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Judging General Principles

DAVID EDWARD

It seems a long time ago since we took part in the conference that led to this book. The outcome of the Brexit referendum has brought a certain unreality to discussion of legal principles that lawyers in the United Kingdom may soon feel free to ignore. 'We want our country back' was the cry, and British judges may soon feel free to echo the sentiments of the scholarly (though Etonian) Scottish judge Lord Hailes, when faced with an argument based on English law at the trial of Deacon Brodie:[1]

> By the articles of the Union, our own laws and forms of procedure are secured to us, and we have as little connection with those of England as with the laws of Japan, being as little bound to obey them.[2]

There is already a loss of interest amongst British students in the study of EU law and, amongst students from other European countries, in the opportunities that are offered by our law schools. Why, then, should we continue to be interested in the legal system of the European Union?

The realist will point out that, for at least the next two years, the UK will remain a Member State to which EU law applies and that, even after final Brexit, British companies will have to abide by the rules of the single market if they wish to trade there and will, on any view, be subject to the competition jurisdiction of the European Commission.[3] The academic may also point out that a legal system that has attracted so much interest amongst lawyers in this country is still worth studying.

Professor Henry Schermers used to say that, whereas French lawyers came to European law through public international law and German lawyers did so through constitutional law, British lawyers came to it through comparative law and were interested as much in its relevance for private rights as for those of states and institutions. This can be seen in the kind of issues that have been referred to the Court of Justice by British courts—most notably, perhaps, in the *Factortame* saga.[4]

[1] A worthy Edinburgh citizen who varied his daytime occupation as cabinet-maker and locksmith with a little night-time burglary.

[2] W Roughead, *Trial of Deacon Brodie* (Glasgow & Edinburgh, Hodge & Co, 1906) 130.

[3] Case 48/69 *Imperial Chemical Industries Ltd v Commission* ('Dyestuffs'), ECLI:EU:C:1972:70.

[4] Case C-213/89 *The Queen v Secretary of State for Transport ex parte Factortame Ltd & others*, ECLI:EU:C:1990:257, and Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport ex parte Factortame Ltd and others*, ECLI:EU:C:1996:79.

While the details of these cases may be peculiar to EU law, many of the underlying problems are not. They are common to all attempts to regulate rights and obligations in a complex legal environment that transcends the boundaries of any single national system.

I came to EEC law, first, through its effects on the legal profession, then as an advocate, and only later as an academic and judge. So I tend to approach the study of the Court's case law from what is essentially the viewpoint of a practitioner.

Other contributors have discussed the problem of general principles from a variety of points of view. I will look at it from the point of view of a former judge of the Court of Justice bred in the common law tradition, addressing the following points:

— What are the essential features of the judicial function?
— How and where are EU judges to find the law?
— General principles as a source of law.
— The problem of legitimacy.
— The search for principles in EU law.
— The problem of translation, and *Van Gend en Loos*.
— Proportionality.

I. What Are the Essential Features of the Judicial Function?

The life of a judge, even in the European courts, is more pedestrian than some of the contributions to this book might suggest. In his Maccabaean Lecture on 'The Search for Principle' Lord Goff of Chieveley contrasted the respective roles of the judge and the jurist:

> The primary function of judges is not the formulation of legal principles. Their main task, more workaday, more humdrum, is to try cases. … For jurists, on the other hand, the formulation of legal principles is one of their main functions.[5]

The judge has to *decide cases*, ideally with the minimum of delay, for 'the courts are neither a debating club nor an advisory bureau'.[6] The special characteristics of judicial work can, I think, be summed up in six points.

[5] Maccabaean Lecture in Jurisprudence (1983) lxix *Proceedings of the British Academy* 169ff, accessible at www.britac.ac.uk/pubs/proc/files/69p169.pdf.

[6] Lord Justice Clerk Thomson in *Macnaughton v Macnaughton's Trustees* 1953 SC 387, 392. Compare Case C-149/82 *Robards v Insurance Officer*, ECLI:EU:C:1983:26: 'The task assigned to the Court by Article 177 of the EEC Treaty is not that of delivering opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States.'

First, judges cannot choose the cases they have to judge. It is up to the parties and those who advise them to decide what cases come to court. Judges who long to pronounce on their favourite topic, to condemn some legislative abomination or to expose a judicial or academic heresy, may never have the opportunity to do so, save in the evanescent context of the lecture hall or perhaps the *Festschrift*. For them, the day for writing the judgment that makes legal history may never come.

Second, a judge cannot refuse to take a case because it is difficult, disagreeable or unpopular. In many cases, we know from the outset that, whatever the outcome, there will be outrage from some quarter. Someone will be 'devastated' and the judge will be pilloried. Even in the more rarified atmosphere of EU case law, the *Daily Telegraph* and the academic commentator lie ready to pounce.

Third, once seised of a case, unless it is settled or withdrawn, the judge must give judgment. The French Civil Code (the *Code Napoléon*) is very explicit on this point. Article 4 provides that:

> The judge who refuses to judge on the pretext of the silence, the obscurity or the inadequacy of the law shall be prosecuted for denial of justice.[7]

The judge must 'find' the law somewhere, and success will depend on the extent to which the legal system offers a well-stocked storehouse of material where the law can be found.

Fourth, the process of judging must be conducted within a more or less tightly defined legal and procedural framework. As Dicey put it: 'The primary duty of a judge is to act in accordance with the strict rules of law.'[8]

In the case of the Luxembourg courts, the procedural straitjacket is tight. By contrast, the Strasbourg Court is master of its own Rules of Procedure. Within the general scheme set out in the ECHR,[9] the Plenary Court lays down the Court's Rules of Procedure.[10] The extent of this power can be judged by a study of the Rules.[11] A request by the Court of Justice to be given comparable procedural autonomy when Treaty revision was under consideration was, to my personal knowledge, refused (or simply ignored). This severely curtails the scope for innovation and sometimes common sense.

Fifth, the duty to judge carries with it the duty to reason. But there are cultural differences as to how judgments should be reasoned. The discursive style of common law judgments and the Opinions of Advocates General is in stark contrast to the

[7] 'Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.'

[8] Dicey, *The Law of the Constitution*, 8th edn, Introduction, xxxix.

[9] Arts 19–51 ECHR.

[10] Art 25(d) ECHR.

[11] Rules of Procedure, last amended 1 January 2016 (available at www.echr.coe.int/Documents/Rules_Court_ENG.pdf).

laconic and impersonal style of judgments in many (perhaps most) other European countries and largely followed in the Luxembourg courts. When I presented my first draft judgment for consideration by the Chamber, one of my colleagues said: 'That is a good opinion, now we must make it aseptic.' The latitude allowed, for rather particular reasons, to Judge Joliet as Rapporteur in the *Ideal Standard* case was unusual.[12]

The requirement (unique to Luxembourg) to produce judgments in more than twenty languages adds a further complication, since the legal terminology of one language may have no direct equivalent in another. Even in Strasbourg, where there are only two official languages, there are notable examples of potential misunderstanding.[13] I discuss the problem of translation further below.

Sixth, having delivered judgment, the judge cannot, except in the most exceptional circumstances, recall, revise, modify or seek to explain the judgment. The judge can only say, with Pontius Pilate, 'What I have written I have written',[14] and leave it at that. This creates particular difficulties for judges of the Court of Justice when they are called upon to explain or justify judgments with which, personally, they disagree. In case of disagreement the majority view prevails and the Judges are bound by their solemn undertaking to preserve the secrets of the Court's deliberations.

Cumulatively, these features of the judicial function differentiate the judicial power from the legislative power and the executive power. Legislators, ministers and administrators enjoy (albeit within limits) a range of choice, and a discretion to act or not to act, that judges do not. The corollary of the judges' power is the strictness of the rules that govern what they do and how they must do it.

II. How and Where Are EU Judges to Find the Law?

How and where are the judges in Luxembourg to find the law that they and, under the reference procedure, the national judges are to apply?

The direction from the Treaty-makers is that the Court 'shall ensure that in the interpretation and application of the Treaties *the law* is observed'.[15] The use of the word *law* in English conceals the crucial distinction in (for example) Latin, French and German between *lex*, *loi* or *Gesetz* on the one hand, and *ius, droit* or *Recht* on

[12] Case C-9/93 *IHT Internationale Heiztechnik GmbH and Uwe Danzinger v Ideal-Standard GmbH and Wabco Standard GmbH*, ECLI:EU:C:1994:261.

[13] See, eg, the judgment in *Delcourt* v *Belgium*, 2689/65, [1970] ECHR 1 (17 January 1970), concerning the presence of the Avocat général at the deliberations of the Cour de Cassation. The French text refers to 'un membre du ministère public', while the English text refers to a 'member of the Procureur général's department'—hardly an appropriate description of the Avocat général, even if true in a sense.

[14] John 18.22.

[15] Now Art 19(1) TEU, originally in Arts 31 ECSC, 164 EEC and 136 EAEC (emphasis added).

the other: the distinction between what has been enacted by the legislator and, more generally and in a more abstract sense, what is 'right' and forms part of the whole corpus of law.

The Treaty-makers' direction could have been limited to requiring the Court to ensure compliance with the provisions of the Treaty, as interpreted according to the established canons of the law of treaties—possibly by a provision such as Article 38 of the Statute of the International Court of Justice with its reference to 'the general principles of law recognized by civilized nations'.[16] But the Treaty-makers' direction was not so limited: the Court is instructed to draw on the whole corpus of law and legal science as the context within which the Treaty is to be interpreted and applied.

Viewed in that way, the Treaty provision that the non-contractual liability of the Union is to be assessed 'in accordance with the general principles common to the laws of the Member States'[17] is not a *lex specialis*, but simply makes explicit in a particular context what is already part of the general scheme of the Treaty.[18]

III. General Principles as a Source of Law

The idea that *the law* includes general principles has a long history. For example, we find in Justinian's Digest the general presumption in favour of freedom; the principle that there can be no obligation to do the impossible; and the equitable principle (*iure naturae aequum est*) that no-one should be enriched to the detriment of another.[19] Indeed, principles of law, neatly encapsulated in Latin maxims, used to be part of the lawyer's stock in trade.

The distinction between reasoning from principle or from precedent is often cited as the basic difference between the civil law and common law systems. But the common lawyer will often seek to extract a principle from a series of precedents. In a rather similar way, the French *magistrat*, who may not create law,[20] will seek to extract (*dégager*) a rule (*norme*) from the existing body of law. By contrast,

[16] See Professor Redgwell's chapter on 'General Principles of International Law' in this volume.

[17] Art 340 TFEU, originally Arts 215(2) EEC and 188(2) EAEC.

[18] The ECSC Treaty dealt with non-contractual liability in different terms (see Art 40 ECSC). As far as my researches have taken me, the words of the current Treaties appear for the first time in the draft of Part Six of the EEC Treaty, which was submitted by a Working Group including Pierre Pescatore, later a Judge of the Court, just over a month before the Treaty was signed—see *Avant-Projet de dispositions générales préparé par le Groupe de Travail Constituée de Messieurs Devadder et Pescatore*, Bruxelles, le 13 février 1957, in R Schulze and T Hoeren (eds), *Dokumente zum Europäischen Recht* (Berlin, Springer Verlag, 1999) Band 1, *Gründungsverträge*, 1178–84. I can find no explanation for the choice of words or any evidence that it was discussed before incorporation in the Treaty.

[19] D.50.17.122, 185 and 206.

[20] Art 5 of the French Code civil provides that 'Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.'

since there is no Code of administrative law, the French Conseil d'Etat has developed a body of *principes généraux du droit*.[21]

In France, recourse to general principles has been criticised as a covert method of judicial legislation in violation of the principle laid down in Article 5 of the French Code civil[22]—a criticism that is reflected in some of the contributions to this book. But the Conseil constitutionnel has affirmed that general principles are a legitimate source of law—for example in asserting the obligation of the administration to 'respect the general principles of law and notably the rights of defence'[23]—leading Professor Georges Vedel to say that:

> [L]e Conseil constitutionnel reçoit les principes généraux du droit en tant que normes de niveau législatif, constituant une source autonome du droit administratif, distinct du droit écrit, manifestant le pouvoir normative du juge.[24]

In German administrative law, the fundamental rights guaranteed by Article 3 of the Basic Law are binding on the administration, as are the general principles of proportionality, equality and respect for legitimate expectations.[25]

In the context of the ECSC Treaty, the question arose whether the High Authority was bound by Article 14 of the German Basic Law guaranteeing private property. Advocate General Lagrange said:

> It is not for the Court, whose function is to judge the legality of the authorizations, to apply, or at least to do so directly, rules of national law, even constitutional rules, in force in one or other of the Member States (judgment of 4 February 1959 in *Stork* v *High Authority*). It may only allow itself to be influenced by such rules in so far as, where appropriate, it may see in them the expression of *a general principle of law which may be taken into consideration in applying the Treaty*.
>
> While it may certainly be admitted that the protection of the right to property, including the remedies which must be available against any infringement of that right, such as expropriation, is a rule of law common to the six countries, it is certain beyond doubt that the present case is not one of such a kind. There is no infringement of property rights, even understood widely, of which the High Authority may have been guilty.

In its judgment, the Court declared, without further discussion, that: 'Community law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested rights.'[26]

[21] For a brief description, see http://fr.jurispedia.org/index.php/Principes_g%C3%A9n%C3%A9raux_du_droit_(fr).

[22] See n 7 above.

[23] Decision No 90-287 DC (ECLI:FR:CC:1991:90.287.DC) para 28.

[24] For this citation, and a more general discussion, see D Menna, *La théorie des principes généraux du droit à l'épreuve de la jurisprudence constitutionnelle* in *Le droit administrative en mutation* (Paris, PUF, 1993) 201ff (accessible online at www.u-picardie.fr/curapp-revues/root/31/domenico_menna.pdf_4a07e0101bb41/domenico_menna.pdf

[25] See, for a detailed discussion, G Nolte, 'General Principles of German and European Administrative Law—A Comparison in Historical Perspective' (1994) 57 *MLR* 191ff.

[26] Joined Cases 36, 37, 38/59 and 40/59 *Geitling v High Authority*, ECLI:EU:C:1960:36, 438–9 and 450 (emphasis added).

In *Transocean Marine Paint*, Advocate General Warner addressed the question directly in relation to the principle of the right to be heard (*audi alteram partem*). Having reviewed the law of the Member States, he concluded:

> [T]hat review … of the laws of the Member States must, I think, on balance, lead to the conclusion that the right to be heard forms part of those rights which 'the law' referred to in Article 164 of the Treaty upholds, and of which, accordingly, it is the duty of this Court to ensure the observance.

The Court's practice of reasoning from general principles of law can thus be seen to have been authorised by the Treaties and to have a long and respectable jurisprudential ancestry. Nevertheless, as some of the contributions to this book suggest, resort to general principles may raise a problem of legitimacy.

IV. The Problem of Legitimacy

The issue of legitimacy arises when the appeal to general principles in a particular case can be thought to amount to judicial legislation, usurping the role of the legislator. But even here, there is room for argument.

One of Dicey's lectures in *Law & Public Opinion* is, surprisingly, entitled 'Judicial Legislation'.[27] He begins with the claim that:

> As all lawyers are aware, a large part and, as many would add, the best part of the law of England is judge-made law.

Some pages later, he says:

> Judicial legislation aims to a far greater extent than do enactments passed by Parliament, at the maintenance of the logic or the symmetry of the law. The main employment of a Court is the application of well-known legal principles to the solution of given cases and the deduction from these principles of their fair logical result. Men trained in and for this kind of employment acquire a logical conscience; they come to care greatly—in some cases excessively—for consistency.

The search for the 'fair logical result' was taken up by Lord Goff in his lecture mentioned above:

> If I were asked what is the most potent influence upon a court in formulating a statement of legal principle, I would answer that in the generality of instances it is the desired result in the particular case before the court. But let me not be misunderstood. When we talk about the desired result, or the merits, of any particular case, we can do so at more than one level. There is the crude, purely factual level—the plaintiff is a poor widow who has lost her money, and such like. At another level there is the gut reaction, often

[27] AV Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London, Macmillan, 1926) Lecture XI, 361ff.

> most influential. But there is a more sophisticated, lawyerly level, which consists of the perception of the just solution in legal terms, satisfying both gut and intellect. It is in the formulation, if necessary the adaptation, of legal principle to embrace that just solution that we can see not only the beneficial influence of facts upon the law, but also the useful impact of practical experience upon the work of practising lawyers in the development of legal principles.
>
> [T]he prime influence upon jurists is not so much facts as ideas; and just as fragmentation presents a danger for practising lawyers, who tend to adopt an unsystematic approach to their work, so jurists are subject to danger from preconceived ideas, and may regard too inhospitably a judicial decision which does not accord with their own preconceptions.[28]

Justice Benjamin Cardozo put the point in this way:

> We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths; they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge, and tell him where to go.[29]

Lord Goff warned against two pitfalls in the judge's search for principle:

> The first I call the temptation of elegance. This is a temptation which can attract us all, simply because a solution, if elegant, automatically carries a degree of credibility; and yet the law has to reflect life in all its untidy complexity, and we have constantly to be on our guard against stating principles in terms which do not allow for the possibility of qualifications or exceptions as yet unperceived.
>
> The second is the fallacy of the instant, complete solution. It is understandable that judges and jurists should from time to time believe that they see the complete answer to a particular problem; indeed, without a measure of self-confidence, no judge is competent to perform his duties. But it must never be forgotten, not only that all law is in a continuous state of development, but also that too strong a conviction of the correctness of one's own analysis may blind one to its imperfections. Humility is perhaps too much to ask of judges; but a reasonable degree of modesty, or at least of diffidence, should be part of the judicial job specification.

V. The Search for Principles in EU Law

In a sense, the EU Court of Justice is over-supplied with sources from which to distil general principles of law. As well as the Treaties with their multifarious statements of values, aims and objectives, there are the national constitutions, the

[28] See n 5 above.
[29] BN Cardozo, *The Nature of the Judicial Process* (New Haven, CT, Yale University Press, 1921) 43.

jurisprudence of national courts, the writings of jurists and commentators, and a range of international conventions and covenants.[30]

From these sources, the Court has distilled a variety of 'general principles'. The principle of unjust enrichment, set out in the Digest,[31] underlies a large and growing corpus of decisions on the obligation to repay taxes and other levies unlawfully exacted (*la répétition de l'indu*).[32] Lord Goff, in his Maccabaean lecture, discusses the influence of the same principle on the previously firm rule of English law as to the irrecoverability of money paid under mistake of law.

In the same way, the presumption in favour of freedom enunciated in the Digest[33] seems to me to underlie the principle of proportionality discussed below.

Other principles invoked by the Court are not general principles of law in a universal sense, but rather 'principles of EU law', developed in the particular context of that law. For example, the much-criticised judgment in *Mangold*[34] should, I think, be read as deducing the principle of non-discrimination on grounds of age, *as a principle of EU law*, from the language of the EU legislature itself in the Recitals and Article 1 of the Directive under consideration.[35] Read in this way, the judgment, far from being an example of improper or over-reaching judicial legislation, is one of the judiciary interpreting and applying the expressed intention of the legislature.

That leads me to remark that *some* criticism of the Court's judgments fails to take full account of the subtleties of language with which the Court is beset.

VI. The Problem of Language

A very simple example of this problem was illustrated by one of the speakers at the conference who criticised the expression 'It must be observed that …' which introduces so many paragraphs in the English texts. This was said to show the arrogance of intellectual certainty. In reality, the words are a literal translation of the French 'Il y a lieu d'observer que …', which the French judge, Jean-Pierre Puissochet, deplored as totally unnecessary since it amounts to little more than a clearing of the throat before passing to a new point. Nowadays, these and similar phrases have largely disappeared from the English texts. (The judgment in *Mangold* is a good example.)

A more fundamental misunderstanding due to translation can be illustrated by commentaries on the judgment in *Van Gend en Loos*,[36] which Professor Weatherill,

[30] See Case C-144/04 *Mangold v Hain*, ECLI:EU:2005:420, paras 74–75.
[31] D.50.17.206.
[32] Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Georgio*, ECLI:EU:C:1983:318.
[33] D.50.17.122.
[34] n 30 above.
[35] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303, 16–22.
[36] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

in his chapter in this book, characterises as demonstrating 'astonishing chutzpah' and 'sheer audacity'.

Let us begin by noting that the question with which the Court was faced was not one of its own invention. The mandatory nature of Article 12 EEC had been settled in the *Gingerbread* case earlier in the year:

> It follows … from the clarity, certainty and unrestricted scope of Articles 9 and 12, from the general scheme of their provisions and of the treaty as a whole, that the prohibition of new customs duties, linked with the principles of the free movement of products, constitutes an essential rule and that in consequence any exception, which moreover is to be narrowly interpreted, must be clearly stipulated.[37]

The question in *Van Gend en Loos* was whether the 'clear, certain and unrestricted' provisions of Article 12 could be 'directly' enforced by affected individuals in the national courts. There was no doubt that provisions of a treaty *could* be 'self-executing' and have 'direct' or 'immediate' (unmediated) effect.[38] The issue was whether provisions of Article 12 *were* so. This had become a live constitutional issue in the Netherlands. The Court of Justice, to which the issue had been referred by a Dutch court, was bound to decide it one way or the other, chutzpah apart.

Unfortunately, the English text of the judgment obscures the careful reasoning of the judgment. At that time, the format of the Court's judgments in French marked the passage from one point to another in this way:

> Attendu que ….
>
> Que ….
>
> Que ….
>
> Attendu que ….
>
> Que ….
>
> Que ….

In the French text of *Van Gend en Loos*, the passage under 'B—Quant au fond' begins:

> Attendu que la Tariefcommissie pose en premier lieu la question de savoir si l'article 12 du traité a un effet immédiat en droit interne, dans le sens que les ressortissants des États membres pourraient faire valoir sur le base de cet article des droits que le juge national doit sauvegarder;

[37] Joined Cases 2/62 & 3/62 *Commission* v *Luxembourg and Belgium*, ECLI:EU:C:1962:45.

[38] The terminology was far from settled. See my contribution to the Festchrift for Judge Mancini: 'Direct Effect, the Separation of Powers and the Judicial Enforcement of Obligations' in *Scritti in onore di Giuseppe Federico Mancini* (Milan, Giuffrè, 1998). See also 'Direct Effect: Myth, Mess or Mystery' in JM Prinssen and A Schrauwen (eds), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Amsterdam, Europa Law Publishing, 2002).

> Attendu que pour savoir si les dispositions d'un traité international ont une telle portée il faut en envisager l'esprit, l'économie et les termes.[39]

There then follow three passages, each introduced by 'Attendu que…', dealing respectively with *l'objectif du traité*, *l'économie du traité* and *le texte de l'article 12*. These are followed by passages dealing with the need for national implementing legislation and with the argument that enforcement of Treaty obligations was a matter for the Commission under Articles 169 and 170 EEC.

The process of reasoning—the same as in the *Gingerbread* case quoted above—is lost in the English translation which does not mark the passage from one point to another, so that the judgment appears to consist of a random succession of ex cathedra pronouncements.[40]

Properly understood, so far from being a judicial coup d'état, the judgment in *Van Gend en Loos* was a carefully reasoned response to a question posed by the Dutch court, which in turn reflected a live debate in the Netherlands. Anyway, as we now know, the outcome was decided by a narrow majority of four to three—a bad start for a putsch.[41]

VII. Proportionality

The principle of proportionality occupied a good deal of the discussion at the conference and consequently of the contributions to this book. As a general principle of law, I believe it stems from the presumption in favour of freedom which, as noted above, is found in the Digest.[42] Essentially, the question is how far the authorities of the state are entitled to restrict, or interfere with, the personal autonomy of the individual. As Paul Craig illustrates in this volume, the same concern was developed by common law judges over the centuries and it is wrong

[39] The correctness of this approach was confirmed in Art 31(1) of the Vienna Convention on the Law of Treaties (1969).

[40] Professor Weatherill describes the Court's reference to the Economic and Social Committee, 'a body pitifully devoid of profile or legitimacy', as 'shallow, feeble and opportunistic'. This reflects a peculiarly British view of society. The idea that there should be an advisory body representing the 'social partners' goes back in France to the creation of the Conseil national économique by the government of Edouard Herriot in 1924. If it be true that the EESC is now 'pitifully devoid of profile or legitimacy', this is due to the plethora of think-tanks, lobbyists, special advisers and researchers who throng the corridors of Brussels. In response to a proposal to abolish the EESC, its President remarked that: 'It's very strange that Liberals, who also ask for transparency and for the development of society, would try to discuss the idea of cancelling the only body that is for people who are not politicians.'

[41] 'Interview with Pierre Pescatore: The Early Judgments of the Court of Justice (1962–1966)' accessible at www.cvce.eu/en/histoire-orale/unit-content/-/unit/7b44d3a7-ea26-432f-a826-185ff0cc353c/f5555be1-2043-4be9-93f9-5e32523c2906. See also S Gori, 'Souvenirs d'un survivant' in *Van Gend en Loos 1963–2013* (Court of Justice, 2013) 29ff.

[42] D.50.17.122.

to suggest that the underlying idea was unknown to British law before our accession to the EEC.

I would suggest that the contribution of EU law, as developed by the Court of Justice on the basis of German administrative law, has not been to formulate a new conception of proportionality as such, but rather to develop a step-by-step process of enquiry in order to impose what might be called a 'discipline of reasoning'. For example, in *Gebhard*, the Court said:

> National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[43]

Similar statements of the required steps of enquiry can be seen in the judgment of the UK Supreme Court in *Christian Institute v Lord Advocate*. In that case, an Act of the Scottish Parliament[44] was challenged on the ground, amongst others, that it was incompatible with Article 8 of the European Convention on Human Rights. (The Act provides for the appointment, for every child, of a 'named person' who would be responsible in various ways for that child's well-being.) The Court said:

> In our view these challenges raise the following four questions: (i) what are the interests which art 8 of ECHR protects in this context, (ii) whether and in what respects the operation of the Act interferes with the art. 8 rights of parents or of children and young people, (iii) whether the interference is in accordance with the law, and (iv) whether that interference is proportionate, having regard to the legitimate aim pursued.

Coming to the fourth question, the Court said:

> It is now the standard approach of this court to address the following four questions when it considers the question of proportionality:
>
> (i) whether the objective is sufficiently important to justify the limitation of a protected right,
> (ii) whether the measure is rationally connected to the objective,
> (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of that objective, and
> (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter (ie whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure).[45]

I find this a good illustration of Lord Goff's distinction between the role of the judge (to try cases) and that of the jurist (to formulate legal principles). The

[43] Case 55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, ECLI:EU:C:1995:411, point 6 of the *dispositif*.

[44] Children and Young People (Scotland) Act 2014.

[45] *Christian Institute v Lord Advocate* [2016] UKSC 51, paras 70 and 90.

step-by-step discipline of enquiry and reasoning helps the judge to ask the right questions in the right order. It is more difficult for the jurist to formulate the underlying principle, but as Lord Goff said:

> I see the law not so much as Maitland's seamless web, but as a mosaic, and a mosaic that is kaleidoscopic in the sense that it is in a constant state of change in minute particulars. The legislature apart, it is the judges who manufacture the tiny pieces of which the mosaic is formed, influenced very largely by their informed and experienced reactions to the facts of cases. The jurists assess the quality of each piece so produced; they consider its place in the whole, and its likely effect in stimulating the production of new pieces, and the readjustment of others. In this their approach is certainly broader, perhaps more fundamental, and also more philosophical than that of the judges.

Judging proportionality is rather like judging negligence. We know in broad terms what is the principle to be applied, but as Lord Macmillan said in *Donoghue v Stevenson*:

> In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed.[46]

The essential point, surely, is that what Lord Bingham called 'the business of judging' is an intensely human activity. What one judge thinks is the right, or even self-evident, general principle to be applied may appear quite the opposite to another. There is no infallible yardstick. In Luxembourg, the business of judging leads to a single judgment reached after deliberation between the judges in camera. It deprives us of the illuminating dissenting judgment, though also, with all due respect, of much unnecessary verbiage.

I can only say that, in my own experience, the Luxembourg system conduces to mutual respect, a willingness to learn from the experience and knowledge of others and to understand the nuances of cultural difference, and, ultimately (I hope), in Lord Goff's words, to 'a reasonable degree of modesty, or at least of diffidence'.

[46] *Donoghue v Stevenson* [1932] UKHL 100, 24; [1932] AC 562; 1932 SC (HL) 31, 70.