

## European Union Law

Topic 3, EU Law and National Law.

Lecture 3 (of 3):

### General Principles of EU Law

**Aim:**

To provide an overview of some of the principles formulated by the ECJ which became general principles of EC law and now continue as such under EU law.

**Objectives:**

After carefully studying the following notes and other prescribed notes for this lecture you should be able to:

1. Discuss the origin and significance of general principles of EU law and discuss in detail whether the ECJ exceeded its remit in developing the principles;
2. Provide an in-depth analysis of the general principles of, *inter alia*, fundamental rights, equality, proportionality and procedural fairness; and
3. Discuss the possibilities of new general principles emerging given the ratification and coming into force of the Treaty of Lisbon.

#### Introduction

The general principles of EC law arose from a variety of sources – constitutions of the Member States and the express provisions of, or the interpretations of, Treaty Articles - which then were developed by the ECJ to become the ‘unwritten law’ of the Community. They became principles which were primarily relevant to questions concerned with remedies and the enforcement of EC law.

General Principles evolved from being merely a judicial development, that originated in *Case 29/69, Stauder v City of Ulm*, to being recognized as a founding principle of the EU in **Art.6 TEU** ‘post-Amsterdam’, and there is evidence to suggest that other institutional pronouncements will promote the development of more general principles.

The legal bases<sup>1</sup> for the incorporation of these principles into EC law are provided by four Treaty Articles, viz; ‘**Arts.263** and **340(2) TFEU** and **Arts.6 and 19 TEU**.’

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<sup>1</sup>See Topic 2, Lecture 3.

Under **Art.263 TFEU** the ECJ shall review and annul the legality of legislative acts if there is ‘infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.’

Under **Art.340(2) TFEU** the ECJ is permitted to decide the EU’s non-contractual liability ‘in accordance with the general principles common to the laws of the Member States’.

Thirdly, **Art.19 TEU** provides that the ECJ is under a duty to ‘ensure that in the interpretation and application of the Treaties the law is observed’.

**Art. 6 TEU** provides that:

- (1) The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights ... which shall have the same legal value as the Treaties.
- (3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

## Origins of General Principles

With regard to the origin of the general principles, **Hartley** (*The Foundations of European Union Law*, 7<sup>th</sup> edn, 2010, p142) says:

They are derived from various sources, but the most important are the **European Union Treaties** and the legal systems of the Member States. In the former case, the Court declares that a specific provision in one of the Treaties is an application of some more general principle which is not itself laid down in the Treaty. This is then applied in its own right as a general principle of law. An example of this is **Article 18 TFEU** [ex.Arts.12EC / 6 EEC] which prohibits all discrimination based on nationality between EU citizens as regards matters within the scope of the Treaty. This ... has been used by the Court as the foundation for a general doctrine of equality which forbids arbitrary discrimination on any ground.

It is submitted that the existence of a general doctrine of equality – as clearly expressed in *Case152/81, Ferrario*<sup>2</sup> - and which became further enhanced by the provisions of the ‘post-Amsterdam’ **Arts.2, 3(2) & 13EC**, the last of which greatly expanded the prohibition of discrimination from, merely, those on the grounds of nationality (**Art.18 TFEU** ex **Art.12EC**) to ‘appropriate action [being taken] to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’: see now **Art.19 TFEU**.

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<sup>2</sup> Where it was said that: “According to the court’s consistent case law the general principle of equality is one of the fundamental principles of the law of the Community civil service.”

## The Principle of Sincere (or Loyal) Cooperation

Another Treaty article that has had a substantial impact on the development of general principles has been **ex.Art.10EC** – now **Art.4(3) TEU** - which provides that:

Member States shall take any appropriate measures, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the union's objectives.

**Art.4(3) TEU** (at least, **ex.Art.10EC**) was instrumental in developing the supremacy of EC (now Union) law<sup>3</sup>, direct effect<sup>4</sup>, indirect effect<sup>5</sup> (the duty of consistent interpretation) and State liability<sup>6</sup> ('*Francovich* damages'). More recently, the ECJ has expressed the view that:

As to [Art.4(3) TEU, ex.Art.10EC / Art.5EEC] of the Treaty, it should be borne in mind that, according to the case law of the Court, the relations between the Member States and the Community institutions are governed, under that provision, by a principle of sincere cooperation. That principle not only requires the Member States to take all the measures necessary to guarantee the application and effectiveness of Community law, but also imposes on the Community institutions reciprocal duties of sincere cooperation with the Member States.<sup>7</sup>

The principle of 'subsidiarity' (See now: **Art.5(3) TEU**, **ex.Art.5EC**) may be seen as a particular manifestation of sincere or loyal cooperation as now laid down in **Art.4(3) TEU** (**ex.Art.10EC**). Whereas subsidiarity is a relatively recent development of a general principle<sup>8</sup>, the 'other' element of **Art.5 TEU** – **proportionality** – is a long-established principle of EC law, originating from Case 11/70, *Internationale Handelsgesellschaft* (see *infra*).

## Categorising the General Principles of EC Law

When analysing the general principles of law, there is no particular way of categorizing them that has prominence or which satisfies any school of academic opinion.

### (1). The Administration of Justice

This category contains at least five important principles, viz;

- (i) Procedural fairness / principles common to the laws of the Member States;
- (ii) Equality and non-discrimination;
- (iii) Legal certainty; and
- (iv) Proportionality.
- (v) The right to an effective judicial remedy before national courts

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<sup>3</sup> Case 6/64, *Costa v ENEL*

<sup>4</sup> Case 26/62, *van Gend en Loos*

<sup>5</sup> Case 14/83, *Von Colson*

<sup>6</sup> Cases C-6/90 & C-9/90, *Francovich*

<sup>7</sup> Cases C-36/97 and C-37/97, *Hilmar Kellinghusen*

<sup>8</sup> See Cases T-5/93, *Roger Tremblay*; and C-114/01, *AvestaPolarit*

### **(i) Procedural Fairness**

Procedural fairness has developed as an important general principle from situations in which a Community Institution, particularly the Commission, has attempted to enforce the law directly against a natural or legal person. Such attempted enforcement is common in Competition Law matters. Indeed, the right to a fair hearing was established in a competition case, Case 17/74, the Transocean Marine Paint Case. This was the first case in which English law contributed to the development of EC general principles of law.

#### **Case 17/74, Transocean Marine Paint Association v. Commission**

Whereas **Art.101 TFEU** (ex.Art.81(1)EC / Art.85(1)EEC) prohibited agreements which restrict competition, Art.81(3) ('ex' 85(3)) enabled the Commission to grant exemptions in particular cases. The agreement establishing the Transocean Marine Paint Association was *prima facie* prohibited by ex.Art.81EC but was granted exemption, subject to specified conditions, for ten years. On applying for renewal of the exemption, the Association was informed of new conditions contemplated by the Commission and it was given the opportunity to make the appropriate representations, which it did. However, it was inadequately informed of one condition which was imposed on it. The Association objected to this condition. Consequently, they sought annulment of the Decision. **Advocate General Warner** proposed that the case should be decided on the basis of *audi alteram partem*: that the right to a hearing was a general principle of Community law and that it was binding on the Commission even in the absence of a specific legislative provision. The ECJ accepted this and **HELD** that there exists a general principle of Community law that 'a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known'. The Decision was annulled.

**Legal professional privilege** may also be regarded as a sub-division of procedural fairness, although some commentators, such as **Steiner** and **Hartley**, regard this as a general principle in its own right. As **Hartley** notes, 'The privileged nature of communications between lawyer and client was first recognised as a general principle in A.M. & S. v. Commission (Case 155/79)' – a principle regarded by **Kaczorowska** (2010, p207) as a general principle "common to the national laws of the Member States".

#### **Case 155/79, A.M. & S. v. Commission**

As part of a general investigation into alleged anti-competitive practices in the zinc industry, Commission inspectors arrived at the office of a British company and demanded to see its business records. The investigation was carried out under **Art.14 of Regulation 17/62** [the forerunner of the present Regulation 1/2003]. This made no mention of legal professional privilege. Nevertheless, the company refused to disclose the documents claiming they were privileged. The Commission disagreed and issued a Decision requiring production of the documents. A.M.&S then brought proceedings before the ECJ to annul the decision.

**HELD:** Confidentiality of written communications was a principle generally recognised in the legal systems of Member States. It would be upheld as a general principle in EC law subject to two conditions, viz; (i) the communication must be for the purpose of the

client's 'rights of defence'; and (ii) the lawyer must be in *private practice*, **not** an employee of the client. **Hartley** notes that the 'latter rule has been criticized as unfair to companies employing in-house lawyers'.

**The right to protection from self-incrimination** has recently become recognised as another general principle of EC law. In this respect **Steiner** notes that: "The right to a fair trial and the presumption of innocence of 'persons charged with a criminal offence' contained in **Article 6 ECHR** [European Convention on Human Rights] are undoubtedly rights which will be protected as general principles of law under Community law."

The leading case on this principle is now *Funke v. France*. Here, Funke refused to disclose information to French customs authorities who were trying to obtain evidence of currency and capital transfer offences. Fines and on-going penalties were imposed on him.

**HELD (ECHR):** Since **Art.6(1)ECHR** guarantees a right to a fair trial, then a person is entitled to remain silent and not incriminate himself. Consequently, any attempt to use a pecuniary sanction to force an individual to produce potentially incriminating documents is in breach of this Article.

## **(ii) Equality and non-discrimination.**

**Steiner** provides a succinct account of equality and non-discrimination operating as significant general principles governing the legality of Community action. She notes that:

The principle of *equality* means ... that persons in similar situations are not to be treated differently unless the difference in treatment is objectively justified. [Accordingly] *Discrimination* can only exist within a framework in which it is possible to draw comparisons, for example, the framework of race, sex, nationality, colour, religion. The equality principles will not apply in situations which are deemed to be 'objectively different.'

That the principle of 'Equality' is now firmly entrenched within the Treaties there is no doubt. Indeed, six Treaty provisions expressly prohibiting discrimination are:

- **Arts.2 & 3(3) TEU** (relating to values of the Union);
- **Art.8 TFEU** which provides that "In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women".
- **Art.18 TFEU** which prohibits 'discrimination on the grounds of nationality';
- **Art.40(2) TFEU** which is a provision of the Common Agricultural Policy (CAP), prohibited 'discrimination between producers or consumers within the Community': see *Case 114/76*, the *Skimmed Milk Powder Case*, and
- **Art.157 TFEU (ex.Art.141EC)** provided that 'men and women should receive equal pay for equal work': see *Case 43/75*, *Defrenne v. Sabena*.

Another breach of the principle of equality was rectified by the ECJ in the *first isoglucose cases*, *Cases 103 & 105/77*. Here glucose producers challenged the legality of a system of production subsidies under which sugar producers received subsidies financed in part by levies on the production of glucose. The glucose producers contended that since they

were in competition with the sugar producers the Regulations implementing the system of levies were discriminatory, i.e. in breach of the general principle of equality.

**HELD:** The ECJ agreed with the glucose producers. Accordingly, the Regulations were declared invalid.

### **No discrimination on the basis of age**

It should be noted that in Case C-144/04, *Manqold v Helm*, the EC J stated that: “The principle of *non-discrimination on grounds of age* must ... be regarded as a general principle of Community law.”<sup>9</sup>

### **(iii) Legal Certainty.**

In Case 43/75, *Defrenne v. SABENA*, the ECJ decided that equal pay for men and women under **Art.157 TFEU (ex.Art.141 EC / Art.119EEC)** was a directly effective Treaty provision, i.e. a provision which private individuals could invoke to sue their national governments or emanations of the State in the national courts of their Member State. However, in the interests of *legal certainty*, claims were restricted to future claims and to those litigants who had made their submissions at the time of the ruling: retrospective claims would not be countenanced. In essence, legal certainty – which *Kaczorowska*<sup>10</sup> regards as the ‘most important principle of public international law recognised by the ECJ’ - means that the law must be clear and precise: Case C-110/03, *Belgium v Commission*. The principle of legal certainty may take either of two forms, viz;

- (a) the principle of protection of legitimate expectations;
- (b) the principle of non-retroactivity.

#### **(a) The principle of legitimate expectations.**

A legitimate expectation is one that might be held by a reasonable person as to matters likely to occur in the normal course of his affairs. A simple illustration of the principle of legitimate expectations emerged from Case 74/74, *CNTA v. Commission*. As **Shaw** notes:

Here it was held that the Commission was not permitted to abolish without warning so-called ‘monetary compensation amounts’ (‘MCAs’) granted to exporters of agricultural products to compensate them for fluctuations in exchange rates since: “a trader may legitimately expect that for transactions irrevocably undertaken by him because he has obtained, subject to a deposit, export licences fixing the amount of the refund in advance, no unforeseeable alteration will occur which could have the effect of causing him inevitable loss, by re-exposing him to the exchange risk.” ([1975] ECR 533 @ 550).

#### **(b) The principle of non-retroactivity.**

The general rule is that the principle of non-retroactivity, as applied to Community secondary legislation, precludes a measure from taking effect before its publication.

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<sup>9</sup> See also: *The Framework Directive on Discrimination in Employment, Directive 2000/78/EC*

<sup>10</sup> *Kaczorowska, A. European Union Law*, 2<sup>nd</sup> edn., 2010. Abingdon: Routledge, p206.

However, retroactivity will be permitted if it is essential for the purpose of the measure to be achieved and for the legitimate expectations of the persons affected to be protected. This was decided in Case 108/81, *Amylum v. Council*.

**Hartley** notes that further analysis is dependent on recognising that the term ‘retroactivity ... is used to cover at least two distinct concepts’, viz; ‘*true retroactivity*’ and ‘*quasi retroactivity*’. These concepts have their distinction in completed and pending transactions. (For further details see: *Hartley* (2010) pp160-162).

In relation to Directives, **Wyatt & Dashwood**<sup>11</sup> have noted that:

National implementing rules should ... give persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed. [Indeed] As the Court of Justice put it in Commission v. Greece (Case C-236/95):

“ ... the Court has consistently held that it is particularly important, in order to satisfy the requirement of legal certainty, that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts”.

#### **(iv) Proportionality**

This principle, which has a strong basis in German constitutional law and which became (i.e., ‘post-Amsterdam’) part of **Art.5EC** [see now **Art.5(4) TEU**], is explained by **Shaw** who notes that:

‘Essentially it requires a measure to be no more burdensome than is necessary to achieve its objective. Once the objective of a measure is identified, a threefold test can be applied:

- [i] is the measure capable of achieving the objective;
- [ii] is the measure necessary for the achievement of the objective; and
- [iii] is there a reasonable relationship between the measure and the objective’?

The case which introduced the principle of proportionality to EC law was: Case 11/70, *Internationale Handelsgesellschaft mbH*, where the exporter of maize who failed to complete an export within the time limit of his licence was required to forfeit a substantial proportion of his deposit guaranteeing that the export would have been completed within the period of validity of the licence. However, the German administrative court sought a preliminary ruling from the ECJ on the validity of this forfeiture given that it was contrary to freedom of action in trading and it breached the principle of proportionality in German law. The Advocate General responded by noting, inter alia, that “the individual should not have his freedom of action limited beyond the degree necessary for the public interest.”<sup>12</sup>

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<sup>11</sup> 5<sup>th</sup> edn., 2006, p164

<sup>12</sup>On the facts of the case, the system of deposits did not violate any right of a fundamental nature.

In contrast to the decision in *Case 11/70*, in *Case 181/84, R v. Intervention Board for Agricultural Produce, ex parte Man (Sugar) Ltd* [1985] ECR 2889, the forfeiture of the applicant's entire deposit of nearly £1,700,000 was grossly disproportionate to the failure to submit his licence application within time when, in fact, he was only three to four hours late and the reason for the delay was ascribed to the person who normally made the application via telex being absent from work that day.

**Hartley** (7<sup>th</sup> edn., 2010, p166) notes the significance of proportionality and says that:

According to the principle of proportionality, a public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure. If the burdens are clearly out of proportion to the object in view, the measure will be annulled. This requires that there exist a reasonable relationship between the end and the means. It implies both that the means must be reasonably likely to bring about the objective, and the detriment to those adversely affected must not be disproportionate to the benefit of the public.

The most striking point about the doctrine of proportionality is that it leaves a great deal to the judgment of the Court. Is the measure reasonably likely to attain its objective? Does it impose disproportionate burdens on those concerned? These are clearly questions on which opinions may frequently differ. The Court will not, of course, interfere unless there is a clear and obvious infringement of the principle; nevertheless, it is not always easy to predict when the Court will consider that the point has been reached.

{Note also another general principle under the heading of 'Administration of Justice':

**(V) The right to an effective judicial remedy before national courts** – see *Case 222/84, Johnston v RUC* (in Topic 3, Lecture 1, Direct Effect)}.

## **(2). General Principles Based on the Fundamental Freedoms of the Internal Market.**

The fundamental freedoms of the internal market are the free movement of goods, persons, services and capital. That the fundamental freedoms give rise to general principles was stated in *Case 186/87, Cowan v. Le Tresor public*, where, in a case involving a British national who had been attacked, robbed and injured, the ECJ said in the course of its judgment entitling the victim to claim compensation for criminal injuries under French law on the same basis as a French national that:

[national] legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law.

Moreover, in Case 240/83, ADBHU, the ECJ said that:

It should be borne in mind that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance.

The general principles which arise from the fundamental freedoms are generally subject to the principle of proportionality. So, for example, in relation to the free movement of goods, and **Art.36 TFEU** [ex.Art.30EC / Art.36EEC], which provides for derogations from the principles of free movement, it was said in Case 104/75<sup>13</sup> that Member States' powers under this Article:

are limited by the fact that the measures adopted for the purpose of the objective which it is sought to attain must be adequate and also that these measures must be *proportionate* to the aim it is sought to achieve.

Another case in which the ECJ applied the principle of proportionality to the free movement of goods was Case 35/76, Simmenthal Spa v. Italian Minister for Finance where it was **Held** that 'systematic veterinary and public health inspections at the frontier by the importing state would be disproportionate, in as much as they would involve unnecessary expense and delay, without any great benefit, as they would merely duplicate the veterinary and public health inspections made before the produce left the exporting state'.<sup>14</sup>

### **(3). Fundamental Rights**

That there is a Community concept of human rights originated as the product of persuasive arguments that EC law should not conflict with the German Constitution. The development of the doctrine began with the decision in Case 29/69, Stauder v. City of Ulm where a war victim on state benefits claimed that having to produce his name and address in order to purchase butter at a reduced price was incompatible with the general principles of Community law. The ECJ decided that it would be - if the contention was correct. It wasn't, however, so, in giving reasons for rejecting the contention, they and added that:

Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights ... protected by the Court.

Whereas Stauder confirmed the *existence* of human rights as a general principle of EC law, later cases focused on the *sources* of the principle.

In Case 11/70, Internationale Handelsgesellschaft mbH it was said that:

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<sup>13</sup>Case 104/75, Officier van Justitie v. De Peijper (Centrafarm BV) [1976] ECR 613.

<sup>14</sup>Notes extracted from Charlesworth and Cullen, European Community Law. London: Pitman, 1994, p117.

... respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

**Wyatt and Dashwood**<sup>15</sup> affirm this as identifying one of the sources of general principles as the “common constitutional traditions” of Member States’ and they continue by stating that Case 4/73, Nold v. Commission, “whilst restating the importance of national constitutions”, ... ‘also held that “international Treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories”, would supply useful guidelines’.

This identification by the ECJ of another source of the general principle of human rights in Case 4/73, Nold v. Commission came only two paragraphs after the Court had already stated that: “fundamental rights form an integral part of the general principles of law, the observance of which it ensures”.

Whereas one of the ECJ’s most detailed discussions on human rights is to be found in Case 44/79, Hauer, (involving provisions of the constitutions of three of the then 9 Member States and an analysis of particular provisions of the **European Convention on Human Rights**), it is noteworthy that the **TEU** (‘Maastricht’) introduced via **Art.F(2)** (which became, post Amsterdam’, **Art.6(2)**) the provision that:

The Union shall respect fundamental rights, as guaranteed by the European convention for the Protection of Human rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

(See, now: **Art.6 TEU** post Treaty of Lisbon).

### **European Union Charter of Fundamental Rights (EUCFR)**

Whilst it is only since the coming into force of the Treaty of Lisbon that the **EUCFR** has legal force<sup>16</sup>, the ECJ had already *made reference* to it in a number of judgments (see, e.g., Case C-491/01, R v. SoS ex parte BAT) though it had not based any decisions on it.

(**N.B.**: the **EUCFR** has the same legal value as the **TEU** and **TFEU** now that the **Treaty of Lisbon** has been ratified).

## **(4). General Principles Based on the Developing Political Rights of EU Citizens**

The possibility of the principles of ‘democracy’ (Case T-135/96, UEAPME v. Council), and ‘transparency’ (in Case 58/94, Netherlands v. Council) have been mooted and

<sup>15</sup> *Wyatt & Dashwood’s European Union Law*, 5<sup>th</sup> edn., 2006. London: Sweet and Maxwell, p259.

<sup>16</sup> Except in the three States that negotiated ‘opt-outs’, viz; Czech Republic, Poland and the UK.

developed and, it is submitted, there is some compelling authority indicating that such principles *will* develop as general principles of EC law. Note also how the 'precautionary principle' (in Case C-180/96, UK v Commission) was introduced by the ECJ and how it was further developed by the CFI. The potential for the development of 'Sustainability' as a general principle should also be considered.

(See further commentary in **Craig & De Burca**, 4<sup>th</sup> edn., pp562-568).

## References

- Chalmers, D, et al.** European Union Law, 2nd edn., 2010. Cambridge: CUP, Ch.6 (principally);
- Fairhurst, J**, Law of the European Union, 8<sup>th</sup> edn., 2010. Harlow: Pearson-Longman, , Ch.2, pp68-83;
- Foster, N.** EU Law Directions, 2<sup>nd</sup> edn., 2010. Oxford: OUP, Ch.4, pp107-117;
- Hartley, T.C.** The Foundations of European Union Law, 7<sup>th</sup> edn., 2010. Oxford: OUP, Ch.5;
- Kaczorowska, A.** European Union Law, 2<sup>nd</sup> edn., 2010. Abingdon: Routledge. Ch.8, pp205-213;

## Questions

1. Critically evaluate the assertion that the ECJ has exceeded its duty by developing general principles of EU law.
2. To what extent, if at all, do you agree with the assertion that: 'as the European Union's legal system continues to develop, the role of general principles of law is unlikely to diminish. Indeed, there is scope for additional general principles to emerge'?
3. Discuss the origins and functions of general principles of Union law; and analyse the development, to date, of the principle of proportionality and the potential barriers to its possible development in the foreseeable future.