

Relatively Certain or Certainly Relative? Thick and Thin General Principles in an Expanding European Community

Nick Cartwright, School of Law, Keele University, U.K.
© 2007

Abstract

In recent political history, many states have extended anti-discriminatory practice to a politics based on inclusivity. Those whose cultural or religious traditions differ are to be treated in a fashion that affords respect to these differences, even so far as to treat individuals from different traditions differently before the law. This recognition is visible in the peoples' court of Australia, the tribal courts in North America and Canada and the local peoples' courts of Sudan. When what is legally right or wrong becomes relative to the moral traditions of one's cultural history, legal certainty is necessarily compromised.

Legal certainty is one of the 'general principles' of the European Community (EC) and it is from this certainty that core principles of EC law such as supremacy, direct effect and direct applicability derive. Whilst the European Union (EU) has traditionally been a union of culturally similar states sharing the same underlying legal morality, this certainty has not caused conflict. However, with the EU's expansion into Eastern Europe, and particularly the accession negotiations with Turkey, conflict is foreseeable. Whereas Turkey is politically a secular country, it has a Moorish tradition and is arguably as much part of the Middle East as it is part of Eastern Europe. There is a point at which legal relativism undermines legal certainty and a total acceptance of either principle is necessarily going to result in injustice. But without states openly engaging in a dialectic as to where the boundary conditions lie, one can neither rely on legal certainty nor respect for difference and this also will lead to injustice.

This paper argues that, if we apply Michael Walzer's models of thick and thin morality to the General Principles of European Community law, we can define this boundary.

The General Principles of EC Law

General principles of law differ from the concrete rules of law; "... it may be said that a principle is a general proposition of law of some importance from which concrete rules derive."¹ Unlike specific rules the general principles of a legal system are the – often unwritten – underpinning principles, forming an underlying jurisprudence; a law answers the question 'what' and a principle the question 'why'.² In general, these principles either evolve over several centuries, as in the English legal system, or are recognised in the founding documents of a new nation state, as in the American constitution.

The EC is unique in that its general principles derive from the laws of the member states.³ However, once taken as concepts from the laws of the member states, they take on their own character as the European Court of Justice (ECJ) develops and transforms them. These principles are binding on EC institutions and Member States, developing into a form of unwritten constitution or "... a constitutional order of States."⁴

The general principles of EC law are now established and, in consequence, a measure that infringes them will be declared illegal and annulled by the ECJ. However, they are derived from the legal systems of no more than 15 of the current 25, soon to be 27, member states. This is, of course, acceptable if the underlying jurisprudence of the new member states is identical to that of those from whose regimes the general principles were adopted, but potential for difficulty arises when underlying jurisprudence differs.

¹ T. Tridimas, *The General Principles of EC Law*, 2000, OUP, Oxford, p.1

² Sir G. Fitzmaurice, 'The General Principles of International Law', 92 *Collected Courses of the Hague Academy of International Law*, 1957, p.7

³ *Internationale Handelsgesellschaft v Einfuhr- und Vorratsselle Getreide* (Case 11/70 [1970] ECR 1125)

⁴ A. Dashwood, 'The Limits of European Community Powers', *ELRev*, 1996, vol. 21, pp.113-14

When traditions of jurisprudence conflict with each other, possible remedies can, from a historical angle, be broadly classified into two types of responses; an 'inclusive' and an 'exclusive' response. However there is also a third route based on Walzer's work on thick and thin moralities.⁵

The 'Inclusive' Response

When faced with the problem of cultural diversity, one mode of response has been to accept these differences, even going so far as to recognise them before the law. Federal systems of government where different states exercise some degree of control over their individual legal regimes exist in countries such as Germany and North America. Other Nation States recognise certain tribal legal norms as existing alongside their own, such as Australia's recognition of the Aboriginal customary law of 'payback'.⁶ However, few other regimes have experienced a period of such recognition of tribal and cultural legal differences as the Sudan;⁷ for this reason, and because of personal experience in this region, Sudan will be used to exemplify what is meant by an inclusive response.

Sudan has traditionally been divided into two groups, the Muslim Arabs who inhabit northern Sudan and the Christian Africans who inhabit southern Sudan; yet such groupings are perhaps naïve, the southerners are largely tribal and there exist many groupings in this region, each expressing their own cultural and religious traditions. Whilst Christianity may be prevalent in the south, many tribal religions still exist and numerous tribal traditions have been absorbed into Christianity creating an array of denominations. Furthermore, a group of western Sudanese exist that is considered by the northerners to be a distinct and separate group of people. The massive refugee and émigré populations that live in Sudan reinforce this ethnic diversity.⁸

Sudan thus experienced a period of legal relativism that was unique. Sudanese law attempted to recognise differences of belief and culture that existed within the different groups within its borders. The Sudan had a common law system based on the principles of 'justice, equity and good conscience', akin to the Indian Penal Code, which attempted to "... reflect and accommodate the local traditions and practices [of different groups] ...[creating] ... a set of rules suited to local traditions and needs..."⁹ This flexibility is exemplified not just by minor matters but by major ones, such as the interpretation of the law of homicide. Whilst local courts can try 'minor' matters, essentially all matters except homicide, under local customary law homicide may not be tried in these courts, yet the legal regime still recognises differences in belief and culture in homicide trials. Examples of this differing application can be seen throughout the Sudanese law of homicide that recognises supernatural belief as a defence, and displays compassion to defendants in decisions regarding infanticide of illegitimate children as well as having differing rules applied to fighting as it occurs in different tribal traditions.¹⁰ Examples of superstition as a reason for killing exist throughout Sudanese culture. For example, the Nuer tribe of East Africa believe that if an infant is born deformed it is the infant of a hippopotamus mistakenly born to human parents, and the infant should be returned to its hippopotamus family by throwing it into the water.¹¹

Sudanese law offers a defence of supernatural belief in homicide cases. This defence applies when the defendant held an honest and reasonable¹² belief that the victim was a supernatural creature. There appear to be only four cases in which this defence was raised, three of which are unreported. In one case¹³ the defendant's sentence was reduced to 6 years. He

⁵ Walzer, *Thick and Thin: Moral Argument at Home and Abroad*, 1994, University of Notre Dame Press, London

⁶ For discussion see M. Finnane, 'Payback', *Customary Law and Criminal Law in Colonised Australia*, (2001), *Journal of the Sociology of Law*, 29, 293

⁷ N. Cartwright, 'Where Now for Iraq? Lessons from Sudanese Legal History', *The Hertfordshire Law Journal*, 2003, Vol. 1, No. 1, 107

⁸ Due to the commandments of Mohammed in the Qu'ran to offer help to all who ask Sudan does not turn away refugees and has émigré populations from the majority of its neighbouring countries.

⁹ M. Zaki, *The Common Law in The Sudan*, 1971, Clarendon Press, Oxford, 89

¹⁰ Vasdev has a sub-chapter devoted to Nuba fights. K. Vasdev, *Law of homicide in the Sudan*, 1978, Butterworths, London, 318-20.

¹¹ H. Kuhse, *The Sanctity of Life Doctrine in Medicine; A Critique*, 1987, Clarendon Press, Oxford, 202-19

¹² There is no clear definition as to what 'reasonable' means in this context. The case law doesn't discuss this and it appears that if one can demonstrate that the belief was honest then reasonableness is assumed.

¹³ *Sudan Government v Muhamed Ahmed Mohamed Mohamedin* (1948), unreported.

raised the defence after spearing a 60-year-old man he met at night on a road believed to be haunted, the man had his head wrapped against the cold and it was believed this could have caused confusion. In all the subsequent cases the defence has been accepted and a total acquittal granted, subsequent case law has held that this is a total defence. In *Sudan Government v Abdel Rahman Yacontu Daw El Bel*¹⁴ the defendant raised the defence after he threw stones at an elderly and infirm man before repeatedly cracking his skull with an axe, believing him to be an evil spirit. In *Sudan Government v Mirghani El Tahir*¹⁵ the defendant, an 18 year old shepherd, stabbed his friend, aged fifteen, three times after he woke up to see him standing over him, believing him to be a ghost. In a similar case¹⁶, a man looking for a cow beat a man in black to death with a stick, again believing him to be an evil spirit.

Sudanese law in general also exemplifies this flexibility, The Peoples Local Courts Act (1971) recognised local courts such as Chiefs' Courts, Native Courts, and Peoples' Councils Court as having legitimate power to confer judgements and sentencing¹⁷ in all cases except those involving homicide. Case law clearly indicates that the views of these courts were respected on appeal.¹⁸ The inclusive response describes legal systems, such as that in the Sudan, where legal certainty is partially or fully surrendered in favour of accepting the difference of underlying traditions and beliefs.

The 'Exclusive' Response

Many countries have an underlying and inflexible jurisprudence, often because their borders have not incorporated a variety of cultural groups. This jurisprudence means that they are comfortable in declaring legal absolutes irrespective of the background of the defendant. What is legally right or legally wrong is clear and equally applied to all. The English legal system is an example of this exclusive response and, because of my academic experience in English law, this will serve to exemplify the exclusive response.

Lord Diplock explained this legal absolutism when he stated; "the acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it."¹⁹ This exclusive response can further be seen in various examples. Female circumcision is one example and Professor Gary Slapper has suggested that to allow such would be a ridiculous extension of "the 'live and let live' principle"²⁰ and David Blunkett, then Home Secretary, supported severe penalties for what he labelled a "vile practice."²¹ Homosexual sadomasochistic practices are a further example and in the infamous ruling in *R v Brown*²² the House of Lords were clear in their assertion that such practices were illegal. Difficulty occurs when a state applies its legal absolutes to a different state, as was exemplified in the case of the Pitcairn islanders²³ found guilty of a series of sexual assaults. The case involved 7 male islanders charged with 55 offences of

¹⁴ (1951) unreported

¹⁵ (1955) unreported

¹⁶ *Sudan Government v Abdullah Mukhtar Nur* (1959) SLJR 1

¹⁷ Part II refers specifically to Northern Sudan allowing sentences of up to 5 years imprisonment or fines of up to 5000 Dina (The exchange rate as at May 2001 is 372 Sudanese Dina to £1 Sterling). Part III refers specifically to Southern Sudan and allows sentences of up to 1 year imprisonment and fines of up to 1000 Dina; Part III further established legal centres in the Southern regions called 'Main Peoples' Local Courts' with powers to confer sentences of up to 7 years imprisonment and fines of up to 8000 Dina.

¹⁸ Mohammedan law was limited in its application; "there can be no conflict of jurisdiction unless a suit is first instituted in a Mohammedan law court and then instituted before a Civil Court. But in this case there is no suit before a Shar'ia Court." (*Fatma Abdel Rahman v Heirs of Mohamed El Azrak (HC-Revision-5-1956)* [1960] SLJR 1 at 1-2) Customary rights were considered by the courts (*Heirs of Sawiris Mahrous v William Morgos Mahrous (DPC-CS-210-1955)(AC-Revision-129-1957)*, [1960] SLJR 15). Consideration was made for the varying levels of literacy and education that existed; "Where an offence requires knowledge of the promulgation of an order such knowledge cannot be imputed from mere publication of such order in the local press and on public notice boards" (*Sudan Government v Abdel Wahats Mohamed and Abdullah El Ballah and Busra El Tayed* (1960) SLJR 98 at 98) and for varying levels of knowledge of the law (*El Khidir El Hag Omer v Alla Mana Farah Massoud (HC-CS-150-1959)* [1960] SLJR 152).

¹⁹ *Black Clawson Ltd. v Papierwerke AG* [1975] AC 591, 638

²⁰ 'Letter: Female Mutilation', *The Independent*, Nov. 16, 2002, 23

²¹ 'In Brief: Blunkett acts on 'vile practice'', *The Guardian*, March 22, 2003, 13

²² (1992) 94 Cr. App. R 302

²³ *Christian v The Queen* (Privy Council) 2004 (unreported)

rape or indecent assault. The defendants argued that; "... rape was a way of life on the island..."²⁴ The relevance of this case here was the appeal based on Britain's authority over the island and further; "They argue that although Pitcairn ... is theoretically subject to English law, consensual underage sex, involving girls 12 or 13, is a traditional part of island life."²⁵ Lawyers argued that the islanders, descendants of the Bounty mutineers, stopped being British subjects in 1789 when they burnt the ship, however; "Both Pitcairn Supreme Court and the Pitcairn Court of Appeal have ruled Britain does have legal jurisdiction over the island."²⁶ Right to appeal to the Privy Council was granted, however the Privy Council upheld the convictions and Britain's legal jurisdiction over the islanders.²⁷

The UK, in common with all EU member states, has an underpinning principle of legal certainty. The EC has, from its member states, adopted this as a general principle of EC law.²⁸

In conclusion: thick and thin General Principles

The Sudanese example shows that legal pragmatism achieved a society in which everyone's values and beliefs were safeguarded and respected without the need to impose one's beliefs onto another. The system worked by recognising diversity between peoples and allowing them to be treated differently based upon this diversity. Whilst there are strong arguments to support the view that one should respect the beliefs of others, when the law is this flexible legal certainty is surrendered. One role of legal rules is to define what is acceptable practice in order to allow the operation of society. This is not to take a deontological view and say there are absolute moral rights and wrongs but rather there is a necessity for society to decide on a series of basic legal rules in order to facilitate its operation. Tridimas argues that in an economic union legal certainty is vital; "Economic and commercial life is based on advance planning so that clear and precise legal provisions reduce transaction costs and promote efficient business. Legal certainty may thus be seen as contributing to the production of economically consistent rules."²⁹ Whilst Sudanese law was very successful in recognising differences in belief, it failed to establish legal certainty and facilitate social interaction. Any legal regime based on group power sharing will have to decide where the boundary between relativism and certainty should lie, a decision which will be very difficult to make, but one with which the EC should engage.

It may be argued that to conflate cultural difference and economic certainty is to find conflict where there is none; however the EC, and certainly the EU, has grown beyond being simply an economic union. It has been recognised that fundamental rights form part of EC law³⁰ and, since the Treaty of Nice, there has existed a Charter of Fundamental Rights that forms a central part of the proposed constitutional treaty.

This paper is not alone in recognising that there exists potential for conflict when applying a western Judaeo-Christian set of principles to a country with a largely Moorish heritage.³¹ The Dutch Prime Minister Jan Peter Balkenende recognised the issue when – outlining the plans for the Dutch presidency of the EU – he asserted that Turkey's Islamic history must not "cloud" their bid for membership³² and senior Turkish officials have argued that their application for membership has been delayed because of their religious history. "Turkey's ambassador to France said in an interview published on Monday that his country's [sic] would have "no problem" joining the European Union if it were Christian and that its Muslim heritage is the real issue behind the current debate."³³

Having identified such potential for conflict, it is clear that what it is necessary for the EU to face up to the issue and to be open to discussion about how best to proceed: ignoring the issue

²⁴ 'Rape a 'way of life' on Pitcairn', BBC News [online] www.bbc.co.uk/news [28 October 2004, 16:50]

²⁵ *Ibid*

²⁶ 'Pitcairn men win right to appeal', BBC News [online] www.bbc.co.uk/news [28 October 2004, 16:50]

²⁷ 'Six guilty in Pitcairn sex trial', BBC News [online] www.bbc.co.uk/news [28 October 2004, 16:50]

²⁸ for example see *Van Duyn v Home Office* (Case 41/74 [1974] ECR 1337)

²⁹ *Supra* 1, 163

³⁰ *Supra* 3

³¹ for example see B. Buzan and T. Diez, 'The European Union and Turkey', *Survival*, 1999, vol. 41, no. 1, 41

³² 'Islam 'must not cloud Turkey bid'', BBC News [online] www.bbc.co.uk/news [21 July 2004, 12:44]

³³ 'Turkey insist EU objections based on religion', The Daily Star [online] www.dailystar.com.lb [21 February 2005, 10:34]

can only lead to future difficulties. Walzer's theories of thick and thin moral theory can play a central role in this dialectic.

Walzer argues that pluralism creates different spheres, with different moral languages. One of these languages is based on simplicity and he terms it 'thin', the other is based in complexity and he terms this 'thick'. Thick morality is rooted in a shared cultural history; it allows one to determine what moral duties she or he owes to those who share his or her history, language and culture. He uses distributive justice as an example of thick morality.³⁴ Thin morality is universal; it allows one to determine what moral duties she or he owes to those who do not share her or his cultural identity. Walzer identifies such values as 'truth' and 'justice' as thin moral values.³⁵ He applies his theory of thick and thin moralities to international politics,³⁶ and this application can clearly apply to the European Community as well. If we accept the need for General Principles as thin values, then, in areas of competence such as the creation of a Common Market, the EC can create thin values and leave areas of discretion for individual member states to fill in their own thick values.

Bibliography

Cases

Black Clawson Ltd. V Papierwerke AG [1975] AC 591
Christian v The Queen (Privy Council) 2004 (unreported)
El Khidir El Hag Omer v Alla Mana Farah Massoud (HC-CS-150-1959) [1960] SLJR 152
Fatma Abdel Rahman v Heirs of Mohamed El Azrak HC-Revision-5-1956 [1960] SLJR 1
Heirs of Sawiris Mahrous v William Morgos Mahrous (DPC-CS-210-1955)(AC-Revision-129-1957), [1960] SLJR 15.
Internationale Handelsgesellschaft v Einfuhr- und Vorratsselle Getreide (Case 11/70 [1970] ECR 1125)
R v Brown (1992) 94 Cr. App. R 302
Sudan Government v Abdel Rahman Yacontu Daw El Bet (1951) unreported
Sudan Government v Abdel Wahats Mohamed and Abdullah El Ballah and Busra El Tayed (1960) SLJR 98 at 98
Sudan Government v Abdullah Mukhtar Nur (1959) SLJR 1
Sudan Government v Mirghani El Tahir (1955) unreported
Sudan Government v Muhamed Ahmed Mohamed Mohamedin (1948) unreported
Van Duyn v Home Office (Case 41/74 [1974] ECR 1337)

Books

Kuhse, *The Sanctity of Life Doctrine in Medicine; A Critique*, 1987, Clarendon Press, Oxford, 202-19
Tridimas, *The General Principles of EC Law*, 2000, OUP, Oxford
Vasdev, *Law of homicide in the Sudan*, 1978, Butterworths, London
Walzer, *Thick and Thin: Moral Argument at Home and Abroad*, 1994, University of Notre Dame Press, London
Zaki, *The Common Law in The Sudan*, 1971, Clarendon Press, Oxford

Journal articles

Buzan and Diez, 'The European Union and Turkey', *Survival*, 1999, vol. 41, no. 1, 41
Cartwright, 'Where Now for Iraq? Lessons from Sudanese Legal History', *The Hertfordshire Law Journal*, 2003, Vol. 1, No. 1, 107
Dashwood, 'The Limits of European Community Powers', *ELRev*, 1996, vol. 21, 113
Finnane, 'Payback', Customary Law and Criminal Law in Colonised Australia', (2001), *Journal of the Sociology of Law*, 29, 293
Fitzmaurice, 'The General Principles of International Law', *92 Collected Courses of the Hague Academy of International Law*, 1957

Other sources

BBC News [online] www.bbc.co.uk/news [21 July 2004, 12:44]
'In Brief: Blunkett acts on 'vile practice'', *The Guardian*, March 22, 2003, 13
'Letter: Female Mutilation', *The Independent*, Nov. 16, 2002, 23
'Pitcairn men win right to appeal', BBC News [online] www.bbc.co.uk/news [28 October 2004, 16:50]

³⁴ *Supra* 5, pp.21-39

³⁵ *Ibid*, p.1

³⁶ *Ibid*, pp.63-83

'Rape a 'way of life' on Pitcairn', BBC News [online] www.bbc.co.uk/news [28 October 2004, 16:50]
'Six guilty in Pitcairn sex trial', BBC News [online] www.bbc.co.uk/news [28 October 2004, 16:50]
'Turkey insist EU objections based on religion', The Daily Star [online] www.dailystar.com.lb [21 February 2005, 10:34]