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An Approach to Legal Principles Based on Their Justifying Function

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I. Introduction

The debates on the characterization of *legal principles* run the risk of becoming dialogues of the deaf. There is, for a start, more than one meaning of the term. Those who participate in such debates do not agree on the difference between legal principles and legal rules or even the paradigmatic features of principles themselves.

Strong categorization of principles as the one proposed by Robert Alexy supports a robust distinction between rules and principles; for him this is not merely a difference of degree, but one based on logical or structural qualities.[1] In this work I identify at least two challenges that must be faced by Alexy's strong categorization and distinction between principles and rules.

This paper proposes searching for the main meaning of legal principles not in their structure as Alexy does, but by considering the function principles fulfill in legal reasoning. To achieve this, one must distinguish between the two different functions, guidance and justification. I observe that the attempt to find the characteristic feature of principles by describing how principles *guide* legal reasoning does not seem to be fully satisfactory. Rather, this paper intends to explain, by considering the special function of *justification*, what is common to all precepts known as 'legal principles'.[2] Although most authors have noticed this function, I consider that we can profit by going deeper into this characteristic feature of principles in order to explain what the relationship between rules and principles is and to show the nature of the distinction between them.

II. An Analysis of the Different Meanings of "Legal Principle"

Our starting point is a description of the different meanings with which jurists use the expression "legal principle". To do this we follow an illustrative enumeration of the various meanings of the expression "legal principle" initially proposed by Genaro Carrió. The aim of such listing is to later determine

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1. Robert Alexy, *A Theory of Fundamental Rights*, translated by Juan Rivers (Oxford University Press, 2002) at 46-47 [Alexy, *Fundamental Rights*]; F De Fazio, "La teoría de los principios. Un estado de la cuestión" (2018) [unpublished] at 2.
2. Roscoe Pound, *Jurisprudence*, vol II (West, 1959) at 124.

whether it is possible to find some common logic or structural features among all these meanings.[3]

(i) Principle as a precept fundamentally directed to the authorities in order to help them to apply rules, by introducing exceptions or restricting the scope of the rules that impose obligations, and by indicating when and how these rules should be used, how they should be combined, when to make one of them prevail, how to fill legal gaps, etc. This type of principle has been considered in some cases by the work of scholars and case law, and in others even expressly by precepts.[4] Examples of this type of principle used in case law are the one against "unjust enrichment" or the one that established that "no man may profit his own wrong". The court of New York used this principle to reject the inheritance claim to the ungrateful grandson who killed his grandfather to that end.[5]

(ii) Principle as one of the fundamental or central elements that must be present in the description of a legal system. In this sense, one could mention the principles of "separation of powers" and of "constitutional supremacy", the principles that presume that "legislators are rational" and that "all laws are constitutional", etc. As well as in case (i), this type of principle may or may not be expressly included. For instance, Section 1 of the Argentine Constitution stipulates the principle of division of powers by establishing that: "The Argentine Nation adopts the federal republican representative form of government…".[6] Further, Section 31 of this Constitution states the principle of constitutional supremacy under the following statement: "This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation".[7]

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3. We ought to clarify that the explanation provided by Carrió of legal principles differs from the one given by Alexy. Carrió's proposal, in opposition to Alexy's, may be considered to be "weak". Instead of affirming that there are logic or structural elements that enable the identification of legal principles, Carrió acknowledges different meanings of "legal principle" and notices that in certain cases these different meanings may overlap with each other. More specifically, he states that "in legal contexts, the word 'principle' is used in many different ways that mirror such meanings and form a complex family united by intricate relations". See Genaro R Carrió, "Legal Principles and Legal Positivism" in J García et al, eds, *Philosophical Analysis en Latin America* (Springer, 1984); *Notas sobre Derecho y Lenguaje (Notes on Law and Language)*, 5th ed (LexisNexis & Abeledo Perrot, 2006) at 210. There are more recent works on the different meanings of the term "principle", namely: Riccardo Guastini, *Das Fontes Às Normas*, translated by E Bini (Quartir Latin, 2005) at 185; Manuel Atienza & J Ruiz Manero, *A Theory of Legal Sentences* (Springer, 1998) at 1-5; Aulis Aarnio, "Reglas y principios en el razonamiento jurídico" (2000) 4 Anuario da Facultade de Dereito da Universidade da Coruña 593 at 595-96.

4. On the different origin and theoretical assumptions of legal principles and the general principles of law see P Serna, *Jurisprudencia de principios. Una aproximación realista* (1993) [unpublished] at chapter I [Serna, *Jurisrpudencia*].

5. *Riggs v Palmer*, 115 NY 506 (CA 1989) [*Riggs v Palmer*].

6. *Constitution of the Argentine Nation*, adopted 30 April 1853 and amended 22 August 1994 at chapter 1.

7. *Ibid*.

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(iii) Principle as an illustrative generalization that is partly obtained from the rules of the system in a relatively inductive manner. These principles can specify partially implicit conditions for applying the rules from which they are inferred.[8] Some of the traditionally known "general principles of law" can serve as an example of this sense of the use of the expression "legal principle". For example, the principle of "good faith" that establishes that "[e]very person is bound to exercise his civil rights in accordance with the requirements of good faith" (see, e.g., Article 6 of the *Civil Code of Québec*[9]) can be considered to be implied in the following institutions of private law: a) the one that determines "no liability without fault"; b) the one that protects the value of certain acts which have a special legal appearance; c) estoppel; etc.

(iv) Principle as a condensation of the *ratio legis*, purpose of the law or the underlying reasons for a certain regulation. In this sense, the principle that gathers the "best interest of the child" condenses in a group of obligations and interpretation guidelines the purpose with which parental rights, filiation, restitution, adoption, emancipation, among other topics, are regulated. As it is easy to notice, this and the different senses of the term "legal principle" described so far may overlap in more than one case, though not in all of them.

(v) Principles as guidelines that express the highest values of a legal system. Nowadays, a significant part of these guidelines is linked to the human rights that have an intrinsically and manifestly fair content. Furthermore, it is usually considered that this type of right is valuable *per se* or that their justification is found in their intrinsic reasonableness. In other words, the existence and validity of these rights would not depend only on having been included in a constitution or treaty but, in turn, because they recognize values that are intrinsic to them. However, this does not mean to affirm that they may be effective despite their institutionalization. We use this sense of the expression "legal principle" when we talk about precepts such as the ones that prohibit any kind of discrimination based on race, sex, religion, etc. (e.g., Section 14 of the Spanish Constitution transcribed above) or that forbid any kind of slavery (e.g., Amendment XIII to the United States Constitution that establishes: "Neither Slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction"[10]) or that prohibit "any cruel and unusual treatment or punishment" (e.g., as Section 12 of the *Canadian Charter of Rights and Freedoms*[11]).

(vi) Principles as policies: as political mandatory guidelines or references that mainly exhort powers of the State and that only in particular

8. Aarnio, *supra* note 3 at 596.
9. CQLR c CCQ-1991.
10. US Const amend VIII.
11. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

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circumstances seem to originate rights. In this sense, the expression "legal principle" is usually used when talking about the State duty to safeguard the protection of the "marriage and family" (e.g., Article 6.1 of the Basic Law for the Federal Republic of Germany[12]), etc.

(vii) Principles as formal requisites that all legal order should acknowledge in order to function as such. In this sense, it is usually said that to constitute a real legal system, a group of laws must have precepts that are "general", "sufficiently clear", "non-contradictory", "prospective", "capable of compelling the authorities", etc.[13] Only some of these principles have been expressly stated in laws. Others, in turn, although they are not expressly stipulated, are mostly accepted by legal theorists, judges, etc. For instance, Section 7 of the Argentine Civil and Commercial Code includes the principle of non-retroactivity of the laws in the following way: "…the laws, whether of public order or not, have no retroactive effects unless otherwise provided. The retroactivity established by law cannot affect rights protected by Constitutional guarantees…".[14]

(viii) Principles as maxims that are widely accepted or known by legal practitioners and that may be useful to teach and apply the law or to defend a legal interpretation. Many of these maxims are not expressly stated by legislation. Nevertheless, in some cases, they are. To illustrate, among the legal maxims that are not expressly stated in laws, we can mention the one that establishes that "*qui potest plus, potest minus*", or the one that suggests "*ignorantia juris non excusat*". Section 19 of the Canadian *Criminal Code* is an example of how to express in a law one of these principles. Under the title "Ignorance of the law", that Section establishes: "the ignorance of the law by a person who commits an offence is not an excuse for committing that offence".[15]

Taking this enunciation of the different meanings of the term "legal principle" as a starting point, what follows is an attempt to show that some central cases of precepts usually named principles do not have the structure or the logic features that Alexy's strong thesis attributes them.

III. Challenges to a Characterization of Legal Principles as Optimization Commands and to a Strong Differentiation between Rules and Principles

1. Legal Principles as Optimization Commands

In this opportunity, we will only stop to consider Alexy's well-known characterization of legal principles as "optimization commands". In Alexy's own words:

12. [Germany], 23 May 1949.
13. See Lon Fuller, *The Morality of Law* (Yale University Press, 1969).
14. Adopted 6 October 2014, in force since 31 July 2015.
15. RSC 1985, c C-46.

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> the decisive point for the distinction between rules and principles is that principles are *optimization commands* whereas rules have the character of *definitive commands*. As optimization commands, principles are norms that order to fulfill something as much as possible, according to the legal and factual possibilities. This means that they can be satisfied in different degrees and that the ordered measure of their satisfaction depends not only on the factual possibilities but also on the legal ones, which are determined not only by rules but also, essentially, by opposed principles. This implies that principles are susceptible to ponderation and, what is more, they need it. Ponderation is the way of applying the law that characterizes principles. On the other hand, rules are norms that are always either satisfied or not. If a rule is valid and applicable, then one is ordered to do exactly as it demands; no more and no less. In this sense, rules contain determinations in the field of the factually and legally possible. Their application is a matter of all or nothing. They are not susceptible to ponderation and they do not need it either. Subsumption is the characteristic way for them of applying law.[16]

Further, Alexy adds that this difference can be observed with great clarity in the cases of conflict between rules and of contradiction between principles. In the first case, according to Alexy, one rule is declared void by the other; whereas the case of conflict between principles is solved by carrying out a ponderation of these principles in a certain case. The result of such ponderation only establishes which principle prevails in the circumstances of the case and does not challenge the validity of the principles in conflict.[17]

2. Criteria for Distinguishing Legal Principles from Rules

This depiction is made from a pre-eminently structural perspective and seeks strong criteria for distinguishing legal principles from rules. More specifically, we could synthesize the strong criteria of distinction between principles and rules in: a) the different way in which principles and rules are applied (gradually versus in an all-or-nothing fashion); and b) in the different type of issue that needs to be addressed when there are conflicting rules or conflicting principles.

a) The different ways in which principles and rules are applied

Alexy considers that subsumption is the way in which rules are applied. If the concrete facts of a case can be subsumed within the state of facts defined

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16. Robert Alexy, *El concepto y la validez del derecho*, translated by JM Seña (Gedisa, 1997) at 162 [Alexy, *El concepto*]. More recently, Alexy explains that the application of any legal precept, including principles, initially implies a subsumption. Then, if the precepts under application are principles, weighting will be necessary. After that, the case needs to be subsumed again within the rule that results from the weighting of principles. See Robert Alexy, "Two or Three?" in Martin Borowski, ed, Archiv für Rechts- und Sozialphilosophie: *On the Nature of Legal Principles*, 119 Beiheft (Nomos, 2010) 18. As we shall see, applying a rule entails determining previously whether that rule is valid, amongst other criteria, according to legal principles. Furthermore, in many cases, the scope of a rule is also established in accordance with principles.

17. Alexy, *El concepto*, *supra* note 16 at 162-63.

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in abstracto in a rule, the legal consequence of the rule determines how the case shall be solved. If the concrete facts cannot fit within the necessary conditions for a rule to be applied, the legal consequence of the rule cannot be applied. This is why it is said that rules are applied in an all-or-nothing fashion.

In turn, principles allow gradualness in their application. They are precepts that do not order us to do anything concrete and determined if certain situations are given; instead, principles order us to do something to the greatest extent possible. The measure that a principle commands depends on the factual and legal possibilities of the fulfillment of the principle in the case; that is to say, considering what is actually possible and what limits other rules and principles also impose.

b) The differences between a conflict of rules and a conflict of principles

The different way in which rules and principles are applied projects onto the different type of problem that is posed when there is a conflict between rules or between principles. According to Alexy, when there is a conflict between rules, the issue is settled by establishing which rule is valid and which one shall be declared void. What is at stake, in this case, is the validity of rules. In turn, when there is a conflict between principles, it is solved by weighting, which determines which principle must prevail in a particular case without questioning the validity of the principle that is *disregarded* in the case.

3. The Difficulty of a Strong Characterization of Principles to Explain Some of its Paradigmatic Examples

This characterization is, amongst other things, too strong as it cannot explain some of the central cases of the expression "legal principle". In particular, according to Alexy's characterization the precept that establishes that "no man may profit his own wrong" would not be a principle, even when this precept is usually used to exemplify that legal systems are not only formed by rules, but also by principles.[18] At the same time, precepts such as the *nullum crimen nulla poena sine lege* precept, the one that prohibits torture, slavery, discrimination, etc. would not qualify as principles. None of these precepts, usually called principles in doctrine and in precedents, seem to fit in the characterization of legal principle offered above. This is because these precepts look more like definitive commands than like optimization commands. The aforementioned do not admit being fulfilled in different degrees, as they seem to determine the field of the factually and legally possible and order what to do. For example, the *nullum crimen nulla poena sine lege* precept determines that it is not legally possible to punish someone without previously having a trial based on an existing law, and orders that

18. Dworkin popularized the case in which judges have resolved basing themselves on this precept, even against what a rule established. See *Riggs v Palmer*, *supra* note 5.

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this possibility is forbidden in such a way that there are no possible exceptions or grades for its fulfillment. As it is easy to observe, something similar happens with the rest of the above-mentioned precepts.[19]

Against this challenge, it is still possible to support -together with Alexy- the idea that precepts such as the non-discrimination principle must be characterized in any way as optimization commands. The reason for this is that, in order to determine in which cases this type of principle would apply, it is necessary to connect them or weigh them against other principles and reasons. For example, to determine if a differentiation made on account of sex is arbitrary and, therefore, discriminatory, we need to consider if there are other principles or reasons that justify that differentiation.

However, this defense of a strong, structure-based distinction between rules and principles is at least challenged due to the following two motives. Firstly, it minimizes the criterion of "gradualness of the way in which principles are applied", which is a decisive element to differentiate principles from rules for strong theories of principles. According to it, the gradualness or dimension of weight of principles such as the "non-discrimination" principle would manifest in the determination of the conditions for its application rather than in the legal consequences that may derive from it.[20] And secondly -as we shall see in further examples- not only the application of some principles requires the determination of the states of facts to which they apply: the same thing happens with several rules. This occurs, at least, in every case in which the conditions for the application of a rule is determined in light of legal principles.

4. Are Principles the only Precepts that are Gradually Applied?

As it was previously stated, a structure-based characterization of principles cannot account for central cases of what we usually call a "legal principle". Furthermore, because of its difficulty to describe principles, this characterization also encounters the challenge of differentiating principles from rules. In fact, from a structural standpoint, the distinction between principles and rules, in the end, is much weaker as it has been previously presented.[21]

Firstly, the criterion of the dimension of weight of principles and correspondingly the gradual way in which they are applied come across the challenge of explaining why some central cases of what we usually call principles do not admit

19. Atienza & Manero, *supra* note 3 at 11. However, we do not share these authors' proposal to characterize principles, as they suggest that principles have a structure composed of openly-configured conditions for its application (among other elements). Next, we will support that the difference between rules and principles, as far as the conditions for their application are concerned, seems to be a matter of grade and that even some precepts usually identified as principles may have conditions for their application which are more closed than those of other precepts usually categorized as rules.

20. Robert Alexy, *Tres escritos sobre derechos fundamentales y la teoría de los principios*, translated by Carlos Bernal Pulido (Universidad Externado de Colombia, 2003) at 120.

21. Several authors state that the distinction between principles and rules is gradual, rather than structural. For instance, Alfonso Garcia Figueroa, *Principios y positivismo jurídico* (Centro de Estudios Políticos y Constitucionales, 1998) at 198.

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gradualness in their fulfillment.[22] What is more, it seems that some of those precepts allow less gradualness in their application than most of the precepts traditionally identified as rules. For instance, the precept that contemplates the "presumption of innocence" admits fewer exceptions (even not legally stipulated) than a rule that imposes a fine to any driver crossing when the traffic lights are red, or not moving forward when the lights are green.[23] There is more than one imaginable example of exceptions that can be (and usually are) made to these type of traffic rules. By the way of example, suffice it to say that the fine will not be imposed on an ambulance crossing with a red light that is taking care of an emergency. Something similar will happen to the case in which the traffic lights of an intersection are malfunctioning because both are working at the same time and drivers cannot avoid committing an infraction, either because they do not move forward when the lights are green, or because they do cross with a red light. Secondly, we may consider that the above-mentioned examples also demonstrate that the central cases of precepts usually denominated as "rules" can hardly be characterized as definitive commands. In other words, not only principles admit being applied gradually or have a dimension of weight. This happens for several reasons.[24] On one hand, due to the open texture that rules have, there will be situations that cannot be completely specified in advance. That is, rules are not able to determine everything factual and legally possible. For example, the rule that establishes that "access to the park with vehicles is forbidden" is not clear, as the condition for its application does not specify if it includes motorized wheelchairs. On the other hand, almost all precepts—including some paradigmatic examples of rules—have a dimension of weight. This is because in plenty of cases it is possible to disregard a rule when it is contrary to a principle, without necessarily declaring the rule void. For instance, in the latter example, forbidding the entrance to a park to someone on a motorized wheelchair would be discriminatory.[25]

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22. Some authors have even observed that linking the notion of "principle" to that of "optimization" minimizes the distinction between principles and rules, as what is "optimizable" does not admit gradual compliance: the regulation subject to optimization is either optimized or not. See Jan-R Sieckmann, "Principles as normative arguments" in Christian Dahlman & Werner Krawietz, eds, *Rechtstheorie: Values, Rights, and Duties in Legal and Philosophical Discourse*, 21st Beiheft (Duncker & Humblot, 2005) at 197 [Sieckmann, "Principles"]. Alexy answers this objection in Robert Alexy, "On the Structure of Legal Principles" (2000) 13:3 Ratio Juris 294 at 300 [Alexy, "Structure"].

23. Alexy explains his proposal by suggesting that the same precept (such as the one that establishes that "the dignity of the human person is inviolable") can be partly treated as a rule and party considered as a principle. The relationship of the preference for the principle of human dignity before other opposite principles decides the content of the rule of human dignity. What is absolute is not the principle, but the rule…. Alexy, *Fundamental Rights*, *supra* note 1 at 61-65.

24. Peczenik, for instance, states that in difficult cases rules are applied through weighting. *Cf* Aleksander Peczenik, *On Law and Reason* (Kluwer, 1989) at 74.

25. Alexy himself acknowledges that rules are not characterized by the all-or-nothing way in which they are applied. However, he understands that this does not affect the argument that states that principles have a dimension of weight while rules do not, and that the dimension of weight is noticed in the different manner in which principles and rules collide. Robert Alexy, "Sistema jurídico, principios jurídicos y razón práctica" (1988) 5 Doxa at 141.

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5. *The Problem of "the Conflict of Precepts" Criterion*

As opposed to what Alexy suggests, conflicts between rules or between rules and principles do not always appear to be solved by denying validity to either one of them. Continuing the above-mentioned example, if the prohibition to enter a park on a vehicle is not applied to anyone on a motorized wheelchair to avoid discriminating against them, this does not make the rule invalid.

What is more, this shows that if there is a conflict between two rules, this does not always mean that one of them will be repealed for all cases. To give an example, a regulation that generally establishes that the maximum speed allowed in avenues is 60 kph can be excluded by another (special) rule that allows a maximum speed of 70 kph on broader avenues.

Finally, something similar to what has been described in the last point occurs in some cases of conflict between principles. Even though no principle is generally abrogated in case of conflict with another, the resolution of the conflict entails the creation of a rule that prioritizes one dimension of one of the conflicting principles over the dimension of the other in certain circumstances.

We ought to acknowledge that in several of his works, Alexy has explained that the conflicts between rules are solved either by declaring one of the rules void (and he complements his statements from a previous work) or by *introducing an exception clause in one of the two rules in conflict* (which allows both rules to remain to be valid). However, according to Alexy there is a substantial difference between introducing an exception clause in one of the precepts to solve an antinomy and establishing that in certain circumstances a principle has priority over another because it is more important or because it has more relevance (though this may change if the importance of each of these principles is weighed under different circumstances).[26]

Nevertheless, we think that the possibility to introduce an exception clause in one conflicting precept to solve an antinomy is too much like the way in which conflicts between principles are solved. On the one hand, this last option acknowledges that some antinomies are solved without establishing that one of the conflicting rules is invalid (which at times seemed to be the most important difference between the ways in which conflicts of rules and conflicts of principles are solved). On the other hand, even when acknowledging that the exception clause introduced in one of the conflicting rules may be considered *more general* than the rule that results from the weighting between two principles (in certain circumstances), the different level of "generality or specificity" of the results of both kinds of antinomies is only an issue of gradualness.

6. *The Infertility of a Strong Characterization of Legal Principles*

Though it seems clear that the strong characterization suggested by Alexy has difficulty in explaining core cases of what we usually denominate "legal

26. Alexy, "Structure", *supra* note 22 at 296-97.

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principle", it is still possible supporting that: "the problem is not to elucidate which the 'correct' concept of principle is. The objective shall rather be to elaborate a theoretically fertile conceptual construction that allows highlighting central structures of law".[27] Therefore, authors like Sieckmann state that we should not argue against the definition of principle as optimization command basing due to the fact that there are different uses to the ones Alexy characterizes. In fact, Alexy himself expressly acknowledges that his theory of principles drifts away from the common use of language. In particular, when referring to the *nullum crimen, nulla poena sine lege* precept, he affirms that that precept formulates a rule as it demands something that can only be either fulfilled or not. Nevertheless, he recognized that this precept can pose a series of problems of interpretation and that, behind it, we can find a principle we can resort to for interpretation. From this proposal for characterizing the *nullum crimen, nula poena sine lege* precept, as a rule, Alexy notices that it represents an example of those cases in which his theory of principles moves away from the common use of language.[28]

However, if we admit that the strong characterization of "legal principle" is a stipulation, the issue we note is that it does not seem fertile enough to explain the relationship between the different types of precepts. After all, the difference between them seems more gradual than intended, and the attempt to find a "criterion" that admits classifying them "with all due precision"[29] can only be accomplished by distorting or exaggerating some of the structural qualities or the way in which they are applied. To exemplify this, it is enough to remember how exaggerated it is to characterize rules as definitive commands. As it has been warned, practically no precept possesses completely definitive determinations neither factually nor legally, nor is their application a matter of all or nothing.

IV. An Approach to Legal Principles Based on the Functions They Fulfill in Law

Taking the critique presented above as a starting point, this paper suggests an alternative characterization for legal principles. For that, we explore the possibility of explaining the main meaning of principles by concentrating on the special function they fulfill in legal reasoning. To address the characterization of principles from the functions they fulfill in law, first it is necessary to distinguish between at least two different types of functions that the precepts called as principles fulfill in legal reasoning: i) function of guidance; and ii) function of justification. Therefore, what follows is an explanation of what is usually understood when referring to the guidance function that principles accomplish in legal reasoning, and of whether this function allows us to characterize them properly,

27. Jan-R Sieckmann, "El concepto de los principios" in *La teoría de Robert Alexy: Análisis y crítica* (Universidad Externado de Colombia, 2014) 173 at 173.
28. Alexy, *Fundamental Rights*, *supra* note 1 at 61.
29. *Ibid* at 46.

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that is, in such a way that it does not stumble against the same difficulties of structure-based characterization. These efforts allow us to conclude that the central cases of precepts denominated as principles fulfill a function of guidance in legal reasoning that is so diverse that it does not provide the element that can characterize all legal principles or differentiate them from rules. Thus, we continue searching—in the second part of this section—for the main meaning of principles, not in their capacity to guide, but in their special justifying function.

Although those who propound that a norm is a reason for action often identify the guiding (directive) function of precepts with its justification function, we will sustain that it is possible to differentiate the two functions. In fact, if it were not possible to differentiate between these two functions, it would be confusing to state (as is usually done) that rules have (or usually have) a guiding function that is more definitive or conclusive than principles have and, at the same time, that principles have a special capacity to justify rules and legal decisions. But this can be explained if we notice that when you say that a norm is a reason for action, we are saying two different things: that a precept guides conduct and, also, that precepts are held to justify conducts. Next, we will elaborate on what both functions consist of.

1. Ways in Which Principles Guide Legal Reasoning

As it has just been mentioned, this paper seeks to demonstrate whether there is a distinctive trait in the way in which the central cases of precepts we denominate as principles guide legal reasoning and to confirm if that characteristic allows one to differentiate principles from rules. On this point, there are those who consider that principles, as optimization commands, would only have a merely indicative strength to guide legal reasoning and that their capacity to guide this reasoning would be restricted to offering some of the elements that should be considered by those who must embark on the decision-making process. This would be because those who must apply principles cannot conclude their reasoning by simply appealing to any of them. Therefore, to apply principles it would be necessary to relate them to other reasons normally contained in other principles and rules. This means that principles can only offer legal reasoning guidelines that only become definitive after being related or weighed against other precepts with incompatible normative qualifications and with a *prima facie* character. By contrast, rules would have a stronger guiding capacity because their orders are definitive as they would contain determinations in the field of the legally and factually possible.

However, as we have observed with some examples in the last section, rules do not always act as definitive commands, and not all principles work as optimization commands. And there are even some core cases of precepts that are usually denominated as principles that seem to be more definitive than most rules. Therefore, those principles have a more conclusive guiding capacity than that of rules.[30]

30. When explaining the different types of reasons included in principles (*prima facie*) and in rules (definite), Alexy acknowledges that, in fact, rules may also offer *prima facie* reasons. However,

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a) Principles With Conclusive Strength

Following Finnis, we can distinguish at least two types of legal principles. On the one hand, there are those that intend to have conclusive strength over legal reasoning (PCS). These principles do not admit justifications for their unfulfillment.[31] Their strength is such that they do not admit any reason not to comply with them. Even more, this type of principle does not admit limitations for their exercise. The reasoning to apply them attempts to conclude or end by simply appealing to such principles. In other words, if a (PCS) principle is applied to a certain case, this principle works as a sufficient and necessary reason to act as commanded. Thus, some authors (such as Finnis) affirm that this type of principle can be considered absolute. This characteristic can also be detected in the way in which they are presented. This type of principle, instead of presenting itself as rights, is usually articulated as negative requirements. An example of a PCS principle is contained in Article 5.2 of the *American Convention on Human Rights*. This article proclaims: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment…". Another example can be found in the Spanish Constitution. In its Section 15 establishes that people "under *no circumstances* may be subjected to torture…".[32]

b) Principles with Merely Indicative and Limited Capacity to Guide Conduct

In contrast, there is another type of principle whose capacity to direct conduct is not conclusive. These principles with a merely indicative and limited capacity to guide conduct (PMIC) are expressed in some cases as rights and not as negative demands, and their capacity to direct conduct is limited, as they only offer some of the elements that will be considered by those who embark on the

he considers that the *prima facie* reasons of these rules are stronger than the *prima facie* reasons of principles. If a rule is valid, applicable and has no exceptions, whoever wishes to introduce an exception not only has the argumentative duty of demonstrating that their solution is better than the one expressed in the rule, but also must show that it is sufficiently better in order to justify moving away from what has been established by the authorities. This would be so because there are "formal principles" stipulating it this way. *Cf* Alexy, *Fundamental Rights*, *supra* note 1 at 58. Since both rules and principles may offer *prima facie* reasons, the difference between principles and rules regarding the type reasons that they include seems to be a matter of *degree*. Furthermore, as it has been already pointed out, there are precepts usually denominated as principles that seem to include reasons that are more definite than those contained in most rules. Finally, it seems like the existence and—undoubtedly—the intensity of the so-called formal principles is a contingent matter.

31. With this distinction, Finnis actually decides to point out how the language of fundamental rights reflects the different guiding force which is expected from them. See John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford University Press, 2011) at 210-11.

32. Sieckmann searches for what distinguishes principles between the normative formulations that say nothing about the validity of their obligatory nature and those that confirm the definite validity of their commands. Sieckmann, "Principles", *supra* note 22 at 198. Unlike that, this paper seeks to demonstrate that there are rules that do not aspire to affirm they are definitively valid, and that there are principles that seem to confirm a validity which is more definite than that of most rules.

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decision-making process. This is because those who must apply PMIC principles cannot reasonably conclude by simply appealing to any of these principles. These principles can even express rights that may be considered inalienable and fundamental, but that are not absolute. Therefore, to apply PMI principles, it is necessary to relate them to other reasons normally contained in other principles and rules. An example of a PMIC principle can be found in Article 2 (2) of the *Basic Law for the Federal Republic of Germany*, which establishes that: "Every person shall have the *right* to life and physical integrity…. These rights may be interfered with only pursuant to a law".[33]

Due to all of the above, the documents that express fundamental rights through PMIC principles usually clarify that these rights are limited by the common good, by the rights of others, etc. For example, Article 32.2 of the *American Convention on Human Rights* specifically establishes: "The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society".[34] As a good part of the legal doctrine, we can characterize this type of principle as precepts from which *prima facie* normative qualifications are derived. This means that PMIC principles are only capable of offering a guideline for legal reasoning, and it will only become definitive once it is related to or weighed against other precepts with incompatible *prima facie* normative qualifications. In contrast, we may support that the demands expressed in PCS principles are imponderable.[35]

The diverse guiding capacity of the different types of principles is usually linked to their different structure. The structure of PCS principles seems to correlate a solution to certain situations or cases. The *in abstracto* state of facts and the legal consequences are both close or definite detailed in PCS principles. These principles do not admit any exception coming from other reasons, or from other principles and rules. Thus, some authors explain these principles as imponderable, while others consider them to be absolute. On the contrary, PMIC principles do not contemplate situations for their application. Instead, they seem to show a good or a purpose that must be sought and that is intrinsic to the principle. What is more, PMIC principles do not seem to specify how to accomplish the state of affairs or the good these principles show. In this way, PMIC principles only stipulate the obligatory nature of using appropriate means to achieve a certain purpose, though without specifying the requested model of conduct.

Therefore, and as Finnis explains, in order to apply PMIC principles, it is necessary to specify or determine their content rationally. This process entails specifying (at least): i) the person (or persons) accountable for the duty of respecting or accomplishing the right stated as a principle (PMIC); ii) the content of the

33. *Supra* note 12.

34. *American Convention on Human Rights* "Pact of San Jose, Costa Rica", 1144 UNTS 123 (entered into force 18 July 1978).

35. Juan Ruiz Manero, "*Rule of Law* y ponderación. Un límite de la ponderación y una insuficiencia de su teoría estándar" (Paper delivered at the University of Buenos Aires, 12 April 2016) [unpublished, archived online at http://www.derecho.uba.ar/institucional/deinteres/2016-ruiz-manero-rule-of-law-y-ponderacion.pdf] at 17.

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duty or the description of the conducts necessary to comply with the duty (this includes the time frame, circumstances, and conditions for compliance); iii) the identity of the rightsholder or the description of his or her class; iv) the conditions under which the right may be lost (this involves determining if the rightsholder can waive his right and under what conditions); and v) the limits to the freedoms the rightsholder has.[36]

c) Principles with Moderated Conclusive Strength

Finally, in between PCS and PMIC principles, we can find another type of principle that only intend to have moderated conclusive strength (PMCS). We can find an example for this type of principle in Section 14 of the Spanish Constitution, which states: "Spaniards… may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance."[37] Although these principles appear to be conclusive, it is not possible for those who apply them to completely arrive at a conclusion by merely appealing to them. In the previous example, first, we need to establish if the discrimination is arbitrary or unreasonable. Therefore, we need to connect or weigh this principle against other principles or reasons. Put differently, these principles leave a part of its state of facts partially open.

d) The Different Guiding Capacity of Precepts is Gradual

Considering what has been said, we may think that rules and principles have radically different guiding capacities. According to this view, the commands contained in rules are definitive, whereas those stated in principles are not.

However, we have noticed that the commands of precepts usually known as rules are not so definitive and that even a particular type of principle (PCS) offers more definitive commands than rules in general. What is more, we could say that the mandates contained in PCS principles are so definitive that do not admit being gradually applied: they are applied in an all or nothing fashion. On the other hand, PMCS principles admit the necessity of being weighed to establish if they can be applied to a certain case. But once this is settled, the commands of these principles are either accomplished or not. In the case of PMIC principles, things are a bit different, as it is necessary to consider not only if this type of principle must be applied to a case, but also the fact that acknowledging a right does not necessarily lead to univocally qualifying a certain conduct. This implies that whoever has to apply these principles must determine to what extent a conduct that fulfills or violates a right is demanded or prohibited. Therefore, it is usually said that from PMIC principles derive *prima facie* normative qualifications. This means that they can offer guidelines for legal reasoning that will become definitive once they are related to or weighed against other norms with opposing *prima facie*

36. Finnis, *supra* note 31 at 218-19.
37. CE (Spanish Constitution).

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normative qualifications. This type of principle does not offer reasons that intend to conclude the deliberation, but reasons whose strength in relation to other reasons (provided by PMIC principles) must be weighed against in order to solve a case.

We ought to acknowledge that in some cases even the application of a PCS or a PMCS principle may require ponderation to determine how to remediate the violation caused by a forbidden conduct. The definition of these remedies is usually gradual (and not in an all-or-nothing manner). For instance, although Section 17 of the Argentine *Labor Contract Law* clearly forbids "any kind of discrimination among workers on account of sex…"[38]; it does not establish what measures are to be taken in the case of a company with thousands of employees and a negligible percentage of women among its personnel. Over the past few years, this principle and others which are similar (contained in international treaties and in the Argentine Constitution) have been taken as starting points by Argentine judges to state that employers *must* have a "neutral standard" towards the sex of an employee when hiring, and "reject other criteria that, although neutral, may produce an unfavorable result for the members of either sex". Courts in Argentina have even ordered a company "to only hire female personnel, until the generated unevenness is compensated in an equitable and reasonable way".[39]

Finally, we must also acknowledge that the difference between the guiding capacities of the types of principles we described (PCS, PMCS, and PMIC) is more gradual than the way in which it was initially presented. What we are trying to say with this is that we can reformulate the enumerated types of principles in order to present them with a guiding capacity that is different from the one they originally had. This possibility to reformulate can be even institutionally established in some constitutional systems. For example, when regulating the limits to the "restriction of basic rights", the *Basic Law for the Federal Republic of Germany* establishes in Article 19(2) that "[i]n no case may the essence of a basic right be affected".[40] Based on this regulation, in some cases the Federal Constitutional Court in Germany specifies the core of a PMIC principle, transforming it into a PCS principle. In this way, when they had to pronounce themselves in relation to the constitutionality of the "Aviation Security Act" -that allowed the German armed forces to shoot down, by the direct use of armed force, a hijacked aircraft that is intended to be used as a weapon in crimes against human lives- the Federal Constitutional Court established that "intentionally killing" the hijacked innocents is incompatible with the essential core of the "right to life" [PMIC principle] and with the obligation of the State to respect and protect human dignity [PMIC principle].[41] Nonetheless, we agree with Finnis that the constitutional framers and legislators' decision to formulate the declarations of

38. *Labor Contract Law*, Law No. 20.744 promulgated by Decree 390/1976 of 13 May 1976.
39. Ruling of the National Chamber of Civil Appeals of Argentina, Courtroom H, decided on 16 December 2002 on "Fundación Mujeres en Igualdad y otro c/Freddo SA s/amparo".
40. *Supra* note 12.
41. BverfF, 1BvR 357/05, párr. 130. The text was consulted on 1 September 2016 at http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705.html.

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rights differently must be attributed neither to logical incompetence nor to keenness towards stylistic variations. With this decision, it is reasonable to suppose that they tried to accomplish some of the effects previously enunciated when referring to the guidance function of the different types of principles, even though they achieve those effects partially or relatively.[42]

2. *The Special Function of Justification that Principles Fulfill*

a) *The Place Principles Have in Legal Reasoning: at the Beginning of its Justification*

Next, we want to show that the special justifying function fulfilled by principles in legal reasoning explains the name "principle" given to these precepts; and, on the other hand, it also explains why such diverse types of norms are equally named as "principles".

Precepts called 'principles' emerge either because those who have legislative functions seek to concentrate the main reasons or motives for the creation of the different parts of the legal system, or because they result from specific judgments formulated by the interpreters' practical reasoning, which are adopted as criteria to solve cases by virtue of their own rationality.[43] Put differently, regardless of the way in which they arise, principles reveal the motives and the ultimate reasons that justify and provide grounds for the rest of the precepts and of judicial decisions.[44]

Authors like Pound have already characterized principles by the relevant role they play in the justification of legal reasoning. For Pound, principles are "authoritative *starting* points for legal reasoning from which we seek rules or grounds of decision by deduction".[45] Precisely, these types of definitions—based on the special justifying function that principles fulfill in legal reasoning—are the ones that allow us to explain the name they receive: they are the starting point from which law is made, known and applied. In other words, on the one hand,

42. Finnis, *supra* note 31 at 212.

43. *Cf* Serna, *Jurisprudencia, supra* note 4 at 44. Alexy expressly notices that principles may be reasons for rules, as well as reasons for specific judgments of what ought to be. See Alexy, *Fundamental Rights*, *supra* note 1 at 59.

44. It is true that Alexy observes that there is a connection between the level of rules and the level of principles. Particularly, he states that since solving conflicts between principles entails creating a rule that prioritizes one principle over the other in certain circumstances, principles are necessary reasons for rules. Alexy, "Structure", *supra* note 22 at 297. Further, he reaffirms this idea when stating that principles usually include the reasons that support rules, which implies that rules and principles are "intrinsically connected". Alexy, "Two or Three?", *supra* note 16 at 14. Nonetheless, as previously stated, Alexy has focused on the different structure of these kinds of precepts, instead of concentrating on the different role that they play in justifying legal reasoning.

45. Pound, *supra* note 2 at 124. Similarly, Finnis speaks about the principles of practical reason as ultimate values that can provide the starting point to consider what to do, guiding our practical reason with a indefinite number of premises and more specific practical principles. See Finnis, "Natural Law", *supra* note 31 at 63-64 and n III.3.

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they explain and provide meaning for law and, on the other hand, they offer ultimate reasons that justify or support law.[46] In Hart's words, principles:

> refer more or less explicitly to some purpose, goal, entitlement, or value, are regarded from some point of view as desirable to maintain, or to adhere to, and so not only as providing an explanation or rationale of the rules which exemplify them, but as at least contributing to their justification.[47]

b) The Special Capacity of Principles to Justify Legal Decisions

(i) Principles Regulate More Cases

Appealing to these reasons contained in principles turns out to be especially useful to justify legal decisions. This is due to—at least—three motives. In the first place, because precepts denominated as principles show through the reasons or motives that justify or intend to justify the rest of the precepts in such a way that principles can cover situations or cases to justify their solution in a way that cannot be accomplished by the rest of the precepts. In other words, without this kind of precept, we cannot properly justify the regulation of a vast variety of cases that legal systems need to order. No attempt to regulate social life only throughout precise and specific precepts is capable of foreseeing every situation that requires regulation.[48] The more precise a regulation aims to be, the more situations will remain without regulation, and this will affect more the capacity of law to order the life of the community. Therefore, the life of a community can only be properly regulated with precise rules and also with principles.[49]

(ii) Principles Enable Law to Fulfil its Ends

Secondly, revealing the reasons or motives that justify—or that intend to justify—the precepts that command a certain conduct enable the law to achieve the purposes it pursues. Although specific precepts are necessary because they offer some benefits, generally related to the rule of law—i.e., foreseeability—,

46. Though rules are also premises of legal reasoning, as we shall see ahead (*infra* IV.2.b), they need principles to be understood and justified. This is why it is said that principles stand "before" or "at the beginning" of legal reasoning.

47. HLA Hart, *The Concept of Law*, 2nd ed (Clarendon Press, 1994) at 260.

48. It is necessary to acknowledge that there is a type of principle that we have denominated "principles with conclusive strength" (PCS) that is usually quite precise. This type of principle usually contains prohibitions that admit no arguments or reasons against them. For instance, Section 18 of the Argentine Constitution establishes that "Nobody may be compelled to testify against himself". Even though this type of principle does not acquire its special capacity of justification from its capacity to regulate an ample variety of situations that may otherwise be not provided by law, it does, instead, by ensuring some minimum or nuclear demands which derive from other principles. In this way, they reveal the reasons that prevent us from admitting other reasons or arguments against them.

49. Timothy AO Endicott, *Vagueness in Law* (Oxford University Press, 2003) at 190. Alexy suggests a system of rules, principles, and procedures. See Alexy, *El concepto*, *supra* note 16 at 172.

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we must also acknowledge that they need to be understood in light of the reasons that explain the motives for their existence and justify them.[50] For example, when a precept establishes a precise age limit—i.e., at least 18 years old—to authorize an organ donation, it ignores the circumstances of persons who intend to donate —for instance, if they are a month away from their eighteenth birthday and if they show enough signs of maturity to take such decision—and may therefore disregard the objective of the law to encourage, allow and regulate a certain type of organ donations made by mature people to save human lives. This does not mean that a rule that precisely states an age limit is not justified, but that in addition to those rules there must be principles that admit mitigating the application of such rules in particular cases.[51] Some authors, such as Schauer, have addressed this challenge by noticing that since rules are composed of generalizations, their factual predicates incorporate some assumptions that do not serve the objectives or the justification such rules have. In this sense, rules are over-inclusive, and at the same time they fail to incorporate other assumptions that may actually serve their objectives—in this other sense, rules are under-inclusive. These situations generate when the application of a rule causes a result that does not derive from the purposes or the justification of the rule. As we can see, the precision of rules usually diminishes the capacity of law to realize the ends it pursues.[52] For this reason, in many cases, the legislation refers to legal principles to enable the law to attain the aims it pursues.

(iii) Principles Provide the Ultimate Reasons to Justify a Decision

Thirdly, in other cases, legal principles emerge as practical judgments formulated by the interpreters' practical reason, that are adopted as reasonable criteria to resolve cases that are not expressly or univocally provided by law. The self-imposing rationality these principles prove to have can only be moral.[53] More specifically, these principles "directly or indirectly [address] justice, equity or some other dimension of morality".[54] This helps us explain and reinforce the special capacity of justification that characterizes these principles. On one side, and as MacCormick observes, "if a regulation *n* is valuable in itself or as a means for a valuable purpose, demonstrating that a specific rule can be subsumed under such

50. Timothy AO Endicott, "Law is Necessarily Vague" (2001) 7:4 Legal Theory 379 at 380 [Endicott, "Necessarily Vague"].

51. In one of its rulings, the Argentine Supreme Court admitted an exception to such age limit by taking into account the particular circumstances of the case. The Supreme Court mainly considered that: i) the minor who requested the judge's authorization to donate was only a couple of months away from her eighteenth birthday; ii) the organ recipient's life was in grave danger, and couldn't wait for the donor to turn eighteen; and iii) the donor showed the court her capacity to decide to donate. Saguir y Dib, Fallos 302:1284 (1980).

52. This generates what Schauer calls "recalcitrant experiences". *Cf* Frederick Schauer, *Playing by the Rules* (Clarendon Press, 1991) at 31-34, 39. Endicott calls this "arbitrariness". See Endicott, "Necessarily Vague", *supra* note 50 at 379-80.

53. Serna, *supra* note 4 at 44.

54. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) at 22 [Dworkin, *Taking Rights*].

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regulation implies that it is a good rule".[55] On the other, and as Nino explains, any attempt to explain the capacity of justification of the law separately from morals fails because the law cannot justify its obligatory nature by itself.[56]

In the end, the only way in which the law can finally justify its obligatory nature is by appealing to some ultimate moral principles which are valid by their own merit and that cannot be justified by other principles. This entails, as Alexy points out, that the legal discourse ends up being a special case of the moral discourse.[57] This is why when judges invoke a regulation to justify their decisions; they refer to such regulations not from an external perspective (that is, as a social practice to abide by), but rather from an internal one, as if those regulations were normative or moral propositions.[58]

c) The Relationship between Principles and Rules Seen from the Perspective of their Justifying Function

(i) Rules Understood as the Determination of One or More Principles

From the perspective of the particular justifying function legal principles have, the image that best explains the relationship between principles and rules is the one that notices that both types of precepts are part of a continuous legal process of determination that starts with the fundamental regulations of a legal system, such as its Constitution, and then is followed by legislation, regimentations, etc., until a court ruling applies all these regulations to solve a particular case. In this process, the rule is the concretion/determination of a principle. Therefore, when a rule is applied, the principle that justifies it is also being applied.[59] In this way, rules and principles need each other. The rule needs the principle to be properly understood and justified, and the principle needs the rule to be specific enough to solve coordination problems by offering a certain degree of foreseeability to that end.[60]

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55. Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1997) at 152.

56. CS Nino, "La paradoja de la irrelevancia moral del gobierno y el valor epistemológico de la democracia" in R Vigo (coord.), *En torno a la democracia* (Rubinzal-Culzoni, 1990) at 97.

57. Robert Alexy, *A Theory of Legal Argumentation*, translated by Ruth Adler & Neil MacCormick (Oxford, University Press, 1989) at 212-20.

58. Carlos Santiago Nino, *La Constitución de la democracia deliberativa* (Gedisa, 2012) at 44.

59. We understand that the explanation provided by Rodriguez-Blanco of the actions of law-making, judicial ruling or complying with the law as *intentional actions* that realize the capacity of practical reasoning of those who make those decisions is compatible with the vision suggested in this section of the paper about the relationship between rules and principles as part of a continuous process of legal determination. For Rodriguez-Blanco, an intentional action is a series of actions directed towards an ultimate goal of the action which is perceived as attractive, convenient and, therefore, possessing the characteristics of something good or desirable to carry out—good-making characteristics. This goal throws light upon this series of actions and makes it intelligible. Thus, the intentional action is unified by the final intention operating as a reason to act, which may be offered to others as a justification. From these ideas, Rodriguez-Blanco affirms that if our intentional actions are realized by an order of reasons which are ultimately based on something deemed valuable, then lawmakers and judges need to conceive this order of reasons as convenient and capable of justifying their rules, directives, and decisions. *Cf* Veronica Rodriguez-Blanco, *Law and Authority Under the Guise of the Good* (Hart, 2014) at 35, 45, 58, 71.

60. On the one hand, the idea according to which rules have limited autonomy because in order to understand and justify them we must do it in light of principles can be found in Dworkin's work. On this regard, he supports that the application of a legal standard entails asking oneself "which

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We ought to clarify that the necessity the rule has to be understood in the light of one or more principles does not turn the rule irrelevant, as the latter specifies or determines a possible and legitimate way (among others) to achieve the objectives proposed by those principles. Although there is no way to understand and justify what is commanded by a rule if not by referencing the principle/s this rule intends to determine, the rule can define which of the different possible or legitimate concretions of that/those principle/s is legally relevant.[61]

The relationship between the rules that establish the duration of procedural stages and the principles these rules intend to specify may serve as an example of what has just been suggested. Although the establishment of the duration of procedural stages addresses the need for a rapidity that is also respectful of the right to a defense in court or of other values; normally, when legislators must define these deadlines, there are many possible and *acceptable* options to determine such principles, as all of them satisfy the mentioned values—i.e. celerity and defense. Therefore, from the viewpoint of the principle of economy, speedy trial, and of the right to defense, it is an indifferent matter whether the term to respond to a lawsuit is of 20 or 25 days. It is simply convenient that the authority that must regulate such matter does so precisely. However, this does not imply that any term can be established, because if it is too short, it could violate the right to defense, and if it is too long, it may endanger procedural celerity.

(ii) The Different Types of Legal Precepts as Part of a Gradual and Continuous Process of Determination

We need to mention that this continuous process of determination of law is not composed of a single step: from a principle to a rule. It is a continuous, stepped and therefore gradual process. The social practice of law results from a chain of actions that are explained and justified by their purposes (actually, sub-purposes or sub-principles), that at the same time are explained and justified by other higher

interpretation, of the different interpretations admitted by the abstract meaning of the term, best advances the set of principles and policies that provides the best political justification for the statute at the time it was passed". *Cf* Ronald Dworkin, "Is there Really No Right Answer in Hard Cases" in *A Matter of Principle* (Harvard University Press, 1986) at 129. This idea was treated in Dworkin, *Taking Rights*, *supra* note 54 at 81, 107-10 and expressed in Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) at 65-68. Atienza and Ruiz Manero state that principles fulfill an explanatory function of law in two ways: i) they allow to synthesize a large amount of information; and ii) they allow to understand the law as a set of guidelines endowed with meaning. See Atienza & Manero, *supra* note 3 at 20. On the other hand, Dworkin employs a double distinction that can be useful for the purposes of this work. He distinguishes background rights from institutional rights and abstract rights from concrete rights. From this last distinction, he concludes that abstract rights offer arguments for concrete rights, but the claims regarding concrete rights are more definite than those that can be made about abstract rights. *Cf* Dworkin, *Taking Rights*, *supra* note 54 at 90-93. Further on, Dworkin will state that the principles regarding dignity express very abstract rights and that all rights derive from them. This implies saying that all rights result from asking ourselves what does equality of consideration and respect demand. *Cf* Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) at 330.

61. Juan B Etcheverry, "La relevancia del derecho que remite a la moral" (2010) 4 Problema at 233-34 and Juan B Etcheverry, "La relevancia de la determinación judicial y la tesis de la respuesta más justa" (2015) 24 Dikaion at 66-85.

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purposes, and so on until we reach some purposes (or principles) that do not need or admit further justification, explanation or argumentation.[62] These principles are the starting point for reasoning what to do, guiding our reasoning in an indefinite number of premises and more specific principles.[63] Some sub-purposes, although part of the foundation of an area of the law (e.g., the *nullum crimen, nulla poena sine lege* precept), are not ultimate purposes and therefore do not necessarily prove the characteristic of having a limited or moderated guiding capacity towards a certain good, nor does their application necessarily admit gradualness or require being specified. This may explain why there are legal principles (actually, sub-principles) with a more conclusive normative force than others. Although these sub-principles, which have more conclusive strength than others to guide legal reasoning, fulfill a justifying function for other rules and therefore are denominated as "principles", they are at the same time explained and justified by other principles that normally do not have conclusive strength to guide legal reasoning. To illustrate this, we could say that the *nullum crimen, nulla poena sine lege* sub-principle, on which a good part of criminal law rests, is explained and justified in another principle such as human dignity which, despite having a stronger justifying capacity, it is not able to conclusively guide legal reasoning.[64]

Conclusions

From what has been presented in this paper, we may conclude that there is widespread disagreement among legal theorists about what the characteristic elements of legal principles are, and even about what the paradigmatic examples of this type of precepts are. Nevertheless, we understand that this can be explained by observing that the concept of "legal principle" admits several different—though somehow related—meanings. For example, we talk about legal principles to refer to a regulation that prohibits any kind of discrimination on account of sex, race or religion, to a precept that establishes that all inhabitants have the right to a healthy and balanced environment, as well as to the regulation that states that no one may profit from their own wrong.

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62. The idea that the legal practice is a chain process has been popularized by Dworkin, who compared this phenomenon with a novel written by successive authors. In this regard see Dworkin, *Law's Empire*, *supra* note 60 at 228.

63. Finnis, *Natural Law*, *supra* note 31 at 63-64 and n III.3.

64. Sieckmann considers that principles are unrestrictedly iterated demands of validity. *Cf* Sieckmann, "Principles", *supra* note 22 at 198. This idea seems to be compatible with the one that states that there are several levels of justification of a legal decision. However, we understand that the only way in which law can finally justify its obligatory nature is by appealing to some ultimate moral principles, which are valid by their own merit and not justifiable by other principles. Dworkin considers that the principle of dignity (which demands that all the members of a community must be treated with the same consideration and respect) is the most abstract of all and, therefore, the rest of the principles are derived from it. However, he believes that this is an interpretative concept, which implies that its understanding demands justification which recognizes no limit (except for exhaustion, lack of time or lack of imagination), as he expressly notices that there is no fundamental governing principle that is true *per se*. Dworkin, *Justice for Hedgehogs*, *supra* note 60 at 116-17.

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In turn, we also argued that Alexy's proposal of characterizing principles by their structure (optimization commands) is not able to explain core cases of what we call principles and does not seem fertile enough to explain the special relationship that arises between the different types of legal precepts.

On this regard, we have shown that there are central cases of what we call legal principles with different kinds of structure and of guiding capacity. We distinguished between principles with conclusive strength (i.e., capable of closing or finalizing the reasoning that appeals to these principles), principles with moderated conclusive strength (because in order to conclude legal reasoning, they must first be weighed to establish whether they apply to a particular case) and principles with merely indicative and limited capacity to guide conduct (as, in order to be applied, they must be related to other reasons contained in other principles and rules).

Therefore, what we propose is to search for the main meaning of legal principles by considering the special justifying function they fulfill in legal reasoning. This proposal allows us to explain why these precepts are denominated as "principles", and also helps us understand why such a vast variety of precepts are called the same. What happens is that legal principles seem to be especially useful to justify legal decisions: either because they can cover more situations or cases, because they reveal the reasons or motives behind precepts and therefore enable decisions to fulfill the purposes of law, or because their obligatory strength lays upon their own reasonableness.

Finally, conceiving principles as starting points for legal reasoning, upon which the law is made, known/understood and applied, also allows us to explain in a attractive way the relationship between principles and rules, as part of a process of continuous and gradual determination.

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