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Special Edition: Tribute to the late Professor John Tiley

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Not argued from but prayed to. Whoôs 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) ï 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 óinternal morality of lawô ï 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.

J.L.M. Gribnau, Professor of Tax Law at the Fiscal Institute and the Center for Company Law of Tilburg University and professor of Tax Law at Leiden University; e-mail: J.L.M.Gribnau@tilburguniversity.edu

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1.1 Introduction

Legal principles seem to be a source of confusion. John Tiley once wrote that principles in European law have óan aspirational aspect with words of such high abstraction that they are waiting to be not analysed but invoked, not argued from but prayed to.ô[1] Also strange to common lawyers and especially tax lawyers is óthe method by which the court states the principle and then works down to the facts.ô[2] According to John Avery Jones the higher level of abstraction accounts for the principle being ósomething external to the rules which helps one to construe the rules.ô[3] So common law principles stay close to the ground in contradistinction with óEuropeanô 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

ï 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 óin the European sense.ô

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 ï which is value-related.

1.2 Outline

(§ 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 ï e.g., societal and statal ï input into the legal order which, however, has to pass the filter of e[6c whi

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

Dworkinôs 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

lawôs.ô[24] As John Tiley reminds us by quoting the American scholar Grove: óTaxation is not simply a means of raising revenue. It is the most pervasive and privileged exercise of the police power.ô[25]

To conclude this section, legal principles constitute the moral core of the legal order - comparable to Fuller's óinternal morality of law.ô[26] They embody the dimension of morality, but they are not purely moral standards, for legal principles serve legal values (see below § 6) ï in contrast with moral principles which serve moral values. Indeed, law and morality are not identical. Legal principles are (moral) standards which are specific

There is another point of disagreement explicitly mentioned by Hart himself on what he calls the ónon-conclusivenessô of principles. This regards Dworkinôs 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 ónon-conclusiveness.ô If this will appear to be a crucial feature of values, the ónon-conclusivenessô of legal principles will be elucidated.

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. óIn this sense, to explicate the principles is to rationalize the rules.ô[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 McCormick 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 ócourse of actionô or ócourse of interrelated actionsô 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 óirretrievably interlocking. [é] 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.ô[37] This may seem to be in line with Dworkinôs 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 óa requirement of justice o ^ pl Ď e

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 ï

in his wording óheld the law to be nothing but state caprice and the point of the law to be nothing but obedience.ô He argues that the law should not be conceived of as the command of the state but primarily as a striving toward justic

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 óform flexible configurations filled with tension.ô[79]

To conclude, this section, it may seem that values are something óout thereô, something transcendent without any connection to reality. As shown above, a dichotomy exists between óisô and óought.ô 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 ómaterial qualification of the ideaô (*Stoffbestimmtheit*) ï signifying a mutual influence between matter and idea ï 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 ónature of the thingô (*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 ï 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 ï 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, Radbruchôs 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 ó*Zweckmäßigkeit*ô 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 1950Tm[(1)7(9)-6(5)7(0Tm[(1)7up15ah(0Tm[(1)7u9(l)7(9)-6(54335EMC /P 3A37o)-6(r)16(a)-4 153.ds)7( )ey5

(*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, óvalues have to contend with other considerations in the law and legal policy.ô[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

modern democratic state. Principles can be conceived as applications of fundamental

and interpreted in an overall principled way.ô[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 not 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 ï

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 óinternalô objectives, the member states are also at liberty to pursue óexternalô objectives through tax measures, e.g., the protection of the environment or stimulation of research and development. Consequently, the ECJ, interpreting and applying TFEUôs 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. óHow should sovereign rights be reconciled with the obligations enshrined in the EC Treaty?ô[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 óinternalô 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 ï instead of relative ï 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.ô

6. If yes, is the cost to free movement caused by the tax measure in proportion to

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 administratio

concerns the principle of honouring legitimate expectations.[133] Both the principle of

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 óin motionô. 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 administrationôs 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 ópriority principles.ô

As Radbruch argues, legal certainty is definitely one of the most fundamental legal values. This also applies to taxation. Here, Adam Smithôs second maxim regarding taxation in general springs to mind: óThe tax which each individual is bound to pay ought to be certain, and not arbitrary.ô[139] Notwithstanding its importance, the concept of legal certainty is not an easy one. óLegal certainty is by its nature diffuse, perhaps more so than any other general principle, and its precise content is difficult to pin down.ô[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 óa retroactive law is truly a monstrosityô.[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, ónot 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: óThe choice of the correct regulative principle for anything depends on the nature of that thing.ô
[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.

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

Retroactivity of tax legislation is a much debated topic.[142]

The last example dealt with priority principles developed to guide decisions with regard to retroactive tax legislation