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Articles

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Principles and Rules in the Emerging European Contract Law: From the PECL to the CESL, and Beyond

Abstract: Legal principles play an important role in any system of law. Following the European Court of Justice, the treaties of the European Union have embraced the concept of "principles of law", mainly as a means to guarantee individual and human rights in public and constitutional law. More recently, however, the ECJ has come to recognize as "general principles" private law and contract law norms and values. Furthermore, the notion of "principles" has played a key role in impressive unification projects which aimed to promote harmonization of national contract laws in Europe, such as the PECL ("Principles of European Contract Law") and the DCFR (Draft Common Frame of Reference). The proposed Common European Sales Law (CESL) also opens with a separate chapter dedicated to "General Principles" of contract law. The article invites the reader to think more carefully and critically about the role played by alleged "principles" in the law generally, and in the evolving European law of contract in particular. Part II points out the instability and vagueness of the concept of a legal "principle". Part III presents an original theoretical model which aims to reduce the inherent vagueness surrounding the concept and the distinction between legal rules and legal principles. The model suggests that while principles do often differ from rules in other respects as well (e.g., in their substantive content or analytical structure), these common distinctions fail to capture the most essential difference between principles and rules, which lies in their sharply distinct political function. Part IV applies this general thesis to the multi-level constitutional architecture of European law, coming to the conclusion that the principles of European private law are those common core norms which are shared by the laws of most Member States (ius commune Europaeum). Part V applies and illustrates this claim on the various instruments by which the Union has attempted to promoted the unification of contract law around Europe. Part VI concludes by claiming that the European principles, including that of subsidiarity, are best understood as a balancing device by which the Union adjusts the level of regulation between legislature and courts on the one hand, and between the supranational and national powers on the other.

Résumé: Les principes juridiques jouent un rôle important dans tout système juridique. Suivant la Cour européenne de Justice, les traités de l'Union européenne ont adopté le concept de "principes de droit", surtout comme un moyen de garantir les droits individuels et humains en droit public et constitutionnel. Plus récemment, cependant, la CJUE en est venue à reconnaître comme "principes généraux" du droit privé et du droit des contrats des normes et des valeurs. Plus encore, la notion de "principes" a joué un rôle clef dans d'impressionnants projets d'unification qui visent à promouvoir l'harmonisation des droits des contrats nationaux en Europe, tels que les PDEC (principes du droit européen des contrats) et le projet de CCR (Cadre commun de référence). Le projet de règlement européen sur la vente s'ouvre aussi sur un chapitre spécial dédié aux "principes généraux" du droit des contrats. Cet article invite le lecteur à penser de façon plus attentive et plus critique le rôle joué par ces prétendus "principes" en droit en général, et dans l'évolution du droit européen des contrats en particulier. La deuxième partie souligne l'instabilité et le caractère vague du concept de "principe" juridique. La troisième partie présente un modèle théorique original qui vise à réduire le caractère vague inhérent au concept et à la distinction entre règles juridiques et principes juridiques. Le modèle suggère qu'alors que les principes diffèrent souvent des règles également dans d'autres aspects (par exemple dans leur contenu substantiel ou dans leur structure analytique), ces distinctions communes manquent à capturer la différence la plus essentielle entre les principes et les règles, qui réside dans leur fonction politique radicalement différente. La quatrième partie applique cette thèse générale à l'architecture constitutionnelle multi-niveaux du droit européen, arrivant à la conclusion que les principes du droit européen des contrats sont ces normes essentielles communes qui sont partagées par les droits de la plupart des États membres (ius commune Europaeum). La cinquième partie applique et illustre cette thèse à propos des instruments variés par lesquels l'Union a essayé de promouvoir l'unification du droit des contrats en Europe. La sixième partie conclut en soutenant que les principes européens, incluant celui de subsidiarité, sont mieux compris comme un instrument de proportionnalité par lequel l'Union ajuste le niveau de régulation entre la législation et les tribunaux d'une part, et entre les pouvoirs supranationaux et nationaux d'autre part.

Zusammenfassung: Allgemeine Rechtsgrundsätze spielen in jedem Rechtssystem eine erhebliche Rolle. Laut EuGH-Rechtsprechung haben auch die verschiedenen Versionen des EG/EU-Vertrages das Konzept der allgemeinen Rechtsgrundsätze anerkannt, namentlich im Bereich der Verbürgung von Grund- und Menschenrechten im öffentlichen und im Verfassungsrecht. In jüngerer Zeit hat der EuGH jedoch auch im Privat- und Vertragsrecht allgemeine Rechtsgrundsaätze als geltendes

Recht und Wertgrundlage anerkannt. Zudem haben allgemeine Rechtsgrundsätze eine beeindruckende und gänzlich zentrale Rolle in den Vereinheitlichungsprojekten gespielt, die eine Harmonisierung der nationalen Vertragsrechte in Europa bezwecken, etwa die PECL ("Principles of European Contract Law") oder der DCFR (Draft Common Frame of Reference). Der Vorschlag eines Gemeinsamen Europäischen Kaufrechts (GEK) hebt ebenfalls mit einem gesonderten Kapitel zu den „Allgemeinen Rechtsgrundsätzen" des Vertragsrechts an. Dieser Beitrag soll dazu anregen, genauer und kritischer über die Rolle nachzudenken, die solche (vermeintlichen) Grundsätze im Recht allgemeiner spielen, vor allem jedoch in dem sich entwickelnden Europäischen Vertragsrecht. Teil II beschäftigt sich mit der Vagheit und mangelnden Präzision des Konzepts rechtlicher „Prinzipien". Teil III setzt dem ein eigenes theoretisches Modell gegenüber, das diese Vagheit eindämmen soll, die zur Abgrenzung zwischen rechtlichen Normen und rechtlichen Prinzipien herrscht. Vorgeschlagen wird Folgendes: Während sich Prinzipien in der Tat von Normen in Vielem anderen ebenfalls unterscheiden (etwa in ihrem substantiellen Gehalt oder in ihrer analytischen Struktur), ist damit jedoch das Wesentliche noch nicht erfasst. Dieses liegt vielmehr in der vollkommen anderen (rechtspolitischen) Funktion. Teil IV wendet diesen Leitsatz auf das Mehrebenensystem des Europäischen Vertragsrechts an und gelangt dabei zu dem Schluss, dass Prinzipien des Europäischen Vertragsrechts all diejenigen Normen sind, denen die meisten Mitgliedstaaten folgen (ius commune Europaeum). Teil V illustriert diese These, indem sie sie auf verschiedene Instrumente anwendet, mit denen die Union eine Vereinheitlichung des Vertragsrechts in Europa anstrebt. Schließlich folgert Teil VI, dass Europäische Prinzipien – einschließlich dem Subsidiaritätsprinzip – als ein Mechanismus des Ausgleichs verstanden werden können, mit dem die Union vermittelt zwischen einerseits Gesetzgebern und Gerichten und andererseits zwischen EU-Ebene und nationalen Rechten.

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I Introduction

In this article, rather than focusing on any specific rule or principle of European contract law, we share with the reader a few reflections on the meaning and functions of 'principles' and 'rules' in the evolution of a unified or harmonized European Contract law.

Legal principles play an important role in any system of law. The practice of describing certain legal norms as 'principles' is pervasive. For centuries, courts, in both common law and civil law jurisdictions, have relied on so called 'principles' or morality, justice or law as a source of inspiration for interpreting the law and for resolving concrete disputes.[1] Academics often make reference to 'principles' when they describe or explain the essence of a certain field of law. Lawyers often rely on presumably established principles when they construct legal arguments, either positive or normative. Finally, in modern times, national legislators have come to recognize the importance of 'principles' and have incorporated the concept of 'principles' into their legal systems' constitutions.[2]

The use of principles transcends the limits of national or domestic legal orders. 'Principles' play a prominent role in international and European conventions regarding human rights.[3] In recent decades, the European Court of Justice has developed a rich jurisprudence of 'general principles' of Community or Union law.[4] In recent years these principles have found their way into the treaties of the European Union, which make a pervasive use of the concept of 'principles'.[5]

In Europe, the use of principles was, in the past, largely limited to the field of constitutional and administrative law.[6] Here, alongside substantive principles reflecting basic human rights (eg, human dignity, equality, freedom of religion, etc) additional institutional principles have been developed so as to provide the

1 See eg A. Scalia, 'The Rule of Law as a Law of Rules' *University of Chicago Law Review* 56 (1989) 1175, at 1185: '[T]he establishment of broadly applicable general principles is an essential component of the judicial process'. Most revealing is a statement made by Jean-Étienne-Marie Portalis, the well-known drafter of the *Code civil*, during the discussion of its *Titre préliminaire* in the session of the *Conseil d'État* of 14 *thermidor an* IX: 'Peu de causes son susceptibles d'être decides par un texte précis; c'est par les principes généraux, par la doctrine, par la science du droit qu'on a toujours prononcé sur la plupart des contestations. Le Code civil ne dispense pas de ces connaisances; au contraire il les suppose'.

2 See eg: Constitution of the Republic of South Africa (the terms 'principles' or 'principle' appearing 14 times); Canadian Charter of Rights and Freedoms (3 times); Constitution of the Italian Republic (17 times); France Constitution (14 times); Basic Law for the Federal Republic of Germany (25 times); Constitution of the Republic of China (7 times); Constitution of the Argentine Nation (9 times).

3 See eg: Universal Declaration of Human Rights (1948); European Convention on Human Rights (1950); Charter of Fundamental Rights of the European Union (2000) ('principle' appearing 12 times).

4 See *infra*, IV B.

5 Treaty on European Union (1992) ('principles' are mentioned 28 times); Treaty on the Functioning of the European Union (2007) (61 times).

6 J. Usher, *General Principles of European Community Law* (Edinburgh: Longmann, 1998) 52 *et seq*, 72 *et seq*, 199 *et seq*.

citizens of the Union with an effective and fair system of enforcement (eg the principles of primacy, effectiveness, proportionality, etc).[7] More recently, however, one can identify a growing willingness to recognize as 'general principles' values which were traditionally thought of as private law principles.[8] First, in recent years, while resolving public law disputes, the European Court of Justice has made several references to what it regarded as 'general principles of civil law' (eg, the principle of full compensation for violation of European Union's law, the principle of good faith, and the principle against unjust enrichment).[9]

Second, in resolving purely private law disputes (eg, consumer protection cases), the European Court of Justice has relied on contract law principles such as party autonomy and *pacta sunt servanda*.[10]

Finally, important 'soft law' instruments, reflecting efforts by the European community to harmonize and unify the contract laws of its member states, make explicit reference to certain presumed 'principles' of European contract law. In the project known as the 'Principles of European Contract Law' (PECL),[11] the term

7 Eg, case 25/70 *Köster* [1970] ECR 1161, at 1175 (principle of proportionality); case 13/61, *Bosch & van Rijn* [1962] ECR 45, at 52 (principle of legal certainty).

8 R. Schulze, 'Allgemeine Rechtsgrundsätze und europäisches Privatrecht' *Zeitschrift für Europäisches Privatrecht* (1993) 442; J. Basedow, 'The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary' *European Review of Private Law* 18 (2010) 462 *et seq*; M.E. Storme, 'Une question de principe(s)?', in A. Fuchs (ed), *European Contract Law – ERA Forum Special Issue 2008*, in *ERA Forum* scripta iuris europei (Heidelberg: Springer, 2008) 72; A. Hartkamp, 'The General Principles of EU Law and Private Law' *Rabels Zeitschrift für ausländisches und Internationales Privatrecht* 75 (2011) 241, 255–256. To be mentioned is that in the second issue of 2012 the *European Review of Private Law* has collected most of the papers presented at a conference on 'Principles and the Law', organized on 25 May 2011 by the University of Utrecht; particularly relevant is the editorial of E. Hondius, 'Principles and the Law' *European Review of Private Law* 20 (2012) 289.

9 ECJ, case 277/05 (*Société thermal d'Eugénie-Les-Bains* v *Ministère de l'Économie, des Finances et de l'industrie*) para 24; ECJ, case 412/06 (*Annelore Hamilton* v *Volksbank Filder eG*) para 24; ECJ 16 December 2008, case 47/07P (*Masdar* v *Commissie*) para 50; ECJ 3 September 2009, case 489/07 (*PiaMessner* v*Firma Stefan Cruger*) para 29; ECJ, case 215/08 (*E. Friz GmbH* v *Carsten von der Heyden*) para 48–49. See M.W. Hesselink, 'The General Principles of Civil Law: their Nature, Roles and Legitimacy', in *Centre for Study of European Contract Law Working Paper Series* No 2011–14 at http://ssrn.com/abstract=1932146; C. Mak, 'Hedgehogs in Luxemburg? A Dworkinian Reading of the CJEU's Case Law on Principles of Private Law and Some Doubts of the Fox' *European Review of Private Law* 20 (2012) 323; K.P. Purnhagen, 'Principles of European Private or Civil Law? A Reminder of the Symbiotic Relationship Between the ECJ and the DCFR in a Pluralistic European Private Law', in *Centre for Study of European Contract Law Working Paper Series* No 2011–04 at http://ssrn.com/abstract=1652039.

10 Hartkamp, n 8 above, at 256–257.

11 See *infra*, V A.

'principles' has been adopted by the drafters to express the notion of a harmonized set of proposed contract law norms. The notion of 'underlying principles' has played a significant role in the unification project known as the Draft Common Frame of Reference (DCFR), which proposed a set of 'Definitions, Principles and Model Rules' which presumably represents the common core of ideas, norms and institutions which make up the European *ius commune* of private law.[12] Last but not least, the proposed Common European Sales Law (CESL) opens with a separate chapter dedicated to 'General Principles' (freedom of contract, good faith and cooperation) which are to govern the interpretation and implementation of this proposed instrument.[13]

These developments invite us to think more carefully and systematically about the possible role played by alleged 'principles' in the ongoing efforts of various European institutions to harmonize important parts of the national laws of contract. This article attempts to address this challenge. To do so, we start, in part II, by pointing out the instability and vagueness of the concept of a legal 'principle' on the one hand as well as, on the other hand, the most commonly presumed features of principles.

Then, in part III, we present a theoretical model which aims to reduce the inherent vagueness surrounding this fundamental jurisprudential distinction. The model defines principles – and distinguishes them from rules, by focusing attention on what we believe is the single most important feature of legal principles, namely, their function as legitimizing instruments. In contrast to the constitutive nature of legal rules, which reflect the sovereign will to impose a new norm of conduct regardless of whether or not such a norm corresponds to any pre-existing social norm, principles reflect the sovereign will to incorporate into the legal system a pre-existing norm which supposedly had already gained social respect and legitimacy. Furthermore, the model suggests that while principles do often differ from rules in other respects as well (eg, in their normative content or analytical structure), these common distinctions, though valuable and helpful, fail to capture the most essential difference between principles and rules.

Part IV applies this general thesis in the context of the multi-level architecture of European law, coming to the conclusion that, at least as far as private law is concerned, principles are those common core nonns of private law which are shared by the legal traditions of the Member States (*ius commune Europaeum*).

In part V we take into consideration some of the restatements and collections of principles of European law which have been compiled so far and, on the basis

12 See *infra*, V B.

13 See *infra*, V C.

of our previous assumptions, consider them not as mere academic exercises, but as recognitions of a part of the pre-existing European private law tradition. Attention is paid also to the forthcoming CESL and to the place of principles and rules in the directives.

Part VI offers a sketch of the subtle and challenging implications which the distinction between principles and rules might have on the crucial question of the appropriate further development of European law. In particular, we claim that the principles, including that of subsidiarity, should be understood as a tool by which the Union adjusts the level of regulation between legislature and courts on the one hand, and between the supranational and national powers on the other.

II Principles in the Law – a Phenomenon in Search of A Definition

Notwithstanding the pervasive use of the concept in legal discourse, the very notion of a 'principle' and the role of this concept within a legal order are far from clear. Judicial decisions which make reference to 'principles' do not often clarify the features which make a certain norm, on which the Court relies, a legal principle. The same is to a lesser extent true also with respect to legal scholarship. Writers dealing with the phenomenon of legal principles emphasize different aspects or characteristics of 'principles' or 'general principles', and have described them in different ways. Tentative, overlapping, and to some extent contradictory definitions have been offered in the literature. Rarely will a scholar dealing with the role of principles in the law commit to any precise test or definition, by which legal principles can be clearly distinguished from legal rules.[14]

14 In Europe, the pioneering work by J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (1st ed, Tübingen: Mohr, 1956), provoked an intense debate, mainly in German scholarship, over the appropriate distinction between principles and rules. For a recent valuable collection of essays on the nature and role of standards in the evolving European contract law see S. Grundmann and D. Mazeaud (eds), *General Clauses And Standards in European Contract Law: Comparative Law, EC Law and Contract Law Codification* (The Hague: Kluwer Law International, 2006). The Anglo-American Literature dealing with the interrelationship between the different types of legal norms is also rich and versatile. See eg R. Pound, 'Juristic Science and Law' *Harvard Law Review* 31 (1918) 1047, esp at 1061–1063; R.M. Dworkin, 'The Model Of Rules' *University of Chicago Law Review* 35 (1967) 14, esp at 22–40; D. Kennedy, 'Form and Substance in Private Law Adjudication' *Harvard Law Review* 89 (1967) 1685, esp at 1687–1713; P. Schlag, 'Rules and Standards' *University of California Los Angeles Law Review* 33 (1985–1986) 379; L. Kaplow, 'Rules *Versus* Standards: An Economic Analysis' *Duke Law Journal* 42 (1992–1993)

This should by no means be read as a claim that a serious controversy exists over the typical features of legal principles. On the contrary, there seems to be a wide consensus among lawyers, judges and scholars, that most legal principles share a number of typical traits.

First, most of us would probably agree that legal principles contain normative imperatives, and that these imperatives overlap considerably with basic moral or social values which most citizens in a given society will respect.[15]

Second, most would probably agree that principles, as opposed to other legal norms, are relatively abstract. This, in turn, will mean that legal principles are relevant, ie, are potentially applicable, to a comparatively wide range of factual situations, compared to ordinary legal rules, which often contain rather specific normative imperatives.[16] Third, and closely related to the last feature is the common presumption that the normative message conveyed by a legal principle is often vague and uncertain, compared to that of other legal norms.

Fourth, and in strong connection with the features mentioned above, principles are often thought of as having a high normative status within the legal system. Describing a certain legal norm or institution as a 'principle' will most often reflect an underlying presumption that for some reason or another the norm

557; E.A. Posner, 'Standards, Rules, And Social Norms' *Harvard Journal of Law & Public Policy* 21 (1997–1998) 101; K.M. Sullivan, 'Foreword: The Justices Of Rules and Standards' *Harvard Law Review* 22 (1992–1993) 106. Notably, however, many of these sources equate 'principles' with 'standards' contrasting them with rules, rather than distinguishing between these two concepts. What most of these authors call 'standards' are vague legal norms which, under our own definition, can be classified either as rules or as principles, depending on their political function (see *infra*, III D). Thought-provoking as they all are, none of these articles touches directly upon the main claim of this article, namely, that some legal norms should be regarded as principles regardless of the content or structure of the norms they set forth. Quite understandable is that much attention to the role of principles of law has been paid by comparative lawyers. Outstanding in this context is the 6th annual Conference of the *Académie International de Droit Comparé*, which took place in Hamburg in 1962: In a session specifically devoted to general principles of law, twelve national reports were presented (Buch for Belgium, Janneau for France, Wolf for Germany, Péteri for Hungary, van der Ven for Holland, Wroblenski for Poland, Gilliard for Switzerland, Elias de Tejada, Garcia Valdecasas, Legaz Lacambra for Spain, Prodanovic' for the Jugoslavia). The general report was held by Rudolf B. Schlesinger.

15 Hartkamp, n 8 above, at 241–242: '[The general principles of EU law] constitute deeply rooted principles, without which a civilized society would not exist.' A classical reference is F. Bydlinski, *Fundamentale Rechtsgrundsätze. Zur rechtsethischen Verfassung der Gesellschaft* (Wien: Springer, 1988) *passim* and esp at 128.

16 Hartkamp, n 8 above, at 242: 'They [the principles] possess a *general, comprehensive character* which is naturally inherent in general principles of law.' See also J. Boulanger, 'Principes généraux du droit et droit positif', in *Le droit prive français au milieu du XXe siècle – Études offertes à Georges Ripert*, I, *Études generales – droit de la famille* (LGDJ: Paris, 1950) 56.

concerned is highly regarded compared to other legal norms within the legal system.[17] This may be either because the so called 'principle' embodies a fundamental moral or social value,[18] because it reflects a time-honored and thus entrenched legal norm or practice, or due to the belief that principles have an important impact on other legal norms.[19]

Fifth, it is often suggested that, as opposed to ordinary legal rules, principles have historically developed as an unwritten, that is, un-codified, non-statutory source of law.[20] As such, they do not ordinarily appear as legislative commands, but rather are formulated and recognized as legally binding by judges and commentators.[21]

Sixth, there seems to be a consensus among writers that principles are used by the judiciary to understand and assess the validity of other, less abstract, legal norms. More particularly, principles are ideas which serve to justify, explain, refine or invalidate other legal norms which the legal system has previously recognized. Thus, principles may be relied upon in the process of interpreting existing legal rules or of providing justification to existing legal doctrine.[22] They may inspire courts in the creation of new legal norms.[23] Finally, in certain legal

17 'The General Principles of EC law... have a status of *higher law*, by the fact that they may be invoked as a standard for the review of Community acts.' B. de Witte, 'Institutional Principles: A Special Category of General Principles of EC Law', in U. Bernitz and J. Nergelius (eds), *General Principles of European Community Law* (The Hague: Kluwer International Law, 2000) 143.

18 De Witte, n 17 above.

19 See *infra*, text to notes 17–19.

20 Principles have been reconnected directly to the brocards of Roman law which have been handed down by the Justinian compilation and have represented from the Middle Ages on the basis of teaching and understanding (private) law. Therefore, it has been maintained that they would have a meta-historical nature, thus considering them as taking part in the 'eternal' question of natural law. See H. Coing, *Grundzüge der Rechtsphilosophie* (4th ed, Berlin: de Gruyter, 1985) 206–207 and earlier H. Coing, *Naturrecht als wissenschaftliches Problem* (Wiesbaden: Steiner, 1965) 22 *et seq*.

21 T. Tridimas, *The General Principles of EC Law* (2nd ed, Oxford: Oxford University Press, 2006) 1: '[S]uch reference [to general principles of law] usually connotes principles which are unwritten ...'. See also de Witte, n 17 above, at 143, defining the General Principles of EC law as 'unwritten principles, recognized by the European Court of Justice ...'.

22 According to Tridimas, n 21 above, at 1 'a principle of law, as opposed to a rule, underlies a rule and explains the reasons for its existence ... [principles] provide justification for concrete rules.' The a relies the statement on Sir G. Fitzmaurice, 'The General Principles of International Law' *Collected Courses of the Hague Academy of International Law* 7 (1957) 92. The role of principles as interpretive instruments is discussed in J. Raz, 'Legal Principles and the Limits of Law' *Yale Law Journal* 81 (1972) 823, 839–840.

23 Tridimas, n 21 above, at 1: '[A] principle is a general proposition of law of some importance from which concrete rules derive.' See also Raz, n 22 above, at 840–841.

systems, principles may even be used to review the validity, or at least limit the application, of specific legal rules.[24]

So, there seems to be a significant number of features which most lawyers and scholars would conceive of as characteristic of legal principles. At the same time, however, it seems quite impossible to pinpoint any single feature or element which all would accept as the most predominant feature of legal principles. In other words, it is hard to find a single test or criterion, which can be accepted as both a necessary and a sufficient condition for a concrete legal norm to be properly considered a legal principle.

To illustrate the point, take for example, the so called European community principles of subsidiarity, primacy and sincere cooperation. Notwithstanding their vital importance for the proper functioning of the European Union and their comprehensive character, it would seem to us non-intuitive, if not altogether artificial, to conceptualize these presumed principles of European law as a reflection of fundamental moral or social values. Does this mean that these basic tenets of European law are not principles at all, or rather that a legal norm does not have to reflect social morality in order to qualify as a legal principle?[25]

Similarly, take the most commonly presumed feature of principles, namely, that of abstractness or comprehensiveness. The duty to compensate for loss wrongfully caused (sometimes known as the principle of full compensation or of *restitutio in integrum*) is considered a basic tenet of tort law in most legal systems. Is this a legal rule, a legal principle, or both? There is little doubt that the norm is consistent with basic moral and social precepts.[26] It is also fairly abstract, as its scope of application depends on vague concepts such as 'unlawfulness', 'reasonableness', 'damage', etc. On the other hand, the norm does include a relatively

24 See Raz, n 22 above, at 840. In the celebrated American case of *Riggs* v *Palmer*, 115 NY 506 (1889), the moral principle that no man shall profit from its own wrong led the Court to restrict the application of a specific rule which apparently governed the question, and which led to a manifestly unjust result. Compare CA 986/93 *Klemer* v *Guy* [1996] IsrSC 50(1) 185, where the Supreme Court of Israel relied on the principle of good faith to enforce an oral agreement to sell a parcel of land, notwithstanding a statutory requirement that such agreements must be made in writing.

25 Some authors have offered to view these principles as setting a distinct category of 'institutional principles'. See de Witte, n 17 above. On our understanding of subsidiarity, primacy and sincere cooperation as tools to coordinate the application of the principles of the European Union see *infra*, V C.

26 The duty to make wrongdoers restore what they have wrongfully taken from other was recognized by Aristotle, who regarded it as a demand of corrective (rectificatory) justice. Aristotle, *Nicomachean Ethics*, Book V, ch 4 (W D Ross Trans, 350 B C E, 1908), also available at: http://classics.mit.edu/Aristotle/nicomachaen.5.v.html.

concrete command (to pay compensation) and defines, if only in very broad terms, the conditions under which this command becomes operative. In this respect the norm seems more like a general rule (or a standard) rather than a principle. What, then, is the appropriate jurisprudential classification of this common tenet of tort law?

Then again, moving to the sphere of contract law, take for example the norm under which only a serious ('fundamental') breach of contract would generally justify a termination of the contract by the aggrieved party. Is this norm a rule, a standard or a principle? On the one hand, it is an important and long-established norm of contract law in many legal systems. The norm is also fairly abstract and vague. And yet, many contract scholars would probably hesitate to define this norm, important as it may be, as a principle of contract law.

What, then, is the distinguishing feature of a legal principle? More particularly, how should we understand the notion of 'principles', as opposed to other types of legal norms (rules, standards, etc), in the context of the evolving European contract law? Finally, and most importantly, why is it important to answer these questions in the first place? What can be gained – or lost – by describing a certain legal norm of contract law as a 'principle' of European contract law? Which purposes may such a jurisprudential classification serve?

The remainder of the article is an endeavor to offer some tentative answers to some of these intriguing questions.

III Rules and Principles – The Distinction Redefined

A Outline

In this part of the article, we construct a theoretical framework which contains an analytic and a critical aspect. It is analytic in that it advocates a clear theoretical separation between three different but nevertheless interconnected distinctions between rules and principles. It is critical in that it aims to emphasize the vital importance of one of these three distinctions, the usefulness of which has not been sufficiently appreciated in the literature.

The expected contribution of the model we propose is twofold. First, it assists us in establishing the claim that the most commonly accepted attributes of principles (namely, abstractness, conclusiveness and moral content) do not capture their most essential quality. Second, the model assists us in explaining why, notwithstanding this claim, in a national legal order, a strong affinity or correla-

tion will very often exist between this essential feature and the other presumed attributes of legal principles. This common correlation obscures the fact that moral content, abstractness and conclusiveness are only typical but not essential attributes of legal principles.

B Principles Redefined

In our view, the single most important feature of legal principles has to do neither with their analytical structure, nor with their substantive content. Rather, it has to do with their *distinctive function within a legal system and with their source.* The recognition of a certain norm as a legal principle represents a *unique lawmaking technique*. This technique is a conscious process through which a competent agent (typically a legislator or a court) gives official legal recognition to a certain *pre-existing norm,* which presumably is already widely accepted by the members of the group subjected to that norm. In a nutshell, *a legal principle is the product of a justificatory process through which an official agent of the political sovereign* (typically a legislator or a judge) *justifies the absorption of an apparently new legal norm into the legal system by depicting it as a merely a restatement of an already widely recognized norm.*

C Rules Redefined

Legal rules represent a radically different technique for the incorporation of norms into a legal system. Unlike a principle, announcing a rule is *not* merely an act of declaration. Rather, by its very nature, *a rule represents an imposition.* By enacting a rule, the political sovereign, through its authorized representatives, constitutes a new norm, *regardless of the degree to which that norm has already been accepted by the community subject to the ruler's laws.* Put differently, a rule may be defined as the product of a process through which a competent agent (typically a legislator or a court) manifests its will to impose on its subjects a norm which may well contradict their practices, costums, values and beliefs.

A brief look at the semantics and etimology of the terms 'rule' and 'principle' renders some support to the propositions just made. To rule, in the English language, is to govern, to reign or to control other people.[27] A principle, on the other hand, is a word of Latin origin ('*principium*'), which means an origin or a beginning.[28] The close semantic connection between the literal meaning and the definition we propose is almost self-evident. To enact a principle is to look *backwards* at the origins of the norm which the principle merely restates. To rely on a principle is merely to approve and acknowledge what is presumably already a recognized truth. Enacting a rule, on the other hand, is a *forward* looking process. It reflects the sovereign will not to declare, but rather to dictate and impose a constitutive norm upon the subjects. A rule is not intended to reinforce an existing valued norm or practice, but rather to bring about a change in the conduct of those subject to the sovereign's laws.

D The Role of Principles in Law: A Principle as A Legitimizing Instrument

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

The simplest and most direct way to affect human conduct by legal norms is to formulate and enforce what H.L.A. Hart called 'primary rules' or 'rules of duty'. Rules of duty are specific conditional orders, ie, norms defining the circumstances or conditions under which a certain person (or class of persons) is required to act (or to refrain from acting) in a certain predetermined way. A more sophisticated method by which a legal system may influence human conduct is to lay down 'secondary rules' or 'rules of power'. These norms do not demand action (or inaction). Rather, they enable agents (either private or public) to bring about an effective change in their own legal position or the legal position of others, provided that certain requirements are met. Thus, while the tort duty to compensate for wrongfully caused loss is a primary rule or a rule of duty, the norm limiting the power of termination to fundamental breach is a secondary rule or a rule of power.[29]

27 See eg Oxford on Line Dictionary, http://oxforddictionaries.com/definition/english/rule?q=rule.

28 See eg Latin Dictionary, Perseus Digital Library,http://www.perseus.tufts.edu/hopper/resolveform?type=begin&lookup=principium&lang=la.

29 For an authoritative discussion of the distinction between primary and secondary rules see H.L.A. Hart, *The Concept of Law* (1st ed, Oxford: Clarendon Press, 1961) 27–28, 78–79, 89–96. Cf F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991) 3–6 (distinguishing mandatory rules, which exert

To achieve obedience and effectiveness, both duty norms and norms granting legal power must be backed with a corresponding legal outcome, which will create a sufficiently strong incentive to fulfill the duty imposed or to take into account the relevant rules of power. As regards duty rules, most frequently the outcome will be a negative sanction which, ideally, will be imposed for any failing to fulfill one's duties.[30] Similarly, certain outcomes must attach to one's following – or one's failing to follow – the rules of power. For example, failing to follow the rules on formation of contracts will result in a failure to bring about a voluntary change in one's legal position, while following these rules of power will enable contracting parties to create or modify enforceable rights and duties.

In practice, however, no sanctioning system is ever perfect. The incentives created by the sovereign's norms and by the operation of the mechanisms established for their enforcement are often insufficient to guarantee a satisfactory level of compliance. A legal system, especially one based on a liberal philosophy, cannot rely solely on deterrence. It must look for additional ways to encourage obedience to and reliance on the law. One such technique is to install in society a minimal sense of respect for the law in general, and for its concrete imperatives (ie, the primary and secondary rules).[31]

We believe that *attaining this sense of respect and legitimacy towards the legal system is the main function of recognizing legal principles*. As we explained, a principle is nothing more than an official proclamation giving formal recognition to a certain preexisting norm which society already presumably respects. A court of law pronouncing a principle and a legislator enacting a statute proclaiming a principle, establishes a *highly visible link* between the official body of rules and institutions to which society is subject by law and the non-official social norms which constitute the common core of values shared by that society. A citizen bound solely by an effective system of rules will probably obey those rules, if only for fear of being sanctioned for not doing so. A citizen bound by both rules and legal principles reflecting norms which he already respects may feel less obliged –

normative pressure to act on those subject to them from 'rules of thumb', which merely present options, which can either be followed or ignored under specific circumstances).

30 This is not to imply that the sanction will necessarily be defined *ex ante* in the rule itself. Thus, the concrete sanction for a certain violation of a rule may be defined only *ex post*, in which case often a principle will be invoked in order to justify the imposition of the sanction (eg: the principle of '*nullum crimen sine poena*'. The key role of sanctions in any theory of law was emphasized by eminent philosophers such as John Austin and Hans Kelsen, which defined law as a system of coercive orders backed with a organized social sanctions.

31 This insight, namely, that law requires legitimacy and general acceptance by those subject to it lies at the heart of H.L.A. Hart's criticism of John Austin's command theory, which defined law as a system of commands backed with threats. Hart, n 29 above, esp at ch 4 (49–76).

and more obligated – to obey the rules and to accept the social institutions which create, modify and enforce them.

In our view, this legitimizing function is the single most important feature of legal principles. Undeniably, as will be explained shortly, a recurrent feature of principles is their comprehensiveness or abstractness, as well as their tendency to converge with highly regarded moral or social values. Indeed, these features are most necessary if the link to the most highly regarded values of the community – which most often can be defined only in very abstract terms – is to be preserved. And yet, in our view, these common features of legal principles are not as essential as they are often believed to be.[32] The most essential feature of legal principles lies not in their analytical structure or in their specific content, but rather in their political function. That function is, once again, the forming of a *stable and reliable bridge* between the body of official injunctions which may be laid down by the political power at any given moment (through either legislation or adjudication), and the non-official community norms of the society subject to these binding commands.[33]

E The Correlation between the Function of Principles and Their Other Common Attributes

1 The Substantive Level: Are Principles Necessarily 'Moral'?

As noted earlier, it is commonly presumed that an intimate connection exists between principles and highly regarded social values. What is the source of this common association? Does it reflect an intrinsic connection inherent in the very

32 The point is further discussed *infra*, III E.

33 Our definition requires two clarifications. First, we should recognize the possibility that a norm which the legislator intended to adopt as a principle (or even defined as a 'principle') would be later interpreted by a court (rightly or not) as a rule and vice versa (a norm designated to be a rule is interpreted as a principle). Second, we must bear in mind that not every norm which purports to be a 'principle' is indeed one. For example, a legislator or a court can, deliberately or by mistake, label a certain legal norm a 'principle', while in fact this norm fails to match any widely accepted social norm. In such cases, the legislator or the court will impose what in essence is a rule under the guise of a 'principle'. Notable is that distilling concrete operable rule from general principles of law common to the member states is not a mechanical recognition of an already ascertained reality, but anyway a process of value judgment and choice, in which the ECJ has to take into account also implicit and potential consistencies among the Member States' laws (see *infra*, VI A).

concept of a legal principle, or is it merely a contingent feature which though often present, is not an essential feature of legal principles?

Influential theorists have argued that legal principles are to be distinguished not only from legal rules, but also from legal policies, that is, social or political goals which do not necessarily reflect moral considerations. Ronald Dworkin, for one, emphasized in his general theory of law the distinction between a 'policy', which he defined as a standard setting out a political or social goal to be achieved, and a 'principle', which is a standard to be observed because it highlights a 'requirement of justice or fairness or some other dimension of morality'.[34] Quite similarly, Harry Wellington has argued that when courts of law resort to 'principles' to justify particular decisions they make, what they are relying on are moral norms which to a large extent correspond to the 'conventional morality' of their community. In his view, to rely on a 'principle' is to justify a decision by reference to a preexisting moral ideal of society, rather than by reference to any future outcome which may result from that decision (eg, deterrence or economic growth).[35]

Under these views, principles are different from policies in that they justify decisions by reference to deontological moral values.[36] When a rule or a specific decision is justified by consequentialist reasoning (eg, by reference to notions of deterrence or even the desire to strengthen certain moral values), the reasons or justifications employed are never true legal principles, but rather policies.[37]

34 R.M. Dworkin, *Taking Rights Seriously* (1st ed, London: Duckworth, 1978) 22.

35 H. Wellington, 'Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication' *Yale Law Journal* 221 (1973) 83.

36 The question of which moral values a principle should or could legitimately reflect is a difficult and controversial one. A non-positivist will clearly prefer the view that it is only the common morality of society rather the personal morality of the agent employing the principle that is relevant (see eg Wellington, n 35 above, at 244). Some positivists, on the other hand, may prefer the view that when a court is required to rely on a moral principles, this process inevitably requires it court to employ its own morality (see eg, Raz, n 22 avobe, at 847: 'What is "unjust" or "for the general good" is a matter of opinion and the courts or officials concerned *are instructed by law to act on their own views*. The law does not impose its own views of justice or the common good.).' On our understanding, which we believe is the understanding shared by most courts and lawyers, a principle is a reference not to the agent's own moral beliefs, but rather to what the agent honestly perceives as the common morality of the society of which he is a member.

37 Admittedly, a certain rule or a certain judicial decision may often be justified by reference to both deontological and consequentialist reasoning. In such cases, the rule or decision will reflect both a principle and a policy. Wellington, n 35 above, at 222–223. The correlation between principles-deontology and policy-teleology is recognized by the author at 223, n 4. It is obvious from the definitions adopted by Dworkin to these terms. See Dworkin, n 34 above, at 22 ('I call a "policy" that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community... I call a "principle" a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.'

In our view, these propositions make much sense in the context of national legal order. Since the conventional morality of any cohesive society (ie, a society which shares a stable set of moral values) is, by definition, a reflection of society's most deeply ingrained social norms, it is only natural to expect that the content of legal principles will, to a considerable extent, overlap with at least some of society's moral conventions.

Nonetheless, we believe that the correlation between principles, properly defined, and deontological morality, is not perfect. In certain societies, it would be possible to imagine a wide and entrenched consensus not only over moral values, but over values and goals which are non-moral, ie, social, political or economic. Imagine, for example, a country which suffers from a persistent drought problem, and in which most citizens have for centuries enjoyed only an extremely limited water supply. It does not seem farfetched to assume that in such a society to 'avoid wasting water' would in due course turn into an entrenched and widely respected societal norm. Nonetheless, such a norm would clearly not reflect a restatement of any deontological moral value. Rather, it would reflect a social policy, namely, the policy of avoiding waste and to exploit water resources in the most beneficial way to society.[38] Under our definitions, in such a society a statute setting forth that 'the wasting of water is forbidden' would clearly be a legal principle rather than a legal rule, for it would merely restate an entrenched societal norm.[39]

The possible divergence between morality in the strict sense of moral deontology and the concept of a legal principle is demonstrated in the clearest manner in the domain of pubic administrative law. In most western states, administrative law (and often constitutional law as well) restricts the government's freedom of

38 Indeed, as long as the problem of water scarcity persists, 'saving water' may remain a most important value, and may even be regarded by some as part of the 'conventional morality' of such society. However, the fact that it will probably no longer retain this status once the water problems of the country are permanently solved demonstrates that it is not a deontological but rather a teleological value, ie, a policy.

39 The classification of the statutory provision may vary if the statute also determined the legal sanction for wasting water. Since moral orders usually fail to attach specific sanctions to specific violations, a law providing for a specific legal sanction would most often reflect a rule rather than a principle (since the sanction would not conform to an already established social norm). In that case the accurate classification of the statute would be of a norm which combines a principle with a rule.

action by subjecting it to norms such as proportionality, equal treatment, transparency, and various norms of procedural justice (eg, the right to be heard). While these norms are often perceived as legal principles, they do not necessarily flow from any deontological moral value. This example also demonstrates that while a strong correlation definitely exists between principles and morality, morality is but one of the substantive sources of legal principles.

2 The Analytical Level: The Formal Structure of Rules and Principles

As noted above, it is a commonplace assumption that rules are specific and concrete, whereas principles are general and abstract.[40] Another important analytical distinction between rules and principles concerns the nature of the normative instruction they give to agents applying the law and to its subjects. According to Ronald Dworkin, whereas a rule, whenever applicable, demands absolute compliance,[41] a principle merely demands consideration, that is, it requires the subject (or the agent applying it) to take the principle into account and to balance it against other conflicting principles.[42] For Dworkin, then, the

40 See eg Schauer, n 29 above, at 13: 'For many, a principle is a principle and not something else just because it is general rather than specific ...'. An important philosopher who based the distinction between rules and principles on their relative degree of specificity is Joseph Raz. See Raz, n 22 above, at 838: 'Rules prescribe relatively specific acts; principles prescribe highly unspecific actions.' Notably, Raz admits that the distinction is not a sharp one, but one of degree (*ibidem*). Compare N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978) 155 noting that '[T]he difference is exaggerated'.

41 Unless, of course, for some reason the rule is not a valid rule, or an exception to the rule applies to the particular case under consideration.

42 Dworkin, n 34 above, at 22–28, esp at 23, 24, 25: 'Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, the either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.'; ... '[Principles] do not set out legal consequences that follow automatically when the conditions provided are met. ... A principle ... does not even purport to set out conditions that make its application necessary. Rather, it states a reson that argues in one direction, but does not necessitate a particular decision.' Not all philosophers accept Dworkin's analysis. Frederick Shauer, for example, rejects the view the rules are necessarily conclusive normative imperatives. See quote *infra*, note 44. Similarly, Joseph Raz has rejected Dworkin's claim that there is a clear logical distinction between these two kinds of norms. Raz, n 22 above, at 842. Dworkin's sharp distinction between principles and rules was further deepened and formally elaborated as a constitutional theory of law. See eg the classical and most influential works of R. Alexy, 'Rechtsregeln und Rechtsprinzipien' *Archiv für Rechts- und Sozialphilosophie Beihefte* 25 (1985) 13; R. Alexy, 'Zum Begriff des Rechtsprinzips' *Rechtstheorie Beiheft* 1 (1979) 59; R. Alexy, 'Zur Kritik des Rechtspositivismus' *Archiv für Rechts- und Sozialphilosophie Beihefte* 37 (1990) 9.

analytical or logical nature of legal principles[43] is inherently different from that of legal rules.

In our view, while these common characterizations may be empirically correct in many cases (or even in most cases) they should not be taken to capture the essence of the distinction between rules and principles. Rather, it is the essential distinction between the diverse functions of rules and of principles outlined above, which explains the strong empirical correlation between rules, specificity and conclusiveness on the one hand, and between principles, abstractness and inconclusiveness on the other hand. Let us explain.

Rules, as we redefined them, are norms aimed at influencing human conduct in a direct way so as to adjust the conduct of people in society to the will of the political sovereign. Rules can differ from each other greatly in the level of generality (or specificity) in which they are formulated. At one end of the spectrum we can imagine a legal system in which a rule (properly defined) is nothing more than a particular order issued by an authorized agent to a particular person to carry out a particular act. In theory, the validity of such a particular order (a 'rule', under our definition) need not depend on its conformity with any predetermined standard or criterion. For example, we can imagine a legal system in which the sovereign is in the habit of issuing only very specific orders to specific people, or in which the sovereign authorizes certain agents to give such binding orders. In this way the sovereign rules, that is, dictates, what is to be done by the subjects.

At the other end of the spectrum, one can imagine a system of law which contains only the most generalized and abstract imperatives (eg: 'every citizen must be loyal to the State and its laws' or 'obligations owed by one person to another must be performed in good faith'). In between, one can imagine, and indeed find in every legal system, countless instances of generalized norms ('rules', as many would define such norms),[44] which are neither extremely specific nor extremely abstract, but which lie somewhere in between these two poles.[45]

43 Or legal policies, which in this context are treated by Dworkin as a principle of a specific kind. Dworkin, n 34 above, at 22.

44 This is the definition adopted by Schauer, who in his seminal work on rules defines them as 'entrenched generalizations', the term 'entrenched' being used to denote the fact that rules bind those subject to them if only for the reason that they logically apply to them (as opposed to the reason or justification lying behind the rule). Notably, however, Schauer, like us, rejects the view that rules (under his definition) are necessarily specific or even conclusive. Schauer, n 29 above, at 14 ('I take neither specificity, conclusiveness, nor authoritative formulation as necessary conditions for the existence of a mandatory rule').

45 Noteworthy is the fact that a rule can be more or less concrete (or abstract) with respect to each of its three elements, namely, the facts which make it applicable, the normative demand which applies to those facts, and the sanction which attaches to a violation of the rule.

Notwithstanding, as a general proposition, the claim that in many legal systems legal principles are most often constructed and formulated as highly abstract normative imperatives does seem persuasive. The reason for this strong correlation is, we believe, fairly obvious. If we are correct to suggest that rules are enacted or announced in order to achieve compliance and directly affect human conduct, then this will most naturally result in a tendency of those charged with the task of enacting or announcing rules to formulate them 1) as relatively specific norms and 2) as conclusive norms, ie, norms which must be strictly followed whenever applicable. For example, if a legislator seeks to enhance the level of certainty in the field of real estate transactions, it is only logical to expect that legislator to carefully define the conditions under which a contract for the transfer of real rights in land would be valid. Similarly, if a certain pattern of behavior is to be discouraged, careful attention must be given to the definition of that behavior, the circumstances under which it would be prohibited, and the sanction to be imposed for any transgression.

On the other hand, if, as we claim, principles are enacted or announced in order to legitimize the rules by which people in society are expected to abide, then it is only natural to expect that those principles will be framed in relatively general and abstract terms. For if a principle is to serve its function as a legitimizing instrument, it must conform to certain beliefs, practices or values which are not only shared by most members of society, but are highly regarded and respected by the society.[46] However, in a modern democratic state, especially in a liberal democracy, people are allowed – and even encouraged – to hold radically different views, beliefs and practices. It is therefore often difficult to identify and formulate the core values or goals which all or most members of society endorse.[47] Nonetheless, for a society in which most member shares a common religion, a common language, a shared culture and a shared heritage, such a task is not necessarily doomed from the start. In such a society, it would seem that the best place to start the search for a common core of entrenched norms is society's conventional morality.[48] However, since in a diverse modern society conventional

46 Thus, a custom or a traditional rule of fashion may qualify as a principle only if deviating from it would be considered a serious misdeed by most members of society.

47 To some the idea that such a common morality ever exists is a pure fiction. See eg Raz, n 22 above, at 850, describing as a 'harmful myth' the belief 'that there is a considerable body of specific moral values shared by the population of a large and modern country'.

48 In moving to the national level, the source of the common value may change. See *infra*, IV. We further elaborate the concept of 'conventional morality' in the following section.

morality is susceptible of being phrased only in very general terms, it is only natural to expect legal principles to reflect this abstractness.[49]

Furthermore, if our account of the function of legal principles is correct, recognizing a 'principle' is equivalent to a commitment of the lawmaker (be it a judge or a legislator) to the social norms which that principle restates or reformulates. Conversely, by enacting a rule of law, the lawgiver does not purport to commit to any of society's values, but merely expresses its will to dictate and govern. Therefore, altering or repealing a rule of law would not be regarded by society as a denial of the lawgiver's commitment to society's common morality. Conversely, any altering or repealing of a legal principle would, by necessity, reflect a deviation from what has previously been recognized by the lawgiver as a societal norm to which the lawgiver has committed himself. Such a deviation could easily be understood by society as a denial of the sovereign's commitment to the values underlying the principle he had already recognized. This, in turn, might arouse a strong sense of indignation and reduce the legitimacy of the lawmaker in the eyes of its subjects. Being aware of such a potential outcome, a rational lawgiver will strongly hesitate to introduce changes into norms which have been previously defined as established 'principles'.[50]

To conclude, because a consensus as to which values are included in society's conventional morality can typically be reached only if those values are formulated in a relatively broad and abstract manner, and because an abstract principle curtails the ability of a lawgiver to legislate much less than a concrete principle (given its inconclusiveness and flexibility), legal principles will most frequently contain relatively abstract normative imperatives.

49 If identifying a common value or purpose for society is a difficult task, an even less attainable goal would be to identify a consensus over the particular course of conduct which to which all should conform at any particular situation. For this reason it would often be simply impossible to find a largely specific norm of conduct, which all members of society would highly regard to such a degree that they would be happy to recognize it as a binding legal norm.

50 In addition, recognizing as principles only vague norms is useful, since it allows the legislator to introduce new specific norms with little difficulty to reconcile them with the previously recognized set of principles. In contrast, if the legislator were to recognize as principles concrete legal norms, any change to these norms, no matter how important for the legislator, would arise difficulties, as it would be regarded as a failure to respect the sovereign's commitment to these principles. In order to avoid such an outcome and to retain flexibility in pursuing its goals in the most convenient way, a rational lawgiver would prefer to recognize as 'principles' only the most vague and abstract social norms (eg justice, reasonableness, morality, freedom, equality, dignity, respect, etc). Formulating principles on such a high level of abstraction makes the prospect of a particular rule directly contradicting a recognized principle much less feasible.

This, however, should not be understood as a theoretically categorical characterization of legal principles. In theory, at least, one can imagine a legal principle incorporating into the legal system a rather precise and concrete norm which notwithstanding its concreteness is an entrenched social norm.[51] If, for example, in a certain society picking protected wild flowers is considered a violation of an entrenched norm of conduct, a statute (or a judicial precedent) prohibiting such practice would not necessarily be a rule, but should rather be classified as a principle. The same would be true for a law recognizing a legal duty to respect one's elderly parents, in a society in which such a norm is already an established one.[52]

IV Moving to the Supranational Level: The Concept and Role of Principles in European Law

A Adjusting the General Model to the Multi-Level Architecture of European Law

As long as the concept of principles is elaborated from the point of view of a general theory of law, it is but an abstract point of reference, which is extremely useful to rationalize the legal discourse, but needs to be challenged in the framework of a positive law. This assumption shall be firstly understood in the sense that it is obviously possible to define what principles are (or at least may be, according to certain conditions), but it would be useless to make up which they are *per se*, if not as a sheer prediction. Given some specific conditions, any norm may recognize a principle, depending on how it has been provided by the law to which it belongs.[53] Moreover, it should be admitted that even the definition of a principle might be in need of some (secondary) adaptation to the constitutional features of a specific law, something that is especially true at the European level.[54]

51 The view that the content of a principle may be rather specific finds support in Kennedy, n 14 above, at 1689.

52 In China, a person is legally obliged to care for his elderly parents. See Law on Protection of the Rights and Interests of the Aged (1996), esp art 10–19; translation available at: http://www.china.org.cn/english/government/207403.htm. A recent proposal to amend the law so as to add to it a duty to visit one's parents 'often' is today under debate in this State. See eg http://www.bbc.co.uk/news/world-asia-pacific-12130140.

53 See *supra*, III E.

54 On the possible existence of varied conceptions of general principles and the lack of unity in this area see eg N. Bobbio, 'Principi generali di diritto', in *Novissimo Digesto Italiano*, vol XXX (Giuffrè: Milano, 1966) 887.

If, different as they may be, national laws in general converge enough to share a single definition of principles, it is at least doubtful that this definition might definitely fit to European law, given that the latter has a very different and specific constitutional architecture, which makes it unique as a legal order, or at least one that radically diverges from the national law of any European State. European law is in fact a supra-national legal order, which includes in itself a part (or eventually even most) of each Member State's private law, but at the same time sets a general framework into which this European common core is put and made consistent with a new and self-standing point of view.[55]

It follows from the foregoing general part of our work,[56] and as will be further explained,[57] that the multi-level architecture of European law is highly relevant to the issue of its general principles of law,[58] both in order to identify them, and even more fundamentally in order to define them.

B Principles of European Law: The Formal Perspective

In order to examine the question of principles in the context of European law, the most fitting starting point is the Treaty on European Union, which, in combination with the Treaty on the Function of the European Union as well as with some key decisions rendered by the Court of Justice, represents the constitutional underpinning of the entirety of the European legal order.

55 The concept of common core was developed by Rudolf Schlesinger during the famous Cornell Law School seminars of the 60's; see R. Schlesinger, 'On the General Principles of Law Recognized by Civilized Nations' *American Journal of International Law* 51 (1957) *passim*; R. Schlesinger (ed), *Formation of Contracts. A Study of the Common Core of Legal Systems. Conducted under the Auspices of the General Principles of Law Project of the Cornell Law School* (Dobbs Ferry NY: Oceana Publ 1968) 2 vols. In a specifically European scale, it has been later assumed as a starting point by the Trento Common Core Project; see M. Bussani and U. Mattei (eds), *Making European Law. Essay on the Common Core Project* (Trento: Università degli Studi di Trento, 2000) *passim*.

56 See *supra*, III E.

57 See *infra*, IV B and IV C.

58 In the same sense, see A. Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht* (Tübingen: Mohr, 2009) 109 (also bearing a fruitful parallel with the United States' federal legal system); S. Grundmann, 'General Standards and Principles, Clauses Générales and Generalklauseln in European Contract Law – A Survey', in Grundmann and Mazeaud (eds), n 14 above, 4; M.W. Hesselink, 'The Structure of the New European Private Law' *Electronic Journal of Comparative Law* 6.4 (2002) http://www.ejcl.org/64/art64-2.html; M.W. Hesselink, 'How many systems of private law are there in Europe? On plural legal sources, multiple identities and the unity of law' in *Centre for Study of European Contract Law Working Paper Series* No 2012–03 at http://ssrn.com/abstract=2046964.

In the preamble of the Treaty on European Union the '*attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law*' is explicitly mentioned. This hint as to the status and nature of European principles finds its decisive elucidation in Article 6, paragraph 3, of the Treaty, which provides that human rights and fundamental freedoms which take part in the Union's law as its general principles are derived from the European Convention of 1950 as well as from the '*constitutional traditions common to the Member States*'. This legislative provision consists of a reformulation of the previous judgments on human rights rendered by the Court of Justice.

The reference by the Court of Justice to the constitutional traditions common to the Member States as the genuine roots of fundamental rights protected by the European institutions dates back to the 1970's.[59] In later decisions, particularly regarding the principle of non-discrimination, the Court added to that formulation a reference to the international Treaties which bind the Member States to respect human rights,[60] and particularly to the above mentioned European Convention on Human Rights.[61]

59 The first statement of the kind may be traced in ECJ, 17 December 1970, case 11–70 (*Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*) par 4, in *Rep* 1970, 1134: '*In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community*'.

60 It shall be noted that art 38, paragraph 1, litt *C)*, of the Statute of the International Court of Justice, which is annexed to the Charter of the United Nations, of which it forms an integral part, foresees that the Court shall apply '*the general principles of law recognized by civilized nations*'.

61 Leading precedents in this context are ECJ, 14 May 1974, case 4–73 (*Nold* v *Commission*) par 13, in *Rep* 1974, 491; ECJ, 28 October 1975, case 36–75 (*Rutili* v *Minister des Inneren*) par 32, in *Rep* 1975, 1219; ECJ, 13 December 1979, case 44–79 (*Hauer* v *Land Rheinland-Pfalz*) par 17 *et seq*, in *Rep* 1979, 3727; for a general survey, see H.G. Schermers, 'Human Rights as General Principles of Law', in Bernitz and Nergelius (eds), n 17 above, 61 *et seq*; X. Groussot, *General Principles of Community Law* (Groningen: Europa Law Publishing, 2006) 56–58. Recently the most important (and fiercely debated) cases have been definitely case 144/04 (*Mangold* v *Helm*) ECJ, 22 November 2005, in *Rep* 2005, I-9981 *et seq* and case 101/08 (*Audiolux* v *Bertelsmann*) ECJ, 15 October 2009, in *Rep* 2009, I-9823 *et seq*, both relating to the application of the non-discrimination principle, the former in the field of labor law and the latter in that of company law (for an insightful comment, see A. Metzger, 'Allgemeine Grundsätze in Europa – dargestellt am Beispiel des Gleichbehandlungsgrundsatzes' *Rabels Zeitschrift für ausländisches und Internationales Privatrecht* 75 (2011) 845 *et seq*).

C Principles of European Law: The Substantive Perspective

The formal way by which the preamble of the Treaty and its Article 6 paragraph 3 conceptualize the constitutional foundation of general principles tells us much not only about their nature, but also about their roots.

First, at their highest level of constitutional relevance such principles are presented as associated, or even coincident with human rights and fundamental freedoms.

Furthermore, though forming part of the law of the European Union, they are presented as flowing into it from outside (international law as consolidated in the Conventions which bind European States and constitutional traditions which are common to the European States).

An illuminating perspective from which these two basic assumptions may be understood is offered by the well-known theoretical framework that Ronald Dworkin has developed on the field of philosophy and general studies of law. Above all, principles of European law are identified with fundamental rights which the European citizens are given before the Union, and potentially even against the Union. At the highest constitutional level, which is the field where principles may generally show their most genuine nature, they stand as a limit to the legislative and judicial power of the European Union, and point to the purpose of the law itself.

From a more general point of view, this demonstrates that the European Union's law lacks completeness, in the sense that it is not self-standing:[62] its

62 The connection between lack of completeness of the legal system and general principles of law is already evident in the national civil codes of the 19th century, which strive to understand it by means of the familiar institute of analogy. At the first level, gaps shall be filled through the application of legal rules relating to similar cases (*analogia legis*); when not possible, through the direct application of general principles of law (*analogia iuris*); see A. Falzea, 'Relazione introduttiva', in *I principi generali del diritto. Atti del convegno linceo del 27–29 maggio 1991* (Roma: Accademia dei Lincei, 1992) 11, esp at 18. The forerunner of this tendency has been the Austrian ABGB of 1811, whose § 7 refers to the principles of nature law as the final criteria to decide a case not taken into consideration by specific legal provisions ('*Läßt sich ein Rechtsfall weder aus den Worten, noch aus dem natürlichen Sinne eines Gesetzes entscheiden, so muß auf ähnliche, in den Gesetzen bestimmt entschiedene Fälle, und auf die Gründe anderer damit verwandten Gesetze Rücksicht genommen werden. Bleibt der Rechtsfall noch zweifelhaft; so muß solcher mit Hinsicht auf die sorgfältig gesammelten und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen entschieden werden*'). That model has been later followed by the *codice civile degli Stati di Sua Maestà il Re di Sardegna* of 1838 (art 15 of the introductory chapter), later by the first Italian civil code of 1865 (art 3 of the preliminary provisions) and finally by the actual Italian civil code of 1942 (art 12, paragraph 2, of the preliminary provisions: '*Se una controversia non può essere decisa con una precisa disposizione, si ha riguardo alle disposizioni che regolano casi simili o*

principles forbid it. It may sound like a paradox, and perhaps it is, but as Ernst-Wolfgang Böckenförde has explained better that anyone else,[63] modern constitutions prevent any legal order from being closed in itself and self-evident, because peoples' rights precede it.

According to these theoretical and constitutional explanations of modern legal systems, principles of European law should be understood as opposed to rules because of their anti-positivistic nature. Although principles are recognized by the European Union as norms,[64] they are not settled and shaped in their content by its legislative power, but are derived from international law and legal traditions which represent the common core of the Member States' laws.

materie analoghe; se il caso rimane ancora dubbio, si decide secondo i principî generali dell'ordinamento giuridico dello Stato'); see R. Sacco, 'I principi generali nei sistemi giuridici europei', in *I principi generali del diritto, op cit*, 163 *et seq*. Much more outspoken is the *Codigo civil español* of 1889, whose *Título preliminar*, art 1, without hesitation mentions the general principles among the sources of Spanish law (paragraph 1: *Las fuentes del ordenamiento jurídico español son la ley, la costumbre y los principios generales del derecho*), although immediately adding that they are applicable only when a specific legal rule or a specific use are lacking (paragraph 4: *Los principios generales del derecho se aplicarán en defecto de ley o costumbre, sin perjudicio de su character informador del ordenamiento jurídico*). It is interesting the fact that, during the drafting works of the Italian civil code of 1942, the Government leaded by Mussolini attempted to make it more consistent with the dictates of fascism by enumerating the general principles of the law in a preliminary chapter (and intending them as the expression of the predominant ideology). The contrary position was however successfully advocated in the 1940 Congress of Pisa titled 'Formulazione legislativa dei principi generali del Diritto' by the young (but already authoritative) Francesco Santoro-Passarelli, who was later to become one of the most influential Italian scholars of the 20th century; see P. Rescigno, 'Conclusioni', in *I principi generali del diritto, op cit*, 331 *et seq*.

63 The famous Böckenförde dilemma sounds '*Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann*'. The author further explains: '*Als freiheitlicher Staat kann er einerseits nur bestehen, wenn sich die Freiheit, die er seinen Bürgern gewährt, von innen her, aus der moralischen Substanz des einzelnen und der Homogenität der Gesellschaft, reguliert. Anderseits kann er diese inneren Regulierungskräfte nicht von sich aus, das heißt, mit den Mitteln des Rechtszwanges und autoritativen Gebots zu garantieren versuchen, ohne seine Freiheitlichkeit aufzugeben und – auf säkularisierter Ebene – in jenen Totalitätsanspruch zurückzufallen, aus dem er in den konfessionellen Bürgerkriegen herausgeführt hat*'. For both quotations see W. Böckenförde, *Staat, Gesellschaft, Freiheit. Studien zur Staatstheorie und zum Verfassungsrecht* (Frankfurt aM: Suhrkamp, 1976) 60.

64 This undeniable assumption may be able to include principles also in a posivistic theory of law, depending on what is meant by positivism; on its innumerable (stronger or weaker) versions from the perspective of private law, see the essays collected in P. Sirena (ed), *Oltre il 'positivisimo giuridico'. In onore di Angelo Falzea* (Napoli: Edizioni Scientifiche Italiane, 2011), and especially F.D. Busnelli, 'In margine alla "grande dicotomia" diritto civile-diritto naturale. Le alterne fortune dei principi generali', *ibidem*, 49.

At the highest constitutional level which has been so far mainly considered, international law is relevant as consolidated in conventions among States which respect human rights and fundamental freedoms, and for similar reasons the only legal traditions which come into consideration are those referring to constitutional public law. If principles are considered in the broader field of private law, and contract law specifically, the point of view shall be also conveniently widened, so that what should be included are all those norms which, though not written down, are '*common to the laws of the Member States*'.[65]

To conclude, principles are the norms of the Union's law which encapsulate the common core of the laws of the Member States and which (with particular regard to subsidiarity and proportionality) create the conditions to apply it at the European level, especially by the Court of Justice. In contrast, rules are those norms of the Union's law which impose a binding norm of conduct irrespectively of the laws of the Member States, or even against those laws. As opposed to principles, a rule of the Union's law promotes legal unity by cancelling the differences existing among national laws. In contrast, principles promote the goal of legal unity by reinforcing what those national laws already share in common.

V Principles in the Evolving European Contract Law

A The Principles of European Contract Law (PECL)

Moving from the above proposed framework, it should be admitted that the *Principles of European Contract Law* and the *UNIDROIT Principles of International Commercial Contracts* (PICC) have to be taken seriously when they refer to themselves as principles.[66]

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

65 This formulation has been adopted by the European Court in its decision on unjust enrichment as a principle (ECJ 16 December 2008, case 47/07 (Masdar v Commission) para 47).

66 Similar considerations may be referred also to the Restatements proposed by the American Law Institute, about which see P. Frank, 'The American Law Institute 1923–1938' *Hofstra Law Review* 26 (1998) 615.

added also here).[67] Such provisions apparently stress the generality of the rules which are set forth by the PECL and the PICC as a criterion to qualify them as principles. However, it is evident that most of them cannot be said to be general at all in relationship to their content, which is instead very specific and circumscribed.[68] They are rather general (and called so) because they are applicable to a contract notwithstanding that it may be a sale, or a loan, etc, and they are contrasted therefore with a possible set of rules which, on the contrary, might be applicable only to single types of contract (sale, loan, etc). In other words, these statements reflect the traditional dialectics between general and particular contract law, which is to be found in most national legal orders (and furthermore in their respective civil and commercial codes).

But this feature is not relevant enough to justify their self-qualification as principles. In this sense, it is rather decisive that they have been drafted as a written consolidation of the common core of the national legal traditions regarding contracts (PECL) and of the so-called *lex mercatoria*, ie, the whole of the legal practices which have established themselves in international commerce (PICC). From this point of view (and probably not from others) they well deserve the label of principles which was chosen by their drafters.

In other words, both the PECL and the PICC may be said to be aimed at reflecting a *ius commune* (*Europaeum*, or even more) which in itself exists beyond the power of a specific legislator. Of course, another question is whether the latter will be ready or not to recognize such *ius commune*, mainly depending on its own will; but if it does so, it will have necessarily recognized that such *ius commune* consists of a set of principles which are not the outcome of its own initiative. Importantly, this will be relevant for the purpose of interpreting such principles and determining their content.

B The Draft Common Frame of Reference (DCFR)

Similar considerations may be applicable to the *Draft Common Frame of Reference*, which explicitly defines its own content in the terms of '*Principles, Definitions and Model Rules of European Private Law*'.[69] In fact, dealing with the meaning of the word 'principles' through an examination of the above mentioned provisions of the PECL and of the PICC, the *Introduction* to the DCFR comes to the conclusion that such word has been used there to denote '*rules which do not have the force of law*',[70] adding that also in the DCFR itself that meaning applies.[71]

Of course, defining the concept of principles by using the term rules may blur the distinction between the two. However, once elucidated that the DCFR consists of true principles, it should be acknowledged that such definition makes sense, because it aims at distinguishing the broad mass of the common principles contained in the DCFR from those few of them which are all-pervasive and whose balance gives a comprehensive framework to the whole.[72] Compared to the latter, the former have a minor force and structural relevance, though being always principles in the above elucidated meaning.

Particularly after the publication of the influential *Principes directeurs du droit européen* by the Association Henri Capitant and the Société de legislation,[73]

67 For an up-to-date commentary on the PICC, see V. Heutger, 'The UNIDROIT Principles 2010: Towards a "Global" Law of International Commercial Contracts (17–18 February 2012)' *European Review of Private Law* 20 (2012) 889.

68 Metzger, n 58 above, 18.

69 For a collection of comments on its provisions, see *European Review of Contract Law* 4 (2008) No 3, and especially the introductory essay of S. Grundmann, 'The Structure of the DCFR – Which Approach for Today's Contract Law?' 4 *European Review of Contract Law* (2008) 225. See also U. Breccia, 'Principles, Definitions e Model Rules nel "Comune quadro di riferimento europeo" (Draft Common Frame of Reference)' *I contratti* (2010) 95.

70 Such understanding of principles has behind a merely negative notion of them, as not being immediately applicable, and at the end as not being norms at all, which has had a considerable fortune in German legal culture; fundamental in that respect has been Esser, n 14 above, at 132–133, followed particularly by C.-W. Canaris, *Systemdenken und Systembegriff in der Jurisprudenz. Entwickelt am Beispiel des deutschen Privatrechts* (3rd ed, Berlin: de Gruyter, 1987) 57. This merely negative conception of principles has been however been set aside by the conceptions developed by Dworkin and Alexy, which understands principles as a species of norms (diverging from rules) (see *supra*, III E 1). On this assumption, it is worth noting that the *ius commune* (*Europaeum*) which has been consolidated in the DCFR, and already in the PECL, is not a mere scholarly exercise, but represents an existing reality of law, although not consisting of rules in a positivistic sense; see the fundamental explanations by S. Grundmann, *Europäisches Schuldvertragsrecht. Das europäische Recht der Unternehmensgeschäfte* (Berlin: de Gruyter, 1999) 1 *et seq*. It has been pointed out that they are relevant not only in order to interpret the provisions of the European Union's legislative acts, but also to fill their gaps; although in a more general perspective, see A. Hartkamp, 'Principles of Contract Law', in A. Hartkamp *et al* (eds), *Towards a European Civil Code* (3rd ed, Nijmegen: Ars Aequi Libri, 2004) 129.

71 C. von Bar, E. Clive, H. Schulte-Nölke *et al* (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline edition* (Munich: Sellier, 2009) 9.

72 DCFR, n 71 above, 13–14.

73 Such *Principes* are incorporated in the more comprehensive *Principes contractuels commun. Projet de cadre commun de référence*, edited by B. Fauvarque-Cosson, D. Mazeaud and by G. Wicker, J.-B. Racine, L. Sautonie-Laguionie and F. Bujoli (Paris: Société de Législation Comparée, 2008).

the mention of the 'underlying principles' was introduced in the body of the DCFR, and has also been added to it a self-contained section where four of them are thoroughly explained (freedom, security, justice and efficiency).[74]

C The Directives on European Contract Law and the Common European Sales Law (CESL)

Shifting attention from the so-called 'soft law' of the *ius commune* to the so-called 'hard law' of the European Union, it should be noted that in its sources principles are implemented or at least evoked only by the above mentioned provisions of the Treaty and by the decisions of the Court of Justice, mainly (even if not only) in the field of human rights and fundamental freedoms.[75]

In contrast, the directives and regulations which have been so far enacted to create a European contract law consist basically of rules, and not of principles. It should be obviously objected that some of the most relevant legislative measures of that kind have been clearly based on good faith (take for instance the directive on abusive contract terms),[76] or on fair dealing (take for instance the directive about unfair commercial practices),[77] but the question to be examined is whether, in those normative context, good faith has been truly considered as a principle, or rather as a rule.

It is evident that good faith (even more than fair dealing) has always in itself that peculiar vagueness and elasticity which makes it immediately look like a principle, but according to the general framework that we have developed in the previous paragraphs, it should be accepted that this is not enough to consider it a principle.[78] Furthermore, or even first of all, what is relevant is the attitude that

74 DCFR, n 71 above, 57 *et seq.* For a strong criticism against that choice see M.W. Hesselink, 'If you don't like our principles we have others. On core values and underlying principles in European private law: a critical discussion of the new "principles" section in the draft CFR', in R. Brownsword, H.-W. Micklitz, L. Niglia and S. Weatherhill (eds), *The Foundations of European Private Law* (Oxford: Hart Publishing, 2011) 59.

75 See *supra*, IV B.

76 Council directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

77 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

78 Of special interest is the related debate between H. Beale, 'General Clauses and Specific Rules in the Principles of European Contract Law: The "Good Faith" Clause', in Grundmann and

the European legislator has demonstrated towards good faith by providing and enhancing it in the above mentioned legislative measures.

Briefly, the vagueness or elasticity of good faith and fair dealing in their respective content is not decisive to consider them as principles, because they have been used by the European legislator in order to impose on the Member States some specific policies which it has been pursuing.

When the directive on standard contract terms mentions 'good faith', what is meant by the European legislator are the specific policies which lie behind that regulation, ie consumer protection. And when 'fair dealing' has lately begun to take its first steps in the directives, at stake were competition protection and market freedom, as specific policies pursued by the European legislator.

This legislative technique is akin to that of principles only if the vagueness and elasticity of the content of the rule is regarded, but they radically diverge in relationship to the attitude of the legislator towards the settlement of the rule.[79] In those contexts, therefore, good faith and fair dealing have been taken so far into consideration by the European legislator not as principles, but as rules, or better as parts of a wider rule.

The peculiarity of good faith and fair dealing as implemented by European contract law so far is well caught by defining them (not as principles, but) as general clauses, in the same sense in which, moving from § 242 BGB, *Generalklauseln* have been elaborated by German legal culture:[80] Despite providing legal

Mazeaud (eds), n 14 above, 205 and O. Lando, 'Is Good Faith an Over-Arching General Clause in the Principles of European Contract Law?' *European Review of Private Law* 15 (2007) 841.

79 See *supra*, IV.

80 It would be fairly impossible to give an account of the related German literature, which is huge; for a survey see P. Schlechtriem, 'The Functions of General Clauses. Exemplified in Regarding German Law and Dutch Law', in Grundmann and Mazeaud (eds), n 14 above, 41. In Italian literature the most classical and influential works have been those of A. Falzea, 'Gli standards valutativi e la loro applicazione' *Rivista di diritto civile* (1987) I, 1; L. Mengoni, 'Spunti per una teoria delle clausole generali' *Rivista critica di diritto privato* (1986) 5, followed by C. Castronovo, 'L'avventura delle clausole generali' *Rivista critica di diritto privato* (1986) 21; P. Rescigno, 'Appunti sulle clausole generali' *Rivista di diritto commerciale* (1998) I, 1; S. Rodotà, 'Il tempo delle clausole generali' *Rivista critica di diritto privato* (1987) 709, and already S. Rodotà, *Le fonti di integrazione del contratto* (Milano: Giuffrè, 1969) *passim*. For a detailed exposition of the previous debate and the new trends of its development, see M. Libertini, 'Clausole generali, norme di principio, norme a contenuto indeterminato. Una proposta di distinzione' *Rivista critica di diritto privato* (2011) 345; S. Patti, 'La ragionevolezza nel diritto civile' *Rivista trimestrale di diritto procedura civile* (2012) 1; F. Denozza, 'Norme, principi e clausole generali nel diritto commerciale: un'analisi funzionale' *Rivista critica di diritto privato* (2011) 379; G. D'Amico, 'Clausole generali', in *I rapporti civilistici nell'interpretazione della Corte Costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2007) I, 429 and the monography of V. Velluzzi, *Le clausole generali.*

standards to evaluate a behavior, they are to be considered rules, or pieces of a more complex rule.

A major change in that perspective could be, however, eventually provoked by the enactment of the proposed regulation on a common European sales law (CESL), which, at least as it has been drafted at the moment, marks the outcropping of true principles on the surface of European contract law. According to its hierarchical structure, which proceeds from the more general to the more specific, the CESL starts by explicitly mentioning and providing its own general principles[81], which are identified in freedom of contract (Article 1), good faith and fair dealing (Article 2), co-operation (Article 3).

In Article 2 CESL good faith and fair dealing are not taken into consideration as general clauses or legal standards (as European directives and regulations have done so far), but are invoked as (general) principles in themselves: they are not the expressions of some specific policies pursued by the supra-national regulation, but rather mark the switch from the rules enacted by the European legislator to the common core of the national laws of the Member States.

But even more relevant is that, when ruling on its own interpretation, the CESL has stated that this shall be autonomous and *'in accordance with its objectives and the principles underlying it'* (Article 4, para 1). Moving from the concept of principles which we have developed before,[82] the meaning of such a reference to the underlying principles is that, in case of uncertainty as to the meaning of the CESL, its provisions have to be interpreted in accordance with the common core of the laws of the Member States, because they identify the principles of European law.

To this understanding of Article 4, para 1, CESL can be apparently objected that the following paragraph of the same article at once adds that the interpretation of the CESL in accordance to its objectives and underlying principles shall be carried out *'without recourse to the national law that would be applicable in the absence of an agreement to use the CESL or to any other law'*.[83] But in response it

Semantica e politica del diritto (Milano: Giuffrè, 2010) *passim*. Less relevant has been the concept of general clauses for the development of French law; for an overhaul, see C. Jauffret-Spinosi, 'Théorie et Pratiqyue de la Clause Générale en Droit Français Et Dans Les Autres Systemes Juridiques Romanistes', in Grundmann and Mazeaud (eds), n 14 above, 23.

81 Part I (Introductory provisions), ch 1 (General principles and application), sec 1 (General principles), art 1–3.

82 See *supra* III, IV.

83 The objection has been raised by Prof Simon Whittaker during the SECOLA conference of Messina where the authors of this essay has presented and discussed a former version of it.

can be said that this final restriction does not apply to the common core of the laws of the Member States for several reasons.[84]

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

Secondly, but for similar reasons, such a common core may not be said to be applicable to a contract in the absence of an agreement to use the CESL. After all, principles are not rules which may be said to govern the contract; and anyway only a specific agreement between the parties could make that set of principles applicable to a contract.

If CESL is enacted, and its text remains unchanged as far as it is here concerned, it will lead European contract law to recognize the centrality of principles beyond rules and anyway the need of a more complex architecture, where both of them are balanced.

This shift of European law becomes more and more necessary to the extent that its territory is not yet surrounded by the narrow boundaries of some specific policies, like consumer protection or competition, however relevant they may be from a social, economic and political point of view. When the European Union begins to sail in the open sea of general private law (beginning with contract), the evocation of its principles, and therefore of the common laws of the Member States, becomes a sheer necessity, as it has been made evident already by the DCFR. By the way, it is not without a sense that, despite every attempt to deny or to lessen the fact, the DCFR was born and has grown as the blueprint of a European civil code.

84 In the opposite perspective, see M. Heidemann, 'European Private Law at the Crossroads: The Proposed European Sales Law' *European Review of Private Law* 20 (2012) 1128 *et seq*, who examining the so-called autonomous interpretation method accuses the users of transnational law to be all *'too tempted on reaching the interface with national law to understand the clauses to be a conflict rule and happily revert back to their own domestic law»'*.

VI The Balance between Principles and Rules as a Device of Tuning the Level of European Regulation

A The Need to Include Implicit or Potential Consistencies in the Common Law of the Member States (cd *minimum maximorum*)

The distinction between principles and rules will be examined finally as a question of tuning the level of regulation between national und supranational legislators,[85] and also between legislators and courts.[86] Because of its extreme complexity, the topic can be only superficially sketched in this article.

Through the invocation of principles the European legislator promotes legal unity among Member States by enhancing the coordination and also the competition among them and among their legal orders. In order to achieve the institutional goals of the European Union, it is however to be pointed out that the common core of national laws should not be the outcome of a static or passive recognition of what at first glance looks already to be shared. Such method would lead in fact to the lowest point of possible convergence among the Member States, according to the logic of the *minimum minimorum*. But the aim of promoting legal unity by way of the Union's law should impose instead an obligation to maximize the convergence and therefore to pursue the logic of the *minimum maximorum*. In other words, it is therefore necessary to include in the common core of the principles of European law also implicit and potential consistencies among Member States, with the only impassable limit being that of the '*not inconsiderable divergences*' specified by the European Court of Justice in the case *Hoechst*.[87]

85 M.E Storme, 'The Foundations of Private Law in a Multilevel Structure: Balancing, Distribution of Lawmaking Power, and Other Constitutional Issues' *European Review of Private Law* 20 (2012) 237; K. Lenaerts and J. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' *Common Market Law Review* 47 (2010) 1629.

86 S. Grundmann, 'The General Clause or Standard in EC Contract Law Directives – A Survey on Some Important Legal Measures and Aspects in EC Law', in Grundmann and Mazeaud, n 12 above, 154; D. Edward, 'Shifting Power from Legislation to Judges and from the Central Level to the National Level', in Grundmann and Mazeaud, n 12 above, 79; S. Grundmann and W. Kerber, 'European System of Contract Laws: A Map for Combining the Advantages of Centralised and Decentralised Rule-making', in S. Grundmann and J. Stuyck (eds), *An Academic Green Paper on European Contract Law* (The Hague: Kluwer Law International, 2003) 295.

87 ECJ, case 46/87 *Hoechst AG* v *Commission*. See M. Herdegen, 'The Origins and Development of the General Principles of Community Law', in Bernitz and Nergelius (eds), n 17 above, 1, 17–18.

According to the principle of subsidiarity (Article 5 of the Treaty on European Union), the best way to avoid the risk that the national differences which have been created by centuries of legal positivism will harm the social and the economic well-being of Europe is to push forward the core of the common tradition of laws. This permits to opt for solutions which are and have been for centuries under the sharp criticism of scholarship and under the pressure of market and this is important because the criticism of scholarship and the pressure of market permanently force the national laws into the quest for a 'better regulation'.[88]

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

B The Risk of a Democratic Deficit as A Restriction on Lawmaking through Principles

Making law through principles creates a shift of power from Parliaments to Courts, or, which is the same thing, undermines the legislative power in favor of the judiciary power.[89]

According to the constitutional structure of modern democracies, in the long run this shift of power cannot but create an unbearable democratic *deficit*, because Courts do not have a democratic mandate from the people and do not express their sovereignty.[90]

C The Risk of Regulatory Failure as a Restriction on Lawmaking through Rules

Coordination and competition among Member States and among their legal orders do not always maximize the social and economic well-being of Europe,

88 Most illuminating is W. Eucken, *Grundsätze der Wirtschaftspolitik* (6th ed, Tübingen: Mohr, 1990) 245 *et seq*.

89 A classical point of reference is the famous debate between Hans Kelsen and Carl Schmitt about the nature of constitutional justice; for a survey see C. Pinelli, 'The Kelsen/Schmitt Controversy and the Evolving Relations between Constitutional and Internal Law' *Ratio iuris* 23 (2010) 493.

90 J.M. Smits, 'European Private Law and Democracy: A Misunderstood Relationship', in M. Faure and F. Stephen (eds), *Essays in the Law and Economics of Regulation in Honour of Anthony Ogus* (Antwerp-Oxford: Intersentia, 2008) 49. See also the European University Institute thesis by M. Bartl, *Legitimacy and European Private Law* at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142798.

because in some specific and well recognizable contexts such coordination and competition are exposed to the risk of failing.[91]

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

In our understanding, at the European level rules, as opposed to principles, promote legal unity among Member States by cancelling the national differences among them. But as it has been so many times elucidated by the scholars who study European integration from an economic point of view, this way of making law hides many dangers, too.

If the counterbalance of making law through principles is the failure of market, then that of making law through rules at the European level is the failure of the European Union itself as a regulator.[92]

Unlike national laws, the Union's law does not have to cope so much with a real criticism by scholarship, which is still mainly national. And it also does not have to cope so much with market pressure, because the level of regulation is too high and too far from the players and fundamentally is also politically irresponsible.

D The Principle of Subsidiarity as a Tool for Adjusting the Level of Regulation

The tool to adjust the level of regulation between principles and rules at the European level is still that of subsidiarity, which however should be taken even more seriously than the past, especially by the Court of Justice when controlling the validity of the legislative acts of the Union. But this issue goes much beyond the limits which are necessarily appropriate for this article.

Our intention so far was only that of pointing out that even the most traditional concepts of private law, when used at the European level, should not be

91 See S. Grundmann, 'The Structure of European Contract Law' *European Review of Private Law* 9 (2001) 505.

92 Fundamental in this respect are the classical studies by James Buchanan on public choice. See particularly J. Buchanan and G. Tullock, *The Calculus of Consent. Logical Foudations of Constitutional Democracy* (Indianapolis: Liberty Fund, 1999); J. Buchanan, *The Limits of Liberty. Between Anarchy and the Leviathan* (Chicago: The University of Chicago Press, 1993); J. Buchanan, *Liberty, Market and State* (New York: New York University Press, 1986).

defined and discussed on the basis of their definition in the national context. On the contrary, the legal concepts should be each time rethought and reexamined from a point of view which shall be consistent with the architecture and the nature of the Union's law. Scholarship may hope to contribute to the goal of European unity only if it has the courage to depart from the reassuring paths of legal nationalism and to develop the dogmatics of private law which can prove truly European.[93]

93 Of fundamental meaning are the works of Paolo Grossi and among them 'Unità giuridica europea: medioevo prossimo futuro?', in P. Grossi, *Società, diritto, Stato. Un recupero per il diritto* (Milano: Giuffrè, 2006) 55. See also J.M. Smits, 'What Do Nationalists Maximise? A Public Choice Perspective on the (Non-)Europeanization of Private Law' *European Review of Contract Law* 8 (2012) 296.