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# General Principles of Law

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# ARTICLES

# GENERAL PRINCIPLES OF LAW*

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## I. THE USES OF THE TERM "GENERAL PRINCIPLE"

The diverse acceptances of the term "principle" refer to diverse meanings, however close they may be to one another. One can identify these meanings by taking into account the profession of the person interpreting the term: the scientist (doctrinal use), the judge (jurisprudential use), and the legislator (legislative use). In colloquial Italian, although less frequently today, "principio" is used as a synonym for "beginning" ("In principio era il verbo" - In the beginning there was the word"). Otherwise principle is used as a synonym for fundamental value ("It is a question of principle"), as an element of basic notion (the principles of ethics, of mathematics, of physics, etc.), or as a progressive abstraction generalized from a series of data and particular cases. Jurists use the expression "principle" in different contexts: as an element of a discipline (principles of private rights), as a value (principle of correctness), as an instrument (principle of contradiction), but above all as an abstract rule applicable to particular concrete instances.

In his treatment of the interpretation of law, Emilio Betti, multifaceted jurist, attorney, Romanist, internationalist, and philosopher of hermeneutics, utilized etymological argumentation to demonstrate that principle (understood in the technical - juridical meaning which we will discuss) alludes to the "begin-

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ning of a standard or of all the standards and criteria in a country at a historic moment." This defines principle as above and outside the system, but he concluded that "principles" are at the same time an external and internal source of the system.

We will dedicate a good portion to "principle" understood as value because of the significant role assigned to principles in the theory of rights. In every case, principles exert a strong fascination: they are evoked by and allude to values. This induces us to be cautious and we therefore assume in their presence an attitude suffused with difference. If the principle is handed down, if it flows from one century to another, from one source to another, and from one system to another, it appears with such an aura of prestige and authority as to seem almost indisputable and ineluctable. In other words, the principle seems to achieve legitimacy on its own. Its existence, its validity, and its force are at the same time a weapon of persuasion and a weapon of standardization. And indeed because it is often joined to or confused with an ethical rule (one thinks of "The Principle of Responsibility" by Hans Jonas), it may appear as a bulwark of and prelude to civilization. But one must pay attention; not all the formulas that present themselves as principles are truly such; not all principles are of the same relevance; not all principles are used the same way.

How do jurists use this term? Normally they understand it colloquially, as a synonym for "fundamental notion." In this case, however, one is not dealing with simple notions but with notions somewhat artificially complex that allude to the quintessence, to the distillation of the system, or to a sector of the system. Giuseppe Chiovenda understands it this way in his successful manual on trial rights. Also, George Edward Moore used it this way in his "Principles of Ethics" as did Bertrand Russell in "Principles of Mathematics." But Philosophers, sociologists, economists, and lovers of the exact sciences during the last century all erected an architecture of knowledge in a systematic way based scrupulously on a foundation of principles.

Going back by this path, the principles of a system are understood also as the essential characteristics of the system, its way of being and appearing, its physiognomy, its soul or spirit. Locré first uses them in this sense in his Espirit du code civil, of

1804, and then Rudolf Von Jhering uses them in describing the "spirit" of Roman rights. Jhering sees Roman rights as "a whole in and of itself," as a phenomena of the history of rights, and as a whole ensemble of techniques still useful in his day. In his introduction, principles are at the same time the points from which the formation and evolution of Roman rights depart (the original principles) and the propulsive force of the mechanism of rights in the system (the unifying criteria). Jhering sees in that analysis, the principle of the subjective will (the system of private defense), the principle of family (the origin of social aggregation), and the religious principle (from the indistinction to the distinction between the sacred and the illicit, fas e jus).

Other illustrious jurists such as Gustav Radburch and Roscoe Pound, in their work to illustrate the spirit of common law, understand this use of "principle" as an expression of the spirit of the system. Fritz Schultz, a historian closer to us in time and culture, refers to Jhering in the individuation of principles. He lived in Germany until the nazis came to power, at which time he moved to England where he continued to study the style of the Roman jurists with acumen. Even Schultz places himself within the proud tradition of those who connect principles to the spirit of the system.

## II. THE COLLECTIONS OF GENERAL PRINCIPLES

As we see, principles are used to accomplish many interpretative operations and maneuvers. Paraphrasing an assumption of Damaska, the world of principles "seems to be a collection of contrasting arguments waiting to be used for a controversy." We will discuss this further with regard to the penetration of values behind the motivation of a decision, with regard to the ideology of the interpreter, and with regard to the weight of tradition.

If the craft of the jurist is "to do things with rules," then one can do many things with rules. Because one can do many things with principles, jurists have fortified themselves and have proceeded to gather principles into non-peremptory lists, ordering them according to diverse criteria. However, we are dealing with unofficial lists. In Italy, lists were proposed at the moment the codification entered into force, but the idea was appropriately abandoned. There are several reasons for this: on the one

hand, the fear that an omission would result in an imprecise work, and on the other hand, the fear of doing an inappropriate job because the list (that could not have been anything but peremptory) would have wound up burying the interpreter under a mass of written rules denying him an active function.

In other epochs, the attempts at official systemization were not rejected. Justinian, as recorded, dedicated a book of his Digest (the 50th) to the gathering of principles (de regulis juris antiqui). But that collection had another function. Justinian wanted to restore authority to the maxims expressed by the greatest jurists, that is by the "official" jurists, and give some order to material that, not being codified, could result in confused, if not opposite, solutions to the same questions. The same exigency was also felt in canon law, as the Sixth demonstrates (that is the decrees of Boniface VIII, L. V., tit. XII, to which 88 regulae juris are added).

In the experience of every country, there have been lawyers, professors, students, and scholars of rights in general that have devoted themselves to collecting principles. Some examples are easily found. In Italy, the collection of two thousand rules of rights compiled by L. De Mauri in the first years of this century has had some success and is still reprinted today.

In France, during the same era and in years before, Boulanger refers to the success that such collections had encountered. He points to the collections of Daguin and Jouanneau. In fact, recently a new collection has appeared edited by Roland and Boyer, where principles expressed in the form of a "brocard" or maxim are considered "adages of French rights."

In Spain, the catalogue put in order by a historian, James Mans Puigarnau, was particularly painstaking. He has classified rules, maxims, and aphorisms, accompanying them with references to sentences from the Supreme Court of Justice.

But the maxims collected by Broom in the last century had, and were still having, a notable success in the 1940's in England and in the United States.

To gather maxims, principles, and aphorisms is not difficult;

it is enough to have some patience and a little luck. It is more difficult to understand what is effectively served by the quotation of the maxim and if the maxim acts as a rule. To understand how often they are used, one can read the principles cited in the jurisprudential maxims prearranged by the editors of juridical magazines.

## III. THE "COMMON VALUES OF THE WEST"

The Congress in Hamburg in 1962, the research that followed in the next thirty years, and the deeper study of the similar characteristics between the diverse systems, have brought us to a very relevant conclusion - there are values that comprise a common foundation among western systems and these values are currently expressed by principles. Principles, therefore, not only go beyond historic phases and cultural traditions, but they yield to transplantation, osmosis, connection, and overlapping points in common.

For the moment let us limit ourselves with the use of theoretical models without consulting legislative texts or the decisions of judges. Peter Stein and John Shand have attempted to illustrate a panorama of these common values and believe to have individualized them: the exclusion of violence and the values of security; the limits of discretion on the part of the interpreter and of the administration; the responsibility for contractual fulfillment and for illicit deeds; personal liberties; the right to life and privacy; propriety and protection of reasonable expectations; and the cooperation and limitation of economic initiative for reasons of the public interest.

For his part, Karl Lorenz, discussing the notion of just rights and the foundation of juridical ethics, enumerates among the principles of the individual sphere self-determination and contractual autonomy, the principle of equivalence in synallagmatic contracts, and the principle of trust and good faith. Among the principles inherent to the communal sphere he cites: participation, equality, and proportionality, to which he then adds the principles that govern political representation and trial rights (impartiality of the judge and of the trial).

How can we not share this classification and how can we not

retrace it in our own tradition?

a) In the fresco of general value principles, the first among all, although not explicit in the constitutional texts or in the civil codes, but imminent in each one of these, is the principle of "reciprocal respect." This is at the base of every form of cohabitation that is founded on a democratic basis inasmuch as it expresses the fundamental Kantian juridical relationship. It is precisely in his Metaphysics of Morals, that Kant poses the rule of the free exercise of one's own rights and the limits of the rights of others. It is easy to recall the antecedent to this rule, the evangelical precept, "Do unto others as you would have them do unto you." The Kantian rule however, is not dictated by love and the overcoming of egoism, but by corresponding rational rules. It remains therefore much further from the other evangelical precept, connected to the first, "Love thy neighbor as thyself".

The vein of natural law is interwoven with these Christian values, that translated into rational formulas, define the free exercise of rights on the part of the individual in such a way as to render them compatible with the exercise of rights by the other members of society.

But let us return to what we were saying at the beginning: he who starts from the Kantian categorical imperative - like Karl Larenz - cannot then abandon the philosophic camp. He must then take into account the development, or better, the successive critical constructions derived from this principle. Religiously, only if one recognizes in the other a being similar to oneself can we say that the "recognizer is a person, as is the recognized." In other words, one is a person, a being free to express his own will, only inasmuch as other beings are respected as persons.

From this principle we derive: the injustice of slavery, the illegality of "corporal" servitude, the illegality of forced labor inflicted without the necessity of sanctions, and in the positive sense, the legal capacity recognized for all men. This principle Larenz sees imminent in par. 1.1 of Fundamental German Rights, according to which the dignity of man is intangible. It is indeed from this norm that the jurisprudential construction of

general rights of the individual is derived. A derivation of the same principle with respect to the person is the liberty of conscience and worship. In other words, a solid direction in German doctrine holds that the principle of respect for the person and therefore of reciprocal respect, while not absolute, eternal, or unalterable, is a "natural right of the modern epoch."

The liberty of the will is thus reduced to the freedom to do anything that is not prohibited and anything that does not obstruct the equal liberty on the part of others.

b) The general rights of personhood, in its image, honor, and privacy, is therefore a value-principle in all western systems. Connected to this principle are corollaries that deal with the freedom to exercise a profession and the prohibition to conclude contracts that result in the total dependence of one subject to another. Stein and Shand, who place the protection of privacy within the range of fundamental values also agree on this conclusion.

c) The principle of individual responsibility is found in the material for civil responsibility.

d) The prohibition on acts of rivalry, (foreseen in art. 833 of the Italian civil code) the good neighbor rules (art. 872 e ss.), and the prohibition on pollutants (art. 844 e ss.), are other examples of the principles of "respects for the other". Reciprocal respect in fact entails limitations on the right that by its nature is the most egotistical (the most "terrible" as the French revolutionaries used to say): the right of property. But we find examples of the application of this principle in the literature on contracts, in which the model of commutative contracts, according to which the parties exchange reciprocal advantages and divide among themselves the risks and burdens, is the scheme normally followed in the discipline of special contracts. Thus, in the literature dealing with civil responsibility, he who causes damage is charged with the obligation of indemnification, in a specific form or in an equivalent number. In other words, he who does not respect the person, the goods or other protected interests of which an individual is entitled, must pay the consequences, compensating for the damage caused.

e) The principle of the "abuse of rights" is instead controversial. In other systems this is doctrinally credited and by jurisprudential practice. In ours (Italy), it has been a difficult life. But it seems to be like the Arabian phoenix that resurges from its ashes as many times as it is expunged by the system. We will return to this point and far beyond, where the "hidden" principles are described.

f) Further value-principles are the one concerning the non-retroactivity of the law and the one which concerns the presumption of awareness of the law (numquam legem ignorare censetur; ignorantia legis non excusat). The first, as well as the second, is, however, derogated and derogatable.

The second, in reality, codifies the conviction that everyone is in a position to know all the rules. Elaborated in a historic period in which there were few laws, these being made known by town criers and directed towards a rather restricted circle of persons, the conviction gradually drifted away from being a realistic consideration and became more imaginary, but not less binding for this.

Laws became ever more numerous, new ones being superimposed over the old; those of the denominators over those of the dominated. It was customary to write laws in the cultured language (Latin), though the majority of the population knew only the dialect and was often illiterate and thus incapable of reading even the "vulgar." Today this world has disappeared, and an immense number of norms not easily retrieved has remained. But it is not for that reason that these norms, which at one time emanated from regular procedures, remain subject to the condition of "knowability" on the part of those to whom it is directed. These norms are knowable through the provisions of law and, therefore, by the above cited principle. (Const. Court, March 24, 1988 n. 364). It has already dealt with their effectiveness by convention.

g) The principle of contractual autonomy is also considered one of the fundamental values.

Larenz observes that in all systems, the principle pacta sunt servanda is recorded, even if in each individual case it may be

realized differently. Everyone can freely make contracts and in binding oneself realize an act of self-determination. Taluno holds that self-determination is an expression of personhood. In a contract, one party recognizes the personhood of the other. Others (such as Ghestin) point out however that autonomy cannot be exercised without recognizing the principle of social solidarity.

## IV. THE VALUE OF THE "PERSON"

In the Declaration of the Rights of Man - the other table of values - we find a series of positions that reflect the aspirations and values of the West. These unite the individual situation with that of the collective and, therefore, conform in part to the tradition of natural law. This is evident in the area of private rights for the right to life and security (art. 3), the prevention of slavery (art. 4), legal capacity (art. 6), equality and non-discrimination (art. 7), the right to defense (art. 8), to property (art. 17), and to association (art. 20).

Obviously, the use of these terms and their teleological interpretation is more developed than those of the nineteenth century; the social dimension has been exalted. But in the individual constitutions, these dimensions, individual and collective, are still more precise.

In synthesis, one can retrace the construction of a table of values common to western systems. A sort of progression or ramification proceeds from persons, to groups, and then to the activities pursued within a society in an orderly fashion, the goal being to mitigate the private interests between persons and the interests of the collective.

(i) At the base of this configuration is the principle of protection of the person with fundamental liberties.

(ii) Among persons so protected, a relationship of equality in treatment is instituted that carries with it the respect for differences (equality in diversity).

(iii) Towards the aim of survival, the individual is in need of goods and thus must be able to exercise the right of property

with such goods. In some systems the right of property is directly tied to the protection of the person and appears as almost a "natural" right. In many systems the right of property is tempered in its egoistic-individual dimension by the social function, more generally by the limits that derive from collective exigencies. Individual economic interests, as well as general interests in the dynamics of the market, always require that goods be able to circulate freely, or at least with as few obstacles as possible. By this, the protection of possession is maintained, and in certain legal systems (German), the circulation of goods is by way of abstract transactions. In other systems, with the simple consent of the transfer of property (as in the French, Spanish, and Italian systems), the freedom to leave an inheritance, tempered by the protection of the inheritors, is guaranteed by the corollary in the protection of property and the free circulation of goods.

(iv) The principle of worker protection in all its social and economic aspects.

(v) The principle of economic freedom, the freedom to exercise a profession, and the freedom of competition; in some systems a corollary of contractual freedom is individuated that however does not seem to have constitutional coverage in ours.

(vi) The protection of the individual extends to members of the family of which he is a part. Within the family the following principles are recorded: the principle of equality between husband and wife that is expressed in the principle of spiritual and material communion characteristic of married life, the equal power to administrate goods, the equal responsibility for and authority over their offspring, and the principle of equal treatment of children, legitimate or illegitimate (with regard to this, differences still exist in the different systems with respect to specific successor rights of illegitimate children).

(vii) The principle of the freedom of association, whose corollary is the principle of free economic association, and the free exercise of collective enterprises.

As for the principle of contractual freedom, it has the following correlations: the principle of mutual consent; the principle of just cause, for which any change in patrimony or inheri-

tance must have a legal and justifiable reason that merits protection; and the principle of contractual equilibrium, giving relevance to corresponding services, their fulfillment or non-fulfillment, to the occurrence of unforeseen circumstances, or to foreseeable circumstances that may upset the economic transaction. This principle, formulated in diverse terminology and carried out with diverse techniques in Germany (c.d. Geschäftsgrundlage), in France (imprévision), in England (frustration of contract), and in Italy (teoria della presupposizione), aims to conserve the original equilibrium of the contract and to keep the economic program of the parties involved in harmony with contemporary events.

(viii) The principle of responsibility, on the basis of which, he who is engaged in an activity, commercial or non-commercial, must indemnify for damages caused, has the following corollaries or coordinates: the principle of causality, the principle of guilt, and the principle of the limitations of risks.

## V. THE PRINCIPLES OF COMMUNITY RIGHTS

A recent reflection on the common values of the West has been formulated in European terms by André-Jean Arnaud. He submits a thorough historic examination of the development of the fundamental themes of "European" juridical culture. He sustains that however ambiguous the term "European" may be, it is still possible to outline a common thread of connection among them. Historic memory is thus the foundation of a "promise" to realize a complete European integration. Historic memory has its roots in the Middle Ages in the canonical tradition. Modern juridical thought draws sustenance from the rationalism of the juridical naturalists, thanks to which, doctrines of will, legalistic positivism, and subjectivism are rooted. These values promote a discipline of international relations and are at the base of the declarations of the rights of man as well as the first codifications. The surfacing of national rights and the social dimension of rights introduces caesuras in this homogeneous and unitary development. But according to Arnaud, this does not have to mean an impediment to European unification as much as a product of growth stimulating useful discussion for the evolution of the systems.

The process of European unification, promoted by means of the two techniques "integration" and "harmonization," is based on the logic of flexibility that keeps in mind pluralism, the plurality of the systems, and the concentration and application of the rights of the person. This complexity of the juridical orders can be governed with logic, through consultation with legal scholars and with development of a system of compromise and resolution of internal conflicts.

Textual references to principles may be found in European Community (E.E.C.) texts. For example, art. 215, paragraph 2, of the institutional Tract of the E.E.C. says, "in material of extra-contractual responsibility, the Community must indemnify, in conformity with the general common principles of the member States, damages caused by its institutions or by its agents in the exercise of their functions." Here the expression "general principles" is employed in the sense of a norm obtainable through dispositions contained in the internal systems that are "common," that is, that correspond. In other words, they are in force and observed in the internal systems of the member States.

As far as the Community principles of rights, Italian literature operates in the same way in which interpreters in other sectors of rights operate. Diverse acceptances of principle are collated (understood from time to time as notion, institute, or a rule of a general character). Here we consider it in its meaning as a norm having a general tenor, obtainable by way of induction from the complex of other norms or as the object of explicit enunciations of formal texts. In this sense they are extracted from the diverse affirmations of principle of the Community's norms: individual liberties, rights of an economic nature, the right of defense, rights already acquired, the principle of certainty of rights and of legitimate consignment, the principle of equality, the principle of proportionality, the principle of exemption from responsibility due to an act of God, the principle of good administration, the principle of extra-contractual responsibility, and hermeneutic principles. In a recent attempt to review jurisprudence, Toriello leaves one to understand that even the Court of Justice employs general principles in the same way in which these are used in Italian courts: an integrative, corrective, and explanatory usage of the dispositions in force that

appear unclear, incomplete, or generic.

Among the principles collected in the Community system, one in particular, often overlooked by internationalist and Community doctrine, appears within private rights: the principle of consumer rights.

The existence and utility of general principles of Community rights is still today the object of some perplexity, notwithstanding that in 1964 Paul Reuter had attempted to establish that the European Community Court of Justice voluntarily has recourse to general principles. Recently, Robert Kovar has confirmed that the Court utilizes principles from unwritten sources of Community rights. In truth, the doubt exhibited today in France is in regard to not so much the existence as much as the "necessity" of general principles of Community rights.

Above all, we shed light on the fact that general principles are tied to the national rights of the single Member States, although one could object immediately that for some families, the Romanic-Germanic, there are undeniable identities or affinities in the cultural and historic "humus" of the legal systems of which they are a part. And some principles, together with many brocards, are also common to English rights.

It is evident however, that the principles of Community rights that receive from time to time different denominations have pragmatic origin and, therefore, a great eclecticism pervades them. Besides, one must point out that the absence of fundamental norms in place at the base of the Community system deprives the judge of a point of reference for the construction of principles. On the other hand, having its specificity, the Community system cannot consider a system closed, there being an osmosis among the diverse systems and a notable circulation of juridical models.

The sources of Community principles must therefore be sought in international rights, in the rights of the individual Member States, and in particular in the constitutional rights of the Member States. Beyond these sources one must take into account the Community rights in themselves, and therefore the complex of economic-juridical values that are at the base of the

Community. More precisely we single out those principles having a structural nature that includes the principles of free circulation, non-discrimination, free competition, and Community preference or the unity of the Common Market.

What are added, more than structural principles, are "supreme" principles founded on all the other principles, the right to rights, that is the right to live in a community founded on a state of rights and the rights to justice. From the right to rights, derive the principles that regard the c.d. juridical security, that is the obligation of institutions to observe a reasonable period of time for notification or for controls, the respect for publicity, motivation, non-retroactiveness, the clarity and precision of juridical rules, good faith, (including the brocard patere legem quam fecisti) and legitimate trust. In evidence, alongside of these, is the principle of equality, non-discrimination for reasons of nationality of the Community nations or for reasons of sex and so on. Also included is the principle of proportionality with reference to sanctions. Thus, the birth of a Community of rights (Rechitsgemeinschaft) is theorized as completed by the "right to justice," that is, to a procedure consistent with Community rights. We sustain, therefore, that in adherence to the characteristics of this Community, it is necessary that the general principles are clear, expressed in a precise form, and are knowable.

As to the Community method of creating principles, one observes that it is not different from that of the individual Member States. That is, it follows the inductive method. But above all, it uses a selection of principles extracted from international rights and from the internal rights of the Member States. This selection allows for the deletion of principles that, in accentuating the autonomy or the individuality of the individual systems, would lead to incompatible Community rights. This is the case, for example, with the principle of reciprocity. This selection has not always been possible. In fact, it has happened at times that the Community has not taken into account the fundamental rights of the person guaranteed by individual constitutions. It found itself in difficulty because internal judges, even constitutional, made internal constitutional rights prevail over Community rights. Here was the bending of Community rights, which had made the common principles its own, to the internal constitutional rights.

Even comparative rights have contributed their share to the construction of Community rights and thus to the principles of these rights. The method followed has from time to time been to actuate, on the basis of value judgments, the selection of models considered worthy even if they are expressed by only a single Member State. The introduction of a system of responsibility, founded on the risk of enterprise for the circulation of defective products, bears witness to this. As it has been noted, it could not be assimilated either into Italian rights, where it prevailed, at least formally, over the responsibility founded on guilt (or the presumption of guilt), or into English rights (no liability without fault).

## VI. THE ITALIAN MODEL: PRELIMINARY DISPOSITIONS TO THE CIVIL CODE OF 1942

General principles are mentioned in the preliminary dispositions to the Civil Code and in numerous other normative texts of the internal system (special laws, regional statutes, regional laws, city and provincial statutes). In the Community system, explicit reference is made to the general principles common to the rights of the Member States on the subject of extra-contractual responsibility (art. 215, paragraph 2, of the EEC Treaty). In the international system, reference is made to the recognized principles of the civil nations (art. 38, paragraph 1 of the Statute of the International Court of Justice). The compilers of the texts have not always employed the same formulas; sometimes one speaks of principles of the system, sometimes of fundamental principles, and at other times of the principles of the civil nations.

Art. 12 of the prelaws (prel.) merits more thorough comment for a variety of reasons. It contains the most well known, diffuse, and tormented text in Italian discipline. It is a disposition that fulfills the task of dictating the criteria for the interpretation and application of normative texts. Thus, it is placed on a different plane with respect to the other dispositions which refer to specific concrete instances. It is a norm about norms and for that reason it precedes all the others from both the interpretive and prescriptive points of view.

Art. 12 prel. presents a particularity with respect to the

other dispositions. It is the disposition which regulates the interpretive process, it dictates (or claims to dictate) the behavior of the interpreter and the limits of interpretation. This disposition has a complex history whose developments are necessary to know in order to fully understand it. It contains similarities with rules of other systems to which it behooves us to refer in order to understand the peculiarity. Moreover, it represents one of the possible models to trace the boundaries of the authority of the interpreter and therefore it poses problems of the general theory of rights.

The heading of art. 12 is titled "the Interpretation of the Law" and the text is comprised of two paragraphs. The first regulates the literal and teleological interpretation. The second adds: "If the controversy cannot be decided with a precise disposition, one can turn to dispositions that regulate similar cases or analogous subjects, if the case still remains doubtful, it is decided according to the principles of the juridical system of the State."

Above all, it is necessary to consider the existence of art. 12, the exigency, of which the compilers of the codification of 1942 cautioned in a written norm ordering the principles.

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

Not all systems of written laws are provided with such a disposition. It has already been brought to light that nothing like it can be found in the "Father" code, that is the Napoleonic Code, in the German code, nor in the common law. This does not mean that the principles, or some interpretive technique, haven't been noted or applied in France or that they have not been noted or applied in Germany or in the common law. We can go beyond the first elementary question, responding therefore that the disposition is useful but not necessary. In an interpretive and systematic way one arrives at the recognition and the employment of general principles. Some hold that the disposition is superfluous because the interpretation of texts is exhausted in

their analogical application. But this extreme thesis has no basis, as is revealed in the following investigation.

The disposition was introduced in the prelaws for many reasons; for historic 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 system, to render more precise, through law, the limits of the interpretive will of the judge, and to sever any discussion on the efficacy of natural law); for ideological reasons (inasmuch as it was desired to assign only to those norms of the system "established" by the State (law in force) the task of governing Italian society in an exclusive way).

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

The legislator is not content to recall principles and to determine their function; he is also given the responsibility to establish when one may have recourse to them.

Art. 12 is formulated in the impersonal; commands are directed toward the third person ("one cannot, " "one has regards to," "one decides"). 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 thus must be respected by everyone and in particular by those who must institutionally interpret the laws. But the normative area of art. 12, second paragraph, has boundaries which are more circumscribed because it is directed not to the moment of the interpretation, but indeed to the moment of the decision of a controversy.

From this it is deduced that the "judging" interpreter must make recourse to the principles in the cases and within the limits indicated in the same disposition. It deals with the "judge,"

and thus not only the magistrate concerned with the controversy, but also the arbiter that must decide in a procedure. In all other cases in which one does not have to decide (that is, in the work of the same judge that pronounces (either requested or allowed) according to equity, in the case of the arbiter of equity or of a contractual arbiter, such as in the case of a scientist-interpreter) there would be freedom to use principles in the most opportune way. Obviously, the judge of equity, the regular arbiter of equity, or a contractual arbiter is not allowed to decide in an illogical or unjust fashion; the interpreter assisted by scientific rigor cannot operate in fantasy, but must concern himself with the rules of doctrinal interpretation.

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

One notes that in this succession, principles can be applied to resolve the doubtful cases, only as a residual and final route; the integration is only residual and surrogate to the interpretation. The interpreter (the judge and related figures) is therefore the arbiter of whether or not to turn to principles; the choice is up to him because it is he who decides if the case is doubtful. If it is not, then it is not necessary to turn to the application of principles, as the application of the written disposition would be sufficient.

The apparent crystalline and pyramidal structure of the criteria of interpretation of the law becomes, however, more opaque with regard to the praxis that belies the legislative dictate. And the same technique of interpretation which for logical reasons presupposes that the singling out of principles comes before any other criteria.

In jurisdictional practice, principles receive a very extended application, not subordinate to hierarchical criteria, and wider than the role that the legislator had foreseen and prescribed a bit ingenuously. In the belief that gaps can be filled and that these can be found directly in the text rather than being the

fruit of an interpretive process is still more ingenuous. In the interpretive technique, the norm, the fruit of the verification of the meaning of the disposition determined by the interpreter and filtered through his cultural baggage, is always framed and frameable in a principle.

But even the rule presupposed by art. 12, in claris non fit interpretatio, can be denied. The decision whether a formula is doubtful belongs to the same interpretive process. Whenever the interpreter prepares himself to fulfill his role, he realizes an operation that isn't (and couldn't be) mechanical. The fact itself of distinguishing the clear particular cases from those that are unclear, is already the fruit of a pre-comprehension that leaves no doubt as to the active role he performs.

Interpreted literally, art. 12 thus reveals all the ingenuousness of a legislator fearful of the betrayals of the interpreters. On the other hand this is not new. Napoleon never liked commentary on the rules of his code. In fact, it is told that when they brought him the first work of interpretation and comment he is said to have murmured, "mon Dieu, mon code est perdu!"

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

## VII. THE IDENTIFICATION OF PRINCIPLES

Because principles are mentioned within the scope of the criteria for the interpretation and application of laws, their normative nature can be founded on this textual argument: principles are also laws, they are norms with characteristics different from those that are written. We can verify the assumptions consolidated by the light of the orientations of Italian doctrine. The following characteristics are assigned to principles: they are vague and imprecise, but it is not for this that the written dispositions are to the contrary always clear and precise; they entail the use of an interpreter, but it is not for this that the other dispositions do not require interpretive choices; they encompass a wider range in their normative content than the other dispositions, but it is not for this that equally broad dispositions are

not found in the legal system.

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

With some authoritative exceptions as with Betti, universal doctrine agrees that principles are "norms."

On the other hand, if principles are extracted from norms by way of a process of generalization and of subsequent abstraction, nothing but a norm is born from a norm. This, with greater reason, applies to the fundamental principles expressed. It is a jurist-positive canon. But modern supporters of natural law also agree on the normative nature of principles. He who holds that principles are founded on the ethics and therefore have a meta-juridical origin, that inspires and shapes rights and thus their epiphany (that is the whole complex of rules which comprise the system), cannot but consider the observance of principles as binding. Otherwise, the judge who ignores them or directly violates them would emit a decision contrary to natural rights.

The juris-realists, instead, express doubts about the normative 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 operations of the interpreter.

The impersonal formulation of art. 12, that would limit the task of applying principles to the judge, clashes however with another logical exigency. Even before it is practical, 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 norm, but a norm referred to and observed in the interpretive and applicative practice. In contrast to common law, that in modern systems does not precede but follows the written norm and is subordinate to it, principles come before the

other norms (if one wants to go beyond the rigid scheme of art. 12) because the other norms presuppose the 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 solution most consonant with rights (that is to the culture and sensibilities of the interpreter).

Here then is the second illusion of the legislator: principles would be a closed number, circulating within well defined boundaries. This is because principles are inferred from the norms, and thus cannot exist (juridically) if they do not have a foundation in them.

Also here the legislator has forgotten, or has pretended to forget the role of the interpreter, who is able to create principles and to anchor them to norms.

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

The introduction of principles has three origins: by the same legislator, by the judge, and by the scientist of rights.

Examples of the first origin are, art. 1, the law on abortion, according to which abortion cannot be utilized as a means of birth control; art. 7, the law on administrative procedures, according to which the administration must operate effectively and efficiently; the dispositions on military discipline; the dispositions of the Statutes on workers and those contained in the laws on parity; and the other examples quoted in Chap. I, par. 4.

The greater part of the sentences that decide a case applying a principle are examples of the second origin. It is enough to think of the application of the principle pacta sunt servanda, rebus sic stantibus and of the employment theory of supposition; of enrichment without cause; of the acquisitive occupation; of the protection of minors in custody cases connected to the separation of parents; and of all the other cases which are the object of analysis in the second part of this work.

The scientist of rights identifies principles attaining them

from jurisprudential practice, from the politics of rights followed by the legislator, and from scientific elaboration, proposing principles that organize diverse and scattered norms in a systematic way or introducing new principles to adapt the system to new necessities (for example, consumer protection; protection of savings; transparency of contracts, etc.).

Today, the normative nature of principles is universally recognized. It could appear contradictory to deny doctrine a role as a source and assign to doctrine the task of in fact describing principles. The juris-positivists escape the contradiction sustaining that the principles in force are those extracted from norms.

Can we place boundaries on the will of the interpreter that insure that principles are not transformed into an authentic Trojan horse that would make interpretive subjectivity re-enter into areas where it had been previously banished and thus transforming the judge into a legislator? Even those skeptical of bridling interpretation spare some limitation: logical consistency, and the reducibility of the topic.

Principles can in fact be classified, ordered hierarchically, and analyzed historically. Since the fundamental values of a system are contained in its fundamental laws, these serve to render the Constitution compatible with the norms in force. In their way of being, they can have a more general importance, if found in the Constitution, in the Civil Code, or in the regional statutes, and a more circumscribed importance, if expressed in special legislation that gives rise to "microsystems."

## VIII. THE ORIGINS OF THE ITALIAN CODIFIED FORMULA

A history of positivist data means researching the formulas antecedent to those codified in the art. 12 prelaws. But it also means analysis of the questions elaborated by the doctrine and by the jurisprudence that surround that positivist data.

A textual comparison apparently yields meager results. As has been revealed, a disposition which makes reference to general principles as such, understood as a technique of enunciating

values and directions to which the interpreter must refer in given situations, is not found in the Napoleonic Code, the father code of the systems belonging to the Roman-French family. Single general principles are codified (like the principle, alterum non laedere, the principle of the bindingness of contracts, and so on).

A most important fact in political history and in the history of rights must not be forgotten. It is the space of time that separates the end of the eighteenth century and the beginning of this century, which we can define as the epoch of codifications, that the "positivization of general principles" occurred.

In the Napoleonic codification as well as in the Austrian codification, the imprints of natural laws can be traced. In the latter they are more distinct because they correspond to rules in the code that make explicit recall to values of the rights of nature. However, such rights are "encapsulated" in the code, and are thus rendered as positivist rights in force and translated in either explicit norms or general principles. Pre-existing the code because they permeate juridical science, the general principles in the new epoch that express a new way of conceiving legality, are applicable inasmuch as they are recalled by the code. In short, the general principles take inspiration from natural rights, pre-exist the system and enter and take part in it only when they are recalled by the system.

In the civil code, where it is repeated many times, principles are not spoken of explicitly. The preoccupation of Napoleon is to give clear rules that the judge "bouche de la loi" must apply in a literal way; not even comment is permitted for fear that the legislative intent would be diminished or distorted.

The doctrine hesitates to elaborate general principles but not for the survival of Roman studies. One notes that the Italian translation of the civil code, that is, the Civil Code of the Kingdom of Italy concerning Italian provinces conquered by Napoleon, enter into force in 1806 with the obligation of University professors to comment in their courses on the civil code with the aide of Roman rights. Even the typically French tendency towards classification and abstraction, is a potent spur towards individuation, coordination, criticism, and the application of prin-

ciples. In the manuals of private rights of Laurent, Toullier, and Zacharie, an ample use of principles is made, in contrast to the original legislative will, but in conformity with the doctrinal exigencies and logic of every juridical experience.

On the other hand, an explicit mention of the expression "general principles" is contained in the Austrian civil code of 1811, in force in Italy by 1816 in the Italian provinces under Austrian control. Section 7 is formulated in this way: whenever a case can neither be decided according to the words nor the natural sense of the law, one will have recourse to other cases decided precisely by the laws and to other analogous laws. If, nonetheless, the case remains doubtful, one will have to decide according to the principles of natural law, having weighed all the pertinent circumstances with diligence and consideration. Few references can be found in the systems of the other Italian states prior to the Napoleonic conquest. In some States, as in the Kingdom of Sardegna, the situation after the fall of Napoleon and the Restoration was still more complicated.

In 1837, in the moment of the unification of the civil discipline of the States of Piemonte (Piemonte and Savoia, where the Savoiard constitutions were in force; Liguria, where the Napoleonic Code remained in force; and Sardegna, where particular laws were in force) the compilers of the code (then called the Albertin code) were beset by a problem: to use or not to use the expression "general principles?" And in the positive case, whether to copy the Austrian expression which refers to natural rights? The solution is singular and at the same time illuminating: a thin wording contained in the "principles of rights" is preferred.

And it is this expression that passes in Art. 3 of the prelaws to the civil code that in 1865 unified the civil rights in the new Kingdom of Italy. From that moment the history of positivist data becomes the history of the techniques of the doctrine and of the jurisprudence the purpose of which is to escape the literal and restrictive application of dispositions, to enrich positive rules and above all to satisfy the exigencies of reality and find a response in positive rules.

This direction is sustained primarily by the scholars of com-

mercial rights that, before any of the other sectors of the system, are affected by the latest developments of the market beyond those that come from abroad and circulate in international relations. Here, principles, besides being the skeletal framework of the sector, are seen as instruments that permit the rapid adaptation of the system to the new reality. It is in the "nature of things" that requires the rejuvenation of the commercial code of 1865; but the code of 1882 also leaves the door open to principles and therefore to new interpretation.

After the First World War the 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 exaltation of the individual and private property. The growing industrialization, the intervention of the State in the economy, and the new social circumstances rendered the code, already grown old, inadequate for the new realities.

## IX. THE GENERAL PRINCIPLES UNDER THE ITALIAN CIVIL CODE OF 1865: THE STATIST THESIS

The historians of Italian rights have not yet deepened the analysis of the jurisprudence of the last century so that we do not know how principles were utilized in the motivations behind decisions. Moreover, a work such as Broom's which allows us to understand the role of principles in living rights, does not exist in the Italian literature. But from the analysis of the scholars of law in force who have investigated single sectors or single institutions of private rights, one can comprehend that these were not applied in a manner very much different from the way they are applied today. Even the problems of general theory of a practical nature that these pose to the interpreter are very similar to those we pose today. Retracing history then has a dual purpose: it serves to reconstruct the origin of texts, but also to avoid repeating the errors of the past.

In an Italy divided by cultures and traditions so different from one another, the legislative unification that cemented the political unification, had to be integrated by the uniform application of laws. What is more, the victory of positivism (the modern technique of the organization of knowledge) in all the natural sciences and in the philosophic and social sciences, led to the

marginalization, by the science and the practice of rights, of those values not explicitly recognized by the laws. Political reasons associated with scientific reasons (beyond, obviously the observance of art. 3 of the prelaws) thus militated in favor of a positivist conception of rights and therefore of general principles of rights traceable in the dispositions of the code.

Vittorio Scialoja was the interpreter of this conception. In his inaugural speech for the academic year of 1879-1880 at the University of Camerino, Vittorio Scialoja, who had just won the Chair of Roman rights and the Civil Code, enunciated a sort of manifesto of Italian jurists that would remain vital and persuasive for more than half a century. The speech bears the title "Of positivist rights and equity;" but its content is much more broad. In fact, the order of the speech is as follows: the role of moral and physical forces in the creation of rights; the consentual nature of rights (that could be also expressed in terms of the original contract of the State); the necessity of the juridical forms; common law, written rights, and the rights of judges; the temper of written rights (strictum jus) on the part of the rights of judges and the force of judicial rights given to equity.

Following this itinerary, Scialoja focuses on the points of intersection in the speech, that become the development of his thesis: nothing outside of rights, everything within the juridical system. Equity is not an "alternative system;" equity is a source (material) of rights. In this prospective general principles (ex. principle of equality, the principle of citizenship, the principle of protection for foreigners) are constructed within the range of rights. These do not derive from natural rights as if they were in a latent or unconscious state, but they are the fruit of convention and 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 can be justified only as a response to formalism and to the crude, thin, and insidious application of rights, but not because it proposes an alternative system of rules with respect to the law in force. According to this illustrious jurist, this idea is dangerous because it incites the judge to not apply the positivist rights considered unjust, and to choose the solution no longer adherent to positive data but more adherent to his own sense of

justice. Since the sense of justice is subjective, the risk of falling into arbitrary interpretation is too high.

In this same way he refutes the idea of equity as a "subsidy and correction of positivist rights."

Here also, the judge, unless authorized by the same legislator, may not substitute his own will for that of legislation. Equity, since it compels the judge to attend to the concrete circumstances of the case and to combine the norms with one another, is not "equity" in the true sense, but expresses the same task of the interpreter. In other words, the judge is not free to interpret the norm but must seek out the intent of the legislator. He can modify his application only when he finds himself using expressions that the article defines as having a relative meaning (and that we would define as general clauses) such as public order, good faith, or correctness. In these hypotheses, the legislative intent is that these norms be interpreted according to the ideas, the sentiments, and the conditions of the diverse cases and times. But also here we are not dealing with a free choice entrusted to the interpreter; the legislator is the one who explicitly authorizes and avails himself of the general clause destined to survive for a century.

Here he arrives at the conclusion of the speech that now points to general principles. Principles are not mathematical formulas 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 juris-positivist and statist credo regarding general principles is contained in these few lines. Rights are understood as an ensemble of commands. Consequently, the general principle is understood as a secondary norm that is extracted by way of abstraction from the written norm or from custom.

How then must we interpret the art. 3 prelaws to the Civil Code of 1865, where it makes reference to "general principles of rights?" Currently, with what he has sustained to this point, Scialoja excludes that such an expression alludes directly to Roman rights, to natural rights, or to equity, as some of his con-

temporaries had held. Such formulas are suitable for those systems where they are utilized in an explicit way and are directly recalled, as happens in the Ticino code (Art. 5) that refers back to "common rights" or in the Austrian code that refers to "principles of natural rights." The formula of equity as an expression consolidating general principles is to be recalled, inasmuch as it is applicable by the judge, only when the law in force 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 to describing the technique of abstraction of general principles from norms ("don't believe that every element of a fact is a juridical element; don't forget to give a just value to those elements of a fact that at first sight do not appear to be juridical elements"). Taking nothing away from a moral imperative in life, he concludes with the assumption, "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 liberty of the interpreter, the uniformity of the legal system, and the conformity of the application of rights to the law, are the main points of this reading of the norms and of the message of this jurist to other jurists.

## X. THE NATURAL LAW THESIS

The Civil Code of 1865 was beginning to show its first cracks. The growing industrialization, modifications in the social structure, and special legislation along with the advent of the period of belligerency was becoming ever wider, colliding with work relations, local relations, and urban and agrarian relations. All these were provoking a re-thinking of the role of the code and therefore of the interpreter. Moreover, the brief period of juridical socialism at the end of the century had denounced the ideological options of a civil code on property that was overturned in the same way that the commercial code on the microeconomy of exchange was overturned. The new times required a modernization that could happen without traumas.

Projections for a new codification were not lacking but most

of these dealt with internal procedures, with progressive adaptations that above all bent the existing norms to the new exigencies. Even without reaching the maximum degree of autonomy entrusted to the judge, good results could be obtained. Swiss legislators, in the same years, had resolved the question in another way, allowing the judge who cannot find a specific rule in the system with which to resolve a case before him, to make himself a "legislator of a single case." Others, a few years before had centered interpretive liberty in analogies. The rules of logic, in the case of analogic interpretation as well as in the application of principles, would naturally serve as a restraint on discretion, thus tempering the creative power of jurisprudence.

In this climate of reform, waiting, and dissatisfaction, the models, currents, and directions that would eventually take root in our juridical culture began to take shape. This included subsequent re-elaborations in the 1940's, again at the end of the 1960's, and finally in the present moment. In our experience, the history of general principles is one of phases, and these phases normally open up in periods of crisis or renewal.

In the 1920's in the first effervescent post war climate, characterized by the desire to install a new order, the positivist jurist began to doubt the granite like certainties that the past century had sculptured. Alongside of those who still wanted an interpreter devoted to the letter of the law and deprived of any fantasy, a mere executor of a voluntas legis obtainable without hesitation from a text that permitted neither nuances nor deviations, there were those who believed it possible to introduce meta-juridical values into the system, entering by way of the general clauses like equity, good faith, and public order, availing themselves of the general principles of rights.

In this climate, the beginning of a new phase and therefore of a new discussion, provoked first by the writings of Donati with his book on analogies in 1910, and then by Brugi with a work in 1916, is given 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 departs from the consideration of the inevitable incompleteness of the law in force and thus from

the necessity of recourse to reason, or better, to "natural reason that governs the creation and interpretation of norms," so as to be able to resolve juridical questions in a just way. Some principles are of a logical nature (nemo transferre; cuius commoda, etc.); others derive from "the nature of things" that is, from the evaluation of the circumstances of single cases; others are postulated by the same civil code that refers back to equity, or to natural equity (art. 463, 578, 1124, 1652, 1718, civil code previously in force).

Del Vecchio does not distinguish between a juridical 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 different and alternative with respect to juridical references. For him, rights and equity are two reciprocally integrated sources; equity constitutes "a perennial source of renewal and re-integration for the whole juridical organism."

There are, however, norms that reproduce principles; norms that reproduce them only in part, and gaps that may be filled with the help of principles. The problem of the will of the judge does not escape Del Vecchio nor does he confuse the jus coditum with the jus codendum. Where there are norms, these must be applied even though they do not respond 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 take place "above and inside the norms." In the application of norms, principles make explicit the ratio legis. In the case of gaps, they regulate the material. Del Vecchio assigns to principles, of natural juridical reason, an interpretive and a "corrective" function because norms always receive an indirect application by way of the interpreter.

## XI. "THE GENERAL PRINCIPLE OF THE JURIDICAL SYSTEM OF THE STATE"

The outcome of the second phase sees the approval of the formula established by art. 3 of the prelaws (1939) which in the 1942 version becomes art. 12. One refers to this article for controversies in which a decision is impossible to formulate by way of a precise disposition. Only subsequently, when doubts still exist, is the judge directed to general principles "of the juridical

system of the State." In the most reductive interpretation this formula would seem to consent only to an interpretive and integrative use; and one attends not to all the principles of rights, but only to those so general as to be part of the Juridical system "of the State." One could not have invented a formula more rigid or positivist, and it was not the fruit of a casual choice considering that other, more bland formulas were rejected.

In reality, the content of the formula was more extended in the first version proposed by the commission where the use of "general principles of rights" to wit, "general principles of the rights in force" was foreseen. This was to exclude the risk of a legislator-judge (that is revived in Art. 1, paragraph 2 of the Swiss Code) as well as to satisfy "the reasonable exigencies of the doctrine and to conveniently serve judicial practice." The formula had remained in the Report of the Minister of Justice, which evidenced that with the recall to rights in force, one could prohibit the interpreter from bringing back into the sphere of the legislative system in force, those norms to which the system itself is connected in its origins and in its historic development. To transcend "to excessive generalizations and abstractions, referring to foreign rights and thus altering the peculiar lines of our national legislation" would thereby be impeded. But the text pleased no one.

In the report of the Minister of Justice, the underlying reasons emerge in the definitive formula compiled. In fact, one reads:

> The specification introduced in the definitive project with respect to the general principles of rights, in the sense that such principles must be sought within the sphere of the legislative system in force, has encountered the full favor of the Parliamentary Commission. Nevertheless, I believed it opportune to introduce in the text of art. 3, a modification, not merely of a formal nature, to express more clearly and more completely this concept. In place of the formula "general principles of the rights in force, " that might have appeared to limiting in the work of the interpreter, I held "general principles of the juridical system of the State," to be preferable. Here the term "sys-

> tem" is comprehensive in its broad meaning, beyond the norms and institutions, and even the political-legislative orientation and the national scientific tradition (Roman rights, common law, etc.) with which it is in harmony. Such a system, adopted or sanctioned by the State, to wit our positivist system, whether public or private, will give the interpreter all the necessary elements for the search of the regulative norm.

As we see, the call to the national scientific tradition, that today is considered mere tinsel, was the mode of tying the values suffused in the system and in place at its base, to the law in force. Some had represented their role under the denomination of the dogma of private rights.

That then the interpreter must extract the principles from the norms of rights in force and be bound to them, is another subject. However, as one knows, the interpretation of norms passes beyond the literal confines of the norms themselves.

## XII. THE JURIS-REALIST THESIS

We have arrived at the actual debate, whose echoes have already given warnings several times in the tension between formal interpretation and conceptual interpretation, as well as in the criticism of the employment of formulas without their conscious use. Of the valuable contributions that doctrine has gradually elaborated, we take into account, above all, the voices of the encyclopedists and of Congressional acts. In this context the position of Giovanni Tarello stands out, demonstrated within a research dedicated to the interpretation of the law.

The juris-realist position of Tarello begins with the presupposition, shared by among others, Betti, but also by the analytic culture, that rights do not spring only from laws ("not all of the discipline of social living can be found in the totality of the laws of rights."). That is because the interpreter already makes additions in the moment that he effects merely literal interpretation of the dispositions; unless it is the same law that contains all the definitions of all the terms used, which rarely happens, the law cannot discipline all the specific concrete instances that are pos-

sible in reality. The search for the norm to complete the system begins here. Tarello explains that this procedure is assisted by the ideology of completeness of the system. The art. 12 prelaws begin with this premise because it adopts analogy and general principles to complete the system; it is therefore a norm of closure. The judge must give content to the analogic interpretation as well as, and above all, to the general principles. Still, completeness is belied by the existence of norms which are conflicting, such that, if all rights were the reflection only of laws, we would find ourselves confronted by a contradictory system. The question is resolved with recourse to three criteria: the criterion of hierarchy (art. 1, prel.), the criterion of posteriority (art. 15, prel.), and the criterion of specialty. But these three criteria require the activation of the interpreter just as the application of the laws requires systematic interpretation.

In this context general principles are one of the diverse techniques utilized by judges in the interpretation of laws. Tarello warns that principles mask the analogia juris; they mask a favor towards some interest (for example, the conversation of the contract, the protection of debtor interest, the interest of the subordinate worker, etc.). Moreover, they mask the ideology of the interpreter, especially when he reproduces the values of the dominate regime (as happened for the principles codified in the Labour "Charte"). The argument beginning from general principles is a blank scheme, that serves to cover from time to time disparate operations.

But principles can be understood in a different way, that is, as values underlying the system, utilized by the judge almost as if they were fundamental material. This is the thesis of Ronald Dworkin. In his critique of positivism, Dworkin distinguishes between rules and principles. Rights are not a system of rules, but of rules and standards, that is of principles, of politics, and of retro-standards. A principle is a standard that must be observed not so much as it provokes or maintains a situation (economic, political, or social), but inasmuch as it expresses an exigency of justice, of correctness, or of any other moral dimension. For example, the standard that no one must draw profit from his illicit act, is a principle. According to Dworkin, principles are therefore different from rules, but are a part of rights. Their difference is above all, logical. The enunciated norm is expressed in a precise

way, while the principles do not determine the exposition of conditions that render their application necessary. Another difference consists in the fact that principles have a dimension that rules do not have; this dimension is given by the weight or importance. Principles, then, serve to give content to general clauses inserted in the rules. What is more, only rules impose results, while principles do not. In reality, principles can be recognized ex post, that is, after their application on the part of the judge.

The fact that in common law the weight of precedent is much more relevant than in continental rights, weighs heavily on Dworkin's thesis. Moreover, is the fact that beyond the influence of Roman rights on common law, there has never been in that culture a dominant position of brocards, traditional principles, or additive techniques, as has developed in the continental countries and in 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 exigency concerning the control of judicial discretion, the consistency and logic of motivation, and above all, the awareness of the use of the expression "principle." This along with the technique of employing the principle that is singled out either for historic recognition or out of careless, natural expression, or as an ad hoc creation to resolve a controversial question.

Along this line, which demystifies principles considering their historical function and content, we place Francois Ewald, a student of Michel Foucault. Ewald advanced his thesis from the presupposition that rights are the fruit of a system of the allocation of power, and that therefore systems of the law in action that exist concretely from one historical phase to another express the values of the society that creates them. He then elaborated that general principles (here understood in the acceptance as the foundation of a system) and unwritten rules latent in the juridical tradition of the civil nations are norms that the jurist follows. These comprise a kind of "natural empirical right" that, as distant from the classic natural right as from dogmatic positivism, consents to value the legitimacy of normative provisions and to enrich positivist data. Thus, general principles are retraceable in the history of rights and are the expression of the

memory of our juridical tradition.

This position, certainly acceptable, although partial in the definition of the role of principles as well as in their historicity, can nonetheless be placed within the range of positivist criticism. But it has provoked the criticism of those who hold that the natural rights model is vital in the history of rights and that principles must be situated in a more circumscribed dimension.

## XIII. THE COMPOSIT FUNCTION OF PRINCIPLES

We can present the results of research obtained up to this point in a comprehensive summary. It deals with assertions that find their foundation in what is espoused in the preceding paragraphs.

1.) The individuation of functions which general principles fulfill is arbitrary as is the categorization of principles, their creation, or their identification in the law in force.

2.) This arbitrariness, however, has congruence and is illicit inasmuch as it is typical of all interpretive activity. What is important is that the interpretive activity responds to the canons of logic, to common sense, and to practical utility.

A fundamental function fulfilled by principles is thus the role that they play in juridical reasoning. As Struck has clearly brought to light, principles, and therefore the juridical topos, serve the application of norms from the moment that no juridical rule or value is absolute. There is always the case in which, depending on the circumstances, the rule must be limited and the value must yield to considerations that are superior.

3.) In the general opinion and in general practice, principles thus fulfill a function much broader than one entrusted to them in art. 12 of the prelaws. On these is hinged the system of private rights, consisting of positivist data and of the enrichments derived from its interpretation, its manipulation, and its construction in the system. Principles thus play the role of "foundation" of the system. In the non-codified sectors, administrative rights and international rights, principles fulfill a still more relevant function, that of a normative frame of reference.

4.) In jurisprudential practice principles obviously play the role recognized for them by art. 12 of the prelaws, that is as a rule applicable to concrete instances when the text has gaps, is imprecise, or is lacking in some way.

5.) In jurisprudential practice, principles are often invoked for the purpose of mere embellishment in that they corroborate the application of a positivist rule. Thus, they serve to reinforce the settlement of the decision and assign the greatest possible internal consistency to the motivation.

6.) Where they are created ex novo by the judge, they serve to legitimize jurisprudential rights. To mask the arbitrariness of the decision, the judge will provide for the introduction of a legitimizing shield which are precisely the principles invoked.

7.) Principles constitute the modern koiné of jurists belonging to different systems. This is for reasons deriving from existing data as well as for the formation of a uniform juridical culture derived from the circulation of juridical models or for the formation of a uniform commercial practice of arbitration.

International positivist data tends to fuse the normatives of the Member States (from time to time, by way of institutions of parallel systems, as happens for the E.E. Community system, or by way of conventions, as happens for the Council of Europe, or through treaties).

The circulation of juridical models occurs either as an effect of the uniformity of the positivist data (as happens for the reception in the internal systems of models from the Community branch acquired from other internal systems and imposed on all Member States); or as the effect of cultural exchanges and comparisons.

Commercial practice tends to be inspired by uniform principles; in the same way, international arbitration tends to follow principles gathered from civil societies.

Today, principles fulfill the function that at one time was fulfilled by Roman rights: they tend towards the fusion of systems diverse in tradition and internal history.

8.) Principles fulfill the function of "policy": they express the policies of the rights of the legislator and, in general, of the interpreter which in a more or less conscious way operates according to a table of values. This policy, understood to make evident the best possible results that can be reached in the expression and application of principles, can either be clear or obscure.

9.) The "obscure" principles serve to elaborate decisions formally presented as consistent with clear principles, but substantially inherent to the policy of the interpreter's rights.

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

Principles fulfill many other functions, as we have sought to demonstrate in this essay and as has been brought to light by many authors who in different epochs have assumed them as the object of their reflection. As it is not possible to identify at one time and forever all principles, and as it is not possible to catalogue at one time and forever all principles, so, in the same way, it is not possible to list all the functions which principles fulfill; and it has not been said that such functions are fulfilled contemporaneously.

In any case, principles appear as a factor that cannot be eliminated in the art and in the process of creating norms and of interpreting them; or, what amounts to the same thing, they are indispensable instruments in the evolution of rights.