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Special Edition: Tribute to the late Professor John Tiley

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Not argued from but prayed to. Who's afraid of legal principles?

Hans Gribnau*

Abstract

What is the use of legal principles in taxation? And do they have anything to do with morality? These are the main questions this article addresses - focusing on the theoretical and practical role of fundamental legal principles on the European continent. It is argued that principles indeed embody the dimension of morality (justice, fairness) – other than policies. These abstract principles are to be distinguished from rules, which contain more specific standards for behaviour.

Moreover, law-making and law-applying institutions are not the authors of legal principles, for they find the principles in the law. Because principles are external standards to law-makers, the body of rules established by law-makers should be in conformity to fundamental legal principles. Hence, legal principles - embodying the 'internal morality of law' – function as essential criteria of evaluation. Furthermore, these regulative ideals can be entrenched in a broader philosophy of law which accounts for some of their characteristics - such as inconclusiveness. Legal values and principles connect the legal system with the moral values and principles prevailing in society; the former function as a kind of filter. Thus, legal principles are vehicles in the movement back and forth between legal values and legal rules. Abstract principles in turn cannot be applied directly unless they are specified and elaborated in rules.

Next, this theory is put into practice. Some examples in the field of tax law are discussed in order to show the added value of the principle-based method of legal reasoning which can take account of varying circumstances. It will be shown that judges actually make use of principles, for example as the normative basis for rule-making. Moreover, it will appear that if it is not (yet) possible to establish a rule, priority principles may be developed to guide law-making. Thus, these examples show some aspects of principle-based reasoning in tax law. The practice of tax law reflects a theoretical approach which conceives of law as a system of rules based on coherent set of moral principles.

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1 INTRODUCTION AND OUTLINE

1.1 Introduction

Legal principles seem to be a source of confusion. John Tiley once wrote that principles in European law have ‘an aspirational aspect with words of such high abstraction that they are waiting to be not analysed but invoked, not argued from but prayed to.’¹ Also strange to common lawyers and especially tax lawyers is ‘the method by which the court states the principle and then works down to the facts.’² According to John Avery Jones the higher level of abstraction accounts for the principle being ‘something external to the rules which helps one to construe the rules.’³ So common law principles stay close to the ground in contradistinction with ‘European’ principles. Apparently such a higher level of abstraction causes common lawyers to change the terms of discourse - from legal reasoning to praying -, which is mildly surprising to some other lawyers, for example those from the European continent.

Xavier Groussot for example states, that principles ‘don’t fall from heaven, [they] are not invented from nowhere.’⁴ He refers to European Court of Justice case law where general principles are based on the law common to the member states of the European Union, international law and the consecutive treaties of the European Union (most recently, the Treaty of Europe, the Treaty on the Functioning of the European Union and the EU Charter of Fundamental Rights). In case law fundamental rights are recognized as general principles of European Union law. Elaborated in case law these general principles, the main tool of judicial development, offer a strong protection regarding individual rights. Thus, the judiciary gradually developed and elaborated these legal principles which as a result became less abstract - for their meaning is made clear in concrete cases.

In this article, I will not reflect on terms and concepts like ‘pray’ and ‘heaven’, being far outside my field of expertise. Neither, I’ll analyse the principles of European Union law – though I will now and then refer to views on features of these principles by way of examples. Instead, I’ll take a more theoretical approach. I will merely analyse the concept of a (fundamental) legal principle and the way a legal principle may function in a legal system – elaborating on Ronald Dworkin’s theory of principles. Though Dworkin was an American legal scholar, his theory of law definitely has the flavour of principle-based reasoning on the European continent.⁵ To that end I will look for a legal philosophy which enables me to entrench principles in the legal system. More specifically, there is need for a philosophy of law which accounts for the fundamental role of legal values in the legal order, a value-oriented philosophy of law, for principles appeal to moral values.

Moreover, I will address the issue of how to transpose principles into rules, for principles are indeed too abstract and unspecific to dictate outcomes in concrete cases

¹ J. Tiley, ‘The Law of Taxation in a European Environment’, *Cambridge Law Journal* 51(3) 1992, p. 451-473, at p. 467.

² Tiley 1992, p. 469.

³ J. Avery Jones, ‘Tax Law: Rules or Principles?’ *Fiscal Studies* August 1996 Vol. 17. Issue 3, p. 76.

⁴ X. Groussot, *General Principles of Community Law*, Europa Law Publishing: Groningen 2006, p. 10.

⁵ Robert Alexy has developed his own theory on the basis of Dworkin’s insights. For an application in the field of (European) tax law, see S. Douma, *Optimization of Tax Sovereignty and Free Movement*, Amsterdam: IBFD 2011. Here, I will mostly keep to the original, i.e. Dworkin’s theory, in order not to complicate matters further.

– a feature which John Tiley may have had in mind. Rules, however, contain less general, more specific standards for behaviour. As a result, both the abstract and the aspirational aspect of principles, elaborated in rules, may become manageable. Thus legal principles, themselves not in any way rigid standards of behaviour, but on the contrary, flexible standards, are fleshed out in rules in specific contexts and situations. All the more reason, not to be afraid of principles ‘in the European sense.’

The research question of this article, therefore, is formulated as: how to understand legal principles as regulative ideals in a broader philosophy of law which accounts for their relationship to rules? I will not elaborate on the common law conception of principles. Nonetheless, I will briefly deal with some common law authors to give the reader an impression so as to appreciate the radically different starting point of a value-based theory and the various features of principles as they are conceived by legal scholars on the European continent.

In passing I cannot but touch upon some aspects of legal positivism, not to give a complete picture of that theory. But pointing out striking contrasts may elucidate some features of principles and its background theory of law – which is value-related.

1.2 Outline

This article is structured as follows. I'll start with Dworkin's distinction between legal principles, policies and rules (§ 2). In his theory, legal principles embody a dimension of morality or fairness - other than policies. Principles state reasons which argue in a direction, they do not dictate an outcome, and they may collide with principles arguing in another direction. In the latter case their relative weight has to be determined to resolve the conflict. According to this substantive conception of law, (fundamental) legal principles connect law to the morality of a society and are therefore the normative basis of the body of rules; they are the underlying justification for the body of rules and therefore standards for evaluating these rules. In passing, I will point at two differences with H.L.A. Hart's view on legal principles, which shed more light on the aforementioned characteristics. In section 3, I will briefly deal with McCormick's theory which conceives of principles as standards constructed by the legislator and the courts to achieve rational coherence. Other than Dworkin, he does not make any reference to a necessary connection to morality. The same goes for his view on policies, which fits well into a 'coherent principle approach' to drafting legislation.

Next, I will argue that principles are standards preceding any law-making act, they are not something which law-makers construct (§ 4). The latter find principles in the law according to the Dutch legal scholar Scholten - they have to further develop these principles and elaborate them into rules. This accounts for a kind of 'empty place' of law-making power: principles do not originate in the will of some law-making institution. They are a kind of standards to assess the legitimacy of the body of legal rules, external to law-making power. Fundamental legal principles set boundaries to legislative policies and rule-making. The actual content of fundamental legal principles is the result of a dynamic collective debate by different legal and societal actors. Hence, the question as to what is considered legitimate power, and therefore, about the principles that limit this power is subject of a permanent debate. Moreover, legal principles never coincide with positive law; this feature accounts for their evaluative, critical function. Principles appeal to some moral value – which accounts for some of their characteristics. The next step will be to further entrench fundamental legal principles in the legal system by way of Radbruch's value-oriented philosophy of law

(§ 5). Law is oriented towards its supreme value: the idea of law. Law aims to realize justice. Radbruch maintains that law is not just a social fact, because it is value-oriented. Law is ultimately motivated by an understanding of a basic human good, viz. justice. Radbruch distinguishes three elements of justice that the law aims for: legal equality, purposiveness, and legal certainty. These fundamental values underlie the legal system. It will be argued that they are not mere abstractions but are elaborated and clarified in concrete situations. The value of purposiveness conceptualizes the external – e.g., societal and statal – input into the legal order which, however, has to pass the filter of equality and legal certainty.

In section 6 I will recapitulate some of the findings. Legal principles are concretizations of legal values in the legal system - at a lower level of abstraction. Legal values and principles connect the legal system with the moral values and principles prevailing in society; the former function as a kind of filter. Legal principles are vehicles in the movement back and forth between legal values and legal rules. Abstract principles cannot be applied directly unless they are specified and elaborated in concrete, often quite technical, rules. Legal principles function as essential criteria of evaluation, in the sense that law-makers are bound by legal principles. This is a conception of law where law is conceived of as based on a coherent set of principles, which express the moral dimension of law.

Then, I will discuss some examples in the field of tax law (§ 7). I will show the added value of the principle-based method of legal reasoning which can take account of varying circumstances.

First, I will show that notwithstanding the high level of abstraction of principles, principles can be elaborated into a theoretical model to assess the existing case law and predicts future developments in the case law. Here, I will make use of Douma's model which analyses the free movement case law of the European Court of Justice. A next demonstration of the relevance of legal principles for legal practice concerns the principle of equality. In the Netherlands, this principle restricts the legislative power to tax. In case law it is used to test tax legislation – thus functioning as a (limited) check on legislative power and protecting citizens against arbitrary interferences with their lives. Then, I will deal with the question how principles are elaborated into rules. Here, the case law of the Dutch Supreme Court serves – once more - as an example. On the one hand, the Court has developed principles of proper administrative behaviour and, on the other hand, it has elaborated these principles in so called priority rules. The last topic concerns retroactivity of tax legislation. Here, it will appear that it is not possible to translate the outcome of the collision of legal principles in (hard and fast) rules for lack of certain types of regularly occurring situations. However, it is still possible to develop standards which guide law-making. Pauwels has developed a principle-based framework for the tax legislator. He shows that when the relevant colliding principles are balanced, this balancing can result in lower level principles, which he calls 'priority principles.'

The final section consists of the conclusion.

2 DWORKIN'S THEORY OF LEGAL PRINCIPLES

2.1 Principles, policies and rules

Attacking legal positivism, Ronald Dworkin famously argued that when lawyers in hard cases reason about legal rights and obligations they make use of two kinds of standards. On the one hand they use rules, on the other hand 'standards that do not function as rules but operate differently as principles, policies and other sets of standards.'⁶ Before dealing with the difference between principle and rules, Dworkin distinguishes principles and policies - though he also uses the term 'principle' generically. He then defines a (legal) principle as a standard which is to be observed because it is 'a requirement of justice or fairness or some other dimension of morality.'⁷ A policy is 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.'⁸ The most striking difference is that, other than policies, principles express moral requirements. Thus, principles embody the dimension of morality which according to Dworkin is part and parcel of the law. My focus will mainly be on principles in this narrow sense.

Dworkin next distinguishes principles in the generic sense from rules. Principles differ from rules in a number of ways. First, he argues that the difference between the two kinds of standards is a 'logical distinction', for they differ in the character of the direction they give with regard to legal decisions. Rules are applicable in an 'all-or-nothing fashion.' If the conditions provided in the rule are met, the legal outcome follows automatically. If the facts a rule sets out are given, either the rule is valid, and the legal consequences it supplies must be accepted, or it is not. If the rule is not a valid rule, it must be renounced or rewritten, for it contributes nothing to the decision. Legal principles do not operate this way. They state a reason which argues in one direction, but does not compel to take a particular decision. Legal consequences do not follow automatically, for there may be other principles (or policies) arguing in another direction.⁹ A legal principle that does not prevail, still contributes to the decision, and may be decisive in the next case or situation to be decided. Thus, officials have to take a principle 'into account as a consideration inclining in one direction or another.'¹⁰

⁶ R. Dworkin, *Taking Rights Seriously*, London: Duckworth 1977, p. 22. Legal positivism, with its pyramidal structure of valid rules, holds that the morality or immorality of a law is a matter conceptually distinct from its validity. Contrary to legal positivism, Dworkin maintains that judges have no discretion when they run out of rules, i.e. when there are no applicable rules (hard cases), they are still bound by principles when they create new rules. The principles that figure in legal argument, are not identified by any broadly accepted master test of pedigree.

⁷ This dimension is also a feature of general principles of European Union Law. Cf. T. Tridimas, *The General Principles of EU Law*, Oxford: Oxford University Press 2006, p. 26: 'to be elevated to the status of a general principle, a proposition must enjoy a degree of wide acceptance, i.e. represent "conventional morality".'

⁸ Dworkin 1977, p. 22. Dworkin later restates the distinction in relation in terms of rights and (social or collective) goals. Dworkin 1977, p. 90: Principles are propositions that describe [individual or group] rights, policies are propositions that describe goals [of the community]. Here, I stay with the original distinction as a starting point in order to elaborate on the dimension of morality.

⁹ Cf. E. Burg, *The Model of Principles*, Amsterdam: Universiteit van Amsterdam 2000, p. 98ff: Principles are pure statements of something good one wants to achieve or an evil one wants to avert. Even though principles might seem to be stated as being absolute they do not function as being absolute within a normative legal system.

¹⁰ Dworkin 1977, p. 26.

According to Dworkin this first difference entails another. Other than rules, principles have a 'dimension of weight or importance.'¹¹ This implies that when principles (or policies) collide, their relative weight has to resolve the conflict. The establishing of the relative weight cannot be, of course, an exact measurement and the judgment that a particular principle has greater weight than another will often be a controversial one. With regard to the rules, however, it does not make sense to ask how important or how weighty it is. Rules are '*functionally* important or unimportant,' i.e., within in the system of rules.¹² So the conflict between two rules cannot be resolved by establishing which rule supersedes the other because of its greater weight.

The decision as to which rule is valid in case of a conflict between rules, 'must be made by appealing to considerations beyond the rules themselves.'¹³ A legal system may use different techniques to regulate this conflict. It may be regulated by other rules, for example, or the legal system may prefer the rule supported by the more important principles.

2.2 A community of principle

As shown above, for Dworkin principles in the narrow sense embody the dimension of morality which according to Dworkin is intrinsic to law. For him law and morality are necessarily, conceptually connected. His conception of law refers to a social and institutional practice that has a normative dimension. The normative dimension of the institutional practice of law does not only stem from the fact that it is regulated by rules, but that it rests on certain assumptions about what can acceptably count as law.¹⁴ In short, what counts as law is dependent on what people value in law, and that is a normative question.

Thus, Dworkin defends a substantive conception of the rule of law: fundamental legal principles or substantive moral values are the ultimate criteria of legal validity.¹⁵ A formal conception of the rule of law, however conceives of law as a neutral instrument.¹⁶ Joseph Raz, for example, disconnects the rule of law as means and the external end(s) it serves. Raz compares law to a knife. 'A good knife is, among other things, a sharp knife.' To his mind, like other instruments, 'the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put.'¹⁷ It is a purely instrumental,

¹¹ Dworkin 1977, p. 26. M.D. Bayles, 'Mid-level principles and Justification', in J.R. Pennock & J.W. Chapman, *Justification* (NOMOS XXVIII), New York: New York University Press 1986, p. 50-51 distinguishes between weight and importance. 'Importance has to do with effects on society's structure – its institutions and the relations among its members. Weight has to do with the force or stringency of a principle.'

¹² Dworkin 1977, p. 27. He adds 'that one legal rule may be more important than another because it has a greater or more important role in regulating behavior.'

¹³ Dworkin 1977, p. 27.

¹⁴ R. Dworkin, *Justice in Robes*, Cambridge (Mass.)/ London: Harvard University Press 2006, p. 2-10.

¹⁵ This is part of Dworkin's attack on Hart's legal positivism. However, H.L.A. Hart, 'Postscript', in H.L.A. Hart, *The Concept of Law* [1970], Second Edition Oxford: Clarendon Press 1994, p. 247 argues that Dworkin misrepresents his position because he states in his book (p. 71-72) that in some legal systems, as in the United States the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values and they may form the content of legal limitations on the exercise of legislative powers.

¹⁶ Cf. H. Gribnau, 'Legal Certainty: A Matter of Principle', in H. Gribnau & M. Pauwels (eds.), *Retroactivity of Tax Legislation*, Amsterdam, [IBFD] 2013, p. 72-80.

¹⁷ J. Raz, 'The Rule of Law and its Virtue' [1977], in J. Raz, *The Authority of Law*, Oxford: Oxford University Press 2009, p. 225-26. For a critique, see, for example, N. Simmonds, *Law as a Moral Idea*, Oxford: Oxford University Press 2007, p. 47ff who shows that the rule of law is a moral ideal because its

morally empty understanding of the rule of law. This version of the rule of law has no content requirement which, therefore, 'renders it open to a range of ends.'¹⁸

Dworkin's substantive conception of law, however, enables us to account for the role of principles as standards for evaluating existing law. It gives principles a place besides the legal rules and standards established by legal authorities. As will be shown, legal principles in the narrow sense have an existence of their own; they are not the product for example of the legislator. On the contrary, they set limits to legislative voluntarism. In this sense they are external to law-making institutions, though law-making institutions may develop principles by specifying them in rules and applying them to concrete situations.

Here, Dworkin elaborates on the distinction between principles and rules. He opposes the view that in a true associative community people assume that the content of the established legal rules exhausts their obligations. Members of a genuine political community view rules as negotiated out of commitment to underlying principles that are themselves a source of further obligation. They 'accept that they are governed by common principles, not just by rules hammered out in political compromise.'¹⁹ According to Dworkin, the rule of law is a discourse about values that have already deeply informed the community's understanding of itself as a community of principle. This community acts in a unified and principled manner. Rights and obligations in such a society of principle are not exhausted by 'the particular decisions the political institutions have reached but depend, more generally, on the scheme of principles those decisions presuppose and endorse.'²⁰ Before it is a set of particular rules, therefore, the rule of law is a set of values that shape and characterize the community in which people live. These principles are not necessarily themselves explicit, they are rather the underlying justification for the body of explicit rules. They can go beyond rules, they can resolve conflicts between the rules, and they offer guidance for the interpretation of rules. Dworkin applies this ideal of integrity, i.e., the requirement of principled consistency, to the legislature who should be guided by the principle of integrity in legislation. This form of integrity 'restricts what our legislators and other lawmakers may properly do in expanding or changing our public standards', such as legal rules.²¹ Laws entailing arbitrary distinctions which are the result of political compromise without minding the matters of principle at stake ('checkerboard statutes'), for example, violate the principle of integrity in legislation.²² Thus, according to Dworkin's substantive theory of law, there is a limit to the arbitrariness of the distinctions which the legislature may make in its pursuit of a collective goal.²³ To be sure, tax law should not be seen as an exception to the ideal of law as integrity, for the 'cases for legitimacy and integrity are at least as strong in tax's empire as they are in

characteristics are shaped and inter-related by one or more moral values (he focuses on one, the value of liberty). Cf. J. Simmonds, 'Reply: The Nature and Virtue of Law', *Jurisprudence* 1 (2010) 2, p. 285: 'The rule of law is 'a positive human good [...] of which we cannot form a clear conception except by reference to its realisation in law.'

¹⁸ B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press 2004, p. 94.

¹⁹ R. Dworkin, *Law's Empire*, Cambridge (Mass.) / London: Harvard University Press 1986, p. 211.

²⁰ Dworkin 1986, p. 211. Cf. P. Kahn, *The Reign of Law: Marbury v. Madison and the Construction of America*, New Haven and London: Yale University Press 1997, p. 45.

²¹ Dworkin 1986, p. 217.

²² D. Smith, 'The Many Faces of Political Integrity', in S. Herschovitz, *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*, Oxford: Oxford University Press 2006, p. 119-153 argues that Dworkin's discussion of checkerboard solutions provides only limited support for his claim that integrity offers a good fit with a community's political beliefs and practices.

²³ Dworkin 1977, p. 114.

law's'.²⁴ As John Tiley reminds us by quoting the American scholar Grove: 'Taxation is not simply a means of raising revenue. It is the most pervasive and privileged exercise of the police power.'²⁵

To conclude this section, legal principles constitute the moral core of the legal order - comparable to Fuller's 'internal morality of law.'²⁶ They embody the dimension of morality, but they are not purely moral standards, for legal principles serve legal values (see below § 6) – in contrast with moral principles which serve moral values. Indeed, law and morality are not identical. Legal principles are (moral) standards which are specific for the law, they are elaborated within the legal system. Though they are influenced by the moral values of a society, they are not purely moral principles.²⁷ Moral values and principles do not flow directly into the legal system, they are filtered by it. Hence, constituting the moral core of the legal order, legal principles connect law to the morality of a society.

2.3 Agreement and disagreement

After having explained Dworkin's conception of principles, it is apt to deal briefly with some legal scholars who conceptualize principles in a different way. Briefly contrasting their views with Dworkin's theory may shed more light on the moral dimension of principles in the latter's theory. First, I will briefly deal with the distinction between rules and principles which has been fiercely debated in legal literature. I will restrict myself to a few points which are of interest here. According to H.L.A. Hart, most scholars – legal positivists included – agree on two features which distinguish principles from rules. The first feature is a matter of degree: principles are broad, general, or unspecific.²⁸ This means that 'a number of distinct rules can be exhibited as the exemplifications or instantiations of a single principle.' Furthermore, principles appeal to some purpose, goal, entitlement or value. Therefore, they are regarded as not only providing 'an explanation or rationale of the rules which exemplify them, but as at least contributing to their justification.'²⁹ Here, the important point is the possible relationship between principles and values. According to Hart, within the legal system an appeal to some moral value by way of principles is possible. However, that does apparently not mean that he recognizes a necessary connection between law and morality. He therefore seems to disagree with Dworkin's conception of law where law - necessarily – is conceived of as based on a coherent set of principles, which express the moral dimension of law, appealing to moral values.³⁰

²⁴ E.J. McCaffery, 'Tax's Empire', *The Georgetown Law Journal* 85 (1996), p. 71–154, p. 107. Cf. R. Dworkin, 'Taxes and legitimacy', in R. Dworkin, *Is Democracy Possible Here?*, Princeton: Princeton University Press 2006, p. 90ff where he applies two principles of human dignity, the principle of the 'intrinsic value of human life' and the principle of 'personal responsibility', to tax policy.

²⁵ Tiley 1992, p. 452 quoting Groves, 1948 (1) *National Tax Journal* I, p. 23.

²⁶ L.L. Fuller, *The Morality of Law* [1964], New Haven/London: Yale University Press 1977, p. 200–224. For an in-depth discussion of Fuller's claim that a necessary connection between law and morality manifests in the principles that constitute this internal morality of law, see K. Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller*, Oxford: Hart Publishing 2012.

²⁷ Moral principles will (co-)determine the actual content of general legal principles. See H. Gribnau, 'General Introduction', in G.T.K. Meussen (ed.), *The Principle of Equality in European Taxation*, The Hague [etc.]: Kluwer Law International 1999, p. 22.

²⁸ Cf. J. Raz, 'Legal Principles and the Limits of Law', in M. Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London: Duckworth 1983, p. 75.

²⁹ Hart 1994, p. 260 (both quotes).

³⁰ Cf. R.S. Summers, *Instrumentalism and American Legal Theory*, Ithaca and London: Cornell University Press 1982, p. 41–42: 'Rules or other forms of law are not merely formal receptacles but have substantive

There is another point of disagreement explicitly mentioned by Hart himself on what he calls the 'non-conclusiveness' of principles. This regards Dworkin's view that rules necessitate particular legal consequences, dictating a result or outcome, whereas principles do not because they have a dimension of weight.³¹ Principles, therefore, do not conclusively determine a decision. Hart does not accept this sharp contrast between principles and rules. However, for Dworkin this is a crucial difference, for principles embody the dimension of morality, they appeal to moral values. The search for a legal philosophy of values to entrench principles (see § 5), therefore, probably will also shed light on the feature of 'non-conclusiveness.' If this will appear to be a crucial feature of values, the 'non-conclusiveness' of legal principles will be elucidated.

3 PRINCIPLES AND POLICIES: VARIATIONS

Now I will return to the difference between principles and policies. As shown above, according to Dworkin, the difference is that principles express moral requirements whereas policies do not. However, the distinction can be collapsed according to Dworkin. For example, a policy may be construed which states a principle - so as to realize 'a requirement of justice or fairness.' In this way, a policy incorporates a principle and consequently embodies a dimension of morality.³² More importantly, the use of principles intends to introduce the moral dimension of law, not as something accidental, but as a feature inherent to the very concept of law. So law does conceptually depend on moral considerations. This is a conception of law which many legal scholars (legal positivists) do not agree with. Moreover, Dworkin points at a second difference between principles and policies: the legislator states a policy and formulates a rule or a set of rules to achieve a policy goal. For Dworkin, however, this is not a feature of principles in the narrow sense, for they are not constructed by the legislator. 'The origin of [...] legal principles lies not in a particular decision of some legislator or court, but in a sense of appropriateness developed in the profession and the public over time.'³³ This specific origin accounts for a kind of 'empty place' which cannot be occupied by any law-making power (see below § 4). Here we see a striking difference with policies, which of course are formulated by government or one of the law-making institutions. Again, not all legal scholars will agree.

The legal theorist Neil MacCormick may serve as a nice illustration of this position. I will briefly deal with it in order to illuminate Dworkin's position. According to MacCormick legal rules tend to secure, or aim to secure, some desirable end. He explains the distinctive meaning of principles: 'to express the policy of achieving that end, or the desirability of that general mode of conduct, in a general normative statement, is, then to state "the principle of the law" underlying the rules' in question.³⁴ These general principles are the underlying reason specifying codes of conduct for a

content. When law is made and applied, its content is necessarily determined by values. These values are manifested in the reasons lawmakers, judges, and other officials give for what they do, and in the very formulations of the law itself. They necessarily figure in standards for evaluating the law.'

³¹ W. Twining & D. Miers, *How To Do Thing With Rules*, Cambridge: Cambridge University Press 2010, p. 83 argue that the 'all or nothingness' as a necessary element of the notion of a 'rule' obscures three separate ideas: 'the level of generality or particularity of a prescription, its precision or vagueness; and its status or force in dictating.'

³² Dworkin 1977, p. 22-23.

³³ Dworkin 1977, p. 40.

³⁴ N. MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press 1978, p. 156.

whole body of rules in an Act. Moreover, these principles are capable of coming into conflict with each other.

Explicating general principles in this way, MacCormick creates the possibility of perceiving an Act of Parliament not just as a set of arbitrary commands but as a coherent set of rules directed at securing general ends, which the legislator conceived to be desirable. 'In this sense, to explicate the principles is to rationalize the rules.'³⁵ Coherence may also be achieved with regard to much of the detailed case-law. The use of principles thus supplies a rationalization of, and thus a justifying reason for case-law and statute-based rules. Note that this principled coherence does not necessarily imply any reference to the internal morality of law.

According to MacCormick, principles have explanatory and justificatory force in relation to particular decisions or rules, but, again, he does not attribute this force to a moral dimension inherent to principles. Evidently, Dworkin will disagree with MacCormick with regard to principles in the narrow sense. There is another point of disagreement. For Dworkin a policy sets out a social or collective goal (see § 2.1). However, MacCormick points out that the common usage of the term refers to a 'course of action' or 'course of interrelated actions' adopted by someone or some organisation.³⁶ A policy is a course of action aimed at securing some desirable state of affairs or achievement. Again, the spheres of principle and policy are not strictly separated, for the question whether a given policy is desirable or not, is raising a question of principle. To his mind, there is no distinction or opposition between arguments of principle and arguments of policy. They are 'irretrievably interlocking. [...] To articulate the desirability of some general policy-goal is to state a principle. To state a principle is to frame a possible policy-goal.'³⁷ This may seem to be in line with Dworkin's remark that the distinction can be collapsed. Actually, that is only the case when a policy is motivated by a principle so as to realize 'a requirement of justice or fairness.'

Apparently, however, there is no need for MacCormick to refer to 'a requirement of justice or fairness,' – to some moral value outside the power of lawmakers. On the contrary, as Judith Freedman explains, the principle is an expression of the scope that the legislature has decided to give to a legislative rule, 'a charging provision or relief and, since it leaves no room for judicial law-making, it does not invite judgments based on morality.'³⁸ Principles, therefore, are not some standards with an aspirational aspect external to the legislature, but the legislature's domain par excellence - a far cry from Dworkin's position with regard to principles in the narrow sense.

The use of principles without any reference to values such as fairness and justice which are external to legislation, is also an important feature of the 'coherent principle approach' to drafting legislation. This form of a principle is 'an operative legislative rule which specifies the outcome [...], and expresses the outcome at the highest possible

³⁵ MacCormick 1978, p. 157.

³⁶ MacCormick 1978, p. 263.

³⁷ MacCormick 1978, p. 263-264.

³⁸ J. Freedman, 'Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited', (2010) *BTR* 6, p. 730. This links in to the issue of trust and uncertainty related to law-making, cf. p. 721: 'If rules can be read subject to principles then, it is argued, this transfers power to the courts and administrators and creates a degree of uncertainty.' However, the thrust of my argument is that every law-making or law-applying institution are bound by legal principles apart from the question whether there is any external check on its power.

level rather than itemising a list of outcomes for every conceivable case.³⁹ A principle or a collection of principles implement the legislative purpose. They have to be structured logically so as to work together to achieve the legislative purpose. Thus, a framework of a specific piece of legislation results: a pyramid with one or more principles at the top 'and then carving out exceptions to the basic fall-back rule.'⁴⁰ When new situations emerge, a properly constructed principle provides a framework for working out how to deal with them. In short, here, a principle is not just a less specific rule, but it is a statement about the essence of the intended outcomes in a general field. Note that it is assumed that principles are something which the legislator constructs - not some standard preceding any legislative activity. Moreover, again no reference is made to any necessary connection to morality, viz. an appeal to values.

In the following I will tackle these two issues after which I will address the question of how to use principles to create hard and fast rules.

4 THE EMPTY SPACE OF LAW-MAKING POWER

Legal principles precede positive law. Therefore, they have an existence of their own – relatively independent law-making and law-applying institutions. They are not a product of the legislator's will, although the legislator determines – in interaction with other legal actors – the actual content of legal principles. The principle of equality, for example, cannot be abolished at will. Hence, principles set boundaries to government policies.

To gain more insight in this aspect of legal principles is worthwhile to turn to Paul Scholten (1875-1946), one of the most important legal theorists in the Netherlands. He has elaborated on the concept of legal principles. Scholten distinguishes a number of characteristics which enhance our understanding of legal principles – and the difference between principles and policies. Scholten precedes Dworkin in distinguishing between legal principles and legal rules. 'Direct application through subsuming a case under a principle is not possible.'⁴¹ Rules, however, can be applied directly because they have a more concrete content. Therefore, principles must be elaborated into rules. A principle only has use, when it is actualized in particular rules. Scholten points out that principles are very 'general conceptions'⁴² – they are more general or abstract than rules.⁴³ To his mind a principle offers guidance, but principles provide diverging reasons. Again, Scholten anticipates Dworkin's theory of principles. 'When forming such rules principles will clash: one will push in this direction, the other in that direction.'⁴⁴ Of course, this may also go for policies.

However, there are also marked differences between legal principles (in a narrow sense) and policies. According to Scholten, a legal principle is a 'statement, which is for us — people of a certain time living in a certain country with a certain system of law — immediately evident.'⁴⁵ He connects this feature with the moral dimension of principles

³⁹ G. Pinder, 'The Coherent Principle Approach to Tax Law Design', 2005, www.treasury.gov.au. See also Avery Jones 1996.

⁴⁰ R. Krever, 'Plain English drafting, Purposive drafting, Principle-based Drafting: Does Any of it Matter?', in J. Freedman (ed.), *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management*, Oxford: Oxford University Centre for Business Taxation 2008, p. 194

⁴¹ P. Scholten, 'General Part' [*Algemeen Deel*], 1931 <http://www.paulscholten.eu/downloads/>, no. 252.

⁴² Scholten 1931, no. 252.

⁴³ This is a point of general agreement; see § 2.3.

⁴⁴ Scholten 1931, no. 252.

⁴⁵ Scholten 1931, no. 251.

(again, in the narrow sense). Like Dworkin, he maintains that the principle regards the moral element in law, which marks a clear difference with policies. The legislator – or another lawmaker – is not the author of legal principles. When the legislator puts some principle into written law, this act in itself doesn't turn it into law. Scholten argues that principles do not become law simply *because* 'the authority has declared it.'⁴⁶ Why? Because principles are the moral *a priori* of the written law. Principles precede the body of rules. The legal principle is found *in* the law.⁴⁷ They are 'anonymous' standards for they exist in the law independently of their elaboration by law-makers. In the end it is possible that the legal principle is neither explicitly stated, nor derivable from specific provisions, but that it is the assumption of the regulation of a legal domain as a whole, or sometimes of the law as a whole.⁴⁸

Consequently, law-making and law-applying institutions may develop principles but they do not create them.⁴⁹ They find legal principles in the legal system. Law-making and law-applying institutions are bound by legal principles.⁵⁰ The legislator may claim to have laid down a principle in legislation, or to have turned principles into a rule, but a court may examine this claim and judge otherwise. Thus, legal principles are instruments to evaluate existing law and, therefore, a source of legal protection against the power of lawmakers.

Here, a comparison can be made with the idea, found in the work of French philosopher Claude Lefort, that in a (constitutional) democracy the locus of power is not embodied by anyone, but is 'an empty place, it cannot be occupied [...] and it cannot be represented.'⁵¹ Lefort argues that in the (French) monarchy of the Ancien Régime, the locus of power was embodied by the king. His power was legitimated by his mediating position between the transcendent authority of God and the people. However, with the beheading of the king at the end of the eighteenth century, the symbolic locus of power becomes and remains an empty place. The symbolic locus of power in a democracy never coincides with the actual exercise of power. Democratic rulers cannot identify themselves with the locus of power, for they only hold public offices on a temporary basis, subject to a regular political and electoral competition.⁵² The rulers wield temporarily power on the basis of their interpretation of the will of the people which itself transcends all actual interpretations.

Furthermore, the open-ended nature of the democratic decision-making process reflects the ineliminable gap between any actual interpretation of the common good and the

⁴⁶ Scholten 1931, no. 269. Cf. G. Zagrebelsky, 'Ronald Dworkin's principle based constitutionalism: An Italian point of view', (2003) 4 *International Journal of Constitutional Law*, p. 625: 'The law governing hard cases consists of legal principles that are placed "above" the norms proposed by the legislator, and it circumscribes the decisions of judges [...] by pointing them in a certain direction.'

⁴⁷ Cf. Tridimas 2006, p. 1-2: 'the process of discovery of a general principle is par excellence a creative exercise and may involve an inductive process.' He briefly deals with several types of general principles in the legal system.

⁴⁸ In the same vein: L.M. Friedmann, *The Republic of Choice. Law, Authority and Culture*, Harvard University Press: Cambridge (Mass.) 1994, p. 71. Principles may render a developing legal system with an incomplete character more coherent; Grousot 2006, p. 10.

⁴⁹ Cf. Tridimas 2006, p. 5: the general principles law in the European legal order are 'unwritten principles extrapolated by the [European] Court [of Justice] from the laws of the Member States by a process similar to that of the development of the common law by the English court.'

⁵⁰ Cf. Tridimas 2006, p. 8 and 44: The general principles bind not only the European Community institutions but also the member states, including central government, local and regional authorities where they implement Community law.

⁵¹ C. Lefort, *Democracy and Political Theory* (trans. David Macey), Cambridge: Polity 1988, p. 17.

⁵² Cf. S. Rummens, 'Deliberation Interrupted: Confronting Jürgen Habermas with Claude Lefort', *Philosophy & Social Criticism* May 2008 Vol. 34 no. 4, p. 384-385.

ideal of the common good. Consequently, on the one hand, no person or institution has absolute, exclusive authority to determine the actual content of the common good, and, on the other hand, every actual exercise of power, every actual interpretation of the common good should be debated on the basis of – conflicting views of – the ideal of the common good. The ideal of the common good is the ‘source’ of critique as to what is legitimate and what illegitimate exercise of power in modern societies. Thus, the ‘empty place’ may be seen as a metaphor for the (ongoing) debate about what is considered legitimate power, and therefore, about (legal) standards that limit this power, without ‘any guarantor.’⁵³ There is no sovereign author of these standards. They have their origin not in decisions by public authorities, for these authorities only wield temporarily power to give an interpretation of these standards - which moreover govern their own conduct.

The same idea applies to fundamental legal principles. As shown above, their origin lies not in the will of some law-making institution, but ‘in a sense of appropriateness developed in the profession and the public over time.’ (see § 3) They never coincide with positive law. Law-making institutions concretize these principles, but their interpretations never exhaust the principles nor the values underlying the principles. The actual meaning and content of legal principles are not fixed, they are indeterminate in the sense that they change over time as a result of the interaction of legal institutions and legal and societal actors.⁵⁴ Laws are legitimate when they comply with fundamental principles, but they do not coincide with these principles. Rules are elaborations of principles which do not exhaust the meaning of principles. By the way, this is somehow reminiscent of an anti-positivist tradition in legal theory in which judges are the guardians of the principles of the rule of law. Here, judges using the common law as the value-laden background against which legislation is to be interpreted, are not seen as ‘setting themselves against the people’s will because that background, no less than legislation, is the product of the people.’⁵⁵ Judges can mould this value-laden background somewhat but are not allowed to force it completely to their will.

Again, positive law does never coincide with fundamental legal principles. There is a gap between all factual exercise of law-making power, which provides for specific determinations of fundamental legal principles’ content, and the fundamental legal principles which transcend all actual and temporary concretizations. Here, the metaphor of ‘the empty place’ implies a permanent debate about what is legitimate law. This is a debate about the applicable standards, i.e., about legitimate interpretations and applications of fundamental legal principles. The locus of the power of legitimate law-making is empty in the sense that these ‘anonymous’ principles are not any lawmaker’s property. They are a kind of standards to assess the legitimacy of the body of legal rules, external to law-making power (though internal to the legal system). Principles often are unwritten law, but even when they are enacted in statutes, they are not exhausted by this codification. Lawmakers are collectively stewards of fundamental legal principles. They have to respect and operationalize the principles that explain and justify the existing

⁵³ See Lefort 1988, p. 39.

⁵⁴ See C. Lefort, *The Political Forms of Modern Society*, Cambridge: Polity 1986, p. 23.

⁵⁵ D. Dyzenhaus (ed.), ‘Recrafting the Rule of Law’, in D. Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order*, Oxford / Portland (Oregon): Hart Publishing 2000, p. 3. He refers to anti-positivists who, ‘following a tradition most famously articulated by Sir William Blackstone, argue that the common law is [...] the legal repository of the moral values of the people.’

legal practice and shows the law in its morally best light.⁵⁶ Every law-making or law-applying institution is bound by legal principles, even when an external (institutional) check on its power is lacking, it should respect them.

Thus, a critical function of legal principles is made possible because the lawmakers are not the author of legal principles. Of course, they may formulate legal principles and turn principles into rules, but principles as such precede law-making. They are already present in the legal system, sometimes waiting to be discovered. Law-making has to elaborate on these principles. This point of view also explains Scholten's conviction that legal science (jurisprudence) has a special responsibility to trace legal principles in positive law.⁵⁷ Legal principles are the moral foundation of the law and no law can be understood without these principles. The search for the principle by legal science is also a search for coherence and systematisation. Combining certain provisions, the legal scholars asks themselves if they stem from the same principle and therefore if the principle supports such a combination. Scholten stressed the importance of this moral dimension for jurisprudence: 'Each time we hark back to the legal principle.'⁵⁸ Thus, principles play an important role in guiding legal doctrine. They are regulative ideals that make morally sound positive law possible. Moreover, they are ends at which law-making should aim. These principles, conceived of as regulatory ideals, are 'in their realization dependent on what is factually possible and on the legal possibilities as defined by other principles.'⁵⁹

5 RADBRUCH'S LEGAL PHILOSOPHY OF VALUES

5.1 A philosophy of values

As shown above, according to Dworkin and Scholten fundamental principles necessarily appeal to some moral value. For Dworkin, the rule of law is a set of values that shape and characterize the community in which people live (see § 2.2). Thus, the relationship between principles and values being established, another question has to be addressed: is there a philosophy of law which accounts for the fundamental role of legal values in the legal order? In order to do justice to the role of (fundamental) principles in law, a conception of law is required which connects principles to values – explaining why they embody the moral dimension of law par excellence. Only then it can be explained how lawmakers can balance principles and creation of rules, by taking into account the relative weight of each principle involved.⁶⁰

The German lawyer and legal philosopher Gustav Radbruch provides a value-oriented theory of law which enables us to elucidate the importance of legal principles, their place in the body of law and to understand some crucial features of principles. Interestingly, Radbruch opposed the command theory of law of legal positivism which

⁵⁶ Dworkin 1986, p. 228-238 uses the idea of a chain novel written by a series of authors (judges) to illustrate this point. As the novel gets longer, the successive authors find themselves more and more constrained by what has gone before. In the same vein, Kahn 1997, p. 92: 'Law's task is to maintain the past in the present and so to construct a future that is continuous with the past.'

⁵⁷ Scholten 1931, no. 253. Cf. no. 254: 'It could be that we find the legal principle by pointing out the common element in provisions which at first sight have nothing to do with each other.'

⁵⁸ Scholten no. 253.

⁵⁹ R. Alexy, 'Zum Begriff des Rechtsprinzips' [1979], in R. Alexy, *Recht, Vernunft, Diskurs*, Frankfurt am Main: Suhrkamp 1995, p. 205. See also R. Alexy, 'On the Structure of Legal Principles', *Ratio Juris* 13 (2000) 2, p. 294-304. As stated above, here I will not discuss the differences between Dworkin's theory and Alexy's optimization theory of principles.

⁶⁰ Principles firmly entrenched in the legal system may account for the testing of laws, and of administrative decisions, against principles, for example, the (fundamental, often constitutional) principle of legal equality.

in his wording 'held the law to be nothing but state caprice and the point of the law to be nothing but obedience.' He argues that the law should not be conceived of as the command of the state but primarily as a striving toward justice. We then must 'regard ourselves as called upon to collaborate in that effort and bring it to completion, called upon, then, not simply to serve the law but to serve justice within the framework of the law.'⁶¹ This quote makes clear that Radbruch refuses to stop at the law as it is posited, there is apparently more to law, i.e., the dimension of justice.

At the very core of Radbruch's legal theory is a philosophy of values, a clear reflection of the influence on Radbruch of – a branch of – neo-Kantian philosophy.⁶² The Heidelberg neo-Kantian school which influenced Radbruch followed Kant in distinguishing between 'is' and 'ought.' To their mind the strict distinction between reality and value translates into a division of labour between science and philosophy. They saw science as the examination of empirical realities and philosophy as the critical examination of values. Values imply an 'ought', the 'evaluative' stance.⁶³ Logic, ethics, aesthetics, the three traditional branches of philosophy, regard the supreme values of the true, the beautiful, and the good. Furthermore, there is nature and culture, which in turn are distinguished by their (non)relation to values. Nature has nothing to do with values. Culture, however, denotes the reality that is oriented towards values, aimed at the realization of values. It is thus practical, not pure reason.⁶⁴ Other than the natural sciences, therefore, the cultural sciences have human pursuits, constructs, relations, and actions as their object.

Radbruch develops his own theory on the basis of this systematization. Cultural sciences share the value-relating perspective, they study those realities that mean to realize values. In this way, they attempt to bridge the gulf between reality and value. Radbruch subsequently qualifies law as a cultural science. Law is oriented towards its 'own' supreme value, for Radbruch introduces a fourth supreme value, that of the idea of law (*Rechtsidee*) or justice (*das Gerechte*). Law then is the appropriate subject of the value-relating perspective. Law as a cultural phenomenon is a fact related to value, which can only be understood like any human creation as meant to realize its 'idea.' Thus the philosophy of values shapes the way in which Radbruch conceptualizes law: 'The law is the reality whose meaning is to realize justice.'⁶⁵ In short, the concept of law is a cultural concept, a concept related to value, viz. justice. Radbruch's idea of law is a regulative idea, because, transcending positive law, it is an end at which we aim our law-making and actions. The idea of law guides the concretization of law, but this positive law only is a partial concretization of the idea of law.⁶⁶ The idea of law is (progressively) approximated but never in fact actually realized. As shown above,

⁶¹ G. Radbruch, *Ihr jungen Juristen!* (Berlin: Verlag Gesellschaft und Erziehung, 1919), p. 13, quoted by S.L. Paulson, 'Statutory Positivism', *Legisprudence* Vol. 1 (2007) 1, p. 15 both quotes.

⁶² See Radbruch's acknowledgements to the Heidelberg neo-Kantians Wilhelm Windelband, Heinrich Rickert, and Emil Lask in G. Radbruch, *Legal Philosophy*, (trans. K. Wilk), in *The Legal Philosophies of Lask, Radbruch, and Dabin*, Cambridge (Mass.): Harvard University Press 1950, p. 49.

⁶³ See Radbruch 1950, p. 49-52. Cf. S. Taekema, *The Concept of Ideals in Legal Theory*, The Hague [etc.]: Kluwer Law International 2003, p. 49-50.

⁶⁴ W. Friedmann, *Legal Theory*, London: Stevens & Sons 1967, p. 192 point at the difference with Hans Kelsen's positivism according to which the essence of law is a 'formal ordering of norms.'

⁶⁵ Radbruch 1950, p. 75.

⁶⁶ The guidance towards the idea of law is the Kantian notion of the regulative idea of law. Cf. J. Stone, *Human Law and Human Justice*, Sydney: Maitland Publications 1965, p. 171: 'This guidance falls short of being a criterion, for it points in the direction of just solutions, rather than fixes their locus and description.'

Radbruch adopts the notion of striving toward justice in contradistinction with the command theory of law. He clarifies this notion of the striving with his claim that the concept of science turns on a striving toward the truth, whether or not the truth is ever attained.⁶⁷ According to Radbruch:

The concept of science is not identical with the value of truth; the science of an age embraces not only its scientific achievements, but also its scientific errors. When we bring together in the concept of science the failures as well as the successes of science, we do so because all these efforts at least strove toward the truth and claimed to be true: Science is that which, whether attaining or falling short of the truth, still has the significance, the sense, of serving the truth.⁶⁸

In the concept of law we find a counterpart to the striving toward the truth, namely, the striving toward justice, whether or not justice is realized in the end. This striving toward justice is the core of Radbruch's concept of law which has a normative function and is regulative.⁶⁹ Law-making is aimed at this regulative idea(l).⁷⁰

Note that this philosophy of values is about basic or fundamental values, in other words, the ultimate and pervasive values to underlie (public and private) law.⁷¹ The term values is often used in a broad sense referring to interests, pleasures, likes, preferences, duties, moral obligations, desires, wants, needs, aversions, and many other modalities of selective orientation.⁷² The sociologist Giddens defines values as 'ideas held by human individuals or groups about what is desirable, proper, good, or bad.'⁷³ However, from the perspective of a philosophy of values one should be on one's guard against 'value devaluation',⁷⁴ for these values are incomparable to the supreme values of the true, the beautiful, the good, and the idea of law (justice). According to Radbruch law is not just a social fact, because it is value-oriented. Radbruch's values, therefore, resemble 'values' as they are used in moral philosophy: 'goods that by their nature enhance life or a world or negatively are things by their nature would make a life or a world less desirable.'⁷⁵ Moreover, they are objective values which are generally favoured because they relate to some basic human good, they are goals or reasons for action for all impartial rational persons.⁷⁶ Values in a sense are purposes ultimately motivated by an understanding of a basic human good, and not 'by nothing more than feeling.'⁷⁷ Finally, ultimate values such as fairness and justice are a special kind of goods we regard as intrinsically valuable: we value them for their own sake regardless of any other things

⁶⁷ Cf. S.L. Paulson, 'Statutory Positivism', *Legisprudence* Vol. 1 (2007) 1, p. 25.

⁶⁸ Radbruch 1950, p. 50 (translation altered by Paulson (2007)).

⁶⁹ Cf. Paulson 2007, p. 24.

⁷⁰ Cf. Simmonds 2007, p. 9.

⁷¹ D. Oliver, 'The Underlying Values of Public and Private Law', in M. Taggart (ed.), *The Province of Administrative Law*, Hart Publishing: Oxford 1997.

⁷² Twining & Miers 2010, p. 86.

⁷³ A. Giddens, *Sociology*, Cambridge: Polity 1991, p. 732.

⁷⁴ K. Economides, 'What are fundamental legal values?', in K. Economides a.o. (ed.), *Fundamental Values*, Oxford/Portland: Hart Publishing 2000, p. 13.

⁷⁵ J.J. Kupperman, *Value ... And What Follows*, New York/Oxford: Oxford University Press 1998, p. 3.

⁷⁶ Cf. B. Gert, *Morality: Its Nature and Justification*, New York/Oxford: Oxford University Press 1998, p. 94-95 'Moral values, like goods and evils, are objective values [...] that all impartial rational persons wants everyone to have, other than e.g. 'family values' and 'religious values', which are 'favored by everyone favoring a certain kind of family or religion.'

⁷⁷ J. Finnis, 'Natural Law and Legal Reasoning', 1990, *Scholarly Works Paper* 79
<http://scholarship.law.nd.edu/law_faculty_scholarship/79>

we may value.⁷⁸ Thus, as Habermas clarifies, values are teleological. A value, insofar as it is a criterion for action and not simply the result of an evaluation, is the final goal that requires its realization through teleologically oriented activities. Like principles, different values compete for priority in concrete situations, they 'form flexible configurations filled with tension.'⁷⁹

To conclude, this section, it may seem that values are something 'out there', something transcendent without any connection to reality. As shown above, a dichotomy exists between 'is' and 'ought.' However, the value-relating perspective of law softens this gap between value and reality, for law must be conceived as a totality of facts and relations, whose purpose is to realize justice. The idea of the 'material qualification of the idea' (*Stoffbestimmtheit*) – signifying a mutual influence between matter and idea – provides another bridge. The idea of the *Stoffbestimmtheit* of the idea of law means that the idea of law, is related to its matter, law. The idea of law, justice, therefore is not a free floating value. Justice both determines and is determined by the reality of law.⁸⁰ The idea of the *Stoffbestimmtheit* is part of the legal doctrine of the 'nature of the thing' (*Natur der Sache*), which is essentially the idea that existing factual relations in part determine what rules and principles should regulate these relations.⁸¹ Making new regulations, one should take into account of existing natural, social and legal facts which set boundaries to the freedom to design new rules – to policy considerations. Moreover, our ideas themselves about law are limited by the historical era we live in. Though all this probably does not imply a reconciliation of complete fact and value no, they are somehow brought together. Legal values are not mere abstractions but are elaborated and clarified in concrete situations.

5.2 The Idea of Law

So, the point of departure of Radbruch's value theory of law is the idea that law aims to realize justice (although law does not necessarily serve it in fact); the idea of law is the specific regulative value of law. The idea of law initially refers to justice – but Radbruch quickly expands it beyond expands the idea of law beyond justice per se. However, the idea of law or justice is not something which has an existence of its own, independent from the reality of law. Justice both determines and is determined by positive law. Moreover, Radbruch's is a tripartite conception of the idea of law; he distinguishes three elements of justice that the law aims for: legal equality, purposiveness, and legal certainty.

Equality demands like cases to be treated alike, and unequal treatment to the degree of dissimilarity (inequality). This formal element, equality, does not determine the content of law, which depends on the purpose of law. Therefore, in order to know, who should be regarded as (un)equal and how to treat them, one needs another (fundamental) value. Here '*Zweckmäßigkeit*' comes in. This second value refers to the purposiveness of law. This notion seems to have not much clear empirical reference because the idea of the purpose of law must be sought in ethics.⁸² It embraces the notion of the general interest

⁷⁸ J. Raz, *The Morality of Freedom*, Oxford: Oxford University Press 1986, p. 200.

⁷⁹ J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (trans. W. Rehg) Cambridge: Polity 1996, p. 255. Cf. Zagrebelsky 2003, p. 627.

⁸⁰ Radbruch 1950, p. 54ff. Cf. Taekema 2003, p. 51-52.

⁸¹ Cf. Taekema 2003, p. 52.

⁸² Cf. Stone 1965, p. 242 –245. J. Rawls, *A Theory of Justice* (rev. ed.), Oxford: Oxford University Press 1999, makes a comparable distinction between the concept of justice and specific conceptions of justice, which 'helps to identify the role of the principles of social justice' (p. 5). The concept of justice is abstract and formal and requires that we treat like cases alike, and different cases differently. Different conceptions

(*Gemeinwohl*).⁸³ Consequently, the purpose of law is the good which is determined by the political theories of the day. This second value is the gateway through which all kind of societal and ethical values may enter the legal system. I would suggest that these different societal and ethical values account for all kinds of policy goals in the legal system.⁸⁴ As a result, 'values have to contend with other considerations in the law and legal policy.'⁸⁵ However, there are many views (theories) about the good (society), and therefore about the actual purpose of law. According to Radbruch, a final determination of the purpose of law is impossible. So a choice between the many views about the actual purpose of law has to be made, to provide one order for all. For 'the law *qua* framework for living together cannot be left over to the differing opinions of individuals. It must stand as a *single* framework for all.'⁸⁶ Here the third element comes in: the value of legal certainty, which requires that law be positive. By introducing the value of 'Zweckmäßigkeit' the relation between law and other domains, e.g., politics, morality and economics, is conceptualized. The external – e.g., societal and statal – input from these domains into the legal order has to pass the filter of equality and legal certainty.⁸⁷

I will not elaborate further on Radbruch's theory, but restrict myself to one more remark on the relation between these fundamental values. Each of these values exerts a pull in a one direction, but undesirable overconcentration is kept in check by the countervailing forces of the other two values. In practice, these components of justice must be constantly weighed and balanced, for there is no hierarchy between these fundamental legal values.⁸⁸ This accounts for their non-conclusiveness, which they have in common with principles (see § 2.1 & 2.3).⁸⁹ 'Non-conclusiveness' is a crucial feature of values, no legal value may be made absolute. Though Radbruch himself gives great weight to legal certainty, with the experience of the chaotic political situation of the German Weimar republic in mind, after World War II he made clear it should not be given precedence even in cases of extreme injustice, for this 'could not be reconciled with the

of justice supply different principles in the light of which to determine when cases are materially alike and when materially different.

⁸³ Cf. G. Radbruch, 'Der Zweck des Rechts', in G. Radbruch, *Der Mensch im Recht: Ausgewählte Vorträge und Aufsätze über Grundfragen des Rechts*, Göttingen: Vandenhoeck & Ruprecht 1957, p. 88-104. Friedmann 1967, p. 193 rightly states that the question of what is ['Zweckmäßigkeit'] can only be answered 'by reference to different conceptions of state and law.'

⁸⁴ This way societal values feed into the legal order, e.g. the five key values identified by Oliver specifically in public law: autonomy, dignity, respect, status and security; Oliver 1997, p. 223.

⁸⁵ Oliver 1997, p. 224. That is one of the reasons she does not regard values as rights, though rights are expressions of, or means to, protect values.

⁸⁶ G. Radbruch, 'Legal Philosophy', in *The Legal Philosophies of Lask, Radbruch and Dabin*, Cambridge (Mass.): Harvard University Press 1950, p. 108 (transl. Paulson; see S.L. Paulson, 'Radbruch on Unjust Laws', (1995) *Oxford Journal of Legal Studies*, Vol.15 Autumn, p. 495).

⁸⁷ The values of legal equality and legal certainty constitute guarantees for a kind of autonomy of the law. Cf. Taekema 2003, p. 87-88.

⁸⁸ Cf. Economides 2000, p. 9: 'the fundamentality of a so-called legal value could be linked more to the fact that it is regularly associated with legal thought or action rather than having any intrinsic claim to status within legal hierarchies.'

⁸⁹ To my mind, the need to balance values is a check on the 'implicit totalitarian propensity', sometimes attributed to values. See Zagrebelsky 2003, p. 628 on this tendency. R. Dworkin, 'Response to overseas commentators', (2003) 4 *International Journal of Constitutional Law*, p. 653 seems to differ with Zagrebelski, speaking of his 'provocative distinction between values and principles.' However, Zagrebelsky concludes that: 'Much of the criticism directed at a "jurisprudence of values" should not be levelled against a "jurisprudence of principles.'

claim to correctness, which includes justice as well as legal certainty.⁹⁰ In effect, what is at stake is the best balance of the relative positions of these legal values – their exact meaning needs to be discovered and is moulded in every new situation. New facts and situations may account for a little shift in the balance between the three values.

Other fundamental legal values may be distinguished, e.g. impartiality and integrity. More important here, however, is the idea that legal values are necessarily very abstract. They cannot be identified with norms which are directly applicable: they can hardly be conceived as guidelines for human behaviour. Therefore, values as the (very abstract) expressions of people's basic commitments need a more concrete shape. Norms are the action-oriented concretizations of values. Likewise legal values find their more concrete shape in legal principles. These principles are guidelines to realize legal values.

Elaborating further on Radbruch's theory of law, one can say that norms and values, evolving over time, are not imposed on society by a sovereign power. In a way, they form a bulwark against (legislative) voluntarism – as defended by a command theory of law. Law seeks to implement legal values, such as equality, impartiality and certainty, which can be regarded as legal translations of important social and cultural values. These values – with norms as their sediment – guide the interactions and relations between free and equal people. No other institution than society can be regarded as the author of values. However, the entering of these social and cultural values, mixed with political values and policies, into the legal system is filtered by the values of legal certainty and legal equality. The latter mould the way in which those values permeate the legal system. This way the semi-autonomous legal system is a responsive system with sensitivity to policy, with some internal safeguards against the power of the state. On a more concrete level legal principles are, in a similar manner, translations, not reproductions, of societal norms within the legal system.

6 LEGAL PRINCIPLES AS THE NORMATIVE CORE OF LAW

It is time to recapitulate our quest up till here. Legal principles fit in a value-oriented theory of law. They are concretizations of legal values in the legal system. Legal principles may specify legal values as a whole: these fundamental legal principles are common denominators of the various sections of the legal system. Legal principles may also specify legal values in a specific part of the legal system, e.g., public or private law, or even a more specific subdivision of law, tort law or tax law. A principle can be supported by another more general one; general principles are often used to justify more specific ones.⁹¹ So they exist at varying levels of generality in the legal system. In the next section, we will take a closer look at the meaning of principles in modern law.

Law is connected to the fundamental norms and values prevalent in a society of free and equal citizens by means of fundamental legal principles. Principles can be considered as expressions of legal values, and constitute the normative core of law in a

⁹⁰ R. Alexy, 'A Defence of Radbruch's Formula', in Dyzenhaus (ed.) 2000, p. 32-33. Cf. Simmonds 2007, p. 173-176.

⁹¹ Fundamental legal principles may be conceived of as supreme principles of law. Subsequently mid-level principles can be distinguished, i.e., principles which are subordinate to those fundamental principles. Their justification usually refers to fundamental legal principles. Consequently, mid-level principles are not as general as fundamental principles, 'although they can be quite general'; Bayles 1986, p. 50. Bayles argues for mid-level justification: mid-level principles have an important place in legal justification and applied normative legal thought can profit from working within a theoretical framework of shared mid-level principles rather than immediately recurring to the abstract standpoint of fundamental ethical theory or supreme principles (or supreme values).

modern democratic state. Principles can be conceived as applications of fundamental legal values; thus principles are 'at a lower level on the ladder of abstraction.'⁹² Now, we can combine Radbruch's value-oriented theory of law with a conception of law which assigns to principles, because of their normative quality, a crucial place. Fundamental legal principles serve legal values. Therefore, a legal principle is to be observed as a standard because it is a requirement of the internal morality of law, which is, however, connected to society's moral values. As argued above, legal principles are standards which are specific for the law. Though they are influenced by the moral values of a society, they are not purely moral principles.⁹³ There is no identity between legal principles and moral ones.⁹⁴ Legal principles are like a concretizations of legal values – which in turn are translations of moral values outside the legal system. Law, therefore, is not an autonomous legal system. The development and actual meaning of legal principles is coloured by extra-legal influences, like the prevailing norms in society or the practice which the law aims to regulate.⁹⁵ Legal principles, therefore, are internal standards generated and developed by the legal system itself – although they are influenced by morality. Law-making institutions are collectively their stewards, not their authors. They have to develop these principles in a collaborate effort (mutual conflicts and irritations cannot be ruled out). In the context of this collective responsibility for the integrity of law, principles have an inter-institutional function: justification to other institutions. Robert Nozick argues that in this way, justification by general principles is convincing in two ways. First, by the face appeal of the principle, and, secondly, 'by recruiting other already accepted cases to support a proposition in this case.'⁹⁶

Principles are intermediaries between legal values and positive law, i.e., legal rules.⁹⁷ In other words, a principle is 'the *medium* in which we find a moral opening to the value and a practical opening to the rule.'⁹⁸ Rules, in the form of general and established laws, form the basis for government's interference with the liberties of the citizen. Government of laws and not of men is rule-governance. Making the law rule thus has a double meaning: legality of government and enforcement of law. In this formal sense of the rule of law, the rule of law is the rule of rules.⁹⁹ But 'this idea is an impoverished notion of the rule of law', argues Aharon Barak. This formal understanding of the rule

⁹² Oliver 1997, p. 224. According to Twining & Miers 2010, p. 387 a ladder of abstraction is 'a continuous sequence of categorisations from a low level of generality up to high level of generality.'

⁹³ R. Dworkin, 'Philosophy, Morality, and Law', *University of Pennsylvania Law Review* 113, no. 5 (March 1965), p. 668-690 argues that a moral principle cannot be established by deliberate act, as some sorts of law can. In the same vein, see Hart 1994, p. 175: unlike legal rules, moral rules or principles cannot be changed by deliberate enactment.

⁹⁴ Cf. Dworkin 1977, p. 342: Natural lawyers advocate that there 'can be no difference between principles of law and principles of morality.'

⁹⁵ Actual moral principles will be among the influences on the actual content of general legal principles.

⁹⁶ R. Nozick, 'How to Do Things with Principles', in R. Nozick, *The Nature of Rationality*, Princeton: Princeton University Press 1993, p. 6.

⁹⁷ Cf. Radbruch 1950, p. 75: 'Justice needs to be complemented by other principles if rules of rules of right law are to be derived from it.' Note that Radbruch uses the concept of 'principle' instead of 'value' which suggests a not very sharp distinction between the two concepts, both indicating the value-relating perspective.

⁹⁸ Zagrebelsky 2003, p. 632. This also goes if one distinguishes between fundamental legal principles and mid-level principles. Then, mid-level principles 'are needed in the justification of rules in order to delineate them more elaborately or relate them systematically'; K. Henley, 'Abstract principles, Mid-level principles and the Rule of Law', *Law and Philosophy* Vol. 12 (1993), p. 125.

⁹⁹ Cf. L. Alexander & E. Sherwin, *The Rule of Rules. Morality, Rules and the Dilemmas of Law*, Durham/London: Duke University Press 2001.

of law is satisfied even in a dictatorship. Therefore, the legal rules must meet certain minimum standards. Legal principles constitute fundamental standards. Legal principles embody the 'internal morality of law', the moral core of law and refer to fundamental values of morality (of aspiration¹⁰⁰). Values and principles create a 'normative umbrella' and 'every legal norm seeks to give effect to these values.'¹⁰¹ Hence, the body of rules is legitimate if it is (*grosso modo*¹⁰²) consistent with the internal morality of law.

Thus, legal rules should be made by weighing and balancing principles. Taking into account the relative weight of intersecting principles is a normative process based on the identification of the relevant values and principles. Colliding principles make visible what values are really at stake on a deeper level.¹⁰³ Behind the metaphorical speech of 'balancing' and 'weighing' hides the assessment of the relative societal importance of the conflicting values and principles. The act of weighing is a normative act that is intended to grant the various reasons and considerations 'their proper place in the legal system and their societal worth in the totality of societal values.'¹⁰⁴ In this way, principles are the normative basis for the creation of rules. The validity of these principles cannot be derived from the authority or power of a specific person or institution. These principles are to be considered as vehicles in the movement back and forth between values and legal rules. Rules are to be seen as operationalizations of principles. Consequently, rules have a more concrete and 'technical' character than principles and are normally less value laden. Law-making and law-applying institutions concretize and weigh principles into rules which are directly applicable ('in an all-or-nothing fashion'). Moreover, principles set boundaries on acceptable solutions, on political consensus. Sometimes, for example, when it is a question of safeguarding 'rights that have a price' the 'minimum content' of the relevant principles must be taken into consideration – thereby limiting the discretionary power of the legislator.¹⁰⁵

7 TAXATION: SOME APPLICATIONS

7.1 Introduction

It's time to turn to taxation and show the way the model of principle enhances our understanding of law-making and the application of law in this field. Since fundamental legal principles constitute the legal expressions (translations) of the basic values of a society and the legal system, law-making should conform to legal principles. Similarly, government bodies, implementing the – written – laws are not only bound by the law promulgated by the legislature (on the basis of the principle of legality) but also by legal principles. Thus, officials confirm the commitment to a coherent set of principles, to the ideal of integrity in law: 'the promise that law will be chosen, changed and developed,

¹⁰⁰ Cf. Fuller 1977, p. 43: 'the inner morality of law is condemned to remain largely a morality of aspiration and not of duty.'

¹⁰¹ A. Barak, *The Judge in a Democracy*, Princeton: Princeton University Press 2006, p. 57. For Barak, as for many legal scholars, norms denote the genus, whereas principles and rules are the species. Cf. Zagrebelsky 2003, p. 629-630.

¹⁰² A body of rules which perfectly reflects the internal morality of law is simply not possible. See M. Kriele, *Recht und praktische Vernunft*, Göttingen: Vandenhoeck & Ruprecht 1979, p. 11.

¹⁰³ Cf. J. Pontier & E. Burg, *EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters according to the Case Law of the European Court of Justice*, The Hague: T.M.C. Asser Press 2004, p. 12ff.

¹⁰⁴ Barak 2006, p. 168. Cf. Friedmann 1994, p. 71: 'Rules in the modern state, no matter how technical, ultimately [...] depend on social norms and moral ideas.'

¹⁰⁵ Zagrebelsky 2003, p. 645.

and interpreted in an overall principled way.’¹⁰⁶ Again, this also goes for taxation. Taxes, therefore, should be levied in accordance with fundamental legal principles.

As stated above, debating case law in terms of principles may reveal a degree of consistency which otherwise would not be visible. Outcomes in concrete cases may seemingly completely lack consistency. However, tracing the underlying principles at stake may show principled coherence, for principles state reasons which argue in one direction, but do not necessitate a particular decision. The collision of principles, therefore, gives insight in the underlying diverging reasons.¹⁰⁷ Thus a relevant principle (reason) contributes to the decision even when it does not prevail – and may be decisive in the next case or situation to be decided.

Consequently, the body of tax laws – statute law, case law, and the decisions and regulations of the tax administration – should be consistent in principle. This implies that law is not legitimized only because it is issued by authorized institutions. Rather, legal principles function as essential criteria of evaluation, in the sense that the legislator is bound by legal principles. Of course, legal rules should be created by authoritative bodies. At the same time, however, they ought to be by and large consonant with fundamental legal principles. Legitimacy of positive law is guaranteed by its conformity to general legal principles. Legitimacy requires a substantive evaluation as to whether rules agree with the principles of law.¹⁰⁸

I will now deal with some examples in the field of tax law to show the added value of the principle-based method of (legal) reasoning.

7.2 Tax sovereignty and free movement

A fine example of a principle-based approach is Douma's reconstruction of the case law of European Court of Justice (ECJ) with regard the interpretation and application of the free movement provisions of the Treaty on the Functioning of the European Union (TFEU) in direct taxation cases. Here, the point of departure is ‘the conflict between two areas of legal competence of which the rules are more or less carved in stone.’¹⁰⁹ Although, as European Union (EU) law stands at present, direct taxation does not fall within the purview of the European Union, the powers retained by the member states must nevertheless be exercised consistently with EU law. The conflict between the two areas of legal competence can be modelled in terms of principles.

It is settled ECJ case law that EU law (striving for an internal market without frontiers) takes precedence over national law and that the free movement of goods, persons, services and capital provisions of the TFEU have direct effect. Consequently, any

¹⁰⁶ Dworkin 1986, p. 214. Legal principles may also offer guidance to taxpayers, see J.L.M. Gribnau, ‘Corporate Social Responsibility and Tax Planning: Not by Rules Alone’, forthcoming.

¹⁰⁷ Cf. J. Lang, ‘The Influence of Tax Principles on the Taxation of Income from Capital’, in P.H.J. Essers & A.C. Rijkers (eds.), *The Notion of Income from Capital*, Amsterdam: IBFD 2005, p. 13: ‘It is a common experience of law that every basic principle is limited by other basic principles, limited by the task of the law to consider a great variety of interests and limited by the real circumstances to enforce the law.’

¹⁰⁸ As Spinoza already observed, the power and the right of a legislator depend on the way it uses its competencies. Unlike the positivist Hobbes, he views law as not simply voluntas or will. Cf. H. Gribnau, ‘The Power of Law, Spinoza's contribution to Legal Theory’, in A. Santos Campos (ed.), *Spinoza and Law*, Aldershot: Ashgate forthcoming.

¹⁰⁹ Douma 2011, p. 3. He applies Alexy's theoretical optimization model, one reason being that this ‘theory does not juxtapose principles and policies’, which fits well in with ECJ's case law (the rights which individuals derive from the EU free movement provisions do not automatically trump the policies that EU member states pursue through their tax systems (p. 34).

national tax measure which contravenes a free movement provision is rendered automatically inapplicable.¹¹⁰ Nonetheless, the EU member states as a matter of principle retain extensive competences in tax matters. They remain free to determine the structure of their tax system and to determine the need to allocate between themselves the power to tax. Moreover, apart from these 'internal' objectives, the member states are also at liberty to pursue 'external' objectives through tax measures, e.g., the protection of the environment or stimulation of research and development. Consequently, the ECJ, interpreting and applying TFEU's free movement provisions, has to reconcile the consequences of the fiscal sovereignty retained by EU member states with the obligations flowing from the EU law. 'How should sovereign rights be reconciled with the obligations enshrined in the EC Treaty?'¹¹¹

As Douma argues, the literature on this subject traditionally attempts to identify mistakes or missed opportunities by the ECJ by taking generally accepted principles of national and international tax law and existing ECJ case law as a starting point. In his view, this 'internal' approach cannot lead to a satisfactory answer to the question of whether the ECJ case law is correct or incorrect with respect to the reconciliation of national direct tax sovereignty and free movement, for it results in an oversimplified discussion in which positions are taken which are often motivated only by referring to the position itself. Douma submits that a proper analysis can only be made in the light of an assessment model which is external to and independent of the ECJ case law. This model should account for the fact that one cannot say that free movement always prevails over national direct tax sovereignty, nor that national direct tax sovereignty always prevails over free movement. Theories, therefore, which regard some principles as being absolute – instead of relative – cannot serve as an inspiration for the development of a theoretical assessment model. Douma concludes that a theory is needed which regards national direct tax sovereignty and free movement as *prima facie* reasons or principles and which provides a framework for reconciling these principles. The framework should be designed in such a way that no principle would always trump the other. They should be given a very wide scope.¹¹² Otherwise, narrowing the scope of the relevant principles in advance, this would essentially result in one principle always trumping the other.

Douma subsequently develops a model that recognizes that free movement and national direct tax sovereignty are fundamentally equal principles which when conflicting in individual cases have to be balanced. The theoretical optimization model he proposes has six phases:

1. To which disadvantage does the tax measure lead?
2. Does the tax measure at issue have a respectful objective?
3. If yes, does the tax measure have a sufficient degree of fit in relation to its objective?
4. If yes, is the tax measure suitable to achieve its objective?
5. If yes, does the tax measure reflect the most subsidiary means to achieve its objective?

¹¹⁰ The Treaty on the Functioning of the European Union TFEU contains only a few possible exceptions which are almost never applicable to national direct tax rules.

¹¹¹ Douma 2011, p. 4.

¹¹² Cf. R. Alexy, *A Theory of Constitutional Rights* (trans. J. Rivers), Oxford: Oxford University Press 2002, p. 201: A wide conception of scope is one in which everything which the relevant constitutional principle suggests should be protected falls within the scope of protection.'

6. If yes, is the cost to free movement caused by the tax measure in proportion to the objectives pursued by it?¹¹³

Next, he analyses the ECJ's case law in the light of this assessment model. He shows that the vast majority of the case law perfectly fits the theoretical model. Moreover, he shows that the theoretical assessment model predicts future developments in the case law which would at present be regarded as highly controversial. Hence, this elaborated principle-based model makes a normative and a descriptive claim.¹¹⁴ The normative claim concerns the question as how the conflict between free movement and tax sovereignty should be resolved in theory. The model also makes a descriptive claim because it enables scholars to structure and understand ECJ case law as a coherent body of law.¹¹⁵ As such it is able to serve as an objective framework which can be used to assess whether the ECJ's case law in the area of direct taxation and free movement strikes a fair balance between the competing principles or not. To conclude, a principle-based model has added value, because it prescribes the method through which the conflict between free movement and tax sovereignty in the case at hand should be resolved – thus 'limiting the number of possible outcomes and structuring the analysis in a coherent manner.'¹¹⁶ Thus, legal certainty is enhanced.

7.3 Testing tax legislation

Another example of the relevance of fundamental legal principles in taxation is the testing of tax legislation against fundamental principles. Fundamental legal principles may function as a check on legislative power protecting citizens against arbitrary interferences with their lives, for these principles are also standards of behaviour for law-making institutions. In the Netherlands, the principle of equality restricts the legislative power to tax. This constitutional principle of equality is the most important judicial instrument to check seriously flawed tax legislation. Acts of Parliament are tested against international treaties (Art. 14 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), in conjunction with Art. 1 of Protocol No. 1, Art. 1 of Protocol No. 12 of the ECHR, and Art. 26 International Covenant on Civil and Political Rights (ICCPR)).¹¹⁷ Here, the court has to balance the principle of democracy and the principle of equality.

As with regard to the method of judicial interpretation, the Dutch Supreme Court always demands an objective and reasonable justification for any inequality of treatment. This is in conformity with the method applied by the European Court of Human Rights. The Court underlines the significance of the principle of equality for fair tax legislation. After all, each violation of the principle of equality damages the integrity of the tax

¹¹³ Douma 2011, p. 117ff.

¹¹⁴ Dworkin also makes a descriptive and a normative claim. Cf. R. Dworkin, 'Principle, Policy, Procedure', in R. Dworkin, *A Matter of Principle*, Oxford: Oxford University Press 1985, p. 75-77.

¹¹⁵ Douma 2011, p. 296.

¹¹⁶ Douma 2011, p. 296. Thus the conceptual framework makes it possible to assess, explain and predict (future) ECJ case law in the area of direct taxation.

¹¹⁷ The principle of equality is enshrined in Article 1 of the Dutch Constitution. However, Acts of Parliament may not be tested against the Dutch Constitution, for it is the legislature's prerogative to decide upon the question of whether a statute violates any fundamental right (Art. 120 of the Dutch Constitution). However, Art. 94 of the Constitution provides that no national regulation may conflict with treaty provisions 'that are binding on all persons.' Consequently, if treaties contain general principles of law, the courts can test provisions of Acts of Parliament against these fundamental legal principles. See H. Gribnau, 'Equality, Legal Certainty and Tax Legislation in the Netherlands: Fundamental Legal Principles as Checks on Legislative Power: a Case Study', <www.utrechtlawreview.org>, Vol. 9, Issue 2 (March) 2013.

system. Nonetheless, the Supreme Court often acknowledges the wide margin of appreciation of the democratically legitimized legislator. The Court differentiates between fundamental and technical distinctions in tax legislation. It allows the legislator to have relatively little margin of appreciation when fundamental aspects are at stake. However, most cases are related to technical distinctions in tax statutes. Only in very evident cases has the Court sometimes decided that technical distinctions in a tax statute are discriminatory – a (very) wide margin of appreciation of the legislator is acknowledged. If the Court establishes a violation of the principle of equality, it acts very carefully. If no unambiguous resolution is available to eliminate the unjustified unequal treatment of equal cases, the Court leaves the choice to the legislator, which subsequently has to bring the legislation into line with the principle of equality in the short term (*terme de grâce*). If anything, a detailed analysis of Dutch case law with regard to the testing of tax legislation against the principle of equality shows that constitutional review is in no way an all or nothing affair.¹¹⁸ Hence, the Court could not develop rules out of the weighing and balancing of principles.

7.4 From principles to rules

7.4.1 Introduction

Rules are vital to a legal system. General rules solve problems of coordination, expertise, and efficiency. They reduce the uncertainty, error, and controversy that result when individuals follow their own unconstrained judgment. Rules can be seen as authoritative settlements that are ‘more general than the controversies and questions already resolved and thus anticipate and resolve controversies and questions that have not yet arisen.’¹¹⁹ Nonetheless, rules need underlying principles. Fundamental legal principles guide and constrain rule-making, rule-application and rule-following.

Principles may collide. As shown above, reasoning according to the model of principle thus may involve the creation of rules by balancing legal principles. But how are principles elaborated into rules in concrete situations? How do they become a reality in tax practice and not just an abstraction? Here, the case law of the Dutch Supreme Court may – once more - serve as an example. It shows how to do things with principles in the field of the implementation of tax laws. On the one hand, it has developed principles of proper administrative behaviour and, on the other hand, it has elaborated these principles in so called priority rules.¹²⁰ Thus, priority rules may concern the ranking and application of very abstract principles of justice,¹²¹ but also less abstract legal principles in the field of tax law.

¹¹⁸ See R.H. Happé & J.L.M. Gribnau, ‘Constitutional Limits to Taxation in a Democratic State: The Dutch Experience’, 2007 *Michigan State Journal of International Law* Vol. 15, No. 2 and Gribnau 2013.

¹¹⁹ Alexander & Sherwin 2001, p. 18.

¹²⁰ I use the term ‘principles of proper administrative behaviour’ instead of the literally translation of Dutch term ‘principles of proper administration’ (*beginselen van behoorlijk bestuur*) in order to highlight that these principles concern the behaviour of the (tax) administration. Cf. Tridimas 2006, p. 410ff. about the principle of ‘good’ or ‘sound’ or ‘proper’ administrative behaviour in EU law.

¹²¹ Rawls 1999, p. 267.

7.4.2 Principles of proper administrative behaviour

Discussing principles of proper administrative behaviour with regard to acts of the tax administration, we should be aware of the special force of the principle of legality in tax law. This rule of law requirement of general legislation, an important safeguard against arbitrary interferences with individual rights and liberties by the public authorities, is of special importance in tax law.¹²²

The tax administration applies the general laws within the limits of the powers vested in them on the basis of other legal rules. Part of its work is to determine the elaboration of the content of the general rules. This elaboration of tax legislation is inevitable because of the deficit of regulative capacity inherent to the normative structure of the rule of law. The general tax laws, with their formal characteristics of limited flexibility and reduced capacity for adaptation and self-correction, seem ill-suited to the 'exercise of effective and timely control of the growing variety and variability of the cases which emerge from a complex society.'¹²³

The tax administration has to apply the general and abstract norm, but often cannot but determine the content of the norm *in concreto*. It has to concretize, clarify, and specify — not just state — the norms of the general law.¹²⁴ The tax administration often has to make a choice as to the specific meaning of a general norm. To enhance consistent application by all the member of the tax administration policies are formulated containing standard interpretations and applications of legislation and judicial rulings. These policies are often laid down in rules and disseminated within the administration in order to be applied by tax inspectors.¹²⁵ These policy rules enable the tax inspectors to coordinate their behaviour with each other, to secure a reduction in individual decision-making error, and a reduction in individual decision-making costs.¹²⁶ These rules are established by the most specialized and experienced tax inspectors within the tax administration and have to be applied by the other tax inspectors and their assistants. Policy rules constrain the latter decision-makers in determining what they want to take into account. In this way, these administrative rules operate as tools for the allocation of power, determined by comparative competence, 'to consider certain kinds of facts, reasons, and arguments.'¹²⁷ Without these policy rules, the latter would be less constrained in their power to take into account. These policy rules are often published, providing the taxpayer with guidance as to the expected behaviour of the tax

¹²² As regards tax matters, the principle of legality is entrenched in the Dutch Constitution. Article 104 states that taxes imposed by the State must be levied pursuant to an Act of Parliament ('*uit kracht van een wet*'). Other levies imposed by the State must be regulated by Act of Parliament. Article 104, therefore, does not cover taxation by lower legislative authorities.

¹²³ D. Zolo, *Democracy and Complexity. A Realist Approach*, University Park: The Pennsylvania State University Press 1992, p. 127-128.

¹²⁴ H. Gribnau, 'Separation of Powers in Taxation: The Quest for Balance in the Netherlands', in A.P. Dourado (ed.), *Separation of Powers in Tax Law*, European Association of Tax Law Professors International Tax Series Vol. 7, Amsterdam: IBFD 2010, p. 169-170.

¹²⁵ To be sure, policy rules (*beleidsregels*) are concerned here, not secondary legislation on the basis of some kind of delegated legislative power conferred by an Act of Parliament. These policy rules, sometimes also known as "quasi-legislation", are laid down by an administrative body as a form of self-regulation over the exercise of its administrative powers. That is the reason why citizens nor courts are bound by these policy rules.

¹²⁶ Alexander & Sherwin 2001, p. 14-36.

¹²⁷ F. Schauer, *Playing by the Rules*, Oxford: Clarendon Press 1991, p. 158. This allocation enables efficient decision-making and the equal treatment of like cases in bureaucratic organisations like the tax administration.

administration. Thus, the taxpayer may derive legal certainty from administrative rules.¹²⁸

As a result, the citizens are often not governed by the provisions of statutes but by their specification in policy rules. Moreover, most citizens do not have much knowledge of the tax legislation in force and depend for their knowledge of tax law on communications by the (Dutch) tax administration. The tax administration, for example, may provide general information to a taxpayer, or to taxpayers in general by way of policy rules, for example on its website, but may also promise a taxpayer to apply the tax law in a certain way. Given this importance of policy rules and other communications the question is whether citizens can rely on them. Suppose a citizen invokes a policy rule, information or promise that is more favourable than the legislation.¹²⁹ The tax inspector, however, imposes an assessment in accordance with the less favourable legislation. The tax inspector deviates from the policy rule, from information previously provided or from his promise. Here, certainty derived from a statute conflicts with certainty derived from a communication on behalf of the tax administration. Hence, two aspects of the principle of legal certainty collide. What should the court decide when the taxpayer lodges an appeal? Should the court regard the tax legislation to be the only source of law, which may infringe upon legitimate expectations, or should it also take into account the principle of legal certainty which protects legitimate expectations?¹³⁰ Indeed, Dutch courts do. They nowadays recognize the importance of legal principles and test the tax administration's decisions against the principles of proper administrative behaviour.¹³¹ The judiciary, on the basis of case law, has developed legal principles with regard to improper actions and decisions of the administration.¹³²

7.4.3 Principles generating (priority) rules

The recognition by the Dutch courts that the (tax) administration is bound not only by legislation but also by principles of proper administrative behaviour raises the question of how to apply this approach. In which *hard cases*, in which exceptional circumstances do the principles of proper administrative behaviour justify a deviation from the strict application of the legislation? This question concerns the method of balancing of principles, for the hard cases can be viewed from the perspective of colliding principles, pointing into different directions (outcomes). The two principles regulating administrative behaviour are the principle of legality and the principle of proper administrative behaviour concerned. In the examples in the previous section it

¹²⁸ Policy rules also serve the principle of equality, another regulative ideal of tax law. Cf. A. Tollenaar, 'Soft law and policy rules in the Netherlands', *Netherlands Administrative Law Library*, July / September 2012, DOI: 10.5553/NALL/.000006, <www.nall.nl>

¹²⁹ The Dutch tax administration frequently takes a position which is not covered by a narrow, restricted reading (interpretation) of the tax statute, so as to enhance the aim and intent of the legal provisions. In these positions *praeter legem* (i.e., beyond the letter of the law), which favour the taxpayer, the tax administration puts aside the text of the statute in order to do justice to its spirit; R.H. Happé, *Drie beginselen van fiscale rechtsbescherming*, Deventer: Kluwer 1996, p. 36-38.

¹³⁰ R. Happé & M. Pauwels, 'Balancing of Powers in Dutch Tax Law: General Overview and Recent Developments', in C. Evans et. al. (eds.), *The Delicate Balance: Tax, Discretion and the Rule of Law*, Amsterdam: IBFD 2011, p. 237-245, at p. 246.

¹³¹ Note that not the legislative rule itself is under debate, but the application of the rule by the tax administration because of some kind of previous communication.

¹³² The same goes for the European Union; the European Court of Justice developed the principle of proper administrative behaviour was in its case law (mainly in the 1990s); *Tridimas* 2006, p. 410.

concerns the principle of honouring legitimate expectations.¹³³ Both the principle of legality and the principle of honouring legitimate expectations are regulative ideals at which the administration should aim its actions.

The Dutch Supreme Court has developed rules as a result of this weighing and balancing of principles in particular types of situations. 'Priority rules' are the result the balancing of principles in a certain situation with specific features. This situation will in the future be seen as a standard situation with its own priority rule describing specific criteria of application. A priority rule indicates which 'principle outweighs – and therefore gets priority above – the other principle in the standard situation concerned.'¹³⁴ It lays down the relative weight of both principles. Thus, different (priority) rules are developed for different 'situations in which there is no need any more for the balancing of principles. A priority rule has the same structure as a statutory rule. It is a rule which sets criteria: in a specific case, it should be verified whether the criteria are all met. If these criteria are all met in the case at hand, the priority rule applies in an all-or-nothing fashion.

Whenever one of the standard situations occurs in the future, the applicable priority rule can be applied. The priority rule 'replaces' the principles that were already involved in formulating the rule. However, a new situation may occur which differs from existing standard situations, in which the straightforward application of a legislative rule would be qualified as improper administrative behaviour. The court then has to weigh the principle of legality (the principle underlying the rule), and the principle of proper administrative behaviour concerned again, in order to establish a new priority rule – tailored to this specific situation.

With regard to the principle of honouring legitimate expectations, the Dutch Supreme Court has developed a typology which classifies several standard situations in which the expectations to taxpayers are raised by the tax administration. The classification is based on the origin (e.g., a promise or a policy rule) of the expectations, which accounts for different priority rules. If the criteria set in the applicable priority rule are all met in the case at hand, the priority rule applies. In that case the expectations concerned are deemed to be legitimate and are honoured.

In other words: the principle of honouring legitimate expectations then has priority over the principle of legality. If one of the criteria is not met in the case at hand, the priority rule is not applied. In that case, the principle of legality has priority. Note, that the relative weight of principles can not only be ascribed to the principles, for 'weight is case-related.'¹³⁵ Therefore, the relative weight of the principles depends on the criteria set out in the priority rule.

The priority rule for promises nicely illustrates this method for creating priority rules out of principles. This priority rule prescribes that the expectations raised by a promise – deviating from the legislative provision – are honoured if four criteria are met: 1) the taxpayer has the impression that the tax inspector is taking a certain position concerning the application of the tax law; 2) the taxpayer has informed the tax inspector of all relevant facts and circumstances of his or her case; 3) the taxpayer may reasonably think

¹³³ For a detailed analysis, see S.J. Schønberg, *Legitimate Expectations in Administrative Law*, Oxford: Oxford University Press 2000 and Tridimas 2006, p. 242-297; Groussot 2006, p. 24-25, 202-212 deals more briefly with this principle.

¹³⁴ Happé & Pauwels 2011, p. 247.

¹³⁵ Cf. J. Hage, *Reasoning With Rules: An Essay on Legal Reasoning and Its Underlying Logic*, Dordrecht [etc.]: Kluwer Academic Publishers 1997, p. 116.

that the promise is in the spirit of the law, and 4) the tax inspector is competent to deal with the taxpayer. To be sure, all criteria have to be met. For example, if the taxpayer is in bad faith, criterion 3 is not met and the principle of legality prevails.¹³⁶

Reviewing the behaviour of the tax administration, the Dutch Supreme Court has not only developed a system of priority rules in the field of the principle of legitimate expectations, but also in the field of the principle of equality as a principle of proper administrative behaviour.¹³⁷ Hence, different factual situations in part determine what principle should regulate these situations; they set different principles 'in motion'. The choice of the correct regulative principles to be balanced in a situation, therefore, depends on the nature of that situation (*Natur der Sache*; see § 5).¹³⁸

7.5 Retroactivity and priority principles

Colliding principles generate rules in the context of the tax administration's behaviour. However, in other (tax) contexts it is often not possible to translate the outcome of the collision of legal principles in (hard and fast) rules for lack of certain types of regularly occurring situations. Interestingly, there is another outcome possible when principles are balanced. This balancing can result in lower level principles, the so-called 'priority principles.'

As Radbruch argues, legal certainty is definitely one of the most fundamental legal values. This also applies to taxation. Here, Adam Smith's second maxim regarding taxation in general springs to mind: 'The tax which each individual is bound to pay ought to be certain, and not arbitrary.'¹³⁹ Notwithstanding its importance, the concept of legal certainty is not an easy one. 'Legal certainty is by its nature diffuse, perhaps more so than any other general principle, and its precise content is difficult to pin down.'¹⁴⁰

Non-retroactivity of law is one of the well-known desiderata formulated by Lon Fuller which links in to the value of legal certainty. Fuller criticizes retroactivity: in itself 'a retroactive law is truly a monstrosity'.¹⁴¹ However, he goes on to argue that there is no absolute prohibition on retroactivity, for, situations may arise in which granting retroactive effect to legal rules, 'not only becomes tolerable, but may actually be

¹³⁶ Happé & Pauwels 2011, p. 248.

¹³⁷ An example is the situation in which the tax administration has a certain favourable policy that is not published. Here, the principle of equality has priority over the principle of legality if the taxpayer is able to prove that such a favourable policy exists and his or her situation is covered by that policy rule. According to this the priority rule the tax administration should apply that policy rule to that taxpayer. Happé & Pauwels 2011, p. 248.

¹³⁸ This a well-known feature of principle-based reasoning. Cf. Rawls 1999, p. 25: 'The choice of the correct regulative principle for anything depends on the nature of that thing.'

¹³⁹ A. Smith, *The Wealth of Nations* [1776], Book V, Ch. II, Part II, Indianapolis: Liberty Fund 1981, p. 825.

¹⁴⁰ Tridimas 2006, p. 243. For the concept of legal certainty understood as an aspects concept, see M. Pauwels, 'Retroactive and Retrospective Tax Legislation: A Principle-based Approach; A Theory of 'Priority Principles of Transitional Law' and 'the Method of the Catalogue of Circumstances', in H. Gribnau & M. Pauwels (eds.), *Retroactivity of Tax Legislation* (2010 EATLP Congress Leuven), Amsterdam: EATLP 2013, p. 100-101.

¹⁴¹ Fuller 1977, p. 53. He points at a close affinity between the harm resulting from too frequent changes in the law and the harm done by retroactive legislation. Both make it hard for people to gear their activities to the law (p. 80).

essential to advance the cause of legality.' Hence, non-retroactivity can be conceptualized as a principle.

Retroactivity of tax legislation is a much debated topic.¹⁴² Pauwels raises the question how the tax legislator should deal with the various colliding interests when making transitional law. He advocates a framework for the tax legislator, based on a principle-based approach.¹⁴³ His starting point is that government is bound by legal principles, for example when making transitional law, but that these principles are not absolute. Therefore, notwithstanding that the principle of legal certainty, including the principle of honouring legitimate expectations, normally provides strong reasons contra retroactivity, this does not mean that there is an absolute ban on retroactivity. It is conceivable that in certain situations legitimate interests could be served if the legislator were to grant retroactive effect to legislation. In that situation the competing interests and principles should be balanced.

Subsequently Pauwels develops a framework for the tax legislator which consists of two parts. The first part concerns the principles of transitional law. These principles are the principle of immediate effect of new tax legislation without grandfathering and the principle of non-retroactivity. These principles are generally accepted. Pauwels proposes to conceptualize these principles as 'priority principles'. With respect to the theoretical foundation of these principles, he argues that they can be regarded as the result of the abstract balancing of the three main principles (or interests) involved when making transitional law.¹⁴⁴ These main principles are the principle of legal certainty, the principle of equality and the objective that is served by the new law.¹⁴⁵ From this perspective, the transitional law principle of non-retroactivity is the outcome of the balancing act in the sense that the principle of legal certainty supersedes any other interests. With regard to the principle of immediate effect without grandfathering, the objective of the new law and the principle of equality – which provide arguments against grandfathering – outweigh the principle of legal certainty – which advocates grandfathering.

In the second part of Pauwels' framework, he uses the method of the 'catalogue of circumstances' to approach the concept of 'legitimate expectations' in the field of transitional law. In a concrete legislative case there may be reasons to deviate from the principles of transitional law. In that respect the concept of 'legitimate expectations' is important. On the one hand, if no legitimate expectations are infringed, retroactivity may be permissible. On the other hand, if the immediate effect (retroactivity) were to infringe legitimate expectations, the legislator should provide for grandfathering. The question is, however, when expectations can be considered 'legitimate'. Pauwels distinguishes two steps to be taken. The first step – from subjective expectations to reasonable expectations – concerns a process of filtering by objectification of the expectations. This implies that the view of a reasonable person is taken. The second step concerns a balancing of the expectations with the interests that would be infringed if the

¹⁴² See Gribnau & Pauwels (eds.) 2013.

¹⁴³ Pauwels 2013, p. 95-116. This article is based on the Ph-D thesis: M.R.T. Pauwels, *Terugwerkende kracht van belastingwetgeving: gewikt en gewogen* (Retroactivity of Tax Legislation: Weighing and Balancing), Amersfoort: Sdu Uitgevers 2009.

¹⁴⁴ A priority principle is supported by other more general ones. They could be conceived of as a kind of mid-level principles (see § 6, note 91), provided a mid-level principle is not defined as a principle supported by another more general one (and only one).

¹⁴⁵ Here, Pauwels 2013, p. 103 argues that the law and economics literature correctly emphasizes that grandfathering has social costs as it entails delay and reduction of the benefits of the new law.

expectations were to be honoured. Although these steps provide something to hold on, in the end the question cannot be answered in abstract, but depends on the circumstances of the case.

Here, the method of the catalogue of circumstances is useful – as Pauwels shows. This method takes an intermediate position between, on the one hand, a non-specified reference to the circumstances of the case (an ‘open group of circumstances’) and, on the other hand, the method of priority rules (see § 7.4). Such a catalogue consists of the circumstances which the legislator should take into account when balancing the conflicting interests (as far as the circumstances are present in the legislative case at hand). This method not only provides the legislator a foothold for balancing, it may also contribute to the transparency and quality of the balancing during the legislative process. Again, this elaborated principle-based framework makes a normative and a descriptive claim, for Pauwels shows that the method of catalogue of circumstances is not a mere theoretical idea. It is true, that the combination of the priority principles of transitional law, on the one hand, and the method of the catalogue of circumstances, on the other hand, is not directly traceable in parliamentary proceedings, case law and the literature. Nonetheless, strong support for this combination is to be found in those sources. He is, therefore, able to draft a catalogue of circumstances that the legislator should take into account in balancing the colliding interests when making transitional law.¹⁴⁶

8 CONCLUSION

This article focused on the theoretical and practical role of fundamental legal principles on the European continent – so the focus was on legal principles outside the common law. The research question was: how to understand legal principles as regulative ideals in a broader philosophy of law which accounts for their relationship to rules? This question was answered in three steps.

First, Dworkin's theory of principles was used to elucidate the concept of a legal principle and its function in a legal system. Principles – in the narrow sense – are distinguished from policies. Principles embody the dimension of morality (justice, fairness), for principles appeal to moral values. For Dworkin the moral dimension of these legal principles is key. Principles differ from rules in that they state reasons arguing in a direction, but they do not dictate outcomes. Due this non-conclusiveness, principles providing diverging reasons may collide. This conflict must be resolved by taking into account the relative weight of each principle. Fundamental legal principles are the underlying justification for the body of explicit rules. Law-making and law-applying institutions are not the authors of legal principles; they find the principles in the law. They concretize principles, but their interpretations never exhaust the principles. Thus, the body of law should be consistent in principle. Legal principles - embodying the ‘internal morality of law’ – function as essential criteria of evaluation. This may imply a transfer of power to the courts and/or tax administrators but that is not the core of my argument, for law-making and law-applying institutions should also, or better, primarily, evaluate their own functioning in terms of fundamental legal principles. Hence, notwithstanding the primacy of democratically legitimized legislature in law-making, principles set boundaries to legislative policies.

Secondly, it was submitted that Radbruch's value oriented philosophy of law makes it possible to firmly entrench fundamental legal principles in the legal system. Law is

¹⁴⁶ Pauwels 2013, p. 110-112.

oriented towards its supreme value: the idea of law (*Rechtsidee*) or justice (*das Gerechte*). Law-making is aimed at this regulative ideal. It was shown, that the idea of law, justice, is not a free floating value. Justice both determines and is determined by the reality of law. Existing factual relations, therefore partially determine what rules and principles should regulate these relations. Values, like principles, are not imposed on society by a sovereign power. Law seeks to implement legal values, such as equality, impartiality and certainty, which can be regarded as legal translations of important social and cultural values. However, the entering of these values, mixed with political values and policies, into the legal system is filtered and moulded by the values of legal certainty and legal equality. Similarly, legal principles are translations, not reproductions, of societal norms within the legal system. Hence, fundamental legal principles are vehicles in the movement back and forth between values and legal rules. These rules must meet the minimum standards set by legal principles.

Thirdly, some examples in the field of tax law were discussed in order to show the added value of the ('European') principle-based method of legal reasoning which can take account of varying circumstances. Notwithstanding the high level of abstraction of principles, the model of principle appeared to constitute a theoretical model with a descriptive and a normative claim. An analysis of case law of the European Court of Justice, concerning the conflict between free movement and tax sovereignty, in terms of this model of principles to render coherence to judgments which appeared at face value inconsistent (descriptive claim). Moreover, this principle-based model prescribes the method through which the conflict between free movement and tax sovereignty in a concrete case should be resolved (normative claim).

Subsequently, the testing of tax statutes against the principle of equality showed how the Dutch Supreme Court tries to strike a balance between the principle of democracy and the principle of equality. In these hard cases, arguments of principle are used to evaluate existing (statute) law. This case law reflects the actual significance of a principle based normative theory. However, the Court cannot develop rules - applicable in an 'all-or-nothing fashion - out of the weighing and balancing of principles.

The next example showed how principles can be specified and elaborated into rules, for principles are indeed too abstract and non-conclusive to dictate outcomes in concrete cases. Here, the case law of the Dutch Supreme Court in the field of the implementation of tax law shows how balancing legal principles in concrete situations may lead to rules. Most citizens do not have much knowledge of the tax legislation in force and depend for their knowledge of tax law on communications by the (Dutch) tax administration. Given this importance of communications the question is whether citizens can rely on them. In other words, has the principle of honouring legitimate expectations priority over the principle of legality? In situations like this one, the Supreme Court nowadays tests the tax administration's decisions against the principles of proper administrative behaviour. The Court has developed these principles for different kinds of administrative behaviour, and it has elaborated these principles in priority rules. These priority rules lay down the relative weight of the principles balanced and describe the specific criteria of application. In this way, the judicial balancing of principles produces hard and fast rules. Again, a reconstruction of case law in terms of principles shows that in practice judges rely on arguments of principle. Thus, actual legal practice here reflects the normative claim that law should be conceived of as based on a coherent set of principles.

The last example dealt with priority principles developed to guide decisions with regard to retroactive tax legislation. As shown above, it is often not possible to translate the outcome of the collision of legal principles in rules for lack of certain types of regularly occurring situations. However, the balancing can result in priority principles. Although they are not rules, but principles, they provide more guidance than the very abstract fundamental legal principles. These priority principles are part of a framework developed for the tax legislator who has to deal with the various colliding interests when making transitional law. Here, a principle-based approach recognises that it is possible that sometimes certain interests could be served with retroactive tax legislation - notwithstanding that the principle of legal certainty, including the principle of honouring legitimate expectations, normally provides strong reasons contra retroactivity. The framework consists of two parts. The first part concerns the principles of transitional law, conceptualized as priority principles: the principle of immediate effect of new tax legislation without grandfathering and the principle of non-retroactivity. In the second part the method of the catalogue of circumstances is used to specify the concept of legitimate expectations in the field of transitional tax law, for in a concrete legislative case legitimate expectations may constitute a reason to deviate from the principles of transitional law. This method not only provides the tax legislator with a (normative) foothold for balancing, it may also contribute to the transparency and quality of the legislative balancing. Again, this principle-based framework also makes a descriptive claim, for strong support for the combination of the priority principles and the method of the catalogue of circumstances is to be found in parliamentary proceedings, case law and the literature.