

General Principles of Law in International Law and Common Law

Conseil d'Etat, Paris

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16 February 2018

General principles of law as a source of international law

I was pleased, but a little surprised, to discover that Article 38(1)(c) of the Statute of the International Court of Justice¹, first included in the Statute of the Permanent Court of International Justice and substantially carried over into the Statute of the International Court of Justice, was drafted by an English judge, Lord Phillimore, who was a member of the Advisory Committee of Jurists which drafted the Statute. Baron Descamps, the Belgian delegate, had proposed that the Court should be directed to apply, after treaty and custom, “the rules of international law as recognized by the legal conscience of civilized nations”. This did not find favour, but Lord Phillimore and Mr. Root, the US delegate, then proposed “the general principles of law recognized by civilized nations”. Lord Phillimore explained that he meant it to refer to “maxims of law, or principles accepted by all nations *in foro domestico*”.²

There is, of course, a fundamental distinction between general principles of international law³ and general principles to be found in the municipal law systems of States. Some writers have suggested that paragraph (c) is limited to the former⁴. It may well be that the provision does not exclude general principles of international law which have been validated by acceptance by States and that certain references of the Court to “general principles of law” are references to general principles of international law.⁵ It seems clear, however, both from the language used and the *travaux préparatoires*, that the primary intention of the drafters was to refer to principles of national legal systems which could be used to fill gaps or to meet deficiencies in international law. The provision was designed to meet the possibility of a *non-liquet* – the possibility that a case

¹ Article 38(1)(c) provides:

“ 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
... (c) the general principles of law recognized by civilized nations; ...”

² Clive Parry, *The Sources and Evidences of International Law* (1965), 83.

³ Described by James Crawford as “certain logical propositions underlying judicial reasoning on the basis of existing international law”. Brownlie, *Principles of International Law*, 8th Ed., 37.

⁴ Tunkin, *Hague Recueil*, 95 (1958), iii. 23-6.

⁵ D.W. Greig, *International Law*, 2nd Ed., 32-3.

could not be decided because of a gap in the law.⁶ The need for such a provision is obvious in the case of a decentralised legal system where there may be no relevant customary law or treaty obligations to apply. A common lawyer would say that judges and tribunals have to decide cases; it is not open to them to refrain from deciding a case on the basis that there is no applicable law.

Why should I be surprised that an English judge was responsible for this resort to general principles? I suppose it is because the traditional common law method has been to approach legal problems from the other direction, to start with specific instances rather than general principles. Yet, there clearly is a need here for the possibility of resort to general principles as a means of supplementing other sources of law which may or may not be available. Again, as Professor Parry points out, this may have been a problem which troubled the Continental jurists who played a part in drafting the Statute, more than the Anglo-Saxons, who expected judges to reason without express instructions.⁷ In any event, it does seem to me – and this to my mind is highly significant - that paragraph (c) opens up the possibility of the development of international law by judicial action instead of exclusively by States.

Not everyone would agree with that. Waldock, in his Hague General Course⁸ refers to the views of writers such as Guggenheim and Tunkin who maintain that paragraph (c) adds nothing to what is already covered by treaties and custom because they consider that general principles of national law are part of international law only to the extent that they have been adopted by States in treaties or recognised in State practice. It may well be that the various paragraphs of Article 38 are not water-tight, mutually exclusive compartments and that general principles of national law may in certain instances be reflected in treaties or in customary law, but surely Waldock is correct in his expression of the view of the majority of jurists who take the line that general principles recognised in national law constitute a reservoir of principles which an international judge is authorised by Article 38 to apply in an international dispute, if their application appears relevant and appropriate in the different context of inter-State relations. Indeed, Jennings and Watts in their edition of Oppenheim make the point that paragraph (c) is an important landmark in the

⁶ See, generally, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, Dissenting Opinion of Higgins J at 583.

⁷ Parry, at 83.

⁸ 106 Hague Recueil 54 (1962 – II)

history of international law inasmuch as States parties to the Statute expressly recognised the existence of a third source of international law independent of custom or treaty.⁹

It is important to bear in mind that paragraph (c) is concerned with principles which are different from rules. The number of States – and therefore the number of municipal legal systems – has quadrupled since paragraph (c) was drafted. Although the task of discovering general principles accepted in national legal systems is simplified considerably by the fact that many will have common origins in some of the world's great legal systems, it would be futile to seek for total consistency at the level of detailed rules and pointless simply to attempt to apply such rules to the decision of international disputes. Paragraph (c) is clearly intended to operate at a higher level of generality. It is not a case of importing into international law detailed private law rules. Nor would it be appropriate to seek to do so. What matters here are the underlying legal principles which reflect the requirements of justice. This was the point made by Lord McNair in the *South-West Africa case*:

“The way in which international law borrows from this source is not by means of importing private law institutions “lock, stock and barrel” ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of “the general principles of law”. In my opinion, [he said] the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institution of private law as an indication of policy and principles rather than as directly importing these rules and institutions.”¹⁰

Even at the level of general principles it will, I should have thought, rarely be possible to demonstrate that they form part of every developed legal system. Rather, the intention is that the Court should be authorised to apply general principles of municipal jurisprudence insofar as they may appropriately be applied in the very different context of international law.¹¹ It will be necessary in each case to consider whether principles of national law provide an appropriate analogy. Often this will not be the case, as is demonstrated by the attempts of earlier generations to apply, in the context of international law concerning the acquisition and loss of territory, civil law principles of acquisition and loss of property simply lifted from private municipal law. There, the superficial attraction of analogies with *occupatio* and

⁹ Oppenheim's International Law, 9th Ed., Vol. 1, para. 12.

¹⁰ *Status of South-West Africa case*, ICJ Rep. 1950 148.

¹¹ Oppenheim, Vol. 1, para. 12.

prescriptio overlooks the fact that the acquisition and loss of territory is concerned with far weightier matters than real property. It is not concerned with the mere ownership of land, but with sovereignty over peoples.¹² Clearly, it is possible to carry an analogy too far. Thus, for example, in the *Right of Passage case* the Court, in determining rights of transit over State territory apparently rejected as inappropriate arguments based on private law analogies of easements and servitudes.¹³ Moreover, if international judges do draw on general principles of municipal law they may well have to refashion and adapt those principles so that they can work effectively in a different context.

It may be that paragraph (c), when first adopted, reflected what was already the practice of arbitral tribunals. It is however the case that, since its adoption, other arbitral tribunals have considered it to be declaratory of international law. It does seem that the Court itself has made only sparing use of paragraph (c). The instances in which it has had resort to paragraph (c) can be divided into two broad categories. The first is where the principles relate to procedural matters, for example *audi alteram partem*¹⁴, *nemo iudex debet esse in proprio sua causa*¹⁵, *res judicata*¹⁶, circumstantial evidence¹⁷, the power of a body possessing jurisdictional powers to determine initially its own jurisdiction¹⁸. The second concerns more substantive principles such as estoppel, acquiescence or preclusion¹⁹, good faith or abuse of rights²⁰, the effect of error²¹ and an obligation to make reparation for wrongs²². It may be that the nature of inter-State disputes before the Court is restrictive in that the application of general principles of national law is not always appropriate in that context. However, as the scope of international law broadens and we move away from the view that it is limited to activities between States on the international plane²³, it may well be that there will be greater scope for other tribunals to apply general

¹² *Island of Palmas (Netherlands v. United States of America)* (1928) 2 RIAA 829; (1928) 4 ILR 3. See Bjorge, *Island of Palmas (Netherlands v. United States of America)* (1928) in Bjorge and Miles (Ed.), *Landmark Cases in Public International Law* (2017), Chapter 6.

¹³ *Case concerning Right of Passage over Indian Territory (Merits)*, ICJ Rep.1960, 6.

¹⁴ *Nuclear Tests case* ICJ Rep 1974, 265, para. 33.

¹⁵ *Mosul Boundary case* (1925) PCIJ Rep., Ser. B, No. 12, 31-2.

¹⁶ *United Nations Administrative Tribunal case*, ICJ Rep. 1954, 53.

¹⁷ *Corfu Channel case*, ICJ Rep 1949, 4, 18.

¹⁸ *Interpretation of the Greco-Turkish Agreement* (1928) PCIJ Rep, Ser. B, No. 16, 20.

¹⁹ *Legal Status of Eastern Greenland* (1933) PCIJ Ser. A/B No. 53, 52-4, 62, 69; *Temple of Preah Vihear*, ICJ Rep. 1962 pp. 6, 23, 31-2, 39-51.

²⁰ *Free Zones case*, Second Phase (1930) PCIJ Ser A, No. 24, 12, (1932) PCIJ Ser A/B No. 46, 167.

²¹ *Temple of Preah Vihear* at 26.

²² *Factory at Chorzów*, Merits (1928) PCIJ Ser. A, No. 17, 29.

²³ *Belhaj v. Straw* [2015] 2 WLR 1105, CA at [115] "... [A] fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the

principles of municipal law in other contexts. Here I have in mind not only the growing recognition of individuals as subjects of international law but also the possibility that in the law applicable to disputes between international organisations and their employees or disputes between States and corporations municipal law analogies may be more appropriate.

So it seems to me that, subject to these important qualifications, general principles of law accepted by municipal legal systems are a valuable and available source of legal principles which can be applied by international tribunals. They are potentially a great resource. To modify slightly the metaphor employed by Waldock, the international judge is likely to find that the general principles of national law can be a very useful quarry in which to go digging.

General principles at common law

All this is very different from the common law approach. In the common law tradition, judges are typically more comfortable dealing with cases on their individual facts, and arriving at conclusions in accordance with the doctrine of judicial precedent, rather than resorting to overarching principles of law as a starting point. It is, perhaps, a matter of the direction of travel. Common law judges tend to start with the specific rather than the general.

General principles can provide coherence to the international legal order. As common lawyers do not generally take general principles of law as their point of departure, but proceed by reference to specific cases, there is a need to instil some discipline which can prevent the law as applied in the courts from descending into a myriad of inconsistent instances. This is essential if we are to have a coherent legal system. This element is provided by the doctrine of precedent which provides the skeleton on which the flesh of the common law can hang. As Lord Neuberger has observed, without it, “the notion of a corpus of law built up in a reasonably coherent and consistent way by the judiciary is a dead letter.”²⁴ As a result, in England and Wales the doctrine of precedent operates both vertically and horizontally through the hierarchy of

regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place. ... These changes have been reflected in a growing willingness on the part of courts in this jurisdiction to address and investigate the conduct of foreign states and issues of public international law when appropriate.”

²⁴ Lord Neuberger, *Law Reporting and the Doctrine of Precedent: The Past the Present and the Future* in Simon Hetherington ed., *Halsbury's Laws of England Centenary Essays 2007* (2007, LexisNexis Butterworths).

courts. Decisions of the Supreme Court and Court of Appeal are binding on all lower courts in the hierarchy. It also operates horizontally at the level of the Supreme Court and the Court of Appeal – they are generally bound by their own earlier decisions – but since 1966 the House of Lords (now the Supreme Court) has been willing, exceptionally, to depart from its own earlier decisions.²⁵ It is fair to say that since 1966 it has done so only in very rare circumstances²⁶ although in 2016 it did so in three cases.²⁷

This does not mean, however, that common lawyers have no regard to general principles. General principles of law are able to develop in common law jurisdictions. Indeed, in England and Wales, clearly identifiable legal principles inform judicial decision making at all levels. What often happens is that individual decisions reflect a fundamental legal principle and, as the pattern of decisions builds up, they crystallise into rules or principles with differing degrees of generality. They may reflect basic considerations of fairness. Thus, for example, the principles of *audi alteram partem* or *nemo iudex debet esse in proprio sua causa* are well established in public law. Similarly, our equity jurisdiction, developed historically by the Court of Chancery, has propounded many general principles, reflected in maxims of equity such as “Equity will not assist a volunteer” or “He who comes to equity must have clean hands”.

Another example is the principle of estoppel. This may be seen to reflect a basic notion of fairness that if one party has by words or conduct misled another he or she may be precluded from going back on his assertion. In the common law, the general accretion of case law has resulted in the emergence of a number of different rules or principles with different requirements. These include an evidential principle of estoppel which precludes a party from asserting an existing fact where he or she has previously represented a contrary fact on which the other party has relied. In an analogous area judicial decisions have developed a distinct principle of promissory estoppel concerned not with representations of fact but with promises.²⁸ In parallel there have developed a principle of proprietary estoppel where one party acts under the belief that he has or will be granted an interest in or over the property of another²⁹ and estoppel

²⁵ Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

²⁶ Adam Gearey, Wayne Morrison and Robert Jago, *The Politics of the Common Law*, (2nd edition) (Routledge, 2013) at page 131.

²⁷ *R v. Jagee* [2016] UKSC 8; *Knauer v. Ministry of Justice* [2016] UKSC 9; *Patel v. Mirza* [2016] UKSC 42.

²⁸ *Hughes v. Metropolitan Railway* (1877) 2 App. Cas. 439.

²⁹ *Dilhyn v. Llewelyn* (1862) 4 D. F. & G. 517.

by convention which arises where both parties to a transaction have acted on an agreed assumption as to the existence of a state of facts.³⁰ The detailed requirements for the application of these principles vary considerably – for example as to whether detrimental reliance is required – and these details have been worked out in the caselaw as the principles have emerged. Different views may be held as to whether these should be regarded as general principles or more specific rules. But what is significant for present purposes is that they have developed gradually by a process of accretion from a number of different judicial decisions. They have grown just like a coral reef.

When judges in a common law jurisdiction decide cases they have firmly in mind the need to do justice in the particular case, the need to conform with the doctrine of precedent and the need to reach a legally principled decision. These considerations will usually be compatible, but, where they are not, the question as to which will prevail may depend on where the court sits in the judicial hierarchy. At the higher levels of our legal system there is a tension, familiar to all legal systems, between certainty and flexibility.³¹ In its 1966 Practice Statement the House of Lords emphasised the importance of precedent for legal certainty but also recognised the potential for hardship in individual cases caused by “too rigid adherence to precedent.”³²

There is, moreover, a constitutional aspect to this. It is accepted that judges have the power to make new law. But what is the proper role of judges in a common law system? To what extent is it appropriate for judges to develop the common law in accordance with general principles of law and justice, as they see them, and to what extent should they defer to Parliament in the matter of law reform? This is currently the subject of quite a heated academic debate in the United Kingdom.³³ Some academic critics complain of “judicial overreach” which “increasingly threatens the rule of law and effective, democratic government”. There are, no doubt, limits to the judicial function in this regard, although they are difficult to formulate with any precision. It does seem to me, however, that recent criticism in this regard of the conduct of the judiciary in

³⁰ See, for example, *Amalgamated Investment and Property Co. Ltd. v. Texas International Commerce Bank Ltd.* [1982] QB 84.

³¹ Adam Gearey, Wayne Morrison and Robert Jago, *The Politics of the Common Law*, (2nd edition) (Routledge, 2013) at page 129.

³² Practice Statement (Judicial Precedent) [1966] 1 WLR 1234.

³³ Policy Exchange, Judicial Power Project.

our jurisdiction has been considerably overblown and the dangers of judicial activism greatly exaggerated.

In other areas, common law jurisdictions have shown themselves willing to borrow general principles of law from other jurisdictions. In particular, under the influence of European Union law and the European Convention on Human Rights, courts in the United Kingdom have developed principles of legitimate expectations and proportionality.

In England and Wales, the concept of legitimate expectations made an early appearance in 1969 in *Schmidt v Secretary of State for Home Affairs*³⁴ where Lord Denning suggested, obiter, that a right to a hearing in administrative law depends on whether a person has some right or interest or some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say. In 1977, Lord Diplock, in an extra-judicial speech in the House of Lords, expressed regret that the continental doctrine had not been “accepted fully in this country.”³⁵ By 1983, the doctrine had made some inroads but its development in the United Kingdom was described as “lacking in precision.”³⁶ More recently, in 2008, Lord Justice Laws considered that the doctrine was “still developing” in English law.³⁷ Moreover, it appears that the principle of legitimate expectations now exists in our domestic law in a number of different forms, both substantive and procedural.³⁸ Despite a certain doctrinal uncertainty, the doctrine has grown swiftly in English jurisprudence. As Lord Justice Laws has observed, “the law’s heart is in the right place.”³⁹ There is today little doubt that the doctrine of legitimate expectation has, albeit by a rather circuitous route, established itself as a fundamental general principle of English law.

In an early stage in the development of public law in the United Kingdom – during the mid-twentieth century – there were some attempts to apply a principle of estoppel. However, there were severe limitations. Estoppel could not be invoked so as to give a public authority powers which it did not in law possess. It could not prevent a change in policy. It could not restrict the

³⁴ [1969] 2 Ch. 149.

³⁵ 379 H.L. Deb. 993 and 994 (3 February 1977).

³⁶ *Attorney-General of Hong Kong v Ng Tuen Shiu* [1983] 2 AC 629 per Lord Fraser of Tullybelton at 636.

³⁷ R (*Niazji*) v *Secretary of State for the Home Department* [2008] EWCA Civ 755 per Laws LJ at para 3.

³⁸ *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 per Lord Roskill at 415.

³⁹ R (*Niazji*) v *Secretary of State for the Home Department* [2008] EWCA Civ 755 per Laws LJ at para 28.

proper exercise of a discretion by a public body in accordance with the public interest. Estoppel was a rather crude tool. In 2003 in *R (Reprotech) v. East Sussex CC*⁴⁰ the House of Lords stated that it was unhelpful to introduce private law concepts of estoppel into planning law. “[P]ublic law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand on its own two feet”. The field has now been occupied by legitimate expectation – in both its procedural and substantive manifestations – which have been relied upon successfully in circumstances where previously an attempt would have been made to rely on estoppel.⁴¹ There is a substantial overlap between estoppel and legitimate expectation – both are underpinned by a principle of preclusion and unfairness – but legitimate expectation is much more flexible, more subtle. Critically, it envisages an express judicial weighing of the conflicting interests. Where there is a legitimate expectation, is a public body entitled to frustrate it in the public interest? In all the circumstances would it be an abuse of power to go back on the expectation created? Moreover, the degree of intensity of review is flexible and is likely to vary according to the circumstances.⁴² Here legitimate expectation is a much more refined instrument and is carrying the day.

Another general principle which has, to an extent, been adopted by in the United Kingdom is proportionality. Proportionality is well established as a general principle of both EU law and the jurisprudence of the European Court of Human Rights. However, as Lord Reed and Lord Toulson recently explained in an illuminating judgment, there is no uniform concept of proportionality. It operates differently in ECHR law and EU law, and in the EU context can apply in several different ways.⁴³

This judgment is to some extent the latest stage in a fierce interpretative debate which has exercised many British judges and academics for several decades. As with legitimate expectations, the integration of the principle in the United Kingdom has not been straightforward. Initially, proportionality was simply considered to be an aspect of the traditional British principle of judicial review of irrationality or *Wednesbury* unreasonableness. Lord Diplock described proportionality as using a steam hammer to crack a nut. But this type of proportionality was not

⁴⁰ [2003] 1 WLR 348.

⁴¹ See, for example, *R v. North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213; *R (Patel) v. General Medical Council* [2013] EWCA Civ 327; [2013] 1 WLR 2801

⁴² *Ex parte Coughlan* at [58]; *R (Bhatt Murphy) v. Independent Assessor* [2008] EWCA Civ 755 at [35].

⁴³ *R (on the application of Lumsdon) v Legal Services Board* [2015] UKSC 41.

seen as being distinct from irrationality; rather it was a reason to support a finding of irrationality.⁴⁴

For many judges, including Lord Hoffmann, the adoption of proportionality as a free-standing principle was seen as futile.⁴⁵ When the House of Lords had considered the issue in 1991 they declined fully to embrace the principle, although they left the door open for future adoption.⁴⁶

A significant trigger for greater engagement with the principle by British judges was undoubtedly the enactment of the Human Rights Act 1998.⁴⁷ The operation of proportionality under the HRA has made it more starkly apparent that it is a very different animal from traditional British standards of review. Perhaps most significantly, the proportionality test may go further than *Wednesbury* style review. As Lord Neuberger observed in *Keyu*, proportionality involves ‘considering the merits’ in the sense that the court must ‘consider the balance’ struck between the competing interests by the primary decision maker (albeit the court’s role is not to displace the role of the primary decision-maker).⁴⁸

The exact scope of the doctrine in the United Kingdom, and whether it is now a freestanding principle, remains the subject of extensive academic⁴⁹ and judicial debate. In *Keyu*, Lord Neuberger declined to rule that the *Wednesbury* test was now redundant. He found that a decisive move from rationality to proportionality would have “potentially profound and far reaching consequences.”⁵⁰ In *Pham*, Lord Reed argued that “even when applied with “heightened” or “anxious” scrutiny,”⁵¹ the *Wednesbury* test is not identical to the principle of proportionality as understood in EU law or as it has been applied under the HRA. The relationship between rationality and proportionality as general principles applicable to judicial review is therefore still, despite years of debate, an area ripe for consideration by the Supreme

⁴⁴ *R v Goldstein* [1983] 1 WLR 151 at 155B.

⁴⁵ See Lord Hoffmann, “The Influence of the European Principle of Proportionality upon UK law,” in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Portland, OR: Hart Publishing, 1999), p107.

⁴⁶ *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 A.C. 696.

⁴⁷ *R v Secretary of State for the Home Department ex parte Daly* [2001] 3 All ER 433.

⁴⁸ *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.

⁴⁹ See Tom Hickman, “The Reasonableness Principle: Reassessing Its Place in the Public Sphere,” (2004) 53 *Cam. L.J.* 166.

⁵⁰ *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 at para 132.

⁵¹ *Ibid* per Lord Reed at para 115.

Court of the United Kingdom. As Lord Neuberger postulated in *Keyu*, it may take a constitution of nine Justices to answer the question once and for all. That is likely to be quite a case.

Conclusion

I have attempted to say something about the role of general principles in two very different legal systems: in international law and in the common law. Clearly, the role they play in those systems differs greatly. However, it seems to me that there is a common unifying thread in that there are certain general principles of law – those underlying legal principles which reflect the requirements of justice - which, however they are arrived at and whether or not they are a point of departure in legal reasoning, are an essential part of every legal system worthy of the name.