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Theorising General Principles of EU Law in Perspective: High Expectations, Modest Means and the Court of Justice

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The aim of our contribution is to introduce and discuss three papers presented at the first panel of the Conference that dealt with selected theoretical questions surrounding the general principles of EU law. We discuss the papers in the context of the judicial decision-making of the Court of Justice of the European Union (hereinafter the Court). More concretely, we engage with three concerns and challenges that the papers pose to the nature, role and function of the general principles: first, the underused potential of EU customary law as a source of general principles of EU law; second, the role of the Court in the general endeavour of the juristic field or community to elaborate a theory of general principles of EU law, and to bind structural and substantive principles of EU law into a coherent whole; and third, the particular nature of legality as a general principle of EU law. Before we proceed with the discussion, we introduce the main arguments of the papers: we inquire into how they contribute to an understanding of the operation of general principles in the context of legal reasoning, as it is used in concrete decision-making contexts, and how they complement each other.

I. Theorising General Principles of EU Law in the Context of Judicial Decision-Making

Principles point in a general direction or orientation but they do not dictate any specific answers. In a sense they help provide structure and architecture, systematising the vast body of norms into a coherent whole. They reduce legal dissonance. The Court most often deals with the general principles of EU law in disputes arising at a Member State (national or domestic) level, due to an alleged incompatibility

of national legislation with EU law, or in proceedings between the undertakings and the Commission, and individuals claiming rights or complaining about the breach of their rights. Thus conceptual and theoretical discourse about general principles of EU law is probably best analysed in the context of their application. Take the situations below as examples, which are by no means exceptional.

In Denmark, Mr K, a child-minder, is dismissed from his job due to his employer's financial difficulties. Prior to the dismissal his employer enquires about the progress that Mr K is making with a weight-loss programme. This leads Mr K to believe that he is being dismissed on grounds of obesity, and he decides to sue the employer for unjustified dismissal. The national court sends a preliminary reference to the Court of Justice asking whether discrimination on grounds of obesity is a general principle, and if so, whether it is prohibited under EU law.[1]

In Poland, Mr M, a court enforcer, collects VAT from the compulsory sale of real property. When the local tax authority demands the payment of the collected tax, Mr M brings an action before the administrative court, arguing that national legislation, which holds him accountable and liable for the payment, is contrary to EU law and the principle of proportionality. The national court stays the proceedings, addressing a preliminary reference to the Court of Justice: is national legislation in accordance with the VAT Directive and is the principle of proportionality a general principle of EU law?[2]

In Italy, wine producers initiate judicial proceedings because they are no longer allowed to use the word 'Tocai' in the term 'Tocai friulano' or 'Tocai italico' for certain wines. This prohibition is based on the exchange of letters on Tocai annexed to the EC–Hungary Agreement on wines, ratified prior to accession. The national court must rule whether the right to property includes protection of intellectual property in designations of origin of wines and its exercise, and whether it precludes this prohibition? The interpretation of the right to property must take into account multiple legal sources, as the right to property is a general principle of EU law, spelled out in Article 1 of Protocol No 1 to the European Convention on Human Rights and incorporated in Article 17 of the Charter of Fundamental Rights. It refers the question to the Court of Justice.[3]

In the first case the Court is asked to find or to create, by extension, a general principle, in the second case to decide whether the existing principle, proportionality, was breached, and in the third case to define the scope of protection of an existing principle (to redefine the object of protection). In all cases the Court must take a stance on the body of law that governs the actual situation. This body of law that must be observed in the interpretation and the application of the EU treaties (Article 19(1) TEU) includes a set of broader principles. Some of these

[1] Case C-354/13 *Fag og Arbejde v Kommunernes Landsforening*, ECLI:EU:C:2014:2463.

[2] Case C-499/13 *Marian Macikowski v Dyrektor Izby Skarbowej w Gdańsku*, ECLI:EU:C:2015:201.

[3] Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale v Ministero delle Politiche Agricole e Forestali*, ECLI:EU:C:2005:285.

principles can operate as normative statements of legal reasoning, leading to a particular solution to the problem case at hand, other principles make that law into a coherent whole, which can be uniformly interpreted and applied in the twenty-eight Member States and in all the legal systems of the EU.

At the same time, the Court must ensure that the coherence of the whole system is not compromised, and that the rights of entrepreneurs, overweight people and the like in Italy, Denmark and Poland and all other Member States are protected. In *Dworkinian* terms, the Court is asked to weave a seamless web of rules and principles which would reflect the fundamental values of the legal system. Preferably, we could add, in due time, and not abusively.

An already difficult task is further complicated by the fact that the Court needs to weave into this web the principles of numerous legal orders, meaningful, if not common, to them all. The working of this so-called creative or interpretative process might not be entirely easy to understand, even for the Court, but the process, if genuinely, sincerely and transparently carried out may reflect the fundamental values of the Union. In other words, the Court must uphold the ideal of law as a rational system. It is an ambitious goal, which the Court must accomplish with modest means in terms of judicial method, time, personnel, knowledge and administration.

II. Familiar Concerns and New Challenges

Samantha Besson, Alexander Somek and Xavier Groussot, J Hettne and GT Petursson present distinct and original accounts of the Court's use and non-use of principles and their role in EU law.

On the one hand, the contributions on the conceptual and theoretical aspects of general principles are as diverse as the topic itself, ranging from the doctrine of the sources of EU law, decisionism as its main feature and the consequences thereof, and the duty of the Court as a constitutional court in elaborating a coherent legal system. On the other hand, the contributions revisit the same or at least very similar and well-known themes: the often-criticised decision-making practice of the Court, and the peculiar character of the EU legal system, with its distinct sources. With regard to the latter, the contributions complement each other. Somek's contribution answers Besson's inquiry into the possible reasons for the very limited role that European customary law has played in EU law and the Court's practice. Groussot et al might want to take into account the role of unwritten practices identified by Besson when assessing the meaning of mutual trust as an emerging principle of EU law. Somek's analysis of legality could be fine-tuned even further by distinguishing between substantive and structural general principles of EU law.

Besson unveils perhaps the most underplayed source of EU law, ie EU customary law, to discuss the role of general principles in EU law. As opposed to national and

international law, EU law increasingly relies on the general principles of law but, surprisingly, does not mention customary law amongst its sources. Customary law, however, is a de facto source of many general principles of law. Customary law is also identified in the same manner and following the same process as general principles of law. Accordingly, it should therefore attract more scholarly attention, and feature more prominently in the decision-making of the Court and the European institutions. Besson convincingly argues how, from the viewpoint of the accepted doctrines of sources of international or European law, none of the arguments against a more pronounced role of customary law are truly persuasive: neither the supranational character of EU law, nor its democratic legitimacy, nor the complex vertical and horizontal division of powers in the EU, nor the jurisprudential nature of EU law, with a pronounced role of the Court.

Legality as a general principle of EU law would seem to be in sharp contrast with the notion of customary law as a source. Somek inspects the credentials of EU law 'as law', asking: *is legality a principle of EU law?* Does EU law exhibit elementary features of legality? What weight does legality have? (Maybe, partly and little.) He furthermore argues that EU law exhibits a peculiar legality, which enters the picture only to mitigate the entrepreneurship of the Court. The latter is nothing but a consequence of the so-called *original sin* of EU law, which was conceived in a way that required clarification by means of decisions (hence the term decisionism) by the Court through the mechanism of preliminary references. To know EU law is thus to know EU law as determined in judicial decisions, something that perturbs a continental European lawyer more than it does other jurists. The Court took full liberty of that feature of EU law, at the expense of the principle of legality, as it has conventionally been interpreted, ie as linked to certainty and plain meaning. This principle is now strained even further given the economic and constitutional crises.

Finally, Groussot et al broach the often implicit and ill-defined connection between the general principles of law and coherence to discuss the relationship among different types of general principles: structural and substantive. When the Court develops substantive principles, such as the principle of good administration or mutual trust it at the same time touches upon structural principles, such as the principle of effectiveness, which are embodied in them. The Court (or a court that takes its constitutional responsibility seriously) should construct a coherent legal order, striking a balance between substantive and structural principles, and provide answers that are specific enough to efficiently resolve individual conflicts at hand and simultaneously articulate the content of the general principle for the future. Perhaps this is already a provisional reply to the objection brought from the perspective of legality raised by Somek. The analysis of the principles of good administration and mutual trust shows that the Court has not fully succeeded in this task. Here the charge would not be normative or existential—what should the Court do?—as in Somek, but rather one of efficiency and quality of what it does or does not achieve.

Would it be possible, by drawing on the three papers, to tell the Court what to do, more concretely, in the above cases? If the Court creates (or finds) that prohibition of discrimination on grounds of body weight is a general principle, that intellectual property can be classified as property under Article 17 of the Charter and that proportionality allows the Member States to collect tax from court enforcers, it might potentially disrupt the rights of traders, employers and employees, as well as public officials in twenty-eight national states. Some of those might already prohibit discrimination on grounds of obesity, others might impose even stricter rules on public officials. For the former the Court's ruling will seem intuitively correct. For the latter the ruling might be too soft.

The criticism of the Court, to be defensible, will have to come from the perspective of EU law, or the laws of the Member States generally speaking, and not from a single Member State. Could it come from EU customary law? In principle, customary EU law might provide an answer that could be more legitimate (more communitarian) than a comparative study of national legal systems or a simple general reliance on the general principles common to the Member States (which was considered an interpretive sin in *Mangold*).[4]

What would legality require? The Court was called to decide, to interpret EU law in the way, which would uphold the principles of EU law as law (cf Fuller's list).[5] The Court was cautious and deferential in its responses. But was it overly cautious, not giving enough guidance for the future cases? Too casuistic perhaps? Or were the Court's tactics to reserve for itself the possibility to expand the principle at will in a subsequent case?

III. The Sui Generis (Autonomy) Thesis and EU Customary Law

From Somek's contribution we can answer the question why the absence of customary EU law is not (so) surprising. It would be possible to argue that EU customary law was conceptually impossible not (only) because of the claim to supranationality, democratic legitimacy, the complex power structure and the pronounced role of the Court but due to the idea that EU law should be *real* law and distinct from international law.[6] Substantial efforts went into upholding the new legal order of international law (the sui generis thesis), of which the absence of reference to custom was a logical consequence. The *opinio iuris* that could have identified the unwritten sources of law was decidedly communitarian in spirit

[4] Case C-144/04 *Werner Mangold v Rüdiger Helm*, ECLI:EU:C:2005:709.
[5] Somek, see chapter 5 in this volume.
[6] JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403–83.

and ambition,[7] and also due to a scholarly self-interest in creating a separate and autonomous legal discipline.

Namely, the idea of EU law as real law, post World War II, was a reaction to the fiasco of international law as institutionalised in the League of Nations, and to the failure of national courts as guardians of unwritten law (particularly in Germany). If anything, the European Community was seeking to prevent the return to inter-state (or worse, nation state) practices as the ultimate measure of what was valid law. It replaced them by the Treaty and the new commitments of the Member States, which the Court turned into a federal-like structure,[8] creating a common market that had a clear harmonisation and uniformisation objective driven by Community legislation, almost a normative substitution of the state in certain sectors. To compensate, the new legal system promised peace and prosperity. It was to be a cultural and spiritual force (Hallstein's speech cited in Somek's contribution).[9] The decision in *Dassonville*[10] followed the same path, prohibiting discriminatory and/or restrictive practices of the Member States without reference to whether they were practised inter-state and by all traders (lex mercatoria), as not permitted under Community law. Any form of state protectionism in the common market of goods was unacceptable.

Moreover, in this legal context, general principles of law might have been (perhaps wrongly) perceived as less confrontational. Even if they came from non-positive sources of law, such as custom, and were therefore vague, abstract and hopelessly indeterminate, they still played an overall unifying role and laid an inherent claim to validity and legitimacy, unlike the codification of inter-state practice in public international law, which was more factual, more akin to realpolitik. This raises another interesting discussion as to the legitimating force of a type of jurisprudence that is comparative in nature and attuned to the practice of individual Member States.

Nevertheless, customary law in the EU is related to institutional practice, and even though it might eventually feed into positive law and get codified in the treaties, it will still be relevant, at least in the interim. Just think about the Luxembourg compromise, the summits of the 'European Council' before this organ was brought into the treaties as an institution, or afterwards, if we take the odd formation of the Heads of Government or State meeting in the Council framework, nowhere to be found in the treaties, but still adopting important international law

[7] H Schepel and R Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3 *European Law Journal* 165. See also A Vauchez, 'The Transnational Politics of Judicialization. Van Gend En Loos and the Making of EU Polity' (2010) 16 *European Law Journal* 1; M Rasmussen, 'From Costa V Enel to the Treaties of Rome—A Brief History of a Legal Revolution' in LMP Maduro and L Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford, Hart Publishing, 2010).

[8] The term coined by E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1.

[9] Somek, see chapter 5 in this volume.

[10] Case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville*, ECLI:EU:C:1974:82.

instruments that have a bearing on the very treaties. The most recent example of this is the March 2016 decision concerning the conditions of membership of the UK in the EU with a view to the Brexit campaign. Comitology is another good example of customary institutional practices, or constitutional conventions playing a key role in EU law-making.

IV. General Principles as a Structuring Device in Need of a (Coherent) Structure: The Case of Human Rights

As Groussot et al observe, in the beginning the coherence of the EU legal order was policy-based. It rested comfortably on the accepted premise that the goal of the Community was to build a common market for goods and services. All legislation had the same policy goal in mind, hence very little need for the hierarchy of legal sources of secondary law or for the systematisation of the guiding substantive principles. Then, human rights as general principles of EU law introduced a so-called irritant to the policy-based coherence of the EU legal order. They furthered substantive principles. Functional coherence of policies that promoted the common market, the single market or the internal market was replaced with substantive coherence, produced through these principles of procedural and substantive justice. When the Court in Opinion 2/13 today speaks of the structured network of principles, the authors rightly ask, what kind of structure does it have in mind? How are human rights as general principles, as norms recognised in the Charter and international treaties and not least in the state constitutions that form part of the common constitutional traditions (another source of EU general principles), found, interpreted and systematised to produce a coherent legal framework, within which concrete cases can be decided? In other words, what is the organising principle (of coherence), from which the Court should build this structure, if it is to take seriously its role as a constitutional court?

On the one hand, the mere plurality of legal sources can be disconcerting. As Groussot et al show, when it comes to the principle of good administration, it is almost a matter of coincidence which sources the Court will use, and on what legal ground.[11] On the other hand, and quite intuitively, there should always be room for one more. Especially so, if the extra one could help explain or contextualise the seemingly inconsistent practice of the Court, or act as the organising principle that could structure the general principles into a coherent system. The argument presented by Besson, that the customary approach to EU fundamental rights best accounts for specificities in practice, seems, at first glance, to be one

[11] Contribution by Groussot et al, see chapter 6 in this volume.

such underlying and potent device. The argument is persuasive, especially as it cuts the Gordian knot of the multiplicity of almost casually interacting sources, exposed by Groussot et al.

First, as Besson submits, the function of EU fundamental rights may not be compared to either national or international human rights (Articles 51 and 53 of the Charter). Rather, they are transnational, and grow out of inter-state practice, but not exclusively from state administrations, since other actors and players generate horizontal normative relations. Second, the customary account is respectful of the idea that the protection of fundamental rights in the EU cannot be a ground for a new competence and thus avoids charges of a competence creep into the human rights duties of the Member States. Third, the customary account of EU fundamental rights justifies and explains why EU fundamental rights are rarely interpreted in conformity with international human rights: since EU rights grew from within Member States' practice as an integrated human rights regime, they are not concerned with the minimal external guarantees that apply directly to those regimes. And fourth, EU fundamental rights as customary law work as unwritten constitutional constraints on EU primary law, because they are concurrent to this law, rather than internal to the latter, similarly as constitutional customary law works as the supra-constitutional constraint to national constitutional law. The recommendation to return to a more comparative fundamental rights reasoning, perhaps a consensus-seeking reasoning, as reflected in the Court's early decisions might solve Groussot et al's conundrum and contribute to a more consistent practice of the Court with respect to fundamental rights. The return to customary law would solve the problem of coherence and consistency of the Court's practice. But would it solve the more principled problem of the balance of different types of principles (of structure and substance)? Perhaps, if it also seeks consensus.

V. Continuously Renegotiated Legality

Finally and perhaps most critically, does EU law possess the necessary credentials to be called law as we know it?

Legality is closely tied to legal certainty and predictability, which is inter alia played out in the interpretation and the application of rules to individual fact situations. The Court's creative interpretations (or, in Somek's words, divinations) clearly go against it. EU law cannot truly sanction them for structural reasons, one among them being the intrinsic need for clarification of indeterminate law through judicial decisions instituted into the system by the preliminary reference procedure. This, Somek forcefully argues, brings the law from the usual and acceptable weak indeterminacy into a state of strong indeterminacy, where nearly anything goes. It is a state of *actively* constituted indeterminacy.[12]

[12] Somek, see chapter 5 in this volume.

In Somek's view the Court has compromised the principle of legality with its entrepreneurial decision-making, making good use of the preliminary reference procedure. The compromised principle has then been restored through political action and the subsequent acceptance by the Member States. Thus legality can only be accidental to the EU legal order, a sort of side-effect.[13] *Defrenne*[14] and *Barber*[15] are two cases in point.

However, we could conceive of an alternative diagnosis. While *Defrenne* can certainly be and has been read as an example of judicial policy-making,[16] it can also be read as an instance of principled incrementalism, ie a step-by-step judicial decision-making that strives for a workable balance between societal and legal concerns. All courts consciously or unconsciously balance the demands of the individual case against the demands of the whole body of law, in particular legal coherence and consistency.[17] Courts use strategies that let them preserve the authority to interpret legal norms in the long run, and at the same time preserve individual rights. In the case of international courts the balancing is additionally strained by the increased political pressure from various states with dissimilar legal systems, conflicting political interests, varying degrees of international commitment and, of course, the absence of a central enforcement mechanism that makes international courts particularly vulnerable and dependent on co-operation with powerful political actors. The legality that emerges is renegotiated legality through renegotiated authority of what courts can reasonably and legitimately do. Doctrinally speaking, *Defrenne* was an extension of the principle of direct effect to the so-called horizontal situations. It was one case in a series of cases in which the Court slowly and step by step (incrementally) elaborated the doctrine of direct effect. The Court's limitation of temporal effects had a stabilising effect on the system, and a rebalancing function. It served legal certainty. As is well known, the Court used the separation strategy and the narrow doctrinal application strategy. First, it decoupled the principle of horizontal direct effect from the remedy, both on the level or language and in terms of its effects in practice. The temporal limitation was a reconciliatory gesture of the Court, and it did not escape criticism. While some gave the Court credit for accepting 'the responsibility to mould constitutional doctrine in order to make more acceptable the practical effects of judicial decisions',[18] others found this type of 'amnesty' unacceptable.[19] Second,

[13] ibid.

[14] Case 43-75 *Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56

[15] Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*, ECLI:EU:C:1990:209.

[16] Most strongly in H Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Leiden, Martinus Nijhoff, 1986).

[17] U Šadl, 'The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-Accession Case Law of the Court of Justice of the EU' (2015) 8 *European Journal of Legal Studies* 18.

[18] Rasmussen (n 16) 438ff.

[19] A comment by C Philip [1976] *Revue trimestrielle de droit européen* 529–35.

the Court did not address the entire spectrum of situations that could/would lead to discrimination but only addressed a narrow aspect of discrimination: direct and overt discrimination, which could be determined by 'legal means'.[20] This further tapered the doctrinal scope and potential of the judgment. Following this account, it could be argued, legality was not suspended, but renegotiated. Legal certainty in the form of legitimate expectations was preserved on the level of the (un)imposed remedy. Legal continuity and coherence of the body of remedies developed by the Court to protect the individual were preserved on the level of principle, safeguarding commitments made in *Van Gend*. The gradual acceptance of horizontal effect was then further negotiated through a series of more and less permissive rulings.

Direct effect is not the only example of renegotiated legality. Examples of such subsequent acceptance of the Court's authority to frame the fundamental doctrines of EU law are primacy, human rights protection as general principles of EU law, the principle of liability of the Member States for thea of Community law, or the principle of institutional balance (standing of the European Parliament). While some were accepted tacitly, others were explicitly written into the treaties or declarations.[21]

Subsequent acceptance does not have to mean that legality has been compromised and re-established on the level of formal rules, and that every such acceptance weakens the system. Legality is a principle, and as such does not impose specific actions and interpretations. It is thus difficult to make it stand as the sole benchmark for assessing the credential of a legal system as law properly understood. Instead, as Groussot et al seem to suggest, it is much more important that the structure of principles, to which the legal systems responds, is coherent.

In more general terms, when courts settle questions raised in our examples in the introduction, which are novel and might touch upon the most fundamental rules, their authority to decide these questions can unavoidably only be accepted after the questions have arisen and the decision has been given; or, in Hart's famous phrase: all that succeeds is success.[22] The success of courts hinges on the acceptance of their rulings by the political actors. They increase the chances of success using different strategies.

The Court, it was argued, could enhance the authority of law and upgrade its own powers by establishing its doctrines gradually,[23] mitigating legal innovation

[20] *Defrenne*, para 18.

[21] For example, the status of the European Parliament as a privileged applicant was formalised in the Maastricht Treaty, in what is now Art 263 TFEU, and the protection of human rights culminated in the Charter. Declaration 17 (Declaration concerning primacy) to the Treaties, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon ([2012] OJ C326 0001–0390), explicitly refers to 'the settled case law of the Court of Justice'.

[22] HLA Hart, *The Concept of Law*, 3rd edn (Oxford, Oxford University Press, 2012) 153.

[23] A-M Burley and W Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41, 69.

either by delaying the full practical effects of established principles,[24] or by reiterating formulas that lift the level of discussion away from the facts and the consequences of concrete cases and decisions to the long-term common goals and interests of integration.[25] When discussing legality we should thus discuss whether these strategies and techniques are in themselves illegitimate and what could replace them, or whether they are acceptable as inherent to every judicial and administrative decision-making. Legality is renegotiated through hard cases. They might make bad law but they do make law.

VI. Conclusion

To conclude, the contributions of Somek, Besson and Groussot et al remind us that we have not solved the old challenges of the doctrine of the sources of EU law, and its main features, such as legality. They attest to the fact that our expectations and the Court's practice are not aligned, especially with regard to the Court's duties as a constitutional court in elaborating a coherent legal system. At the same time, they provide benchmarks and novel solutions. They bring new and exciting arguments to the table. They deserve to be read carefully and assessed critically. After all, general principles will evolve and revolve around the use of legal reasoning by Courts and jurists in concrete cases or contexts of application, where legality and the rule of law is not a given, but rather a process that oscillates between the requirements of legal certainty and the quest for coherence, over time and over cases.

[24] '[I]n the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed.' TC Hartley, *The Foundations of European Union Law: An Introduction to the Constitutional and Administrative Law of the European Union*, 7th edn (Oxford, Oxford University Press, 2010) 74.

[25] Burley and Mattli (n 23) 68–69.