

THE DIALECTIC BETWEEN RULES AND PRINCIPLES AN APPROXIMATION TO LEGAL REASONING*

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- **ABSTRACT:** This article examines the dialectic between legal rules and principles as a way of approximating the structure of legal reasoning in contemporary constitutional states. It challenges widespread commonplaces in neo-constitutional and anti-positivist scholarship that present principles as intrinsically anti-positivist and fundamentally distinct from rules. Drawing on debates since the late 1960s and on the practice of principle-based adjudication, the author argues that rules and principles are not mutually exclusive categories but interact at multiple levels of interpretation, justification and application. Principles inform the interpretive construction of rules, for example through teleological and constitution-conforming arguments, while rules in turn constrain and structure the concrete balancing and realization of principles. From this perspective, the apparent opposition between “law by rules” and “law by principles” conceals a more complex argumentative dynamic, in which principles and rules continuously shape each other within legal reasoning. The essay thus proposes a demystifying analytical framework aimed at better describing, controlling and critically assessing principle-based and rule-based legal argumentation.
- **KEYWORDS:** Legal principles; legal rules; neoconstitutionalism, teleological interpretation.

A DIALÉTICA ENTRE REGRAS E PRINCÍPIOS: UMA APROXIMAÇÃO AO RACIOCÍNIO JURÍDICO

- **RESUMO:** O artigo examina a dialética entre regras e princípios jurídicos como uma aproximação à estrutura do raciocínio jurídico nos Estados constitucionais contemporâneos. Contesta lugares-comuns difundidos na doutrina neoconstitucionalista e antipositivista, que tendem a apresentar os princípios como intrinsecamente antipositivistas e radicalmente distintos das regras. A partir do debate desenvolvido desde o final dos anos 1960 e da prática de uma argumentação “por princípios”, o autor sustenta que regras e princípios não constituem categorias mutuamente excludentes, mas interagem em múltiplos níveis de interpretação, justificação e aplicação. Os princípios informam a construção interpretativa das regras, por meio, por exemplo, da interpretação teleológica e da interpretação conforme a Constituição, enquanto as regras, por sua vez, condicionam



e estruturam a concretização e a ponderação dos princípios. Nessa perspectiva, a aparente oposição entre “direito por regras” e “direito por princípios” encobre uma dinâmica argumentativa mais complexa, em que princípios e regras se co-determinam continuamente no raciocínio jurídico. O ensaio propõe, assim, um quadro analítico desmistificador destinado a descrever, controlar e criticar de modo mais adequado as formas de argumentação jurídica baseadas em regras e em princípios.

■ **PALAVRAS-CHAVE:** Princípios jurídicos; regras jurídicas; neoconstitucionalismo; interpretação teleológica.

1. On Some Commonplaces about Principles and Rules

The debate on legal principles shows no sign of abating, either among legal theorists or among doctrinal scholars. Apart from a few minimal points of agreement—most notably, the fact that argumentation “by principles” has become a widespread practice among jurists—discussion has remained entirely open for more than fifty years on almost every aspect of principles: their nature; the possibility of conceiving them as a unitary and coherent category; the criteria for their identification; the modes of their application; their differences from other types of norms; and even the very possibility of regarding them as legal norms.

The reasons for this continued interest are evident, and by now well known¹ (our translation).

1 Our translation: In what follows, I will refer specifically to the debate that has developed since the late 1960s: both for reasons of expository economy and because this debate maintains a certain thematic coherence (e.g., it adopts constitutional principles as its main point of reference, along with the interpretive and argumentative operations that typically occur in a constitutionalized legal system). However, of course, the topic of legal principles was also the subject of important reflections before this period; I am thinking in particular of V. Cristafuli, *Per la determinazione del concetto dei principi generali del diritto* [For the determination of the concept of general principles of law] (1941), in «Lo Stato», 12 (2019), pp. 139-154; 13 (2019), pp. 183-200; 14 (2020), pp. 185-210; and N. Bobbio, *Principi generali di diritto* [General principles of law] (1966), in Id., *Contributi ad un dizionario giuridico* [Contributions to a legal dictionary], Torino, Giappichelli, 1994, pp. 257-279. Original text: Qui di seguito mi riferirò specificamente al dibattito che si è sviluppato a partire dalla fine degli '60 del secolo scorso: sia per ragioni di economia espositiva, sia perché questo dibattito mantiene una sua compattezza tematica (ad es., adotta come principale punto di riferimento i principi costituzionali, e le operazioni interpretative e argomentative che tipicamente hanno luogo in un ordinamento giuridico costituzionalizzato). Ma ovviamente alla tematica dei principi del diritto sono state dedicate importanti riflessioni anche prima di questo periodo; penso in particolare a V. Crisafulli, *Per la determinazione del concetto dei principi generali del diritto* (1941), in «Lo Stato», 12 (2019), pp. 139-154; 13 (2019), pp. 183-200; 14

On the one hand, the emphasis on principles has often been used by certain currents of legal thought (frequently identified by the ambiguous label ‘neoconstitutionalism’) as an anti-positivistic weapon. Based on the presence—or even omnipresence—of principles in contemporary legal systems, and in the legal argumentation practiced in these contexts, it has been purported to show the inadequacy of legal positivism. The latter, in fact, would programmatically ignore principles to focus exclusively on ‘rules’; therefore, legal positivism would be incapable of describing the variety and complexity of jurists’ interpretive activities. Furthermore, principles, as ‘amphibious’ entities belonging simultaneously to both law and morality, would also refute the thesis of the separation or separability between law and morality—a true cornerstone of any legal positivist approach². Contrary to what legal positivism would allegedly maintain, therefore, the presence of principles in law shows that legal reasoning is much more complex than a syllogistic application of rules, and that—thanks precisely to principles—there is not a ‘separation’ between law and morality, but rather a continuous communication. Criticisms of this kind, although based on a caricature of legal positivism, have nonetheless produced some beneficial effects: in particular, they have also prompted many legal positivist authors to engage deeply with principles, and this has ultimately made principles one of the most frequented topics of legal-theoretical debate in recent decades.³

On the other hand, due to the way contemporary constitutions are formulated, and due to the progressive constitutionalization of legal systems and legal culture, ‘principle-based’ legal argumentation has become widespread, not only within Constitutional Courts but also among ordinary judges and in legal scholarship. This is because the Constitution, in the context of the contemporary constitutional State, is not

(2020), pp. 185-210; e N. Bobbio, *Principi generali di diritto* (1966), in Id., *Contributi ad un dizionario giuridico*, Torino, Giappichelli, 1994, pp. 257-279.

- 2 Critiche di questo tipo sono apparse per la prima volta in R. Dworkin, *The Model of Rules I* (1967), in Id., *Taking Rights Seriously*, London, Duckworth, 1978², pp. 14-45; v. poi anche R. Alexy, *Concetto e validità del diritto* (1992), Torino, Einaudi, 1997; G. Zagrebelsky, *Il diritto mite*, (1992), 2ª ed. Torino, Einaudi, 2024; Id., *Intorno alla legge*, Torino, Einaudi, 2009, capp. V e VI. Per una vigorosa replica a queste posizioni, L. Ferrajoli, *Costituzionalismo principialista e costituzionalismo garantista*, in «Giurisprudenza costituzionale», 2010, 3, pp. 2771-2816; Id., *La democrazia attraverso i diritti*, Roma-Bari, Laterza, 2013, cap. III.
- 3 Tra i primi ad occuparsene, in Italia: M. Jori, *I principi nel diritto italiano* (1983), in Id., *Saggi di metagiurisprudenza*, Milano, Giuffrè, 1985, pp. 301-332; L. Gianformaggio, *L'interpretazione della Costituzione tra applicazione di regole e argomentazione basata su principi* (1985), in Ead., *Filosofia del diritto e ragionamento giuridico*, a cura di E. Diciotti e V. Velluzzi, Torino, Giappichelli, 2008, pp. 173-204; R. Guastini *Sui principi di diritto*, in «Diritto e società», 4, 1986, pp. 601-624; ai quali va aggiunto anche L. Prieto Sanchis, *Sobre principios y normas*, Madrid, Centro de Estudios Constitucionales, 1992.

seen as a normative body separate from the rest of the legal system, but rather as the reservoir of principles from which to potentially draw for any type of legal dispute. In the contemporary constitutional State, and in a constitutionalized legal culture (a legal culture that has become fully aware of the argumentative resources offered by the new constitutions), principle-based argumentation thus becomes a pervasive practice—though not always a painless one, of course. Principles now crowd legal discourse. Expressions such as ‘principle-based argumentation,’ ‘law by principles,’ ‘jurisprudence by principles,’ and even ‘legislation by principles,’ are very common in the way jurists express themselves. And this, in turn, leads to a growing interest from legal theorists, who seek to equip themselves with an adequate analytical toolkit to better understand, control, and possibly critique these styles of legal reasoning and argumentation⁴.

In light of all this, the purpose, or one of the purposes, of this essay consists, so to speak, in an attempt at demystification. It seems to me, in fact, that the current discourse on principles, especially within neoconstitutionalist and anti-positivist circles, is characterized by certain tenacious commonplaces that do not at all help in understanding what principles are and how they function. On the contrary, they make certain interpretive, argumentative, and applicative operations based on principles more opaque—and, in turn, this also leads to an inadequate understanding of rules. These are commonplaces that all revolve, in one way or another, around the assumption of a sharp separation between rules and principles or, as it is now customary to call it, a ‘strong,’ qualitative, or categorical distinction between them: rules and principles are said to be norms endowed with distinctly different structural and operative characteristics. Thus, according to such an approach, (only) principles would be subject to balancing, while (only) rules would be subject to subsumption. Or, which is just a different way of saying almost the same thing, (only) principles follow a flexible logic of weight and importance (to be assessed in relation to the specific case), while (only) rules apply in an all-or-nothing fashion. Furthermore, rules are ‘fact-pattern-based’ norms, while principles are norms ‘without a fact-pattern’; consequently, rules clearly indicate their conditions of application, while the content of a principle can only be appreciated in relation to the circumstances of a case. Finally, rules lend themselves to a universalistic, mechanical, and repetitive application (a rule applies to all cases that fall within its

4 Si tratta, in altre parole, della “funzione civile della metodologia” di cui parla L. Gianformaggio, *Modelli di ragionamento giuridico. Modello deduttivo, modello induttivo, modello retorico* (1983), in Ead., *Filosofia del diritto e ragionamento giuridico*, cit., pp. 89-107 (a p. 93).

fact-pattern), while principles—especially when they must be balanced—dictate a solution that is valid only ‘for the specific case’ (and thus a principle, ultimately, might not even apply to cases for which it is in fact relevant).

I find such representations of the relationship between rules and principles simplistic and misleading. A more adequate understanding should, in my view, instead highlight the numerous continuities and interactions that inevitably occur between rules and principles. On another occasion, I have already pointed out the limits of theories that postulate, at the structural level, a “strong” distinction between rules and principles, arguing instead for the preferability of a “weak” distinction⁵. According to the theory of the weak distinction, rules and principles are types of norms that share the same characteristics but exhibit them to different degrees: specifically, rules are more precise and determinate norms, whereas principles are more general and indeterminate norms. At the same time, principles are norms regarded as particularly important (or endowed with “final” importance), whereas rules are less important norms (or endowed only with “instrumental” importance).⁶

Now, all these characteristics (generality, indeterminacy, importance) are not dichotomous in nature, of an all-or-nothing kind; on the contrary, any norm may possess them to a greater or lesser extent. This is particularly evident with regard to generality and indeterminacy, characteristics that are notoriously scalar. But upon closer inspection, importance is also a scalar characteristic: thus, in general, within a legal system there will be norms—whether principles or rules—that are more important and norms that are less important; and this relation of importance manifests itself not only between principles and rules, but also among principles themselves. Some principles are in fact specifications of other principles, or are grounded in other principles that are evidently more important (for example, the principle of legal certainty is grounded in the principle of the protection of individual autonomy). From all this it follows that, depending on the intensity with which they exhibit the relevant characteristics, some norms will certainly be classifiable as principles, others will certainly be classifiable as rules, and still others will lie in a grey area between the two.

⁵ G. Pino, *Teoria analitica del diritto I. La norma giuridica*, Pisa, ETS, 2017, cap. IV.

⁶ Per la precisione, ritengo che le caratteristiche rispettivamente della genericità/indeterminatezza e dell’importanza si possano anche presentare in maniera *disgiuntiva*: da questo punto di vista, il concetto di principio è dotato di “vaghezza combinatoria”, in quanto concetto dotato di una pluralità di caratteristiche definitorie non necessariamente tutte presenti in ogni sua instanziazione. Cfr. G. Pino, *Teoria analitica del diritto I*, cit., p. 86.

For the sake of clarity, stating that the difference between rules and principles is “weak” (gradual, quantitative, scalar) does not mean denying that any difference exists—that rules and principles are the same thing. A gradual or nuanced difference can nevertheless be an important and significant one, and can be clearly perceptible on many occasions. More simply, the idea of a weak distinction means that it is illusory and misleading to seek definitional characteristics that are possessed exclusively by rules and, respectively, by principles. The distinction between rules and principles is a matter of degree.

That said, I will not add anything further here on this structural aspect of the distinction between rules and principles. On this occasion, I will instead focus on the relationships between rules and principles at the operational level: my aim is to highlight the numerous interactions that take place between rules and principles in interpretation, application, and legal argumentation. From this perspective, I intend to show that, in legal reasoning, rules and principles do not operate in watertight compartments nor in clearly distinct modes, as certain widely circulating *vulgatae* in contemporary legal culture would have it (such as those mentioned above).

Moreover, the myth according to which there is a sharp distinction between rules and principles also at the operational level seems to open the door to a curious *heterogenesis of ends* from the standpoint of legal policy: indeed, assuming that many anti-positivist authors look favorably upon the presence of principles in law and in legal argumentation, it is difficult to understand why they then offer a representation of the relationship between principles and rules that is bound, at the operational level, to sideline principles whenever a rule is available.

This is indeed the logical consequence of conceiving the application of rules as an “all-or-nothing” matter: if a rule exists and is applicable to the circumstances of the case, then it must be applied, full stop. Or at least this is what many anti-positivists maintain. But if this is so, it follows that a rule—any rule—has the capacity to sideline any principle that would call for a solution different from that provided by the rule.

Fortunately, as I will seek to show here, it is by no means necessary to adopt such a counterintuitive position. More plausible explanations exist for the functioning of rules and principles in legal reasoning. To demonstrate this, I will first introduce some preliminary clarifications (§ 2). Then, I will proceed to show the different interactions between rules and principles in legal reasoning (§ 3). Finally (§ 4), I will draw some brief conclusions from this discussion.



2. Rules and principles: between the theory of norms and the theory of legal reasoning

Legal language is often hostage to an ‘ontologizing’ tendency: jurists often express themselves, perhaps unconsciously, as if they were speaking of things that are simply ‘there,’ in the world or in that specific portion of the (social) world that is the law. A typical example of this ontologizing tendency is the reference to the ‘legal order’ (or ‘legal system’) as something that simply ‘exists,’ to be acknowledged in an almost physical, spatial manner—as evidenced by the well-known pyramid metaphor⁷. This way of thinking is also clearly perceptible in many discussions on rules and principles: often, jurists seem to refer to rules and principles as if their presence in the law were a kind of fact, simply observable—provided, of course, that one knows how to look properly; as ‘things’ that are there, each with its specific distinctive characteristics, ready to be used in their respective contexts and modes of use.

Obviously, this is not the case at all. Indeed, in the discussion I have conducted so far, I have assumed, as almost everyone does, that rules and principles are norms. Precisely as norms, rules and principles do not exist except by virtue of a series of intellectual processes: strictly interpretive processes (explicit norms), or ‘productive’ (or ‘integrative,’ or ‘constructive’) processes (implicit norms). And it is by virtue of such intellectual processes that a norm takes on the form of a rule, or that of a principle.

Thus, to some extent, it is the interpreter—or, ultimately, the “community” of interpreters—who decides whether a given norm should count as a rule or as a principle. Rules and principles, insofar as they are norms, are the product of interpretation (understood in a broad sense): in many cases, the same provision may be interpreted indifferently as expressing either a rule or a principle, and therefore the classification of a norm as a rule or as a principle is left to the interpreter’s choice.⁸

7 Our translation: The fight against such ontologizing tendencies was, in the last century, a typical hallmark of legal realism, particularly the Scandinavian school, which saw in them a residue of magical thinking. Original text: La lotta contro simili tendenze ontologizzanti è stata, nel secolo scorso, un tipico marchio di fabbrica del realismo giuridico, in particolare scandinavo, che vi vedeva un residuo di pensiero magico.

8 L. Gianformaggio, *L’interpretazione della Costituzione tra applicazione di regole e argomentazione basata su principi*, cit., p. 178; F. Sorrentino, *I principi generali dell’ordinamento giuridico nell’interpretazione e nell’applicazione del diritto*, in «Diritto e società», 1987, pp. 181-201 (a p. 184: «le stesse disposizioni di principio stabilite dal legislatore [...] in tanto possono operare come principi generali, in quanto come tali vengano riconosciuti in sede interpretativa»); P. Comanducci, *Principi giuridici e indeterminazione del diritto* (1997), in Id., *Assaggi di metaetica due*, Torino, Giappichelli, 1998, pp. 81-95 (a p. 84); R. Guastini, *Interpretare e argomentare*, Milano, Giuffrè, 2011, pp. 180-182.

Obviously, a normative text may be formulated in such a way as to steer the interpreter in one direction or the other; yet, in any case, even a provision apparently drafted in the style of a rule may be interpreted as expressing a principle, and vice versa. All this, I repeat, follows analytically from the very definition of a legal norm as the product of interpretative activity (understood in a broad sense): since rules and principles are two types of legal norms, their identification as norms can only be the result of interpretation. Up to this point, moreover, I have referred to principles that are textually derivable from a provision—for example, from an article of the Constitution (explicit principles); but, of course, many principles are “implicit” or “unexpressed”. For the identification of these latter principles, the contribution of interpreters is evidently even more decisive—or rather, such principles are identified exclusively by interpreters, in the absence of any textual constraint.

Nor is that all. If, as we have just seen, the qualification of a norm as a rule or as a principle ultimately depends on an interpretative choice—rather than on the objective observation of some Platonic legal reality—then it is legitimate to ask what reasons may lead the interpreter to choose one option rather than the other. And the answer is obvious: rules and principles serve different purposes in interpretation, legal argumentation, and application. Employing a rule or a principle in legal reasoning requires, or at least makes possible, different kinds of operations. Qualifying a norm as a rule or as a principle is therefore a preliminary step that enables those operations to be carried out—or, reversing the perspective, we may say that we are dealing with a rule when jurists perform certain operations, and with a principle when they perform other, different ones. In particular, a rule is a norm intended for a tendentially “rigid” application, that is, protected against possible implicit exceptions (exceptions other than those expressly provided for by the rule itself or by other rules), and characterised by a well-defined scope of application (it is relatively easy to determine what falls within and what falls outside the rule’s factual predicate). A principle, by contrast, is a norm intended for an “elastic” application (insofar as it enters into balancing with other principles and may be limited by them), and has a scope of application that is not clearly defined.

It is therefore easy to conclude that the difference between rules and principles—which already emerges at the structural level—also matters, and perhaps above all, at the operational level: rules and principles are typically associated with different styles of legal reasoning. Does this mean, then, that the difference between rules and

principles is relevant only at the level of legal reasoning? And that, accordingly, rules and principles are in reality nothing more than ways—perhaps misleading and deceptive ones—of referring to two different modes of legal reasoning?⁹ I don't think so. In fact, if one focuses only on the operational level, on the level of legal reasoning, one fails to understand that principles can function in certain typical ways precisely because they possess certain characteristics of a structural type (generality, indeterminacy) and of an axiological type (importance); and, *mutatis mutandis*, the same also applies to rules. It is precisely these characteristics that make certain peculiar operational modes of rules and principles possible.

And again, since these structural and axiological characteristics can be possessed by various norms in different degrees, it will be entirely possible—as in fact happens, and as we will see more clearly in the next paragraph—for norms that are certainly identifiable as principles to sometimes behave, on an operational level, like rules, and vice versa.

⁹ Our translation: A thesis of this kind has been proposed by C. Luzzati, in *Il superamento pragmatico dell'opposizione tra regole e principi* [The pragmatic overcoming of the opposition between rules and principles], in «Materiali per una storia della cultura giuridica», 1, 2016, pp. 135-154. The idea is to separate the discussion and analysis of rules and principles from the notion of a legal norm, and instead transport it entirely into the pragmatic dimension of uses, and particularly of reasoning styles (inclusive reasoning vs. exclusive reasoning). Although I completely agree with the idea that one of the most important issues to examine regarding the rules/principles distinction lies precisely in the dimension of uses—of the interpretive, applicative, and argumentative practices associated with such types of norms—I nevertheless believe that such a radical proposal is inappropriate and unnecessary. Indeed: (1) 'rules' and 'principles' are terms and concepts extremely rooted in the practices of jurists and legal theorists, and their suppression risks creating too sharp a disconnect from current legal language, especially if less costly theoretical options (e.g., redefinitions) are available. (2) Once it is recognized that, as norms, rules and principles are the result of interpretation, and that the interpreter assigns a norm the status of a rule or a principle also to be able to then carry out certain operations (or, conversely, to avoid carrying out certain operations), once all this is recognized, suppressing the category of the norm from our discourse becomes useless. Original text: Una tesi di questo tipo è stata proposta da C. Luzzati, *Il superamento pragmatico dell'opposizione tra regole e principi*, in «Materiali per una storia della cultura giuridica», 1, 2016, pp. 135-154. L'idea è di separare la discussione e l'analisi delle regole e dei principi dalla nozione di norma giuridica, per trasportarla invece interamente nella dimensione pragmatica degli usi, e in particolare degli stili di ragionamento (ragionamento inclusivo vs ragionamento esclusivo). Anche se sono completamente d'accordo con l'idea che una delle questioni più importanti da esaminare riguardo alla distinzione regole/principi consista proprio nella dimensione degli usi, delle pratiche interpretative, applicative e argomentative che si associano a tali tipi di norme, ritengo tuttavia che una proposta così radicale sia inopportuna e non necessaria. Infatti: (1) regole e principi sono termini e concetti estremamente radicati negli usi dei giuristi e dei teorici del diritto, e la loro soppressione rischia di creare uno scollamento troppo marcato rispetto al linguaggio giuridico corrente, specialmente se sono disponibili opzioni teoriche meno costose (ad esempio, ridefinizioni). (2) Una volta riconosciuto che, in quanto norme, regole e principi sono frutto dell'interpretazione, e che l'interprete dà ad una norma la qualifica di regola o di principio anche per poter poi porre in essere determinate operazioni (o anche, al contrario, per evitare di porre in essere certe operazioni), una volta riconosciuto tutto questo, sopprimerla dal nostro discorso la categoria della norma diventa inutile.

3. The dialectic of rules and principles in legal reasoning

As anticipated, my aim now is to show the various ways in which rules and principles “work together” in legal reasoning. The most common representations, precisely because they are grounded in a sharp distinction between rules and principles, tend almost inevitably to emphasize their diversity also at the interpretative, argumentative, and applicative levels (typically: rules are applied through subsumption, principles through balancing; rules operate in an “all-or-nothing” fashion, principles by virtue of their “weight” and “importance”; and the like)¹⁰, here I will seek to bring to light the many operative connections between rules and principles.

Some, or perhaps many, of these connections are, in reality, widely known to jurists. Highlighting them in this context is, however, useful and interesting, both to emphasize once again the artificiality of the supposed sharp distinction between rules and principles, and, more generally, to bring to light (in the concluding paragraph of this essay) an important, and perhaps unsettling, characteristic of legal reasoning.

In the next two subsections, I will therefore show the various ways in which principles are present in the application of rules, and rules are present in the application of principles.

3.1 Principles and the interpretation/application of rules

The typical depiction of the application of rules is that of the syllogism: the rule, equipped with a fact-pattern (understood as an ‘abstract fact-pattern’) and a legal consequence, stands as the major premise (‘Whoever commits theft is punished with sanction S’); certain facts—a ‘concrete fact-pattern’—are subsumed under the abstract fact-pattern, forming the minor premise (‘Tizio’s conduct qualifies as theft’); the conclusion consists in associating the legal consequence with the concrete fact-pattern (‘Sanction S is to be applied to Tizio’). From this depiction stems the customary

10 Tutte queste idee sono perfettamente compendiate nel seguente passo: «rispetto alle regole, i principi possiedono una logica propria, di tipo ponderativo, dal momento che la loro applicazione si lega a valutazioni ‘di peso’ nell’argomentazione giuridica, da riferire al singolo caso concreto» (G. Zaccaria, *Ancora su interpretazione e principi giuridici* (2011), in Id., *Postdiritto*, Bologna, il Mulino, 2022, pp. 209-226, a p. 216). I loci classici sono R. Dworkin, *The Model of Rules I*, cit.; R. Alexy, *On Balancing and Subsumption. A Structural Comparison*, in «Ratio Juris», vol. 16, 2003, pp. 433-449; G. Zagrebelsky, *Il diritto mite*, cit.

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assertion that rules are applied in the manner of subsumption and on an all-or-nothing basis: if, and only if, a certain concrete fact-pattern is subsumable under the abstract fact-pattern of a rule, the rule applies.

This is all well and good: it is a very familiar depiction (as well as being widely adopted by the anti-positivist supporters of the ‘strong’ distinction between rules and principles), and one that also has its heuristic and didactic utility. The problem is that, from the perspective of reconstructing legal reasoning, it consists of the proverbial tip of the iceberg. Let us see why.

First of all, I have stated on several occasions, challenging what is commonly taken for granted, that a rule is a norm and, as such, is the product of interpretation. Therefore, the rule that is placed in the major premise already represents, in itself, the conclusion of an interpretive process¹¹. Thus, it is very likely that principles have already played a role in this interpretive process: indeed, one of the most widespread interpretive and argumentative approaches—namely, teleological interpretation—can easily be construed as a form of argumentation based on principles¹². And another extremely frequent form of principle-based interpretation/argumentation is the so-called conforming interpretation, or interpretation in conformity with the constitution (given the almost universal consensus on the characterization of constitutional norms as principles)¹³: in this second case, the reference to constitutional principles can operate either by considering a certain principle as the foundation and justification of the rule (and here we are again in a form of teleological interpretation), and therefore the principle in question will serve to provide an interpretation of the rule that is as congruent as possible with the principle; or by considering a certain (and

11 E pertanto, il sillogismo giuridico è in realtà un “argomento complesso”, in cui le premesse sono a loro volta conclusioni di ulteriori argomenti (nel caso della premessa maggiore, essa è la conclusione di un argomento interpretativo). Sulla nozione di “argomento complesso”, in generale, v. A. Varzi, J. Nolt, D. Rohatyn, *Logica*, Milano, McGraw-Hill, 2007², pp. 7-8; A. Iacona, *L'argomentazione*, Torino, Einaudi, 2005, pp. 36-38.

12 Sulla identificazione tra principi e *ratio legis*, v. N. McCormick, *Legal Reasoning and Legal Theory*, Oxford, Oxford University Press, 1978, p. 166; M. Jori, *I principi nel diritto italiano*, cit., pp. 303, 317-318; C. Luzzati, *L'interprete e il legislatore*, Milano, Giuffrè, 1999, pp. 638-645; R. Guastini, *Teoria e dogmatica delle fonti*, Milano, Giuffrè, 1998, pp. 282-283; Id., *L'interpretazione dei documenti normativi*, Milano, Giuffrè, 2004, p. 155; Id., *Interpretare e argomentare*, cit., pp. 175-176, 182, 186-188; B. Pastore, *Pluralismo delle fonti e interpretazione: il ruolo dei principi generali*, in «Diritto privato», 2001-2002, vol. VII-VIII, pp. 65-95 (a p. 79); G. Pino, *Teoria analitica del diritto I*, cit., pp. 94-95.

13 Un consenso generale, ma non unanime: per la tesi che le norme ricavabili dal testo costituzionale debbano essere intese come regole, anziché principi, A. Pace, *Interpretazione costituzionale e interpretazione per valori*, in *Interpretazione costituzionale*, a cura di G. Azzariti, Torino, Giappichelli, 2007, pp. 83-113; L. Ferrajoli, *Costituzionalismo principialista e costituzionalismo garantista*, cit. (ma per un successivo aggiustamento di questa idea v. *La democrazia attraverso i diritti*, cit., 112-122). Il che mostra, ancora una volta, come la distinzione tra regole e principi dipenda da una scelta interpretativa.



different) principle as a limit to the rule itself, and thus as an argument to restrict or modify its scope of application¹⁴.

In summary, then, the reference to principles usually produces various conforming effects on the rule to be applied: it can encourage an extensive, restrictive, or corrective interpretation; it can also make the rule defeasible (that is, it can cause the rule to be subject to implicit exceptions: the ‘ablative’ function of principles¹⁵).

In all these cases, it seems to me, what is presented as the syllogistic application of a rule is in reality the final step of a reasoning process that consists in ‘bending’ the rule, with its textual formulation, as much as possible to the principle that hypothetically justifies it (or to another relevant principle that may limit it). And such reasoning can be more or less complex: in fact, when legal reasoning ‘ascends’ to the level of principles, it is quite unlikely that only one principle will be taken into consideration—probably the relevant principles for the type of case or legal problem in question will be two, or three, or four, pushing in different directions, and thus they will have to be balanced.

This is even more evident when one moves from the ‘interpretive’ to the ‘productive’ uses of principles, however precarious this distinction may be. Consider the case of analogy as a method for deriving unexpressed norms. The mechanism is well-known: a fact-pattern F1 arises, which does not clearly fall within the scope of application of any express norm; however, F1 has certain points of contact (a ‘relevant similarity’) with the fact-pattern F2, which is governed by the express norm N2; by analogy, N2 (specifically: the legal consequence C2, provided for by N2) is then also applied to F1. Consequently, by means of the analogical procedure, an unexpressed norm N1 has been created, which has this form: F1 > C2 (‘If fact-pattern F1 occurs, legal consequence C2 shall be applied’). And, as is also well-known, this mechanism is governed, at least in the ‘context of justification,’ by reference to a principle: namely, the principle that justifies N2 (the principle that constitutes its *ratio legis*), and which is deemed relevant for also dictating the rule for fact-pattern F1. One could also say that, in these cases, the reference to the underlying principle allows one to completely overcome the limits of the linguistic formulation of N2, making it applicable even to cases that clearly do not fall within its scope of application: the principle has made the rule totally transparent.

14 Su conflitti “verticali” e conflitti “diagonali” tra regole e giustificazioni: cfr. F. Schauer, *Le regole del gioco* (1991), Bologna, il Mulino, 2000, pp 291-292; v. anche Á. Ródenas, *Entre la transparencia y la opacidad. Análisis del papel de las reglas en el razonamiento judicial*, in «Doxa», 1998, 21-I, pp. 99-212 (spec. p. 117).

15 Così si esprime, efficacemente, C. Luzzati, *Principi e principi*, Torino, Giappichelli, 2012, pp. 17-20.

So, what do the examples provided in this paragraph show? Two things, it seems to me.

The first is that it is not true that a rule always applies in an ‘all-or-nothing’ manner: the possibility of extensive and restrictive interpretation shows that a rule can, in fact, be applied ‘more or less’; in the case of defeasibility, a rule does not apply—by virtue of an implicit exception—to cases to which it is applicable; and in the case of analogy, a rule also applies to cases to which it is not applicable¹⁶.

The second is that, in cases like those seen here, a rule is applied directly, and a principle indirectly¹⁷. In other words: as soon as one looks even slightly beyond the tip of the iceberg of the legal syllogism, one sees that, often, rules and principles work together in legal reasoning, and that the application of rules is affected in various ways by the presence of principles.

3.2 Rules and the interpretation/application of principles

Let’s reverse the perspective: can it be said that the interpretation and application of principles highlight an interaction with rules? Here too, the answer is affirmative.

First of all, there is a level of interaction between rules and principles that emerges in the very phase of identifying a principle as a principle: often, a principle is inferred, by way of abductive reasoning, from one or more rules (but it could also be inferred from other, intermediate-level principles).¹⁸ At least some implicit principles, therefore, derive from rules: from a group of rules, or hypothetically even from a single rule, a principle is identified that represents their unified *ratio*, their underlying justification; and, evidently, at least in these cases, the content of the principle will be conditioned by the content of the source rules. But the same thing also happens with principles

16 Secondo N. McCormick, *Legal Reasoning and Legal Theory*, cit., p. 155, «the whole point of argument by analogy in law is that a rule can contribute to a decision on facts to which it is not directly applicable».

17 E, nel caso dell’analogia, ad essere applicata *direttamente* è una norma implicita, e *indirettamente* la norma esplicita a partire dalla quale viene individuata la norma implicita (con procedimento analogico), così come anche il principio che giustifica l’inferenza analogica.

18 Sull’abduzione come metodo di individuazione dei principi, G. Tuzet, *L’abduzione dei principi* (2009), in Id., *Do-ver decidere*, Roma, Carocci, 2010, pp. 69-89; G. Carcaterra, *Sulla logica della costruzione dei principi generali*, in *Studi in onore di Franco Modugno*, a cura di M. Ruotolo, vol. I, Napoli, Editoriale Scientifica, 2011, pp. 499 ss. Non tutti i principi impliciti sono necessariamente individuati in questo modo; alcuni principi sono specificazioni di altri principi (G. Pino, *Principi e argomentazione giuridica*, in «Ars Interpretandi», 2009, pp. 131-158); altri principi sembrano avere un fondamento puramente “ideologico”, espressioni di una ideologia politica che si assume incorporata nell’ordinamento - si pensi al principio della separazione dei poteri.

expressly laid down in a normative text (e.g., constitutional principles): thus, the content of the ‘democratic principle’ (expressly stated in our Constitution) is inevitably affected by the various relevant detailed rules and institutions—for example, it is (also) by virtue of such rules and institutions that we can affirm that, in the Italian legal system, the democratic principle assigns a much more important role to the institutions of representative democracy than to those of direct democracy, even though the textual formulation of this principle in Article 1 of the Constitution seems to say nothing in this regard.

Let’s move on to the application of principles. It is often said that principles are not susceptible to direct application to ‘cases’¹⁹: This is because principles are highly generic and indeterminate norms and therefore, to be applied, they require a prior activity of specification. This activity of specification is nothing other than the ‘translation’ of the starting principle into one or more rules (or into a principle that is less generic and indeterminate than the starting one, but which in turn requires further specifications). Principles, in other words, have a ‘nomogenetic’ dimension: at least at the moment of their application, they inevitably produce other norms²⁰. This, it should be noted, is an axiological, not a chronological, relationship: for a principle to be considered the justification for certain rules, the fact that those rules were promulgated before the principle (if it is an express principle) is entirely irrelevant. To be more precise, the specification of principles—like that of any other norm with a significant level of generality (norms containing general clauses, indeterminate concepts, etc.)—can be carried out through ‘concretization,’ or through ‘exhaustive categorization’ (*tassativizzazione*).

19 R. Guastini, *Applicare principi costituzionali*, in «Materiali per una storia della cultura giuridica», 2017, pp. 127-137. Ma cfr., per la tesi contraria, E. Diciotti, *L’interpretazione e l’applicazione dei principi costituzionali*, in *L’arte della distinzione. Scritti per Riccardo Guastini*, a cura di P. Chiassoni, P. Comanducci, G.B. Ratti, vol. I, Madrid, Marcial Pons, 2018, pp. 103-128.

20 Sulla funzione “nomogenetica” o nomopoietica dei principi cfr. E. Betti, *Interpretazione della legge e degli atti giuridici* (1949), Milano, Giuffrè, 1971, p. 317 (i principi hanno «una funzione genetica rispetto alle singole norme»); J. Raz, *Legal Principles and the Limits of Law*, in «Yale Law Journal», vol. 81, 1972, pp. 823-854 (a p. 841: «principles as grounds for making new rules»); S. Bartole, *Principi generali del diritto (diritto costituzionale)*, in *Enciclopedia del diritto*, vol. XXXV, 1986, pp. 494-533 (a pp. 515, 531); F. Modugno, *Principi generali dell’ordinamento*, in *Enciclopedia giuridica*, vol. XXIV, 1991, pp. 4, 8-9; U. Scarpelli, *Diritti positivi, diritti naturali: un’analisi semiotica*, in *Diritti umani e civiltà giuridica*, a cura di S. Caprioli, F. Treggiari, Perugia, Stabilimento Tipografico Pliniana, 1992, pp. 31-44 (a p. 39: principi come «matrici e generatori di norme»); G. Zagrebelsky, *La legge e la sua giustizia*, Bologna, il Mulino, 2008, pp. 219, 225; G. Pino, *Diritti e interpretazione*, Bologna, il Mulino, 2010, cap. III; R. Guastini, *La sintassi del diritto*, Torino, Giappichelli, 2011, pp. 205-206.

To concretize a principle means to transform the starting principle into a more specific norm, or more precisely into a non-exhaustive series of more specific norms (rules). In other words, through concretization, rule R1 can be derived from principle P, but this does not exclude that (that is: the possibility remains entirely open that) further rules R2, R3, R4 ... Rn, relevant for circumstances different from those that gave rise to R1, can also be derived from the same principle P. (Between R1, R2, R3, R4 ... Rn, there is a relationship of ‘vel-vel’ [an inclusive ‘or’], not ‘aut-aut’ [an exclusive ‘or’]). And furthermore, the list of rules derivable from the principle is never exhaustive: new rules could always be derived from the starting principle, depending on the circumstances. Thus, the principle of Article 21 of the Constitution (‘everyone has the right to freely express their thoughts by speech, writing, and any other means of dissemination’²¹)—if one has decided to classify it as a principle—can from time to time be concretized into various more detailed rules that refer to activities such as: holding political rallies, writing novels, writing scientific essays, producing films, writing journalistic articles (news, opinion, etc.), giving interviews (in print, on television, on the radio, on websites...), publishing posts on social media, hosting podcasts, and so on.

To interpret a principle exhaustively means to transform the starting principle into a single, more specific norm. While with concretization the principle functions as a continuous generator of new rules, not subject to an exhaustive list, with an exhaustive interpretation the principle (or what at first glance would seem to be a principle) is reinterpreted to function as a rule. Thus, continuing with the example of Article 21 of the Constitution, one could argue that it exclusively contains the prohibition of censorship by the State²².

In this process of specification (concretization or concretisation), the initial principle will also be confronted with competing considerations, with other principles, and with systemic considerations, among others, which will likely end up limiting or otherwise shaping the content of the initial principle. The concretization of a principle usually requires a balancing between that principle and other principles or competing considerations²³.

21 Original text: («tutti hanno il diritto di manifestare liberamente il proprio pensiero con la parola, lo scritto e ogni altro mezzo di diffusione»).

22 Un suggerimento di questo tipo, relativamente agli artt. 32, 21, e 16 cost., in L. Ferrajoli, *Costituzionalismo principialista e costituzionalismo garantista*, cit., p. 2800.

23 Che il bilanciamento, in queste situazioni, diventi una modalità di interpretazione delle disposizioni di principio, o comunque un modo per ricostruire il contenuto dei principi costituzionali, è sottolineato da R. Bin, *Ordine delle*

Let us draw the conclusions. If the framework reconstructed here is correct, then the application of principles also passes through a “rule-based” phase. Once again, in legal reasoning, rules and principles interact rather than being confined to separate compartments. What has been said also helps to dispel a claim that is extremely recurrent in the legal literature, namely that principles require a particularistic interpretation or application, tied exclusively to the circumstances of the concrete case²⁴. Now, it is certainly true that principles bring an openness and flexibility to the law (including to rules, as we have seen) to allow the interpreter/applicator to consider circumstances, emerging from the ‘unknowns of becoming’²⁵, and not previously foreseen by the rules themselves. And it is also true that a balancing of principles necessarily takes into account the circumstances of the case that prompted the balancing itself. However, upon closer inspection, what happens is that the decision is normally intended to be replicated for every other case similar to the one decided: the ‘case’ that prompted the balancing or, in any event, the application of a principle is relevant not only as an ‘individual’ case, but also and above all as a ‘generic’ case, that is, as the class of cases that share the same characteristics (of course: the relevant characteristics) as the individual case that was the occasion for the balancing²⁶. An application of a principle that is considered valid only for a specific individual case, and not also for the other individual cases that have the same characteristics, seems to challenge both the ideal of formal justice and our very notion of rationality.

4. *In conclusion. Legal reasoning: Hercules or Janus?*

The examples examined in the two preceding subsections evoke scenarios that are entirely familiar to legal scholars. Obviously, one must avoid falling into an easy and naïve generalization: not every instance of legal reasoning is necessarily such as to trigger a dialectical movement between rules and principles along the lines of what was

norme e disordine dei concetti (e viceversa), in *Il diritto costituzionale come regola e limite al potere. Scritti in onore di Lorenza Carlassare*, a cura di G. Brunelli, A. Pugiotto, P. Veronesi, vol. I, Napoli, Jovene, 2009, pp. 35-60 (a p. 49-50); Id., *La Costituzione fra testo e applicazione*, in «Ars interpretandi», 1, 2009, pp. 111-129 (a pp. 124, 128).

²⁴ S. Bartole, *Principi generali del diritto*, cit.; R. Bin, *Diritti e argomenti*, Milano, Giuffrè, 1992, pp. 35-41; R. Guastini, *Applicare principi costituzionali*, cit. (e si veda anche il brano di Zaccaria citato sopra, nt. 14).

²⁵ L’efficace espressione è di L. Lombardi Vallauri, *Corso di filosofia del diritto*, Padova, Cedam, 1981, p. 38.

²⁶ Su bilanciamento ad hoc e bilanciamento definitorio, G. Pino, *Diritti e interpretazione*, cit., pp. 187-193.



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observed in the previous paragraphs. In many cases, legal reasoning does not need to oscillate between rules and principles; in many cases, the application and interpretation of rules are not problematic and proceed as *a matter of course*. However, as soon as a case arises with even a minor anomaly—a case that deviates, even slightly, from the paradigmatic (familiar and unproblematic) cases of rule application—the dialectical dimension (from rules to principles, from principles to rules, and so on) of legal reasoning is set in motion. Moreover, to support the point that interests me, I do not need to demonstrate that the interaction between rules and principles always occurs; for my purposes, it is more than sufficient to have shown that this connection occurs in many cases, and, in any event, in (qualitatively) significant cases.

That said, I believe that the analysis carried out so far clearly shows two things.

First, the distinction between rules and principles—which is already difficult to depict in categorical, dichotomous terms at the “structural” level—cannot be “essentialized” at the operational level either. Indeed, as we have seen, not only the application of principles but also the application of a rule may be subject to weight considerations: this is exactly what happens when a rule is rendered defeasible, that is, when a rule is set aside due to the occurrence of implicit exceptions. In cases such as these, in other words, the rule (and the value or principle it pursues) is weighed against an opposing value or principle, which, hypothetically, justifies its non-application in a certain type of case; therefore, it is not true that rules apply according to an all-or-nothing mode.²⁷ On the other hand, it is by no means an analytic truth that all principles are subject to balancing: some principles may be exempt from balancing or, which amounts to the same, may be regarded as invariably prevailing when balanced against other principles.²⁸

27 N. MacCormick, *Legal Reasoning and Legal Theory*, cit., p. 232; H.L.A. Hart, *Postscript* (1994), in Id., *The Concept of Law*, Oxford, Clarendon, 1994²; J.J. Moreso, *Come far combaciare i pezzi del diritto*, in «Analisi e diritto», 1997, pp. 79-118; R. Guastini, *Le fonti del diritto*, Milano, Giuffrè, 2010, p. 204, nt. 9; C. Luzzati, *Principi e principi*, cit., pp. 38-39.

28 Our translation: This is also argued, in an entirely persuasive manner, by a proponent of the strong distinction theory such as Robert Alexy: “There are, therefore, conditions under which, with great certainty, it can be said that no competing principle prevails [over the right to private life, ndr]. [...] The absoluteness of its protection, however, remains a matter of the relationship between principles. One cannot exclude a constellation in which, on the contrary, competing principles prevail. The certainty of protection, however, is so high that, with regard to normal circumstances, one can speak of absolute protection” (cf. R. Alexy, *A Theory of Constitutional Rights* (1994), Bologna, il Mulino, 2012, pp. 325-326). Original text: Questo è sostenuto, in maniera del tutto condivisibile, anche da un sostenitore della teoria della distinzione forte come Robert Alexy: «Ci sono, perciò, condizioni presso le quali, con grande certezza, si può dire che nessun principio concorrente abbia la prevalenza [sul diritto alla vita privata, ndr]. [...] L'assolutezza della sua protezione rimane, però, una questione di relazione tra principi. Non si può escludere una combinazione in cui, al contrario, prevalgano principi concorrenti. La certezza della tutela, tuttavia, è così elevata che, in relazione a circostanze normali, si può parlare di protezione assoluta» (cfr. R. Alexy, *Teoria dei diritti fondamentali* (1994), Bologna, il Mulino, 2012, pp. 325-326).



Second, rules and principles interact in various ways within legal reasoning. Depending on the circumstances, legal reasoning may assume modes that tend more toward the model of rules, or more toward the model of principles.

In the former case, the elements of rigidity of the norm to be interpreted/applied (resistance to implicit exceptions, rigidity of the contours of the factual pattern, etc.) will be emphasized, to the point that even a norm that could plausibly be understood as a principle will be made to operate as a rule (taxativization).

In the latter case, the norm to be interpreted/applied will be rendered more flexible, adjustable in light of situations of over- and under-inclusiveness²⁹, according to a logic of *reasonableness* and attentiveness to the particularities of the circumstances of the case, to the point of rendering the norm entirely transparent with respect to the underlying reason (or principle), applying the latter directly regardless of the limits arising from the textual formulation of the rule (for example, by resorting to analogical reasoning).

And in between these opposite and extreme poles, of course, there is a whole range of intermediate possibilities, in which rules are brought closer to principles (through extensive, restrictive, and corrective interpretation of rules), and principles are brought closer to rules (through the concretization of principles into rules, or into mid-level principles...).

Well then, due to the infinite variety of reality (the variety of factual circumstances, and of the combinations among legally relevant interests that may come into play from time to time), it is not possible to establish a magic formula, let alone any logical formalization, that determines in advance when it is preferable for legal reasoning to orient itself toward the mode of rules rather than that of principles³⁰. Once it is acknowledged that a rule will never be perfectly optimal—it will always give rise to situations of over- or under-inclusiveness—the problem will always be how much

29 Our traduction: A rule is over-inclusive when it includes within its scope cases that, in light of its justification (the principle that constitutes its *ratio*), it should not include. A rule is under-inclusive when it fails to include within its scope cases that, in light of its justification (the principle that constitutes its *ratio*), it should instead include. On these notions, see F. Schauer, *Playing by the Rules*, cit. Original text: Una regola è sovra-inclusiva quando include nella sua fattispecie anche casi che, alla luce della sua giustificazione (il principio che ne costituisce la *ratio*), non dovrebbe includere. Una regola è sotto-inclusiva quando non include nella sua fattispecie casi che, alla luce della sua giustificazione (il principio che ne costituisce la *ratio*), invece dovrebbe includere. Su queste nozioni, F. Schauer, *Le regole del gioco*, cit.

30 Su questo problema (il “problema della riconsiderazione”), v. B. Celano, *Rule of Law e particolarismo etico*, in *Rule of Law. L'ideale della legalità*, a cura di G. Pino, V. Villa, Bologna, il Mulino, 2016, pp. 235-285.

sub-optimality one is willing to tolerate. That is, the problem will be to decide, case by case, whether to continue following the rule or to “move up” to the level of principles.

Obviously, legal scholars may have different sensibilities regarding the attitude to adopt in these situations. From this point of view, we may distinguish two broad families of approaches: “formalism” and “substantivism”³¹. Formalist jurists will privilege the “rules” mode, making recourse to principles as marginal as possible. Substantivist jurists will privilege the “principles” mode, exploiting every culturally tolerable opportunity to flexibilize rules. However, neither formalism nor substantivism, in my view, can present themselves in a pure state, so to speak: they represent different degrees of intensity along a spectrum, rather than a dichotomous alternative.

In conclusion, it can be hypothesized that rule-based reasoning represents the default mode of legal reasoning: law pursues certainty, and certainty requires rules. However, due to the multiformity and incessant mutability of reality, it is in fact impossible, or at least highly unlikely, that an interpreter or applier of the law can remain exclusively within the realm of rules: an activity of interpretation and application of the law exclusively through rules would, in many cases, be absurd—unreasonable, if not downright irrational. In such cases, the law must look to the level of principles, which introduce elements of flexibility and “reasonableness” into the application of rules. Moreover, it is often necessary to look to principles even in order to identify the content and scope of a rule (teleological interpretation, conforming interpretation).

The ineliminable problem is that there is no formula for establishing when to maintain the default mode (rules, which provide certainty, but at the cost of possible sub-optimality) and when, instead, to shift to the corrective mode (principles, which provide flexibility, but at the cost of weakening rules). The pressure of cases may tear the paper sky of rules, and the jurist will have to decide, case by case, whether to mend it or to look through it. The assessment is necessarily contextual, and, in any event, the choice for one or the other mode inevitably entails the sacrifice of a legal value: legal certainty on the one hand, and the realization of a principle (the ratio of the rule, or another relevant principle) on the other.

It is as if every legal rule, at the moment of its application, were followed by a shadow (benevolent or sinister, depending on one’s point of view) that recites formulas

31 Per una presentazione di queste due categorie, G. Pino, *Teoria analitica del diritto I*, cit., pp. 157-161; Id., *L’interpretazione nel diritto*, cit., pp. 318 ss.



such as “unless absurd consequences follow,” “unless an anomalous case arises,” or the like. And it is never possible to know in advance when this shadow will remain in the background and when, instead, it will completely eclipse the rule.

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