in an explicit way and are directly relied upon, as was the case in the Ticino code (Art 5) that made reference to "common law" or the Austrian code that refers to "principles of natural law." The formula of equity as an expression that consolidates general

principles is only to be relied upon (in so far as it is applicable by the judge) when the governing law permits it: the judge has the duty "not to exceed his powers."

Scialoja (in a note to the text) returns to the problem and gives his instructions to the interpreter. These instructions are directed more towards describing what we call today the technique of qualification than describing the technique of abstracting general principles from rules ("do not believe that every element of a fact is a legal element; do not forget to give their fair value to those elements of a fact that at first sight do not appear to be legal elements"). Taking nothing away from the moral imperative of life, Scialoja concludes with the summary: "to bend the private will and private judgment to the will of the State, whatever it may be, is the work of a good citizen."

The freedom of the interpreter, the uniformity of the legal system, and the consistent application of rights under law are the main points of this reading of norms, and the message of this jurist to other jurists.

### 5. The natural law thesis.

The civil code of 1865 was beginning to show its first cracks: the growing industrialisation, changes in social structure and special legislation, which along with the dawn of the period of war were becoming ever wider, in turn colliding with work relations, local relations, and urban and agrarian relations. All these were provoking a rethinking of the role of the code, and therefore that of the interpreter. Moreover, the brief period of legal socialism at the end of the century had denounced the ideological options of a civil code that had been inverted on property, in the same way the commercial code was inverted on the microeconomics of exchange. The new times called for a modernisation that would take place without trauma. Plans for a new codification were not lacking, but most of these dealt with internal procedures, with progressive adaptations that above all bent existing norms to fit new needs. Even without reaching the maximum degree of autonomy entrusted to the judge, good results could be obtained. Swiss legislators had, in the same period, resolved the question in another way, allowing the judge who could not find a specific rule in the legal system that would resolve the case before him to make himself a “legislator of the individual case”. Others, a few years before, had based interpretative freedom on analogy. The rules of logic, whether in the case of interpretation by analogy or in the application of principles, would naturally function as a restraint on discretion, tempering the creative power of case law.

In this climate of reform, waiting and dissatisfaction, models, trends, and directions that would eventually take hold in our legal culture began to take shape. These would be reproduced subsequently in the 1940s, again at the end of the 1960s, and finally in the present day. In our legal system, the history of general principles is one of phases, and these phases open up, normally, in periods of crisis or renewal.

In the 1920s, in the effervescent climate after the First World War characterised by the desire to install a new order, the positivist jurist began to doubt the established certainties that the past century had sculpted. Alongside those who still wanted an interpreter devoted to the letter of the law – deprived of any fantasy and a mere executor of a *voluntas legis*, obtainable without hesitation from a text allowing for neither nuances nor deviations – there were those who believed it to be possible to introduce meta-legal values into the legal system, entering by

way of general clauses like equity, good faith and public order, making use of general principles of law.

In this environment, the beginning of a new phase, and therefore of a new discussion, first raised by the writings of Donati with his 1910 book on analogy and continued by Brugi with a work in 1916, is outlined by Giorgio Del Vecchio's broad essay, informed by a moderate and modern idea of natural law (1921).

In this essay, destined to become a pillar of the theory of interpretation, Del Vecchio begins from consideration of the inevitable incompleteness of the law in force, and therefore from the necessity of recourse to reason, or indeed to "natural reason that governs the creation and interpretation of rules" in order to resolve legal questions in a just way. Some principles have a logical nature (*nemo dat*, *cuius commoda*, etc); others derive from "the nature of things", that is, from evaluting the circumstances of individual cases. Others are postulated by the same civil code, referring to equity or to natural equity (Arts 463, 578, 1124, 1652, 1718; references to previous civil code).

Del Vecchio does not distinguish between a legal system and a system of equity. He does not consider the references made in the codes to 'equity' or to "the nature of things" to be expressions of values that are different and alternative with respect to legal references. For him, the law and equity are two reciprocally integrated sources; equity constitutes "a perennial source of renewal and reintegration for the whole legal organism."

There are, however, norms that reproduce principles, norms that only partly reproduce principles, and gaps that may be filled with the help of principles. The problem of the will of the judge does not escape Del Vecchio, and nor does he confuse the *jus coditum* with the *jus codendum*. Where there are rules, these must be applied even if they do not conform to criteria of rationality and equity. In other words, principles, "having a character of vitality and of absoluteness" cannot have the value of special norms that constitute the system, but can be placed "above and inside the norms." In applying the rules, principles make explicit the *ratio legis*. Where gaps are concerned, they regulate the subejct. Del Vecchio gives principles of natural legal reason an interpretive and 'corrective' function, since norms always receive an indirect application by the interpreter.

## 6. "General principles of the legal system of the state."

The second phase closed with the formula established by Art 3 of the prelaws (1939), which in the 1942 version becomes Art 12, to which reference is made in cases in which a decision cannot be reached using a given provision. Only subsequently, when doubts persist, is the judge directed to general principles "of the legal system of the State". In its most reductive intepretation, this formula would seem only to allow an interpretive and integrative use, and this would not extend to *all* principles of law, but only to those so general as to be part of the legal system "of the state". One could not invent a more rigid or positivist formula, and this was the fruit of a non-random choice, considering the rejection of other more bland formulas.

In reality, the content of the formula was more extended in the first version proposed by the Commission where "general principles of law" or indeed "general principles of the law in force" was planned. This was to exclude the risk of a judicial legislator (noted in Art 1, paragraph 2 of the Swiss code) in addition to satisfying "the reasonable needs of doctrine and

to conveniently serve judicial practice". The formula had remained in the report of the Guardasigilli ('Keeper of the Seals'), which showed that in relying on the law *in force*, one could prevent the interpreter from reentering the legislative sphere of the legal system in force, and those norms that the system itself is connected to by its origins and historical development.

Transcending "excessive generalisations and abstractions, resorting to foreign laws and thus altering the particular lines of our national legislation" would therefore be prevented. Yet the text pleased no-one.

The underlying reasons behind the definitively accepted formula emerge from the report of the Guardasigilli. Indeed, we read:

"The specification introduced in the definitive project regarding general principles of law, in the sense that such principles must be sought within the sphere of the legislative system in force, has been met with the full favour of the Parliamentary Commission. Nonetheless, I believed it opportune to introduce a modification into the text of Art 3, not merely of a formal nature, to express more clearly and more completely this concept. In place of the formula 'general principles of the law in force', that might have appeared too limiting of the work of the interpreter, I held 'general principles of the legal system of the State' to be preferable, where the term 'legal system' is comprehensive, in its broad meaning, beyond norms and institutions, and even the state's political-legislative position and the national scientific tradition (Roman law, common law, etc) with which it is in harmony. Such a legal system, adopted or sanctioned by the state, namely our positivist legal system, whether public or private, will give the interpreter all the necessary elements for finding the applicable norm."

As we can see, the reference to the national scientific tradition, today considered mere tinsel, was the way of tying together to positive law the values dispersed in the system that lie at its base. Some represented this role under the guise of private law dogma.

That the interpreter would then have to extract principles from the rules of the law in force, and be bound by them, is another matter entirely. However, as is known, the interpretation of norms goes beyond the literal boundaries of the norms themselves.

## 7. The legal realist thesis

Here we arrive at the current debate, whose echoes have already given warnings several times, which concerns the tension between formal interpretation and conceptual interpretation, along with criticism of the unconcious use of formulas. Of the valuable contributions elaborated gradually in the doctrine, we take into account above all the voices of the 'encyclopedists' and the Congressional acts. In this context, Giovanni Tarello stands out, with his research on legal interpretation.

The legal realist position of Tarello begins with the premise, shared by Betti among others, and shared also by analytical culture, that law does not only spring from laws: "not all of the regulation of social life can be found in the totality of the laws of a legal system". This is because the interpreter already makes additions the moment he undertakes a merely literal interpretation of the provisions; unless the laws themselves contain all the definitions of all the terms used, which rarely happens, the law cannot govern all the specific concrete instances that are possible in reality. The search for the rule to complete the system begins here. Tarello

explains that this process is assisted by the ideology of completeness of the system. Art 12 of the prelaws begins with this premise because it seeks to use analogy and general principles to complete the system; it is therefore a norm of closure. The judge must give content to the analogical interpretation as well as (and above all) to the general principles. Still, completeness is belied by the existence of conflicting rules such that, if all law were the reflection only of laws, we would find ourselves faced with a contradictory system. The question is resolved with recourse to three criteria: the criterion of hierarchy (Art 1 of the prelaws), the criterion of 'posteriority' (Art 15 of the prelaws), and the criterion of 'specificity'. But these three criteria require the action on the part of the interpreter, in the same way that the application of the law requires systematic intepretation.

In this context, general principles are one of the various *techniques* utilised by judges in interpreting law. Tarello warns that principles mask the *analogia juris*; they mask a favour towards some interest (for example, the preservation of the contract, the protection of the debtor's interest, the interest of the employee, etc). Moreover, they mask the ideology of the interpreter, especially when he reproduces the values of the dominant regime (as happened for the principles codified in the "Charter of Labour"). The argument beginning from general principles is a blank slate that serves, from time to time, to cover disparate functions.

However, principles can be understood in a different way. This is as values underlying the system, used by the judge almost as though they were the fundamental material. This is the thesis of Ronald Dworkin.

In his critique of positivism, Dworkin distinguishes between *rules* and *principles*. Law is not a system of rules but of rules and standards, that is, principles, policies, and other standards. A principle is a standard that must be observed not because it provokes or maintains a certain situation (economic, political, or social), but rather because it expresses a need of justice, correctness, or some other moral consideration. For example, the standard that no-one should benefit from his own wrong is a principle. According to Dworkin, principles are therefore different from rules, but are a part of the law. The difference is above all a logical one. The written rule is expressed in a precise manner, wheras principles do not determine or set out conditions that render their application necessary. Another difference consists in the fact that principles have a dimension that rules do not have; this is the dimension is of weight or importance. Principles, then, serve to give content to 'general clauses' inserted into rules. Furthermore, only rules impose results, whilst principles do not. In reality, principles can be recognised *ex post*, that is, after their application by a judge.

The fact that in common law systems the weight of precedent is much more relevant than in civil law systems weighs heavily on Dworkin's thesis. Moreover, there is the fact that beyond the influence of Roman law on common law, brocards, traditional principles and such techniques have never had dominant position in that culture, as conversely developed in the civil law countries and Italy in particular.

In any case, it is not possible to stop at the positivist conception. What one can do is take into account the positivist concern regarding control of judicial discretion and the consistency and logic of reasoning. Above all, this concerns awareness of the use of the expression 'principle' and the technique of employing a principle that is singled out whether out of prior recognition, out of carelessness, natural expression, or out of an *ad hoc* creation in order to resolve the question in issue.

Still in the context of this same theme of demystifying principles, considering also their historical function and content, we can place Francois Ewald, student of Michel Foucault. Ewal advanced his thesis moving from the premise that law is the fruit of a system of power allocation, and therefore that there exist concrete systems of positive law that from one historical phase to another express the values of the society that creates them. Ewald outlined the theory according to which general principles, here understood in the sense of foundation of the system, and unwritten rules latent in the legal tradition of civilised nations are, norms that the jurist follows. These comprise a kind of "empirical natural law" that, as distant from classic natural law theory as from dogmatic positivism, allows consideration of the legitimacy of legislative provisions and the enrichment of positivist fact. General principles are thus retraceable in the history of law and are the expression of the memory of our legal tradition.

This quite acceptable position, if only partially whether in defining the role of principles or in their historicisation, can nonetheless be placed within the range of positivist criticism. But it has provoked the criticism of those who hold that the natural law model is vital in the history of law, and that principles should be more circumscribed.

## 8. The composite function of principles

We can present the results of our research conducted so far in a comprehensive summary, and this deals with assertions noted in the preceding paragraphs.

1) The identification of functions performed by general principles is arbitrary, as is the categorisation, creation and identification of principles in the law in force.
2) This arbitrariness, however, is coherent and is acceptable inasmuch as it is typical of all interpretive activity. What is important is that the interpretive activity responds to the canons of logic, common sense and practical utility.

A fundamental function performed by principles is the role they play in legal reasoning. As Struck has clearly brought to light, principles, and therefore the legal *topos*, assist in the application of norms the moment that no legal rule or value is considered absolute. There is always the case in which, depending on the circumstances, a rule must be limited and its value must yield to other more important considerations.

3) In general opinion and in general practice, principles thus perform a function that is much broader than that entrusted to them by Art 12 of the prelaws. On this hinges a system of private law, consisting of positivist fact and the enrichments derived from its interpretation, manipulation, and construction in the legal system. Principles therefore play a role as a "foundation" of the system. In uncodified areas, administrative law and international law, principles perform a yet more relevant function: that of a normative frame of reference.

4) In the jurisprudence, principles obviously play the role recognised by Art 12 of the prelwas, that is, as rules applicable to concrete instances when a legislative text has gaps, is imprecise, or is in some way lacking.

5) Principles are often invoked in jurisprudence for the purpose of mere embellishment in that they corroborate the application of a positivist rule. They therefore serve to reinforce the crux of the decision and to assign the greatest possible internal coherence to the reasoning.

6) Where they are created *ex novo* by the judge, they serve to legitimise the case law. In order to mask the arbitrariness of a decision, a judge will provide for the introduction of a legitimising shield, namely, the principles invoked.

7) Principles constitute the modern *lingua franca* of jurists belonging to different legal systems. This is the case whether for the positivist side of things, the formation of a uniform legal culture derived from the circulation of legal models, or whether indeed for the formation of uniform commercial practice and arbitration.

8) The international positivist position tends to homogenise the legislation of member states (from time to time, though the setting up of parallel systems, as happens for the Community legal system, or by way of conventions, as happens for the Council of Europe, or indeed through treaties).

9) The circulation of legal models occurs either as an effect of the uniformity of positivist data (as happens in the reception by internal legal systems of models from the Community, thmselves acquired from other internal legal systems and imposed on all member states) or as an effect of cultural exchanges and comparisons.

10) Commercial practice tends to aspire to uniform principles; in the same way, international arbitral justice tends to follow principles collected from civil societies.

11) Principles today perform a function once performed by Roman law: they tend towards the fusion of systems that are diverse in their traditions and internal history.

12) Principles perform the function of 'policy'; they express the legal policy of the legislator and, in general, of the interpreter, which more or less operates in a conscious way according to a table of values. This policy – understood as evidencing the optimal results that expressing and appling the principle would want to achieve – can either be clear, or indeed, obscure.

13) "Obscure" principles serve to elaborate decisions that are formally presented as consistent with clear principles, but are substantially inherent in the legal policy of the interpreter.

14) Principles expressed in a dialectical way, along with their reciprocal (or opposite), perform the function of mitigating the interests in play, orientating the social engineering and facilitating the mediating function of the judge.

15) Principles perform many other functions, as we have sought to demonstrate in this book, and as has been brought to light by many authors who at different times have taken them as the subject of their reflection. Just it is not possible to identify all principles once and for all, and that it is not possible to catalogue them once and for all either, so, in the same way, is it not possible to list all the functions which principles perform; and neither is it said that these functions are performed contemporaneously.

16) In any case, principles appear as an unavoidable factor in the art and process of creating norms and interpreting them; or, which ultimately the same thing, they are indispensable instruments in the evolution of law.