Mexican Law Review
New Series
VOLUME II
Number 1

THE NOTION OF "PRINCIPLE" IN LEGAL REASONING AS UNDERSTOOD IN MEXICAN LAW

Carla HUERTA*

ABSTRACT. *The use of the term "principle" is common to law, but it has a wide variety of different meanings. Contemporary legal theory has added some new ones which should help improve the application of justice, particularly when they are accompanied by an appropriate theory for the interpretation of rules. This article revisits the term "principle" and analyzes the distinction between principles and rules in order to evaluate the different ways in which Mexican Courts apply principles. "Balancing" and "subsumption" are compared as methods when there are conflicts between norms.*

KEY WORDS: *principles, norm conflicts, legal justification, constitutional control.*

RESUMEN. *El término principio, de uso común en el derecho, tiene varios significados. La teoría del derecho contemporánea ha agregado otros, que junto a una específica teoría de la aplicación de las normas, deben contribuir a mejorar el sistema de impartición de justicia. Se analizan el término principio, asi como la distinción entre reglas y principios para evaluar la forma en que son aplicados por los tribunales mexicanos. Los métodos de ponderación y subsunción son comparados a la luz de los con- flictos entre normas.*

PALABRAS CLAVE: *principios, conflictos de normas, justificación legal, control de constitucionalidad.*

TABLE OF CONTENTS

* Professor, Institute for Legal Research, National Autonomous University of Mexico.

I. Introduction

Over the past 20 years the notion of "principle" as distinguished from "rule" has provoked a great deal of discussion with regard to its meaning, scope, application and advantages. The impact of this discussion has moved beyond academia into the practical realm. One of its most attractive characteristics is that this distinction has offered an alternative to "subsumption," the traditional form of applying norms usually considered a "logical" method, to open the possibility of taking a more explicitly justified decision based on "weighing" and "balancing."[1] Nevertheless, there are still many unresolved questions with regard to the distinction between principles and rules.

I will argue that logical syllogism is a required part of the decision to individuate a norm regardless of the kind of conflict between norm sentences, whether referring to rules or principles. I will take this idea further to analyze: 1. the ambiguity of the term "principle" in law, 2. the theory of principles, 3. conflicts between norms: subsumption *vs.* balancing, 4. how courts make legal decisions, 5. the use of the term "principle" in some specific decisions taken by Mexican courts.

Although legal adjudication implies a variety of procedures, I shall only describe the judicial process in general terms and concentrate on the logical aspects of the resolution of normative conflicts. Even if a legal decision cannot be deemed as having a logical nature, logic plays an important role in legal decision-making processes, and not only in relation to subsumption. For implications of the theory of principles, it is important to distinguish the different possible kinds of conflicts between norm sentences, because the solution to the problem depends on how the norms collide.

The process of justification is a reconstruction of legal reasoning. Legal certainty is best served if the arguments of a legal decision are made public. The "legal syllogism" is the traditional form in which a legal decision is presented and the logical appearance of its structure is very persuasive. The

---

[1] Subsumption is the procedure used to compare the hypothesis of the norm sentence with the proven facts in a given case in order to determine the applicability of the norm. *See* Karl Engisch, Introducción al pensamiento jurídico 69-70 (E. Garzón Valdés trans., Ediciones Guadarrama, 1967). For Kelsen, subsumption is simply an act of norm creation, so that the facts are subsumed in a general norm and the legal consequences are produced. *See* Hans Kelsen, Die Idee des Naturrechtes 261 (Die Wiener Rechtstheoretische Schule, 1968).

question is whether formally speaking the solution to a collision of principles is substantially different from the solution of a conflict of rules. Especially because the legal effects of the application of a legal sentence follow from a weighing procedure, it is also presented in the form of a legal syllogism as if obtained by subsumption. The main difference resides in the fact that balancing norms has to be justified by explaining the reasons behind the decision taken to do so, which are not expressed in the internal justification.

The main purpose of this paper is not only to point out that there are different ways in which norms collide, but also to evaluate the possibilities of making a decision by using logic, since the object and process of argumentation varies depending whether it concerns rules or principles.

II. The Ambiguity of the Term "Principle" in Law

The term "principle" is not really new to law, although perhaps not as old as the concept of "rule."[2] Nevertheless, the history of law has shown that the use of principles was common practice in Roman law. Many of these are still applied all over the world. In some legal systems, the word "principle" will appear quite often. But usually, no formal definition is given since the purpose of law is not to describe, but to prescribe some kind of act or action.[3] Identifying principles is therefore no easy task.

According to the use of the term we can separate its different meanings into four groups: 1. when it refers to some value, 2. when used as synonym of "legal principle" and refers to a legal institution, 3. as a general principle of law, and 4. as the complementary category of rules as differentiated by the theory of principles.

In the first sense, which is the most general, its meaning refers to the ethical dimension, so that understanding a certain principle, like justice, equity or proportionality, for example, is an issue related to the dimension of goodness. However, one should not confuse these principles with the values that sustain a legal system, since the latter have a social origin in either a social or political discourse, and may therefore have a different scope.

The main difference between values and principles in law resides respectively in their teleological and directive functions. They are similar in so far as both are formulated as general clauses. Nevertheless values resemble criteria while principles resemble a norm. Principles prescribe a *Sollen*, some-

---

[2] The doctrine uses the term "principle" in different ways, *See* Aulis Aarnio, *Taking Rules Seriously*, 42 ARSP 183-185 (1990).

[3] Even so-called "definitions" are prescriptions of meaning for the application of legal sentences in order to produce certain legal consequences. "Definitions" in law do not explain but determine the scope of a concept.

thing that *ought to be.* According to Dworkin,[4] principles establish rights, their binding nature is a requirement of justice and equity, and so, they reflect the moral dimension of law. In this sense, he appears to assimilate principles to values.

Values have a guiding function towards an end and are used in the interpretation and application of other norms. As part of the decision-making process, they might be considered reasons for action, for both individuals and authorities. In that sense, they seem like generic directive clauses, but in law they operate as meta-norms in relation to principles.

Values and norms constitute different categories. Considering a semantic definition of norm,[5] one could agree with Sieckmann that norms are the meanings of a legal sentence and are characterized by a deontic modality, while values may be described as criteria for evaluating the good. Values represent the part of a sentence that limits the evaluation and the way it corresponds to its content.[6]

The meaning of the term "principle" used in the concept "legal principle" is completely different since legal principles have a specific function in law. They are formulated to express the regulation of a given legal institution formed by a variable number of legal sentences, like "due process," "Rule of Law" or "presumption of innocence." They are exclusively applied in a legal context and have no axiological value.

"General principles of law" on the other hand constitute a type of sentences that become part of a legal system through the practice of written law. Yet this cannot be called a simple and uniform category, as Bobbio pointed out.[7] While seldom given as rules that are to be obeyed by those who apply norms, these principles are used and quoted by judges in their decisions. Most of them originate in Roman law and are even formulated in Latin. They are mainly guidelines for conflict resolution and integration in case of a gap or absence in the law. Some examples are "*nullum crimen sine lege*," "*testis unus testis nullius*," "no one can benefit from one's own tort," "first in time first in right," etc.

A general principle of law can be understood as a summary of a set of relevant legal sentences and are usually inferred from written law by doc-

---

4 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22, 90 (Harvard University Press, 1978).

5 *See* J. R. Sieckmann, *Semantischer Normbegriff und Normbegründung*, 80 ARSP 228 (1994). The terminology used by Sieckmann coincides with that of C. and O. WEINBERGER SEMANTIK UND HERMENEUTIK, 20, 108 (Munich, 1997), as well as with the one used in ALEXY, THEORIE DER GRUNDRECHTE 42 (Suhrkamp, Frankfurt a. M., 1994).

6 *Zum Verhältnis von Werten und Normen*, *in* PERSPEKTIVEN DER ANALYTISCHEN PHILOSOPHIE, 743, 744, 749 (Meggle, Nida-Rümelin eds., 2000).

7 *See* generally Norberto Bobbio, *Principi generali del diritto*, NOVISSIMO DIGESTO ITALIANO XIII (Turin, UTET, 1966).

trine and judges. For Aarnio[8] these principles originate in positive law and even if they are created by legislators, they are part of the legal tradition that passes from one generation to the next by means of their decisions and argumentation.

Due to their uncertain origin, general principles of law are often characterized as summarized legal sentences, as abbreviated formulae or even as short descriptions of written rules depending on their process of elaboration. They are inferred from the legal system in force and constitute legally valid rules even if they are not expressly formulated. As norms, they operate like rules (*s.s*), which means that they are applied in an "all or nothing" way as Dworkin describes it,[9] and their function is secondary, integrative and corrective of legal norms. This kind of principles may be applied to the same set of sentences, *e.g.* to ensure consistency in the set regarding a certain issue at the heart of the principle. They can also be used to identify conflicts between the realm at which that set of legal sentences is aimed and other realms or aims, whose set of relevant legal sentences may also be summarized as different principles.

It is in this way that Zagrebelsky[10] understands the term "principle" when he holds that science cannot provide an articulation of principles because of their plurality and the absence of formal hierarchy among them. For him, principles are not structured according to any kind of "hierarchy of values." Therefore, he suggests that they be prudently "balanced." He argues that the only rule that could be accepted is the optimization of all principles, but considers reaching this goal a more material and practical issue. It should be noticed though, that in this case Zagrebelsky does not use this term in the sense of the theory of principles as Alexy does.

In the last sense of the term, principles are understood as "norms."[11] This conception has been introduced to establish a distinction between norms that are applied strictly and those whose application can be interpreted in different degrees within the framework of legality. This special form of operation of principles is nevertheless only noticeable when applied, and especially in case of a conflict. These norms are the meaning of legal sentences structured in the classical form, though they might be given an abbreviated formulation or be identified as rights or principles (such as the right to life or freedom of expression).

It is in this sense that norms interpreted as principles allow an evaluation of their possible application as given by legislators or more restrictively with-

---

8 AULIS AARNIO, LO RACIONAL COMO RAZONABLE 131 (Centro de Estudios Constitucionales, Madrid, 1991).

9 Dworkin, *supra* note 4, at 22.

10 GUSTAVO ZAGREBELSKY, EL DERECHO DÚCTIL. LEY, DERECHOS, JUSTICIA 125 (Trotta, Madrid, 1997).

11 As Dworkin and Alexy do.

out affecting their validity. That is why doctrine has insisted on optimizing their content in the case of a conflict, so as to warrant their application in the fullest possible way. Weighing and balancing as methods for applying norms must reconcile the principles in conflict in the best possible way, even optimally, avoiding any harm or loss.

Even if traditional legal positivism does not consider any conceptual distinction between "rule" and "principle" as Zagrebelsky[12] states, conflicts between different types of norms are possible.

III. The Theory of Principles

An important part of contemporary legal theory focuses on the reconstruction of the process of justifying legal decisions. In recent years, experts have argued that legal reasoning does not have a single structure. The reason for this resides in the fact that the reasoning procedure varies depending on the type of conflict between the norms. An important change has derived from the typology of norms that distinguishes rules from principles.

Legal decisions have traditionally been presented in the form of "legal syllogisms." The theory of legal argumentation suggests that the application of principles differs from that of rules in that they are not "subsumed" but "weighed." The question is whether subsumption and weighing constitute different forms of reasoning or only of reconstructing a legal decision. Do judges actually reflect the intellectual process carried out in a resolution that includes principles? Is "weighing" independent from the standard or classical form of application associated to propositional or formal logic? This seems a valid question especially since legal decisions are finally presented in the form of a legal syllogism.

The answer to these questions presupposes an explanation of the difference between rules and principles. From a linguistic perspective, one could say that norms are the meaning of normative sentences. These sentences must be reformulated into their ideal structure and interpreted to determine the normative status of the regulated conduct (that is the "deontic character" as in Aarnio).[13]

The ideal or logical structure of a legal sentence consists of a hypothesis (the condition), a normative link (usually the verb "to be" that is deontically translated as a duty or permission) and a sanction (understood as legal consequence, that is, rights or duties). A legal sentence has a conditional form, and as Kelsen stated, produces a necessary imputation of the legal consequences on the subject that materializes the hypothesis as regulated.[14] This

---

12 Zagrebelsky, *supra* note 10 at 117.

13 George Henrik von Wright, Norma y Acción 87 (Tecnos, Madrid, 1979).

14 The principle of imputation, as Kelsen called it, explains the functional connection

is the structure of a sentence that, according to its rule of recognition, belongs to a legal system. Law provides for the legal character of the sentence. It is not a consequence of regulated content, but a quality that depends on their function as sentences sanctioned by the competent authority.

If we agree that all sentences issued by legislators have legal meaning and may produce an effect on the legal status of an act or action, then the unity of the legal system allows for their reconstruction as norms (*s.s.*). One could reconsider Kelsen's theory on the non-independent norm[15] and on those grounds establish a relationship between the sentences that form a complete normative sentence in the ideal form.[16]

Many authors believe that due to their formulation and function, legal sentences may contain two different kinds of norms: rules and principles. Rules are applied in terms of "all or nothing." On the other hand, principles, they say, have to be "weighed." But what does weighing really mean?

Contemporary legal theory has distinguished the basic components of the legal system: the norm, in rules and principles. Following Dworkin and Alexy, this distinction leads to two forms of application: subsumption and weighing. However, rules and principles have the same nature. They are legal norms sanctioned by legal authorities. The difference cannot be perceived in the formal or logical structure of the legal sentence, and does not take into account the generality of their formulation. It is only possible to distinguish a rule from a principle in the case of conflict, which provides for a different way of justifying the application.

One of the difficulties in explaining this method resides in the actual possibility of distinguishing a rule from a principle. In my opinion, this is not possible *a priori*, but only when a conflict of norms arises, especially because legal sentences are hypothetically formulated and expressed in a common and often technical language. A norm, understood as the meaning of a legal sentence, can be inferred as a rule or a principle depending on its content. Regretfully there is no concept of principles that enables their immediate identification by simply reading a legal sentence. And though they constitute a distinct logical category of norms, they are still general and abstract, just like rules. The difference is only perceived by the authority or interpreter of the legal sentence in terms of its application to a particular case and could hence be discretional. Second order rules may come in handy to

---

between the condition and the sanction brought about by a legal norm, HANS KELSEN, GENERAL THEORY OF NORMS 24-25 (Michael Hartney trans., Clarendon Press, 1991).

15 HANS KELSEN, LA TEORÍA PURA DEL DERECHO 52 (2nd ed., 1981); HANS KELSEN, TEORÍA GENERAL DEL DERECHO Y DEL ESTADO (Eduardo García Máynez trans., UNAM, 1988).

16 According to this thesis, norms that do not provide for a coercible sanction are connected to others that do, due to the unity of the legal system. HANS KELSEN, REINE RECHTSLEHRE, 52-55 (2nd ed. 1960), and Hans Kelsen, *The Law as a Specific Social Technique*, 9 U. CHI. L. REV. 75, 87 (1941-1942).

determine the nature of the norm, yet its interpretation as a rule or a principle still has to be justified.

Dworkin proposes a model of principles according to which a legal system is integrated not only by rules, but essentially by principles. He considers that law contains other elements but he does not define principles. For him, all principles are "legal principles," but he also alludes to their moral dimension.[17] So, their origin or the kind of principles judges may legitimately use is not clear. For Dworkin, rules are applied in an all-or-nothing fashion. If the norm is valid, legal consequences follow when the hypothesis is fulfilled. Even when applicable, principles do not determine the case; they give reasons in favor of one or another decision. Principles have a dimension of weight, which become evident in case of a collision. The weight is assigned by the competent authority solving the case.

The distinction Dworkin proposed and Alexy further developed is the nucleus of the so-called "theory of principles." Principles are *prima facie* applicable. This means they are to be applied only if no other principle can be applied. For Alexy, central to the distinction between rules and principles is the fact that principles are norms that order something be done to the highest possible measure within legal and factual possibilities. Hence he defines principles as rules for optimization.[18] A collision of principles is solved by establishing what ought to be done in a definite way, but it could be expressed as a collision of values, to thus refer to what is better in a definitive way.[19]

Balancing constitutes a form of reasoning that justifies a different application of a legal sentence. The interpretation of a norm as a principle requires the comparison of the norms in conflict and must be sustained by arguments. Weighing arguments is central to this procedure. It is the arguments that are balanced to defend the weight of a certain norm in a case of conflict. Transforming the norm into a principle allows the application of two norms in conflict without questioning their validity. As a process it requires a certain method for weighing norms, that is, to explain the relevance attributed to each one of them. By balancing normative sentences, the weight settles on the arguments that establish the preference of a principle.

According to Alexy, fundamental norms are principles, that is, norms that have to be optimized. He goes on to point out that interferences with constitutional rights are admissible if they are justified,[20] which is only pos-

---

17 Dworkin, *supra* note 4, at 20, 90, and RONALD DWORKIN, LAW'S EMPIRE 225 (Fontana Press 1986).

18 Alexy, *supra* note 5, at 75, 76.

19 Alexy, *Sistema jurídico, principios y razón práctica*, 5 DOXA 139, 145 (1988).

20 Judges often use the terms "principle" and "value" synonymously when referring for example to fundamental freedoms specified in a Constitution. This practice has contributed to the confusion of the different character and function of principles in law.

sible if said interferences are proportional. For him "proportionality judgments, however, presuppose balancing."[21] Balancing has a similar structure to subsumption though it is not a logical one. Alexy has proposed a triadic model of a "weight formula"[22] to maintain that this procedure links judgments on degrees of interference, the importance of abstract weight and degrees of reliability.

The notion of principle is the starting point for a type of argumentation that provides an exceptional solution to a conflict. It preserves the validity of the norms while establishing a differentiated degree of relevance for their fulfillment in the case at hand. If priority is granted to a principle, it then operates as a rule regarding an individual normative claim.

IV. Conflicts Between Norms

Legal norms are issued to direct human behavior in society. It is therefore important for their content to be clear. However, legal sentences may be vague, obscure or ambiguous. These problems, in addition to the superabundance of norms, produce uncertainty. Norms in conflict fail to fulfill their object: they cannot direct conduct. Some application problems originate in these defects or in the lack of precision of particular normative sentences. Sometimes they can be solved by interpretation, but genuine norm conflicts cannot be solved by mere interpretation. But understanding the nature of a norm conflict and the process of solving it can help overcome a problem.

The possibility of a norm conflict cannot be denied even if such a situation is not considered ideal in a coherent legal system. For Von Wright a "*contradiction between prescriptions can be said to reflect an inconsistency (irrationality) in the will of a norm-authority,*"[23] but that does not necessarily mean that a normative system is inconsistent in itself or that legislators deliberately issue contradictory norms. As von Wright argues, the coexistence of contradictory commands might not be a logical contradiction; but in any case it can be called a "conflict."

Conflicts have been usually identified as a problem of application or fulfillment of the norm, and even in the execution of the legal consequences.[24]

---

[21] Robert Alexy, *On Balancing and Subsumption. A Structural Comparison*, Vol. 16 No. 4 Ratio Juris 433, 436, (2003).

[22] For him, this formula is a scheme that works according to arithmetic rules: numbers help in the interpretation. Balancing represents a graduating scheme of legal reasoning, *id,* at 448.

[23] George Henrik von Wright, Norm and Action a Logical Enquiry 145, 151 (Routledge and Kegan Paul 1963) (1951).

[24] As Stanley Paulson correctly mentions it in *Zum Problem der Normkonflikte*, there are as

On a higher level however, it is more a matter of the actual validity and belonging of the norm to the legal system. Regarding the structure of legal sentences, the conflict can occur in terms of different elements of the norm, that is, in the hypothesis (its content or its character[25]) or in the legal consequence. Incompatibility between any of those elements makes it impossible to apply both norms at the same time, because they oppose each other. They are either contrary or contradictory, which is why it is logically impossible to satisfy both.[26]

A normative conflict implies the incompatibility of two or more *prima facie* valid norms that are to be applied under the same circumstances. They can either not be satisfied simultaneously or they produce contradictory legal consequences. The incompatibility of the norms can be of a normative or a logical nature, but it does not need to be the kind of a logical contradiction. To be conceived as a normative conflict, it is only necessary for the norms to prescribe something that cannot be legally or logically satisfied at the same time without some undesired or inconvenient consequence.

As a result many different types of normative conflicts can materialize in a legal system. Since the conflict-solving process begins by determining its existence and type, the first step is to analyze the legal sentences in order to identify the norms and determine whether there is in fact some kind of incompatibility between them. A semantic definition of norm is best suited for this purpose. The legal sentence is hence understood as the linguistic expression of a norm. Norms are the meaning of normative sentences.[27] Generally speaking, there are different kinds of conflicts between norms. When the distinction resides in the type of norms to be applied in a certain case, then we can speak of conflicts between norms and collisions of principles.

The interpretation of the norms requires that the legal sentence be reconstructed and reformulated to the ideal form, "If A then B." This is done from the syntactical perspective, that is, independent of any kind of interpretation. The object is simply to put the pieces together in such a way that, the "new sentence," allows the norm to be identified. Once this condition has been fulfilled, other problems will have to be overcome such as vagueness, ambiguity and obscurity of the concepts and the sentence they belong to.

Making a legal decision implies a far more complicated process than appears at first glance since it may imply many different forms of analysis and

---

many conceptions of the nature of normative conflicts as authors have written about it, ARSP, Bd. LXVI/4, p. 487.

25 The term "content" refers to the regulated behavior and "character" to the deontic modality that qualifies it, for this classification, *see* von Wright, *supra* note 13, at 87 ff.

26 For von Wright "*A norm directing a person to undertake both a certain act and its complement is directively unreasonable if it prescribes what is logically unreasonable, and its fulfillment is therefore logically impossible*," *supra* note 23, at 174.

27 In *Norm and Action,* von Wright distinguishes between "norm" and "norm formulation," *id.* at 95.

of course a certain methodology. Logic —not only formal logic, but also deontic logic— plays an important role at different moments in this process and serves different purposes. Taking into account that there is more than one kind of logic related to this process, the analysis at this point can be separated into two moments: first, that of referring to the "external justification" to ascertain the function and limits of logic at this stage of the process given that the correction of the premises has to be verified in this part of the justification; and then, to that of the "internal justification," which will be analyzed to evaluate the logical character of the subsumption and the so-called legal syllogism.

There are many kinds of legal decisions, but all of them have something in common: there is a normative problem that must be solved by the competent authority. It can deal with the vagueness of a concept, the meaning of a normative sentence, a gap in the legal system, a contradiction between norms or the validity of a norm. But they can all be reduced to one single problem: deciding which legal sentence to apply and how.

As for what the role of logic in the solution of normative conflicts entails, von Wright[28] states that logic cannot help us solve a conflict, but can provide certain principles or normative rules, certain "meta-norms" that indicate how it can be done. In the first stage of solving a normative conflict, logic can be a useful instrument to identify the problem and the kind of normative conflict.

For Ota Weinberger, logic can only determine the existence of a normative contradiction, but cannot eliminate it.[29] In the case of a conflict between the deontic character of two norms, deontic logic is necessary to determine the conflict. Thomas Cornides[30] is of the same opinion. He sustains that logic can only confirm the contradiction, but not solve it. Logic might therefore be considered as a limited, but useful tool to solve normative conflicts.

Finally, we could say that a solution of a normative conflict cannot be reached by logical means, but by legal ones. The rules of logic do not apply to the solution of normative conflicts; guidelines must be found in the law. That is why García Máynez[31] believed that establishing the applicable norm is not a matter of logic, but has to be regulated by positive law, to thus determine the criteria for resolving conflicts. The solution of a legal problem follows more from the subsumption of the case in the applicable norm than from a logical inference.

---

28 Georg Henrik von Wright, *Sein und Sollen*, *in* NORMEN, WERTE UND HANDLUNGEN, 73 (1994).

29 OTA WEINBERGER, RECHTSLOGIK 254 (Duncker und Humblot 1989) (1982).

30 Thomas Cornides, *Ordinale Deontik*, 25 FORSCHUNGEN AUS STAAT UND RECHT 5 (Vienna, New York, 1974).

31 Eduardo García Máynez, *Some Considerations on the Problem of Antinomies in Law*, Vol. 49 No. 1 ARSP 9 (1963).

V. Legal Justification

According to Alexy,[32] the object of legal discourse is the justification of legal decisions that constitute a special case of normative sentences. To demonstrate the complexity of the process, it has been divided in two parts: the "internal justification," which shows how the decision follows "logically" from the premises adduced as basis, and the "external justification," in which the adequacy of the premises is verified.

The interpretation and argumentation of the norms and facts related to a certain case must be stated in the external justification. At this stage of the reasoning, many decisions are taken about the meaning of the norms and the legal consequences they might produce, the way in which they have to be applied and the considerations regarding the particular case and the related facts that indicate the reasons that will uphold the final decision.

The process of justification will be explained using as an example the solution of a normative conflict, distinguishing between the external and the internal justification. A normative conflict is usually related to the circumstances of a certain case. Sometimes they are not even evident and have to be identified through interpretation of scholars or the judges competent to control the norms of a legal system.

Aarnio[33] argues that the conflicts between norms constitute a logical inconvenience of the system because two norms that establish different legal consequences to the same hypothesis can produce contradictory normative sentences. For him, conflicts are possible as a matter of fact. The problem of which of the norms and under what circumstances they should be obeyed must be solved, because both cannot be applied at the same time. Therefore, in his opinion one of them has to "recede, at least partially." Nevertheless, he does not explain the meaning of his assertion —he could be thinking of the temporary suspension of the application of the norm, or that the norms can be applied to different degrees, as with Alexy in the case of conflicts between principles. Regrettably, Aarnio does not delve into this problem even when he considers it relevant.

In the case of a normative conflict, the challenge resides in deciding on the application of the norms. Internal justification only determines that a certain norm must be applied to a case and therefore has immediate effects on a specific person's rights or duties. External justification studies the incompatibility of the norms that cannot be applied at the same time and the choice of the norm to be taken as the normative premise for internal justification.

---

[32] Robert Alexy, Teoría de la argumentación jurídica 36 (Centro de Estudios Constitucionales, Madrid, 1989).

[33] Aarnio *supra* note 8, at 160.

The argumentative process actually begins with the external justification. The first premise states that two norms are applicable to the case; the second one indicates that they are incompatible; and the third that incompatible norms cannot be applied at the same time. The following premises are the sentences that consolidate the argumentation of the existence of a conflict and the reasons why one norm should be preferred over the other. In the case of a collision of principles, weighing is done at this stage of the argumentation to decide on the need to apply one or both of the conflicting norms and to what degree. Propositional logic may be useful to verify the correctness of the arguments, but that does not necessarily mean that external justification has a logical structure or produces a deductive inference. In the case of a collision of principles,[34] the weighing would be done at this stage of the argumentation to reach the conclusion of the need to apply one or both of the conflicting norms to a certain degree.

The incompatibility of the norms must be proven in the external justification. After having tested their actual applicability and their normative validity, the argumentation of the reasons to preserve one or the other must convince the audience that there are sufficient grounds to eliminate one or even both norms because they infringe higher normative rules, principles or values. The conclusion is the elimination —or better said, the decision not to apply— at least one of the norms. In the event that both norms are considered non-applicable, the judge can fill the gap created if it falls within his competence. If not, the legislative power will have to issue a new norm.

Once the legal sentences have been reformulated, the norms identified and their meanings established, the incompatibility of the norms can be analyzed. In the first stage of solving a norm conflict, logic can be a useful instrument to establish the relationship between norms and thus identify the problem and kind of conflict. When a conflict can be identified in the deontic character of the norms, analysis will have to be carried out by means of deontic logic. However, if there is in fact incompatibility, it cannot be solved by logical, but only by normative means.

Other instruments such as normative criteria, interpretation and argumentation, as well as considering the operating rules of a normative system, are also needed in order to complete the process of justification. It is always important to take into account the operating rules of the normative system. Thus, the definition and operation of the legal system and its basis are also relevant to discovering the problem and finding a solution.

For Aarnio,[35] the structure of the internal justification differs not only from that of the classical syllogisms, yet it is also more complex since it is composed of premises, rules of inference and the values needed for the in-

---

[34] Here I follow Alexy's conceptualization in ALEXY, TEORÍA DE LOS DERECHOS FUNDAMENTALES 81 (Centro de Estudios Constitucionales, Madrid, 1989).

[35] Aarnio, *supra* note 8, at 166.

terpretation. For him, the difficulty in interpreting does not reside in whether the conclusion follows logically, but in selecting the premises and determining its content, in choosing the appropriate rules of inference or basic values. That is why he believes the real problem of the legal discourse centers on the external justification.

As Aarnio clearly points out, external justification in not syllogistic; it is more a matter of convincing the addressee of the interpretation, the syllogisms supporting the interpretation or the argumentation guided by criteria of rationality or interpretation standards. In the end, the objective of external justification is to prove that the chosen normative premise is the right one for the case, which implies that the decision is lawful and thereby obligatory. In the case of normative conflicts, the applicability of one of the conflicting norms, as well as the acceptance of the judge's decision of the definitive validity of the norm must be assured.

Internal justification has the appearance of a syllogism. Its first premise consists of the norm chosen to be applied, which is therefore called "normative premise." The second premise summarizes the legally proven or admitted facts to be subsumed in the hypothesis of the norm. The third and last premise, usually the "conclusion," expresses the decision regarding the legal consequences after applying the norm.

Despite its logical characteristics, the so-called "legal syllogism" does not produce a deductive inference nor does it in fact represent a logical process (*s.s.*). The conclusion derived from a normative premise and the facts compared to it in the subsumption is that the norm is applicable to the case. The formal structure of subsumption is usually presented as a deductive scheme. It represents a way of formalizing an apparently deductive structure by means of formal logic. The actual individuation of the norm is the result of a different type of reasoning.

The justification process in the resolution of a normative conflict needs to distinguish between conflicts in a specific case (concrete) and those produced by issuing a norm (abstract).[36] The possibility of a concrete conflict cannot be denied, and I believe that its process of justification is also clearer than that of an abstract conflict. A concrete conflict usually depends on circumstances regarding the application of the norms. The existence of abstract conflicts is harder to accept, because they are not evident and they need to be identified by interpretation of either by scholars or those with

---

[36] Most contemporary legal systems regulate at least some form of control of constitutionality. Constitutional legal theory speaks of two main forms of control: the concrete or actual case related system, and the abstract or potential conflict system. In Mexican law, the *Amparo* is an example of the concrete form of control of constitutionality; the procedures regulated in article 105 of the Mexican Constitution are, on the contrary, abstract forms of control since the existence of a directly affected person or interest is not necessary. In these cases, abstract control protects the legal system from invalid norms that may produce some conflict.

the power to control the legality of norms, as commonly found in cases of unconstitutionality.

In the case of either a concrete or an abstract normative conflict, the question lies in deciding the application of the norm. In a concrete conflict, internal justification aims at individuating the norm so as to apply it to the case at hand. In an abstract conflict, only the validity of one or both norms can be determined. The outcome of the resolution of the conflict may be a modification of the legal system, but it has no direct effect on any person's legal status. Of course, the consequence of the determination of the invalidity of a norm is that it can no longer be legally applied. Legal effects depend on the stipulations in the legal system and can include the possibility of a legal nullity declared retroactive.

External justification in both cases is similar since incompatible norms should not be applied and one of them must be chosen as normative premise for the internal justification. In extreme cases, both conflicting norms can be found non-applicable or invalid. With such a decision, the judge could produce a gap in the legal order. In these situations, it is advisable that the legal system provide for a way to remedy the problem, so that the judge can give a legal solution. The difference between both forms of control resides in the legal consequences of the decision since they depend on the powers attributed to the judge, more than on the procedure of justification. In the concrete case, the decision regarding the non-applicability or the declaration of invalidity of the norm considered inappropriate for the case ends with the individuation of another norm. Abstract cases usually function as methods of control over the coherence of the legal system and the normativity of its legal sentences. Therefore, the decision could even be the declaration of the nullity of the norm.

Abstract judicial review requires that external justification deal with the fact that two norms pertaining to a same legal system are incompatible with each other with demonstrating their incompatibility. The relevance of this form of control resides in that it serves to avoid future conflicts. Judges can therefore determine the definitive elimination of a norm from the legal order. It operates as a mechanism of control of the norm-issuing power. Incompatibility produces a problem of application of norms and therefore in the coherence and efficacy of the legal system.

Internal justification in an abstract conflict starts with the norm (or general principle) that establishes that two conflicting norms cannot be simultaneously applied. The second premise is related to the actual applicability of a norm saying that it is either not valid or that it cannot be applied. The conclusion is that one of the norms (or even both) is declared either invalid or null.

One could therefore conclude that the main difference is that in the concrete case, the object of the decision is the application of the norm, whereas

in the abstract conflict it is related to its validity -which also determines its future application. Legal validity of a norm is presupposed in order to accept that there is a normative conflict. Even if the validity of a norm could be revoked in certain cases of concrete conflicts, discussion dos not center on the issue of validity, but on the application of a norm. Principles need not be nullified nor declared invalid, because each conflicting norm persists since the judge finds some kind of balance. Arguments sustain the relevance of one or another principle to determine their precedence of application to the case.

VI. Principles as Understood by Mexican Courts

Law should be conceived as a dynamic legal system in order to give an adequate and comprehensive answer to the problem of norm conflicts. This model implies that its elements (legal norms) are interrelated because the legal system forms a unity, and are organized according to certain criteria that determine their relationship.

The Constitution is the norm at the basis of a legal system. As a dynamic norm that itself operates as a system, it allows its systematic interpretation, a method that produces modifications in norms and in the institutions it regulates as a result of the process known in the constitutional legal science as "mutation."[37] As the Supreme Norm of a legal system, it determines (to some degree) not only the relationships between the norms of the system, but also their meaning because of its nature as a frame of reference for the interpreter. A legal system created in conformity with the Constitution's stipulations operates as a whole; its completeness, coherence, consistency and independence[38] make it applicable.

Interpreting the legal system according to the principle of non-contradiction helps prevent situations that seem to produce contradictions between constitutional norms. The principle of coherence enables the meaning of an institution to change from its original sense to make it compatible with other institutions. Assuming the rationality of the constituent assembly, there cannot be any redundant norms in the Constitution because each norm has a meaning of its own, hence affirming each one's independence. Finally, the Constitution as the Supreme Norm of the legal order is complete. Therefore, constitutional gaps are not possible. Human conduct is either regulated or not, and both situations are lawful. The completeness of the Con-

---

37 Konrad Hesse, Escritos de derecho constitucional 25 (Centro de Estudios Constitucionales, Madrid, 1983).

38 *See* Carla Huerta, *Constitución, Reforma y Ruptura*, *in* Transiciones y diseños institucionales (González & López eds., UNAM, 1998).

stitution is a necessary supposition for its application and interpretation. The completeness of the system is, on the contrary, a rational ideal.

The Constitution establishes the processes for creating norms, which are directly linked to the system of constitutional control. The possibility of judicial control of constitutionality is at the core of constitutional efficiency since it reinforces the mandatory character of the Constitution. The judicial system guarantees the applicability of norms. Part of its function is to solve conflicts between norms by giving coherent and independent solutions. Ever since the Constitution began being considered a legal norm instead of a political document,[39] judicial review became a fundamental axis in the structure of the Supreme Norm.[40] In this way, balance between fundamental rights and the separation of powers can be attained.

Mexican law follows the Roman legal tradition and many general principles of law are part of it, as can be expected. As in other legal systems, the term "principle" appears often in legislation and in court decisions. Judges often appeal to principles to solve a case, but they either refer to principles established by the law as obligatory for its interpretation or to general principles of law. In the first case, this kind of principles are considered as "undetermined," and are defined by the organs with the legal power to delimit them. Examples of such legal indeterminate legal concepts in Mexican law are "general interest," "public security," "transparency," etc.

Courts often resort to principles to use their discretional powers and adapt a decision to values such as equality, justice or fairness. Methods of interpretation and argumentation are not fully developed by law; this task has been undertaken by doctrine. Positive law regulates the general methods allowed by simply mentioning them. For example, Article 14 of the Mexican Constitution states that in criminal law, no argument by analogy or *mayoría de razón*[41] is permitted. In any other matter, the application of general principles of law can fill the gaps in the law.

In Mexico, resolutions based on principles normally do not refer to norms that are optimized through a balancing procedure as proposed in Alexy's theory of principles. Nevertheless, a recent decision has started to make changes in this area by explaining the "balancing" process, focusing on the need to solve contradictions between norms following the criteria of "the interest of society, its values and the consequences of a decision" in envi-

---

[39] One could say that the decision on *Marbury v. Madison* is the turning point in this matter.

[40] On the internal structure of the Constitution, *see* Huerta, *Constitución y diseño institucional*, *in* TEORÍA DEL DERECHO. CUESTIONES RELEVANTES 58-61 (UNAM, México, 2009).

[41] With this concept the Mexican Constitution refers to an extensive argumentative method know as *a fortiori* in both its forms, *a majori ad minus* and *a minori ad majus*, which allows the interpreter to add something to a norm or create a new one.

ronmental law. However, it does not indicate the difference between rules and principles.[42] It does not indicate though the difference between rules and principles or the meaning of the term "principle." There is another key court decision that technically reproduces Alexy's theory, and so shows its actual influence on Mexican judges.[43] This decision presents certain flaws since it confuses a norm conflict with a meta-conflict between interests.

A famous decision regarding the military officer's right to not be discriminated against for being HIV positive[44] appeals to different methods of interpretation, such as systematic, teleological and by "principles" to uncover the values that may fill the gap in the system to solve the case. It is not entirely clear what the court understands here by "principle" or "value," nevertheless one could say that the term "principle" is not used in the sense of the theory of principles, but refers to the special nature of fundamental rights.

Mexican judges apply general principles of law and legal principles that help them fill gaps, solve conflicts or better justify a decision. Nevertheless, their interpretation has not been able to innovate the legal system by resort-

---

[42] Multas por violación a las normas en materia de equilibrio ecológico y protección al ambiente. Como su imposición no tiene la finalidad de salvaguardar el derecho fundamental previsto en el artículo 4º de la Constitución Federal, resulta inaplicable la ponderación de principios constitucionales cuando aquellas se controviertan." [Fines for Infringing Norms of Ecological Balance and Environmental Protection. As the purpose of imposing a fine is not that of safeguarding the fundamental right set forth in Article 4 of the Federal Constitution, weighing constitutional principles does not proceed when there are contradictions among them.] Registry No. 169263, Ninth Epoch, Collegiate Circuit Courts, Weekly Federal Court Report and its Gazette, XXVIII, July 2008, p. 1749, Thesis: I. 7º.A.579 A, Isolated Thesis, Law: Administrative.

[43] "Suspensión en el Amparo. Conforme a la teoría de la ponderación de principios, debe negarse contra los requerimientos de información y documentación formulados por la Comisión Federal de Competencia en el procedimiento de investigación de prácticas monopólicas, pues el interés de la sociedad prevalece y es preferente al derecho de la quejosa a la confidencialidad de sus datos." [Suspension in *Amparo*. According to the theory of weighing of principles, it should be denied against the requirements of information and documentation stipulated by the Federal Antitrust Commission in procedures investigating monopolistic practices since public interest prevails and is preferred to the claimant's right to information confidentiality.] Registry No. 171901, Ninth Epoch, Collegiate Circuit Courts, Weekly Federal Court Report and its Gazette, XXVI, July 2007, p. 2717, Thesis: I. 4º.A.582 A, Isolated Thesis, Law: Administrative.

[44] "Militares. Para resolver sobre su retiro del activo por detección del VIH, debe estarse a la interpretación sistemática, causal-teleológica y por principios de los dispositivos constitucionales que protegen el derecho a la salud, a la permanencia en el empleo y a la no discriminación". [Military Personnel. To decide on one's discharge from active duty for having tested HIV positive, an interpretation that is systematic, causal-teleological and based on principles of the constitutional provisions that protect the right to health, the right to work and the right to not be discriminated against.] Registry No. 180322, Ninth Epoch, Collegiate Circuit Courts, Weekly Federal Court Report and its Gazette, XX, October 2004, p. 2363, Thesis: I. 4º.A.438 A, Isolated Thesis, Law: Administrative.

ing to principles, as the Federal Constitutional Court in Germany has, whose decisions have even provided the legal system with new fundamental rights.[45] Judges in Mexico have still a very traditional positivistic perspective and remain therefore bound to written norms.

In their decisions, Mexican judges have often evaluated the meaning of the term "principle," its scope and form of application. It has generally been done regarding the concept of "general principles of law," establishing that principles are part of positive law, considered as evident "legal truths," organized by legal science to help judges in their decisions. They have a secondary function; that they are only to be applied in case of a gap in the system. It has also been held, however, that they may be invoked to decide cases that have not been regulated or where the law is deficient, that is, when a case "cannot be solved by the law." They seem to be considered as a "general formulation of values" and have an interpretative function.[46]

Regarding the ambiguity of the term "principle," we could mention a recent amendment to Article 20 of the Mexican Constitution that provides the "principles" for oral criminal procedures, as well its "general principles." The use of one of these principles will require the need to balance arguments with regard to the requirement that evidence must be evaluated in a "free and logical manner." It also establishes that a judge may only convict a defendant if he is "convinced" that he is guilty.[47] Legislators used the term "principle" in different senses in this amendment, leaving the interpretation of its meaning and function to the judge. It will nevertheless be necessary to teach judges to balance, especially because the term "proportionality" as regards argumentation and a way of applying norms as in the theory of principles has a very different meaning from that in Article 31 of the Mexican Constitution that refers to tax law.[48] Article 20 has to be fur-

---

45 One example is the fundamental right of "self-determination of personal information" derived from the right to free development of personality and the principle of dignity, *Volkszählung* (*See* Resolutions of the German Federal Constitutional Court, BVerGE, 65, 1).

46 As has been so stated in many decisions, especially during the so called "*Quinta época*" that followed the Mexican Revolution, since the meaning of Article 14 had to be delimitated. *See* also, "Acuerdos dictados por los jueces de amparo. Pueden fundarse en los principios generales del derecho a falta de precepto legal aplicable." [Court Rulings Pronounced by *Amparo* Judges. Rulings can be grounded in the general principles of law in the absence of an applicable legal precept.] Registry: 221278, Eighth Epoch, Collegiate Circuit Courts, Weekly Federal Court Report and its Gazette XV, March 2002, p. 1428, Thesis: I.4º.A.340 A, Isolated Thesis, Law Administrative.

47 Published in the *Diario Oficial de la Federación* [Federal Official Journal] on June 18th, 2008.

48 This has been clearly mentioned in, for example: "Principio de proporcionalidad y proporcionalidad tributaria. Sus diferencias." [Principle of Proportionality and Tax Proportionality. The Differences.] Registry: 168824, Ninth Epoch, Collegiate Circuit Courts,

ther developed by law, but in the meantime, it will have to be applied directly based on the supposition that every reform made to the Constitution aims at strengthening personal liberty and guaranteeing the exercise of fundamental rights.

Weekly Federal Court Report and its Gazette XXVIII, September 2008, p. 1392, Thesis: I.4º.C.26 K, Isolated Thesis, Law: Common.

Recibido el 10 de febrero de 2009 y aceptado para su publicación el 25 de marzo de 2009.