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A EUROPEAN LAW INSTITUTE?
TOWARDS INNOVATION IN EUROPEAN LEGAL INTEGRATION
Conference held in EUI Florence April 2010

Organised by Professors F. Cafaggi, F. Francioni, H.-W. Micklitz,
and M. Poiares Maduro

**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**

**ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES**

# *A European Law Institute?*
# *Towards Innovation in European Legal Integration*

**ORGANISED BY F. CAFAGGI, F. FRANCIONI, H.-W. MICKLITZ,**

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# TABLE OF CONTENTS

*F. Cafaggi, F. Francioni, H.W. Micklitz, M. Poiares Maduro, The creation of a European Law Institute?* *1*

*J. Basedow, A European Law Institute – Purposes, Models and the European Perspective* *5*

*B. Fauvarque-Cosson, Towards Innovation in European legal Integration: "Trans Europe Experts" (TEE) and ELI* *11*

*P. Fois (no title)* *15*

*Griss, Creation of a European Law Institute?* *17*

*S. Grundmann A European Law Institute? Towards Innovation in European Legal Integration* *19*

*G.C. Hazard Jr & A.J. Scirica, The Constitutional Role of the American Law Institute* *27*

*W. Heusel, Towards a European Law Institute?* *33*

*V. Reding, A European Law Institute: an Important Milestone for an Ever Closer Union of Law, Rights and Justice* *43*

*M. Safjan, The European Institute of Law – A Step towards Strengthening the Integration Processes?* *49*

*H. Schulte-Nölke, The European Law Institute* *55*

*C. Timmermaans, Creating a European Law Institute?* *63*

*H. Van Loon, A European Law Institute? – A perspective from The Hague* *67*

*Overview of Conventions and Other Instruments Drawn up under the Auspices of UNCITRAL, UNIDROIT and the Hague Conference on Private International Law* *73*

*F. Graf von Westphalen, European Law Institute* *79*

*R. Zimmermann, Reflections on a European Law Institute: based on the proceedings of the Florence conference* *81*

*S. Cassese, A European Law Institute: what for?* *85*

# The creation of a European Law Institute?

F. Cafaggi, F. Francioni, H.-W. Micklitz, M. Poiares Maduro

This workshop aims to open the debate on whether the creation of a European Law Institute is feasible and desirable? What exactly its aims and objectives should be? How should it be governed? How should it relate to other European institutions? Should it have Treaty Status? How should it be funded? These are just some of the questions that we would like to consider during the workshop at the European University Institute on April 9th and 10th 2010.

One of the main strengths of the workshop is that it brings together Judges, regulators, practising lawyers, academics, members of European and national institutions all of whom are engaged in promoting European legal integration.

The premise is that legislative integration and harmonisation are important but not exclusive parts of the process leading to European legal integration. In fact, several other instruments are currently being used to promote integration. In particular, new modes of governance including the Open Method of coordination and national judicial intervention concerning European law, beyond legislation, require a higher level and indeed simply better coordination. For this reason, not only areas concerning European legislative competences should be considered but also the coordination of legislation and policies in areas that are still primarily attributed to MS. The role of both national and community courts has been and will continue to be paramount to the integration process. However, this element has not yet found adequate institutional recognition.

The creation of a European Law Institution can not only improve horizontal coordination among courts and administrative agencies but could also provide institutional support to drafting common principles and guidelines. Furthermore, the delicate relationship between private law making, influencing European legal integration, and public law making should be considered. ELI could indeed aim to coordinate public and private law making in areas where private parties play a significant role.

Moreover, the function of a European Law Institute goes beyond the institutional dimension. As other experiences show, the creation of integrated legal communities contributes to mutual learning. In Europe we continue to witness a very decentralized architecture in which national legal systems play a major role and languages reflect different legal traditions, reflecting the need to promote the consolidation of a European legal community.

## Scope

The creation of the European Law Institute would promote European legal integration by drafting common principles and supporting the European Commission in the process of implementing these principles. Often, the European Union Treaty refers to common principles of the Member States, and the European Court of Justice is forced to presume these principles by engaging in burdensome comparative analysis through a case by case examination. ELI could draft common constitutional principles, but also common principles in areas like private law, fundamental rights, and criminal law. These common principles would be drafted by communities of academics, judges, regulators, and lawyers on a voluntary basis and revised periodically following the American Law Institute (ALI) model.

A second task would be related to the implementation of European legislation or compliance with ECJ case law. Often, implementation requires giving guidance to Member States. Coordination, both at the initial stages and after the legislation has been adopted, is strategic. Divergences in application

can undermine internal market policies. Divergent applications, however, do not often amount to infringements, and steering in the right direction, rather than punishment, should be the response. ELI can contribute by monitoring implementation and facilitating coordination among regulators and judiciaries in order to address divergences and attempt to reconcile them.

A third task would be to provide support to the Commission and the Parliament in producing Green and White Papers for legislative reforms. As happens with the Law Commission and equivalent bodies, ELI could verify the need for legislative initiatives by engaging in analysis concerning desirability and modes of legislation.

ELI should be a local institution thinking globally. It should also engage in cooperative relationships with the rest of the world. Though it is a regional organisation, it should promote the European legal model in other jurisdictions. It should engage in bilateral cooperation with twin institutions such as the ALI.

In order to perform these tasks, ELI will also have to promote institutional cooperation among States' judiciaries and regulators as well as between European Institutions and itself.

In particular, judicial cooperation among national Courts is still at a very preliminary stage. ELI can facilitate the creation of judicial networks and coordinate them with the ECJ and the European Court of Human Rights (ECHR).

Initiatives organised in recent years and the response by both national and European judiciaries suggest that there is strong demand for an institution that can coordinate the different existing networks and promote common initiatives.

## Governance

ELI should be a not-for-profit, independent organisation governed by the different participants of the European legal community, including judges, regulators, lawyers, and academics. Within Europe many initiatives promoting cooperation have grown. Several networks have been created among national judiciaries to foster cooperation. A similar trend can be noted in the academic field with networks specialised in different legal fields springing up. ELI can contribute to coordinate these different networks in order to enhance inter-professional dialogue and to increase the influence and the cohesion of the legal community. ELI should have a governing body and operate with affiliation of individuals and institutions.

The model, a *'network of networks'* could promote decentralised coordinated governance on different initiatives.

## Funding

In order to preserve its independence, ELI should sell its services on a contractual basis. All products, including principles and restatements, can be sold to legal communities.

ELI could also play a very important role in legal education. A Centre for the Judiciary that would offer courses for national judges, especially in new MS, could be established. This activity could be organised in cooperation with existing institutions like the Academy of European Law (ERA) in Trier and the European Institute of Public Administration (EIPA) in Maastricht.

## Questions

Using this introduction as a basis, we would like to outline some of the main questions for discussion:

### 1. Is the creation of ELI desirable?

- Why should we create an ELI?
- To promote European legal integration with complementary instruments to legislation?
- What are the main objections?

### 2. Which model should be adopted?

- Should ELI be a network of networks coordinating existing and future initiatives of judicial and professional cooperation?
- Should ELI adopt an Agency-like model centralising the activities?
- Which relationships should be established with the European Institutions? In particular with the Commission?

### 3. Which activities should it carry out?

- What should be the 'domain' of activities?
- Should activity only cover subject matters of European legislative competences or should it encompass also areas where cooperation (in particular judicial) operates beyond?
- Restatements and Principles**.** Should it produce a Restatement, a common core of MS States law?
- Which relationships and projects should ELI engage in with other similar organisations (ALI or others) ?

### 4. How should it be governed?

- Should ELI be a private or a public institution and why?
- If the private model is chosen should it be a for profit or non profit organisation and why?
- How should the different legal communities be represented? Should it be a federation of associations or should it allow also individual membership?
- Should other private organisations (trade and consumer associations) have a voice? Should they be granted memberships? Should they be given only participatory rights?

### 5. How should it be financed?

- Should ELI be primarily self-financed?
- Which combination between public and private financing is desirable?
- Should it only be financed by European public institutions or also by MS?
- Should only use fees or should it sell services to individuals and organisations?

We are looking forward to your participation in debating these issues

# A European Law Institute – Purposes, Models and the European Perspective

Jürgen Basedow*

## Introduction

The establishment of a new institution requires prior consideration to be given to its purposes and intended functions. They can be manifold and various attendees of the conference at the European University Institute have in fact voiced the need for a new institute in view of rather diverse activities. It should be clear from the outset that a single institution cannot perform all these different functions. Only after the identification of clear and reconcilable objectives will it be possible to look at the peculiar institutional characteristics of a European Law Institute. As we shall see, very different existing models can be followed. While the American Law Institute certainly lends itself as a model to such an endeavour which is already made clear by the very designation of the project as European Law Institute, it is not the only example that could be followed. In particular the German Max Planck Institutes could serve as models for a more research-oriented type of European Law Institute.
In choosing the right institutional structure it will be necessary to look at the particular features of European law and its development. They do not admit a complete copy of the American model.

## 1. Purposes and Functions

### *a) Services at the stage of law-making*

At the present stage, a European Law Institute is very much linked to the idea of European restatements of the law, i.e. to the objective of preparing sets of principles for various legal disciplines. It is certainly not by chance that an Association for a European Law Institute has been founded after the project of an academic Common Frame of Reference sponsored by the European Commission was finalised in 2009. It is a legitimate and promising idea to keep up the momentum of European soft law codification and of scholarly networking all across the continent.

The new generation of comparative law that has arisen from the initiative of the European Commission on Contract Law of the 1980s somehow requires an institutional basis for its own further progress. The very least that such an institution would have to care for is the acquisition of an oversight over the specialists in the various sectors of the law in the 27 Member States of the Union and even beyond. It is only on the basis of such a survey that a European Law Institute could organise groups of expert scholars when that becomes necessary for the preparation of new principles in a new area. As part of these facilitating services which could be rendered by a secretariat, an ELI would also convene such groups and might serve as a platform organising conferences. Furthermore, an institute of this type could collect materials, publish its own proceedings and serve in all these capacities as a kind of addressee for the decision making bodies of the Union and the Member States.

The activities of that Institute could be characterised as short-term or mid-term and as a kind of service, understood in a broad sense, rendered to the European political institutions. That Institute would not conduct research of its own, but rather build on the expertise and knowledge of the academic institutions of the various Member States.

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***b) Strategic research***

One could also conceive of a European Law Institute as a more research-oriented institution. It would enable scholars to conduct their individual research on long-term strategies for the development of European law. The focus of such research would be on the future development, i.e. the perspectives for the law of the Union and the Member States in the long run. It would not necessarily have immediate repercussions in European legislation, but would be devoted for example to topics such as the implementation of the subsidiarity principle in the various areas of the law, to the relation between the procedural autonomy of the Member States and the principle of effectiveness of the law of the Union, to the relation between the system of undistorted competition and the principle of antidiscrimination, to the relation between the freedom of contract and mandatory provisions of the private law of the Union, to the links between the private international law of the Union and harmonisation projects, to the benefits to be expected from regulatory competition as compared with legal harmonisation etc.

It should however be clear that institutes of this kind are already in operation; in particular, the German Max Planck Institutes and the European University Institute at Florence may be mentioned in this context. A certain residual need exists perhaps for an institute that can effectively bring together scholars from different social sciences and that could organise interdisciplinary research needed for future European legislation. The so-called impact assessments which the European Commission asks consulting firms to produce from time to time very often do not meet the scholarly standards and should be replaced by more ambitious academic cooperation. But even with that objective in mind, an institution of this type can hardly be said to be urgently needed.

***c) Training***

The same can be said with regard to an institution dealing with the training of professionals, judges, young academics and in-house lawyers in matters of the law of the Union or comparative law. Institutions such as the European Law Academy at Trier or the International Faculty of Comparative Law dealing with such matters already exist, and it is unlikely that much more demand for that training could be provoked by the establishment of a new institution.

***d) Research on extra-European law***

What the European Union will need in the long run is an institute where information and expertise on the law of extra-European jurisdictions is built up and collected. While European lawyers know quite a bit about the law of the United States, there will be an increasing need for information about the law of other extra-European jurisdictions such as China, Japan, India, Brazil, Australia, Russia or Canada. At present only few sources of information on those jurisdictions exist in Europe, in particular in the Max Planck Institutes. But extending this basis is perhaps a second step and not the first one.

***e) Services for the courts***

During the Conference, some members of the judiciary have referred to the need for services that a European Law Institute should render for the various court systems in the European Union. They suggested an institute that could provide information on the law of the Union and particular legal systems at the request of single courts, that would survey the implementation and enforcement of the law of the Union in the various Member States and that would organise the meetings of judges from different Member States and thereby promote networking between the European judiciaries.
These functions would be rather heterogeneous. The implementation and enforcement of the law of the Union in the Member States can only be controlled by comparative research which should be conducted in the numerous universities and research institutes of the Union. As to the training of judges, one can again refer to the European Law Academy at Trier, and the organisation of a network

of European judges is better placed in the hands of the administrative services of the judicial systems of the Member States. Just like national competition authorities organise the annual meetings of the International Competition Network by way of rotation, analogous meetings of the judges could be organised by national supreme courts.

### *f) Services or research as the fundamental question*

Having the wide range of possible functions of a European Law Institute in mind, the founders would first have to answer the basic question whether they aspire to an institution rendering services to the European judiciary or whether they want an institution devoted to basic research. It is not easy, though not impossible, to combine these two basic orientations. If the Institute's priority is service to European legislation, it is unlikely that it will get the brightest young scholars. Such an Institute should rather be organised with a small and primarily administrative staff. If, however, fundamental research will be the main objective of the ELI, it should recruit academics in the first place, and it is likely to get very intelligent young scholars. But they will want to conduct research and accept tasks concerning all kinds of service functions only to a very limited extent.

## 2. Two Models: The American Law Institute and the German Max Planck Institutes

### *a) The ALI*

The American Law Institute has been presented by other speakers at this Conference. Some major characteristics should however be highlighted from a European perspective. When the ALI was founded in 1923, an urgent need was felt by the American legal community to prevent the laws of the various jurisdictions to drift further apart since, throughout the preceding decades, American society and economy had become more and more integrated asking for reliable and, where possible, uniform legal standards. Thus, the focus of the ALI has always primarily been on the *internal* harmonisation of the law within the United States. Consequently, comparative law in an international sense has not played any important role in the work of the ALI. It is only in more recent years that the ALI has engaged in projects affecting the position of the US in the international legal community. In that context, for example for the restatement of foreign relations law of the United States or the principles on jurisdiction, applicable law and the enforcement of foreign judgements in matters relating to intellectual property, foreign advisors have been appointed in order to benefit from comparative insight and foreign experience.

The *membership structure* of the ALI is characterised by a rather strict selection process. Only less than 4,000 members compare to the total of 1.2 million practicing lawyers in the United States. The elite nature of the ALI is further underpinned by the support it received from the outset from the highest representatives of the American legal system. One of the founding members was the then Chief Justice of the US Supreme Court and former President of the United States, William Howard Taft. At present, so-called ex-officio members, in particular high-ranking judges of the Federal and the State judicial systems connect the ALI to the top levels of the judiciary. There is a clear predominance of legal practitioners, both in membership at large and in the governing bodies. 41 of the current 56 members of the Council are practicing lawyers including judges; only 15 are academics. The predominance of practitioners explains the strong impact they have on the choice of the topics for the various projects. Without any exception they all have a strong significance for the practice of legal advice and of litigation.

The ALI is reported to have only a very small staff of 10 fulltime employees. This staff is providing administrative support to the projects of the ALI, but not conducting research on its own. In many respects it is more like a secretariat facilitating the creation of networks and the work of the various project groups. The ALI is a private association that was established without the specific

support or consent of Congress. In the early years, the ALI allegedly received very important grants from private foundations. At present, its expenses are covered in part by membership dues and to a large extent by the revenue derived from the sale of its own publications. Given the great authority of the restatements of the law, practicing lawyers across the US must take them into account in their everyday work. Consequently, the sales numbers have been soaring over the years to satisfy the information needs of 1.2 million practicing lawyers in the US.

### *b) The German Max Planck Institutes*

A counter model to the American Law Institute is provided by the German Max Planck Institutes. The two oldest ones are the Max Planck Institute for Foreign Public Law and Public International Law, now established at Heidelberg, and the Max Planck Institute for Comparative and International Private Law, now in Hamburg. Both were founded in 1926 in the aftermath of the First World War at Berlin to cope with the previously unknown problems of international law and foreign law raised by the Peace Treaties after World War I. At the time, a whole generation of German lawyers had been educated on the basis of national codifications, in particular the German Civil Code of 1896, and were surprised to learn that other contracting States of the Peace Treaties advocated very different interpretations of these instruments. Thus, the thematic focus of the Max Planck Institutes was directed towards international law and comparative law from the very beginning.

Moreover, basic research was recognised as their main purpose very soon, and that is the reason why they were integrated into what is today the Max Planck Society for the Advancement of Science. No teaching responsibilities are incumbent upon the Institutes although their directors and several members of their staff will generally teach at a nearby university. To a rather limited extent they provide services to the German legal system, for example expert opinions for German courts on foreign law or comparative surveys to the German government. The Institutes are subject to an annual reporting obligation and also to an academic evaluation which takes place at regular intervals.

They mainly hire legal staff educated in German universities, but usually require knowledge in foreign languages and some experience in foreign legal systems. The academic staff is involved in research projects conducted by the Institute, but also carrying out individual research. The Institutes have a rather important administrative staff which is meant to support the academic activities of the respective institute. In current years, the policy of the Max Planck Institutes has generally been to encourage the members of their academic staff to qualify for subsequent appointments as professors in German or foreign universities. No legal practitioners are working in the Institutes. Many of these Institutes have developed to centres of academic exchange between scholars coming from all over Europe or even from the whole world.

While the Max Planck Society for the Advancement of Science is a non-profit association established under private law, it receives the major part of its budget from the State. In the federal system of Germany fundamental research is considered as being a task partly of the Federal State and partly of the single Länder. Consequently, 50 percent of the budget of the Max Planck Society derive from federal funds while the other half is provided by the Länder each of which pays a share corresponding to its own size. The single Max Planck Institutes receive their budget from the Max Planck Society. The mixed financing system has the advantage of allowing for a considerable independence of the single Institutes with regard to the content of their research programs.

## 3. The European Perspective

From what has been said so far it clearly emerges that the various functions cannot be performed by one and the same institute. Service functions require attitudes and qualifications that differ notably from those needed for critical comparative and interdisciplinary research. The solution therefore could only consist in the foundation of two institutes, one for research and one for the coordination of

academic activities in the law-making arena. An institute of the latter type would certainly deserve priority if a choice has to be made between the two models.

However, it would be dangerous to set out for a European Law Institute by just copying the structures of the American Law Institute. Very basic differences between America and Europe have to be taken into account. A first one concerns the interaction between lawyers and academics, a second the language barriers.

### *a) Practitioners and academics*

While the relation between scholars and practitioners appears to be rather homogeneous throughout the more than 50 jurisdictions of the United States, there are profound differences in Europe. In some European countries legal scholars are primarily considered as teachers who convey their knowledge to students and, by way of academic publications, to the legal community at large. In these countries a mutual exchange of ideas between practitioners and academics for the purposes of adjudication or legislation is rare. This observation applies to a large extent to countries such as the United Kingdom or France. In Italy, most professors of law are at the same time *avvocati*, but they clearly separate the academic from the practical sphere of their activities. Academic conferences in Italy usually transpire an atmosphere of rather abstract scholarly debates although all participants are often involved in legal practice. In Germany the legal profession is very distinct from the holders of academic offices, but professors and practitioners meet at all kinds of conferences; for 150 years the biannual meetings of the *Deutscher Juristentag* have been platforms for the discussion between lawyers and legal academics on a great variety of topics concerning the future legal development. Many associations in all areas of the law perform a similar function.

Throughout the last 10 years, efforts have been made to establish similar platforms at the European level, the so-called *Europäischer Juristentag* or European lawyers' forum. While attendance from countries such as Germany or Austria has reached a satisfactory level, hardly any participants of these events come from France or the United Kingdom. Apparently, the ways of interaction between practitioners and academics form part of what may be called the national legal culture or style of the legal systems of the Member States. It is rather likely that a European Law Institute would therefore receive a rather diverse echo from the various Member States.

### *b) Language barriers*

A second peculiarity of the European Union as compared with the United States consists of course in the diversity of languages. American lawyers throughout the United States are able to read and understand what the ALI publishes. Quite to the contrary, the documents produced by a future European Law Institute in English would be discussed in rather small minority circles of the European legal community. While many lawyers working in the Member States may be able to read an English text, they will generally avoid such documents and will definitely not try to get actively involved in discussions about the development of European law conducted in English. Since the translation of such documents into other languages of the Union is not a feasible alternative, the debates within a European Law Institute will always remain events for a minority of European lawyers.

This has repercussions on the role of the European Law Institute within the European legal community. It is rather unlikely that lawyers working at the national level will make use of the work product of a European Law Institute to the same extent their American colleagues use the restatements of the American Law Institute. The authority of the ELI work product in legal circles will be much lower than that of the restatements for the sole reason that national lawyers will consider it as a legal product coming from outside which does not share the legitimising effect of their own legal system.

### *c) Broad coverage as an objective*

As a consequence, the ELI will be an endeavour with a much narrower aspiration than the ALI. It would therefore be all the more important that all legal professions participate which take some interest in the development of the European legal system. In particular, the big law firms established in the United Kingdom, in the Netherlands and increasingly also in some other Member States which pursue their interests in all European markets for legal services should play an important role. Of course, the European Court of Justice and the heads of various European agencies should also get involved, just like the representatives of numerous private organisations which operate at the European level.

Moreover, the ELI should from the very start try to cover all major areas of the law. In particular, it should not try to be a further European institution in the field of comparative law focusing on the areas left to national law, but should include also the vast and growing body of the law of the Union. It would appear that the recently founded Association for a European Law Institute should modify its approach in the light of these observations.

### *d) Legal structure and funding*

As to the legal form of an ELI, any structure would be acceptable that allows for an efficient and flexible use of that institution. As a consequence, the form of a European agency would have to be excluded since both the bureaucratic complexity and the language regime of the European Union would hamper its performance. An establishment founded on the basis of private law will be preferred.

This would perhaps not exclude a partial funding by the Union, for example in the framework of the European Research Council, and by the Member States. The legal services industry should equally contribute, perhaps by setting up a foundation for this purpose. A further source of revenue would be membership dues. For the sake of programmatic independence of the European Law Institute it would be essential that the financial resources are derived from various sources. Contrary to the American model the ELI will most likely not be able to make great profits from the sale of publications; this is due to the language barriers which will most probably turn the reading of ELI publications in English into the activity of a small European elite. It is the more important that some of the major foundations existing in the Member States generously support a future ELI.

# Towards Innovation in European Legal Integration : « TRANS EUROPE EXPERTS » (TEE) and ELI

Bénédicte Fauvarque-Cosson*

This workshop opens a very important debate on the creation of a European Law Institute. I would like, first, to congratulate the organisers for this and thank them for their invitation.

Among others tasks, a ELI would contribute to coordinate various different networks that have thrived in Europe. I am grateful to the organisers of this workshop for their invitation which already demonstrates their capacity of contributing to such a coordination. I will present a very recently born new network, TEE, try to give a few answers as to the possible relationship between this network and a ELI and then conclude by insisting upon what are, as scholars, our most important common tasks.

## *Trans Europe Experts*, is a network of independent experts from all European Union Member States created in Paris in October 2009.

It held a large inaugural meeting at the Chamber of Commerce of Paris, on March 31 2010. Although these experts (of whom we currently have 250) are up to now mainly academics, this network brings together members of the legal professions, as well as representatives from the social, political and economical sphere. Our membership has undisputed abilities in the field of European law as very broadly understood.

We have in common that we all possess a real interest in the construction of a European legal culture.

TEE has more than 20 working groups or « pôles de compétence ». These range from contract, consumer law, electronic commerce and tort law to Fundamental rights, European employment law, Environment and health, Intellectual property, Financial services, European criminal law, Company law and insolvency, Competition law, Procedure and litigation, Public procurement and State aids, Freedom of movement and rights of aliens, private international law. Each working group organizes workshops and debates.

TEE has a double role :

- First and foremost, it seeks **to bring together lawyers of all types and backgrounds so as to provide a convenient source of expertise** on which European and national institutions may draw in the creation of EU and national legislation. Its 'siege' may be France, but both its membership and its outlook is European. TEE attempts to meet the needs of the European Parliament and of the Commission in terms of European legal expertise.
- Secondly, it seeks to provide **a focus for lawyers in France – again, both academic and professional – interested in and working on EU law**. Here, we have a particular focus on young researchers, whom we seek to encourage in their European and comparative interests. These young researchers, in a few years, will become leading academics in France. They are the ones who will teach law to our students. They are the ones who will – or will not, depending on what are their personal experiences during these important years- give a true European legal education to the next generations of students.

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Why is TEE based in France and why was it founded by 5 French jurists, in spite of it being truly European ?[1].

- It is right to acknowledge both the value of the contribution of individual French jurists to the development of European law but also the disappointing lack of French input in some spheres.
- TEE seeks to help co-ordinate French input and give it a chance to be more visible in Europe, by initiating new European projects or participating to various European consultations. By no means is TEE's project lead in an exclusive way or in spirit which is defensive of French ways or legal concepts. Here lies the importance of our wider membership, with many scholars from all over Europe, which reflects the collaborative character of the development of European law and the need for openness in the debates which it generates.

As I have said, Trans Europe Experts is aimed at sending **a strong signal, both in France and in Europe**. I have often heard cries of our European colleagues, searching for a French scholar to join their groups. This is partly due to academic life in France. There is just not enough incentive for young scholars to go and spend some time abroad. Trans Europe Experts will enable them to work alongside with other European scholars, to get involved in various European networks and to catch not only a glimpse but a real understanding of important European projects.

European law goes well beyond legislative integration and harmonisation. It necessitates, to develop, a European common culture. Not only do we want, via TEE, to give scholars a chance to find out and build this European legal culture but we want to send this strong message to the young generation : go ahead, this is what matters most in your future academic life and for the students you have.

## Possible links between ELI and TEE

Our mission is to help build a true European legal culture and this necessitates joining all our forces.

Like the present project of a ELI, TEE brings together judges, regulators, practicing lawyers, academics, members of European and national institutions all of whom are engaged in promoting European legal integration. TEE is a local institution thinking globally – or "europeanly"-.

If a ELI was created, TEE would benefit from setting up close links with that Institute. It could be a "relais", based in France, for its European activities and also for the development of a network of legal experts. TEE's aim is to offer a structure where all experts are easy to get in touch with, through the president of each working group, or even directly. With such a structure, we will be more visible and more reliable.

Concretely, TEE could provide assistance in all of the three tasks envisaged for a ELI :

- promote European legal integration by drafting common principles and supporting the European Commission in the process of implementing these principles.

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[1] The other founders are :

**Judith Rochfeld, Co-*President,*** Professor at the University Panthéon-Sorbonne (Paris 1) ; Member of the European Research Group « Community Acquis » on existing private Community law.

**Denis Mazeaud** , ***Vice-President***, Professor at the University of Panthéon-Assas (Paris 2) ; Co-President with B. Fauvarque-Cosson of the group Association H. Capitant/Société de législation comparée (included in FP6) ; Secretary General of the Association Henri Capitant des Amis de la culture juridique française

**Carole Aubert de Vincelles, *Secretary General,*** Professor at the University of Cergy-Pontoise ; Member of the European Research group « Community Acquis » on existing private Community law (included in FP6)

**Catherine Prieto, *Treasurer,*** Professor at University of Panthéon-Sorbonne (Paris 1) **;** Co-director of the *Revue trimestrielle de droit européen*, Dalloz.

- monitor implementation and facilitating coordination among regulators and judiciaries in order to address divergences and attempt to reconcile them.
- provide support to the Commission and the Parliament in producing Green and White Papers for legislative reforms

European legal education

In the paper that was sent to us, it is noted that a ELI could also play a very important role in legal education. A particular emphasis is put on a Centre for the Judiciary that would offer courses for national judges, especially in new Member States. I believe that the role of ELI could go beyond what is envisaged in this paper. The role of ELI is also to help spread instruments for legal teaching. This should be done in cooperation with national law faculties.

The ongoing unification or harmonisation of European private law has opened new prospects. It has injected new energy into comparative and European legal studies. National lawyers have finally understood today's challenges and have come to grips with them. Yet, in many countries, the standing of European and comparative law is still rather modest. The development of a European legal thinking is largely on its way. However, its strength and impact in real life largely depends on education. In many European countries, legal education is still very nationalistic.

Surprising as it may seem, legal education may well still be the flaw of the whole process of Europeanisation. Indeed, there is a sharp discrepancy between the rise of European scholarship and the limited means allocated to the European education of future jurists in our universities. The use of really European tools (such as books on European private law or such as *the jus commune* casebooks) for legal teaching is still very exceptional.

It may be that, so far, European scholarship has been too much preoccupied and orientated towards legislative action on a European level. More efforts should be directed towards the teaching of European law. One of ELI's major aim should be to contribute to the spreading of what Walter van Gerven called a « common framework of reference *and* teaching", that is to say a true European teaching, with a wide range of materials that are used all over Europe.

I sincerely hope that a ELI, together with other European networks, can find the most appropriate and efficient ways of fulfilling all these important tasks.

Paolo Fois

The Italian Association of European Lawyers, having developed an intense cooperation in the field of European legal integration with other associations since the foundation, welcomes this initiative of the European Law University towards the creation of a European Law Institute. With reference to the working paper submitted by Professors Cafaggi, Francioni, Micklitz and Poiares Maduro, we wish to give our contribution to a debate on the main questions raised in agenda.

- As for the desirability and feasibility of a European Law Institute, we cannot but a agree wholeheartedly. We must keep in mind that, until now, the existing relationship between the different institutions and associations in the field of European legal integration shows a *bilateral and episodic* character. When we refer to a "network", we mean essentially the sort of relations which have been established so far, that is bilateral and episodic. On the contrary, according to the a prospective Statute, the European Law Institute will promote *multilateral and continuous* cooperation between the existing associations on one side and the Institute and the same associations on the other side: in this sense, a true "network of networks" will be created.
- In addition to the coordination of activities in the field of European legal integration, *new, more functions* could be conferred to the European Law Institute, which existing associations generally do not provide. The Italian Association of European Lawyers share the opinion laid out in the working paper, according to which ELI will promote European legal integration by drafting common principles and supporting the European institutions in the process of implementing these principles. In particular, Green and White Papers can be elaborated.
- All that would hardly be compatible with a European Law Institute conceived as a "federation of associations", or as a new, special network. In fact, ELI will promote collaboration with existing institutions and associations, but at same time be given functions which would be new and different from any previous framework.
- For the same reason, the idea of a European Law Institute conceived as a "private person" can not be accepted. The ELI structure is supposed to be rather complex, and we do not see how any private contributions could suffice to finance its activities. To this end, the financial participation of institutions of the European Union is essential: many times agencies or Institutes have been established through an European act in order to coordinate networks or to conduct studies and researches in different fields (see for example: art.2 of the Council Joint Action of 20 July 2001 to the establishment of a European Union Institute for Security Studies, OJ L 200, 25 07 2001; art. 3 of the Regulation (EC) NO 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, OJ L 403, 30 12 2006).
- Participants to this conference could of course confirm their favour to the establishment of a European Law Institute by actively collaborating to a project of a Statute (annexed to a prospective EU act), in which the relationship between the Institute and the existing associations will be regulated with specific provisions.

# Creation of a European Law Institute?

Irmgard Griss

## Introduction

The Network of the Presidents of the Supreme Courts of the European Union has now existed for about six years. Its activity has so far mainly consisted in judicial cooperation through the exchange of information and experiences. Last fall a discussion on the future strategy of the Network was started and a questionnaire distributed to all members. Its results were presented at the board meeting and the general assembly that took place in Dublin three weeks ago.

The results can be summarised as follows: The Network will cooperate with other Networks and EU-institutions in order to advocate the fundamental issues of all judicial systems. These are issues that relate to the independence of the judiciary and the rule of law. Apart from that it will seek to cooperate with EU-institutions in order to secure a practical judicial perspective in the European legislative process. Some members expressed a wish for common principles and guidelines in substantive matters or best practices regarding the administration of justice, whereas others were sceptical of such an enlargement of the Network's activities because of limited resources.

## 1. Basic question

The creation of ELI could be an answer to this tension between the Network's quest for a more active role in the European judicial field and its limited resources. In my opinion the creation of ELI therefore corresponds with the future strategy of the Network. ELI could not only play a proactive role in the European legislative process. It could also coordinate national judicial intervention concerning European law and provide institutional support to drafting common principles and guidelines.

An objection that could be raised is the fact that there are already numerous institutions and organisations dealing with the legal integration of Europe. But that objection is only justified if ELI is envisaged as a further institution with a central location and with its own permanent staff. It would not be justified if it were organized as a decentralised, collaborative network, a network of networks coordinating the different initiatives.

## 2. Organisation

As a network coordinating existing and future initiatives of judicial cooperation, ELI could facilitate the exchange of experiences and best practices. ELI could thus considerably contribute to safeguarding and even enhancing the high quality of administration of justice in Europe. For the future, it could be envisaged that also common principles be deduced in subject matters where there are major divergences. It is quite clear that the legal integration of Europe cannot be achieved without a core of common judicial standards reflecting common values.

ELI should cooperate with European institutions, especially with the Commission. For the future it seems desirable that ELI should become an EU institution since there is a fair chance that the results of its work will be critical to European legal integration.

## 3. Scope

The "domain" of activities could be rather broad. It should encompass all areas that are of importance to legal integration. The activity should therefore cover not only matters of European legislative competences but also the judicial field.

In all these areas there is a need for common European principles. Such common principles could form not only the basis for legislative measures but could also be a very valuable interpretative tool for the judiciary.

ELI could also play a major role in assisting the implementation of European law in the law of the Member States and improving compliance with the case law of the Luxembourg Court. This could bring about a double advantage: On the one hand, it could improve the legislative process and facilitate the decisions of the Luxembourg Court by drafting common principles in private law and criminal law, on the other hand, these principles could also be of assistance for the transposition of EU-law and the compliance of national court decisions with the case law of the Court.
There is no need to re-invent the wheel. The experiences of similar institutions like the ALI could be of great value. Cooperation with such institutions should be sought.

## 4. Governance

Being a private organisation leaves more room for seeking the best way possible. To be successful ELI will have to win outstanding figures of legal science and practice for its project. At least in the beginning a private institution therefore seems to be of advantage.

ELI should be a non-profit organisation. It should dedicate all its power to promoting legal integration in Europe without having to be concerned that its research projects are also profitable in the economic sense.

ELI should aim at bringing together all predominant players in the field of European legal integration. These can be institutions, organisations but also individuals. It should therefore have institutional and individual members. Besides academic bodies also organisations of the legal professions should be invited to become members. Individual members should be academics or practitioners enjoying a high reputation in their field of work.

The results of ELI's research projects will only be persuasive if they are achieved by impartial and high quality analysis. Trade and consumer organisations are per definitionem lobbyists. Their input can be of value but they should be admitted only as observers without voting rights.

## 5. Finance

Combining private and public funds should finance ELI. Private funding could stem from membership fees, public funding from the EU as well as from Member States. In addition ELI could sell services to individuals and organisations. The main issue in this respect is safeguarding ELI's independence. There will be need for an innovative concept

# A European Law Institute? Towards Innovation in European Legal Integration

Stefan Grundmann

## 1 Introduction

The question 'A European Law Institute?' resembles the question in Socrates' Apology, the first (series of) work(s) written by Plato. There the question is, in summary, 'Democracy?' As is well known, Socrates does not ask so much the question whether there should be democracy at all – that is not much of a question (even) at the end of the classical Athenian democracy. Rather he asks what democracy is for or – more precisely – what democracy has given him personally. The answer is radical. Although democracy has just sentenced him to death, he refuses to evade this judgment and to flee. In his view, democracy has given him freedom and protection for lifetime, he feels that he has a contract with his democratic city of Athens and this implies for him that he has to abide by its rules – even if fatal. 'Crito. I owe a cock to Ascplepius; will you remember to pay the debt.' – are his last words in the dialogue Phaedo.[2] This was, of course, still radical democracy, i.e. pure majority, without the rule of law and without the procedures inherent to it.

Similarly, the question is not primarily whether there should be a European Law Institute. Rather the question has to be asked in which particular tasks it could increase the chances of innovation in European Legal Integration. There may be such chances in the court system – namely with respect to networking between national Supreme Courts and the European Court of Justice or even with courts worldwide, because Europe with its particular model of multi-level governance may be particularly well positioned in this respect.[3] There may as well be such chances for practicing lawyers. As an academic writer, and still more narrowly: as a private law scholar, I shall concentrate on the role which academic writers have played so far in European integration and which they are likely to play, and this with some focus on private law. For these tasks, I shall ask the question in how far a European Law Institute could increase the chances of innovation in European Legal Integration.

## 2. Action in a Multi-Level System of Laws

The starting point should be that a European Law Institute would be designed for a multi-level system, for Europe with its Member States and for the core players in the Internal Market and in the Constitution Building process in Europe. A second starting point may be that a European Law Institute even if it depended on the EC institutions would not have unlimited resources, and that this would apply a fortiori if it should be independent. The question will then also be: independent from whom? Therefore, it is most likely that choices have to be made.

There is a long-standing literature on the advantages of diversity and on the advantages of uniformity, namely in the so-called literature on federalism. It would seem unwise to neglect this

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2 Plato/Socrates, *Apology, Crito & Phaedo* (The Harvard Classics), Phaedo n. 623; The dialogues reconstructing the trial and death of Socrates' are Apology, Euthypron, Crito, and Phaedo. See the masterly interpretation by R. Guardini, *Der Tod des Sokrates*, (Hamburg 1957); and as well C. Philipson, *The Trial of Socrates*, (London 1928).

3 There is probably less of a need in the area of training of judges in European Law matters in the large sense. This is not because this area is not important, but because the Europäische Rechtsakademie – the European Law Academy – in Trier would seem to play this role already quite well, and a European Law Institute should not start with duplicating, but rather start in areas where a prime need is not satisfied so far.

literature completely.[4] Core arguments are: Diversity typically has the chance to allow for a much higher level of experimentation, therefore the advantages are particularly high where innovation is highly needed. Moreover, diversity allows for a better supply for many heterogeneous needs. Conversely uniformity has the advantage of allowing for economies of scale, i.e. when the product developed can be used by more users in the same way. And uniformity may render information easier between the different users of a particular market, because information is more standardised then. Already these very sketchy assumptions shed some light on the three core areas where I see particular input from legal scholarship to the European integration process and innovative solutions in it. This is, of course, legal research, teaching, but as well legislation and law making:

## 3. Potential Tasks (and Existing Institutions)

The core areas which come to mind first would seem to be research, teaching and preparation of legislation. When approaching these tasks, existing institution should, of course, be taken into account. Therefore it is helpful to begin with a short survey, even though certainly incomplete. It helps at least to exclude or postpone quite a few of the potential tasks of a European Law Institute.

### *a) 00*

A *short survey* is largely sufficient to recall how many *institutions exist already*. There are, first, the universities and research institutions. Many universities nowadays heavily concentrate on or even specialise in European and comparative law. There is already a European University Institute on the European level as well which is particularly strong in post-graduate teaching. The Europäische Rechtsakademie (Trier) concentrates, among others, on the ongoing training of judges. Many national research institutions, have European and Comparative Law as one of their or even as their most prominent research focus, such as the CNR founded research initiatives, the Max-Planck-Institutes or other similar institutions. They act on a permanent basis – with large budgets and excellent staff. Some particular research institutes for one area have developed as well, for instance for torts the Institut für Europäisches Schadensersatzrecht der österreichischen Akademie der Wissenschaften. Again, on the European level, the European University Institute acts as well as such a specialised research institution – although it might be worth considering whether this dimension could be enhanced by extending the staff and by streamlining the structures more in this direction – reducing the teaching and supervision load. With the time limits imposed on tenure there – typically not more than 8 years altogether –, the EUI also is open for change and enlarged input: It gives the chance to a higher number of scholars to work for eight years in a particular research setting, a quite substantial amount of time. The Institute so far, is, however, probably even more directed towards excellent post-graduate teaching than towards serving as a European counter-part to those national research institutions. There are as well open discussion and research platforms on the European level already. Just to name those which are probably most relevant for a codification process in core private law, there is a Society of European Contract Law (Secola, www.secola.org), there is a European Centre of Tort and Insurance Law, now with the Journal of European Tort Law (www.ectil.org), there are others. Finally, there are the

[4] See, for instance, K. Gatsios / P. Holmes, 'Regulatory Competition', in: P-P. Newman (ed.), *The new Palgrave Dictionary of Economics and the Law*, vol. 1, (1998), 271-275; K. Heine / W. Kerber, 'European corporate laws, regulatory competition and path dependence', (2002) 13 *European Journal of Law and Economics* 47-71; H. R. Romano, 'Law as a product - some pieces of the incorporation puzzle', 1 *Journal of Law, Economics, and Organization* 225-283 (1985); Siebert / M. Koop, 'Institutional competition – a concept for Europe?', *Aussenwirtschaft* 45 (1990) 439-462; J.-M. Sun / J. Pelkmans, 'Regulatory competition in the Single market', (1995) 33 *Journal of Common Market Studies* 67-89. For the area of contract law which is one core focus for those proposing the creation of a European Law Institute: W. Kerber / S. Grundmann, An Optional European Contract Law Code – Advantages and disadvantages, (2005) 21 European Journal of Law and Economics 215-236; J. Ganuza / F. Gomez, 'Optimal Standards for European Consumer Law: Maximum Harmonization, Minimum Harmonization and Co-Existence of Standards', *Working Paper Universitat Pompeu Fabra*, Barcelona.

different and well known drafting initiatives, most prominent certainly the so-called Lando Commission, Study Group and Acquis Group.[5] Already this overly short survey gives some guidelines for a discussion of the most promising tasks of a potential European Law Institute:

### *b) 00*

In the *area of (fundamental) research*, it would seem as if the need of a European Law Institute was rather restricted. In a research arena with complex questions (in Europe, perhaps even world-wide), innovation and experimentation are, of course, paramount. The arena is complex with respect to the multitude of legal orders involved, with respect to the high-speed change of phenomena to be dealt with, and as well with respect to an increase in disciplines seriously involved in a European debate (from legal, economic and sociological to behavioural and political sciences and, of course, also philosophy). These three types of rapid change and complexity are already sufficient to render any centralised research model illusory. The multitude of high level research institutions and universities already existing, the large majority on the national level but dealing with European questions, cannot be possibly topped by a European research institution. 'The market' is so strong here that 'the plan' is no suitable alternative. This is so, because on the other side the gains from economies of scale would seem rather limited. Legal research does not need the amount of pooled investment needed in some natural sciences, and except for areas where uniform legislation is an issue, standardising output of legal research is pointless and even counter-productive. The only relevant question in this respect, on the European level, is whether strengthening the research orientation at the European University Institute ('research professorships') might offer to a larger range of European academics some extended time for 'thinking Europe'.

More complex is the question whether research focussed on the preparation of legislation could not be a task of a European Law Institute. This is related to such preparation and to the question which role a European Law Institute could play in this respect. This more narrow question will therefore be discussed in this context later (below 5).

### *c) 00*

The same or a very similar picture can be sketched for *teaching*. Law in Europe consists of an interplay between diversity and uniformity, many legal traditions and their interplay. Even if a European Law Institute was capable of coping with high numbers of students, teaching only European perspectives would not be sufficient. Moreover, marvellous institutions exist which already teach mainly comparative or European Law, both on the graduate and, even more, on the post-graduate level. To name only a few among them, one can think of the European University Institute in Florence, the Collège de Bruges, the Maastricht Law School, and, combining the European and the comparative dimension, now the European Law School (Berlin/London/Paris). And for the best mix between national and supranational, so many universities compete in Europe that no need really would seem to exist for an intervention of a newly created European Law Institute. It could not really add a lot. Again, the market is strong, and in a Europe, where diversity is a core component, an exclusively 'European' lawyer without 'national roots' is pointless.

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[5] O. Lando / H. Beale (eds.), *Principles of European Contract Law*, parts I (Dordrecht et al.: Martinus Nijhoff, 1996), II (ibidem 1999) and O. Lando / E. Clive / A. Prüm / R. Zimmermann (eds.), part III (The Hague et al.: Kluwer Law International, 2003); Ch. v Bar / E. Clive / H. Schulte-Nölke et al. for the Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group) (eds.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR)*, (Munich, Sellier: 2008), now revised edition with commentaries; see now Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, *EC OJ* 2010 L 105/109).

Whether this is different in the area of legal training of courts and practitioners may be another issue. Universities have not developed the same density of teaching in this respect as in the area of graduate and post-graduate studies, but the question would need more careful consideration whether the alternatives are not strong enough as well (like the ERA). Where there might be an interesting scope for a European Law Institute is, if networking between Supreme Courts is concentrated in this institution, then it may be advisable to combine such sessions with some type of European legal training as well.

***d) 00***

A third area is *legislation/law making*. In this respect, experience both in Europe and in the U.S. legal system, which is also designed as a two-level system, would seem to indicate the following: There are important examples where the institutional legislative process might be enhanced by a preliminary drafting process outside the EC Commission. This has been the feeling, for instance, in the process towards a European Constitution (though later modified) or in the process towards a large scale private law codification. This might well be a way to increase coherence more generally. The experience in the U.S. is similar, but as well different: There, the preliminary drafting process was rather to foster restatements and model laws – two types of texts which diverge to a certain extent from the scope of creating the first draft of a federal large scale piece of legislation.

Before approaching the question which type of design could best enhance the process of preliminary drafting, it may be useful to give some indication on the question in which areas such preliminary can most be expected (and is most needed):

## 4. More Specifically: Which Acts of Legislation?

Therefore, before coming back to the question, which can be the added value of a European Law Institute in one area or the other and therefore as well in how far existing institutions already cope with this task, it would seem to be helpful to specify a bit more which types of legislation could be approached by a European Law Institute – if indeed legislation, among all tasks, is the one where such an institution can be most helpful.

***a) 00***

There are, in my view, many large scale legislation and 'codification' candidates which are *unlikely to be dealt within a European Law Institute* and within a preliminary drafting process which such an Institute could guide.

- This is so with a European Constitution, should it ever be on the agenda again. Like Treaty amendments, it is too political a task not to be subject, already in the preliminary phase, to be 'outsourced' by the legislative organs of the European Union: Already the choice of the members of the preliminary Convention will be a political one, and as well the choice of the moment in which such an endeavour is approached.
- The same would seem to be the case with many specialised areas where high practical expertise is needed, which in part are mainly regulated on the EC level already, and which would seem to be outside the *general* focus of legal academia. Such areas are competition law, financial services law, environmental law – all of which, theoretically, could be seen as areas prone to large scale legislation on the EC level. Even EC Company Law (with EC Capital Market Law) may fall into this category, although this is the area which comes closest to falling within a more general focus of legal academia. A potential candidate for an ELI project could, however, be financial services contracts, probably best in conjunction with services contracts more generally.

***b) 00***

*More likely as large scale legislation or 'codification' candidates* are in my view:

- an EC Contract Law Code, the so-called 'optional instrument'; here, the process is most advanced already, and the example of the Uniform Commercial Code shows that this has some inherent logic as well (despite significant differences in content);
- an EC Civil Code in the classical sense as the DCFR proposes;[6]
- or as well smaller Codes, for instance in the area of insurance contracts or banking contracts (or financial services contracts as mentioned above).

***c) 00***

Yet another question is whether a European Law Institute should not play a role in ongoing advice, once a particular area has been regulated on the EC level under its auspices. Such ongoing advice is known, for instance, in the area of financial services in the form of CESR, but as well, in the United States, in the case of the U.C.C. For a modern codification, ongoing updating may indeed be an interesting perspective.

## 5. Design Issues

Probably the *most important question* is that of design of a European Law Institute – at least, if indeed the organisation of academic input into large scale legislation and of focussed research leading to such legislation is the most promising task for a European Law Institute. Design issues are delicate, but some tentative answers may be possible with respect to the following questions which would seem to be of particular importance: what can be the relationship of such preparation of legislation to general legal research on European Law matters (see below section a); which of two main roads possible is more appropriate, the European Law Institute preparing itself legislation or the European Law Institute only organising scholarly input from others into such preparation (see below section b); and, finally, some words may be helpful as well on the results which should ideally be expected from such preparation (see below section c).

***a) 00***

If academia has a comparative advantage in the preparation of large-scale legislation, such *preparation includes as well focussed research* in this field. This can be comparative law research, as was the prime focus in the DCFR. This is, however, by no means the only important dimension. Research on the legal treatment of modern phenomena in a quickly moving society and social sciences based (interdisciplinary) research are only two more dimensions which are just as important. Even this research, however, is one which to a large extent should be carried out in academia more generally as well, by all the research institutions mentioned. Thus, preparation of legislation means taking up mainly what is developing as research in the academic market more generally – standing on the shoulders of the giants which are the academic research nuclei existing all over Europe already. The large majority of the material is to be researched elsewhere. Preparation of legislation implies mainly a

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[6] For the strong reasons which speak against such a ‚Grand Civil Code' solution, see, among others: S. Grundmann, The Structure of the DCFR - Which Approach for Today's Contract Law?, (2008) 4 *European Review of Contract Law* 225-247 = 'La structure du DCFR – Quelle forme pour un droit européen des contrats?', *Revue de Droit international et comparé* 2009, 423-453. See, as well, S. Grundmann, 'The Role of Competition in the European Codification Process', in: H.-W. Micklitz / F. Cafaggi (eds.), *European Private Law After the Common Frame of Reference*, Cheltenham (Elgar) 2009, 36-55.

structuring and systemising of research results – drawing, however, best possible on all sources of modern research and discussion of legal questions in Europe (and to some extent even beyond), drawing on the whole variety of approaches existing.

For European Contract Law, however, this already has some implications: It would seem as if this field was relatively young. The term of a European Contract Law – designating law, and not just a common heritage – has been coined only late in the 90ies of last Century, some 10 to 15 years ago. Such important areas as long-term contracts (most 'services'), networks of contracts (which are the reality in commercial contracts), but as well the interplay between regulatory order and facilitative (traditional) contract law have not thoroughly been discussed so far on the European level, in part not even on the national level. A European academia is still in its infancy. If a proper codification is to stand on the shoulders of giants, there is still time needed that these giants develop. The evolving status of European academia – for instance in contract law – would seem to speak in favour of having a draft codification proper perhaps in one or even two decades and not having the most rapid first draft adopted, restricting the focus mainly to one of many possible approaches. On the other hand, the discussion about a European codification which thus has been generated would seem to serve as one of the most powerful catalysts for the development of a European legal discussion and scholarship already today.

***b) 00***

The *core design question* in the context discussed here is which role a European Law Institute could play in this process. Design issues are, of course, a question of further debate. If, however, scholarly preparation of large scale or complex legislation is the main focus, the prime question would seem to be the following: whether the role of the decision body within the European Law Institute is that of (i) being responsible for the preparation of legislation itself or rather (ii) of choosing the scholar(s) or person(s) best suited for such preparation. Thus, there are two main roads which could be envisaged. The European Law Institute could have eminent scholars as directors – like a Max-Planck-Institute, for instance – who are chosen as the reporters for a codification project or its role could rather be that of an organiser of such projects.

The second approach would seem to have several advantages, among them: (i) Given that projects can come from different areas and that a European Law Institute should structurally represent all of European Law, it will be virtually impossible to have broad enough a directorship, it would seem difficult that the directors can serve as reporters without seriously restricting the range of potential projects. (ii) If preparation of legislation is the focus and if such preparation is meant to last for some years but not for lifetime, directors would have to be nominated on a rotating basis anyhow. (iii) There is an obvious problem of choice of the reporters best suited. The approach can of course be that those reporters are chosen who first appoint themselves as members of the 'network of excellence', supported by the official who happens to be in charge. The alternative approach would be to put a lot of expertise, but as well true independence and transparency, into this procedure of choice. Expertise *and* neutrality in the choice of (i) promising legislative projects and (ii) of the reporter(s) best suited would seem to be the most appropriate design for a proper governance of this core task.

If this is so, it may be more advisable (and closer to the long-standing good experience made in the American Law Institute) to use the European Law Institute for having a sound governance mechanism in the choice of the reporter of a project: A European Law Institute could have a board of trustees, consisting of eminent scholars from many areas. This board would not serve full time and could therefore be more extended, representative of the areas where such legislative projects would seem to be promising. And this group of peers should best not have a stake in the question itself, consisting for instance of senior scholars, not willing to engage themselves in the projects to be chosen, for instance because of their age, possibly even from other fields: An excellent contract lawyer can probably not

prepare excellent company law legislation, but he or she can very well judge on the quality of scholars even in this other field.

It is yet another question how far the choices by such an – independent and experienced – board of trustees (peers) should reach: Should they only choose *one* reporter who then, possibly under the supervision of the board, already has the prime responsibility in putting together 'his' drafting group? Or should the board choose a group or at least some players? In this case, the role of the decision body within the European Law Institute would be that it decides on the composition of the drafting group as such, at least in part, thus, for instance, guaranteeing some representation of certain approaches or disciplines. In this case, the board takes responsibility for what it thinks is the best design of a drafting group. Another question is whether the board should decide on project *and* reporter. Another approach is known from the Law Commission in the United Kingdom, where the reporter chosen chooses 'his' projects for developing the law (more systematically).

All these questions are open to discussion. I personally feel, however, very strongly about the two core petita: The deciding body within the European Law Institute should be a (i) highly expert group of peers who at the same time (ii) have no stake in the question ('elder statesmen' of academia who do not want to attribute the most interesting tasks to themselves). The highest possible level of expertise and neutrality (no conflict of interests) – this is so obvious a petitum in all governance research that this would seem to me to be the cornerstones which cannot be doubted. A consequence will then probably be that reporters have to be chosen ad hoc and on a rotating basis, for each project anew.

Independence in this respect means complete independence: from the public authorities, namely the EC Commission; but as well complete independence from those who apply as potential reporters. In this respect, the American Law Institute was in a better situation. There was not *the* large codification project already visible, the ALI could start with smaller, less prestigious projects. There was not yet a DCFR standing there and a drafting group which tries to dominate or at least have a position as well in any deciding body within the European Law Institute. If such an institute is to be successful it would be a large step in the good direction if those willing to do the drafting or having their drafts advanced accepted that there has to be neutrality in the deciding body and that there is incompatibility of the two tasks.

### *c) 00*

The final question is which results such a design could foster. If indeed contract law is the area most discussed today as a potential candidate for codification and if indeed in this area a scholarly debate and community still have to develop, the role of a European Law Institute would need to be, in a first phase, still to foster competition of designs and innovations (see last footnote).

In a second step – after such a phase of increased coherence and discussion in contract law scholarship on the European level – the choice of projects of legislation and reporter(s) could follow. During the discussion, it might as well be possible better to define the core criteria and prepare a choice of design of the project and of persons responsible. This might imply that core criteria of choice are developed. In contract law it may be felt that all of the following criteria are important, as much as possible:

- Private and Business Law Expertise
- Scientific and Practical Expertise in the Area
- Methodology
- Expertise in the Most Important Neighbouring Areas (Torts? Company Law? Labour Law?)
- Pan-European Approach
- Group Design

These are, of course, just some possible criteria, sensibility and the true capacity to decide about the many choices possible is of the highest importance.

## 6. Conclusion: What can Democracy (of Peers) Achieve?

This is only some input to what are only the first steps of the discussion of a European Law Institute. Therefore, the conclusion should be quite focussed: A European Law Institute should focus on one role mainly which is that of acting as the high quality organiser of the best input from legal scholarship into large scale or complex and fundamental European legislative projects. This is where legal scholarship – combined with input from practice – can possibly claim superiority over alternative forms of preparation of legislative measures.

A high quality organisation of such input would seem to imply two things mainly: That the choice which scholars should be asked and which might be the best design of a drafting group is taken by a (i) *highly expert group of peers* who at the same time (ii) have *no own stake in the question* ('elder statesmen' of academia who do not want to attribute the most interesting tasks to themselves). The highest possible level of expertise and the highest possible level of neutrality (no conflict of interests) – this is so obvious a couple of prerequisites that it does not need further explanation. This is the core plea of good governance in any field – from public governance to corporate (organisational) governance. This is where the process could be considerably enhanced as compared to what has been the process so far. Transparency of the procedures of choice would seem to be the most important issue. This then would hopefully lead to choices which allow for drafts which really prepare legislation for the problems and on the basis of the methodology of the 21st Century.

It is evident that such a European Law Institute would as well create a new platform of encounters and thus still enhance networking in a European world of legal thinking.

# The Constitutional Role of the American Law Institute

Geoffrey C. Hazard Jr. & Anthony J. Scirica

## Introduction

The American Law Institute is a private organization, not affiliated with the United States government, that has performed an important function in conserving the rule of law. It is organized as a private eleemosynary corporation and composed of more than 4000 judges, members of the legal profession, and members of the faculties of law throughout the country. It contributes to the clarification and constructive criticism of the law in the United States, both federal law and the law in the 50 states. An organization of generally similar character could be advantageous in furthering the rule of law and the role of the courts in Argentina.

## 1. History

The American Law Institute (ALI) was founded in 1923, so that it is now almost a century old. Its founders were leading members of the judiciary, the practicing bar, and law faculties. For example, a leading judicial member was Benjamin Cardozo, at the time Chief Judge of New York and later a Justice of the United States Supreme Court. Another member was Judge Learned Hand of the United States Court of Appeals. Today ALI membership includes the chief judge of the highest court of each state and as well many justices and judges of federal and state courts of appellate jurisdiction and also of courts of the first instance. At the founding of the ALI, leading members of the bar included Elihu Root and John W. Davis of New York, and today many leaders of the profession continue as members, including many who have been President of the American Bar Association. A leading academic member was William Draper Lewis, Dean of the Law School at the University of Pennsylvania. Today members of law faculties across the country constitute about one third of the Institute's membership.

The stated purpose of the ALI was the improvement of the law by its clarification and adaptation to the needs of society. Its work commenced with projects in the law of contract, civil wrongs (torts), and property law. The products from these projects, called "Restatements," were books consisting of formally stated legal rules, accompanied by explanatory Comments and Illustrations, the latter being hypothetical scenarios demonstrating application of the rules. The format is comparable to classic treatises in law in civil- law systems. The Restatement format remains a major part of the ALI's work.

Following the Second World War, the ALI extended the scope of its projects. It has worked closely with other organizations, including the American Bar Association (with which it cooperates in providing continuing legal education for lawyers) and the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission (with which it cooperates in review and revision of the U.S. Uniform Commercial Code). It has undertaken model legislation, notably the Model Penal Code (stating a model law of crimes), Principles of Corporate Governance: Analysis and Recommendations (stating principles to govern business corporations), Principles of the Law of Family Dissolution: Analysis and Recommendations (addressing problems upon divorce of spousal support, division of property, and child custody), and Principles of Transnational Civil Procedure (a model code for civil litigation serviceable in both civil-law and common- law systems).

Today the ALI is engaged in projects, for example, addressing principles applicable to nonprofit corporations and to the law of international trade. Its work in Restatements has continued in successive series, taking account of the obsolescence in modern law – the Restatement Second and now

Restatement Third. A recent major work has been the Restatement of the Law Governing Lawyers, addressing the law and rules of ethics that govern the practice of law in the United States.
The ALI continues as an energetic institution, dedicated to the intelligent and disinterested analysis and exposition of the law in a variety of subject matters.

## 2. Composition

The ALI membership is selective, new members being selected on the basis of nomination by existing membership. Membership is very largely in the United States but there are members from more than two dozen countries, including those in Europe, Asia, Canada, and Mexico, and sister countries in South America. Members in the U.S. are from all 50 states but are primarily concentrated in major urban centers such as New York, Washington, D.C., and Chicago and in Texas and California. Almost 40 percent of the membership consists of practicing lawyers, including those in various special fields such as litigation and tax law. Members of the judiciary include several hundred from various parts of the country, many of whom are judges of appellate courts. There are members from faculties in most of the law schools. Members include general counsel of business and nonprofit corporations and lawyers practicing in government agencies.

Membership includes the opportunity to receive drafts of the texts being developed in the ALI projects; to attend and participate in critical discussion of the drafts; to attend the Institute's Annual Meeting (traditionally held in May) and to participate there in deliberations addressing Discussion Drafts, Tentative Drafts, and Proposed Final Drafts; and to communicate informally with other members who have common subject-matter interests. It includes responsibility for annual membership dues, now $250 or $125 per year, depending on professional classification.

## 3. Governance

Management of the Institute and its affairs is under the direction of its Council and its officers including the Director. The Council is constituted of approximately 60 members, including judges, lawyers, and academicians. They are elected for limited periods but generally serve up to three consecutive five-year terms. The officers include a Chair of the Council, the President, and others, all of whom are volunteers serving without compensation – and devoting substantial time to their responsibilities. The Director is a compensated position and a substantially full-time responsibility. Traditionally, the Director has been a member of the faculty of laws of a leading university law school. The present Director is Professor Lance Liebman of Columbia University.

## 4. The Portfolio of ALI Projects

At any period the ALI is engaged in several projects, usually about a dozen in various states of completion. The subject matters are also various, reflecting both the wide range of legal matters worth serious thoughtful attention and also the broad range of professional interests of the membership. In recent years, for example, the projects have included Principles of the Law of Aggregate Litigation (dealing with class suits and "mass torts" administered through other procedures); Principles of World Trade Law (beginning with analysis and description of the decisions of the adjudicating bodies of the World Trade Organization); Restatement Third, Torts: Liability for Physical and Emotional Harm (dealing with injury to person as a civil wrong); and Restatement Third, Property (Wills and Other Donative Transfers). Another special project (Model Penal Code: Sentencing) has been a study of administration of criminal law in cases in which the sanction can be the death penalty.

## 5. Other projects in prior years have been mentioned above.

It can be seen that the range of subject matter in the Institute's "portfolio" at any given period is broad. The range over the Institute's longer history has run from criminal law and procedure in criminal cases to the law of federal income taxation, to multiple aspects of property and commercial law, to international law. Some projects have generated subsequent projects in the same field by other organizations. For example, a project addressing comparative insolvency law in Canada, Mexico, and the U.S. has stimulated similar projects extending the comparisons to insolvency law in European countries and Japan.

## 6. Project Selection

Selection of ALI projects is made by the Director and a Program Committee, in consultation with other members of the Council, with the membership at large, and with outside interested persons. Some of the projects are successors to earlier ALI projects, for example, a series originated more than 70 years ago addressing various aspects of tort law (civil wrongs). Some of them respond to areas of the law that have come to have public notoriety, for example, the project on Corporate Governance 30 years ago and the current study of criminal procedure in cases involving the death penalty. Some address subjects of great practical importance but "low visibility" in the public arena, such as the law in divorce cases and the law of nonprofit corporations. Some subjects are quite esoteric, such as the law of indemnity; others deal with legally familiar subjects, such as personal injury caused by defectively designed or manufactured products.

One or perhaps two projects may be commenced in any year, it being contemplated that a project typically will require about six or seven years before final publication. Selection depends on the importance of the topic, the availability of qualified principal rapporteurs (called "Reporters"), the composition of the pending ALI "portfolio," and estimates of the scope and difficulty of the subject. The scope can be modified as the project proceeds, often in the direction of narrowing it in response to unexpected complexity. In unusual circumstances a project may be terminated without completion. The management must sometimes deal with failure.

## 7. Project Technique

A project is commenced with a general statement of its subject matter and scope; appointment of the Reporter (sometimes two or more Reporters); and designation of its committees of commentators. The Reporter is responsible for drafting the texts as the project moves forward, under supervision of the Director. The Council appoints an Advisory Committee (usually about 20 to 30 members) and members of the Institute may volunteer as Consultants. Advisers are selected for their special knowledge and experience in the subject of the project, and usually include judges, lawyers, and academicians. The Advisers and Consultants review each draft, making comments and suggestions. The Reporter is responsible for paying attention to the contributions and accepting them or perhaps clarifying the draft.

The sequence of a project consists of an annual drafting cycle, in which the steps of review are: The Advisers and Consultants; the Council (at one of its meetings during the year); and then the Annual Meeting of the members. Accordingly, the text of a draft is reviewed by technical specialists (the Advisers), members having special interest (the Consultants), the responsible governing board (the Council), and the members at large (at the Annual Meeting).

A project usually requires four or more annual cycles, as the drafting proceeds through the subject matter. The approach may vary from project to project, for example, one project beginning with a general introduction, another project beginning with the definitions, yet another with specific subtopics. As indicated above, the scope may be modified as the work progresses. In general, the

approach as to scope and depth is flexible and pragmatic. Sometimes crucial issues will be identified but not given a definite resolution, to await attention perhaps in a subsequent project or indefinite postponement.

The tenor of the discourse is sympathetic but constructively critical. The response of the Reporter is always attentive and receptive but also critical. The objective is to produce a text that is correct, coherent, and sensible, and which enjoys general (but not necessarily unanimous) support from all the reviewing bodies. The final product is a Final Draft, approved by the Council and the Annual Meeting. It is then checked for technical completeness and published as a book.

## 8. The Professional Convergence

The project technique brings about a convergence of viewpoints and experience from the various professionals in the law – judges, lawyers, and academicians. It can be said that the judges bring to the deliberations their sense of responsibility to the law and knowledge of administering the law; that the lawyers bring their knowledge of the practical working of the law and the viewpoints and interests of those affected by the law; and that the academics contribute their familiarity with legal theory and legal history and the tradition of legal scholarship.

However, there is no division of responsibility and competence, but rather mutual appreciation and respect. All participants are expected to leave their professional affiliations "outside the door," whether the interests of clients of the lawyers, the interests of judges in their positions in the judiciary, or the interests of academicians in their academic reputations.

The product of the projects – the Restatements and the Principles in various subjects – represents the convergence of intellectual effort among the branches of the professions. The Restatements and Principles have achieved a respected reputation in the judicial and professional community outside the ALI. The final texts are not legally official or obligatory, but rather educational and persuasive. Over the years since the ALI was founded, its work has come to be accepted as very reliable, both within the United States and in the international legal community.

## 9. Conclusion: Constitutional Significance

The work of the ALI has brought together members of the judiciary, the practicing legal profession, and the law faculties in a common purpose of improving and refining the law. Pursuing that purpose has become of increasing practical importance as the rate of social change has accelerated in the modern era. The work of the ALI therefore has never been more significant in practical terms. It represents an unofficial but serious and respected "voice" concerning the community's law and its administration.

A by-product – a secondary consequence – of the ALI's work has been the continuous strengthening of the professional relationships among the judiciary, the practicing legal profession, and the faculties of law. These relationships have yielded greater understanding and acceptance of the various aspects of the law – the responsibility for its administration by the judiciary, the awareness of its practical effects through the legal practitioners, and, through the academicians, appreciation of specific subject matter in the larger fabric of law. It has thus contributed to what may be called professional solidarity among the judiciary, the practicing profession, and the legal academy.

This increased solidarity in turn is a source of strength in the relationship between these professionals and the public at large, particularly in the political and constitutional processes in which the law must be administered, practiced, and studied. In the common-law tradition, as in the United States, the underlying affinity within the branches of the profession is probably greater than in many

civil-law systems. An institute similar to The American Law Institute could increase the affinity within the professions in a civil-law system.

# Towards a European Law Institute?

Wolfgang Heusel

## Introduction

## 1. Avant-propos

An impressive number of institutes for European law can be found in many countries in and outside the European Union, and in terms of subsidiarity it would seem, with all due respect, appropriate to question the added value of yet another European Law Institute, even if this is created in conjunction with the European University Institute.[7] And although an added value may be found in the genuine European character of such a new institute, as it is proposed to consider creation at European and not at national level, the project would need additional justification if we remember that there have been prior or parallel endeavours to create a European Law Institute (ELI) in the aftermath of the Common Frame of Reference project and also if we think of an existing European law institute of a different but genuine European character with a Europe-wide remit of activities, which has been operative for almost 20 years now: the Academy of European Law (ERA) which I have the honour to represent.
The answer will depend on the analysis of current needs and subsequently on the identification of the role and mission of such a new institute. Following on from there, and in this order, the best possible concepts for its structure, governance and financing can be considered.

## 2. Current needs: Is the creation of an ELI desirable?

The proposed creation of a European Law Institute (ELI) is clearly inspired by the example of the American Law Institute in the United States (ALI), an institute founded in 1923 to tackle two "defects" identified in American law, its "uncertainty" and its "complexity", which were considered to have led to a "general dissatisfaction with the administration of justice". The "uncertainty" of the law was found to be a consequence of the lack of agreement on the fundamental principles of common law; of the poor quality of statutory precisions; of the great number of reported court decisions; and of the "number and nature of novel legal questions". The "complexity" of the law was seen as due to a "lack of systematic development" and its variations within the different state jurisdictions.[8]

These findings indeed sound familiar to a European lawyer in the beginning of the 21st century, and although some of them are just peculiar to the common law character of US law and cannot simply be transposed to the situation in the EU, we can identify others which describe quite precisely the current challenge in contemporary Europe: despite the progress achieved so far thanks to "better regulation", the often poor quality of legislation both at EU level as well as in member states' transposition of directives and framework decisions; the need to provide a legal response to new social or economic developments such as the internet, global financial markets or genetic engineering; the patchwork approach in the regulation of specific areas of law such as consumer or contract law; and the

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[7] The era of new European law institutes has not come to an end at national level either, cf. the recent (5 May 2010) opening of the new "Frankfurter Institut für das Recht der Europäischen Union fireu" at the Europa University Viadrina, Framkfurt/Oder.

[8] All quotes in this paragraph from the brochure of ALI "About the American Law Institute" as published on their website at http://www.ali.org/index.cfm?fuseaction=about.overview.

divergence between member states jurisdictions in both the implementation and application of European law and the regulation of areas of their exclusive competence.

With the exception of the latter, as divergence between national regulation of areas outside the EU competence cannot per se be described as a problem but should rather be perceived as enriching, this challenge is indeed calling for a response by legislators and regulators at European and national level, as well as by those interpreting and applying the law, i.e. administrative authorities, the legal profession, and courts. In principle a European Law Institute created for this purpose and operating at European level should indeed be able to provide valuable assistance to that end, unless such assistance is already provided by existing structures.

In more concrete terms, the following *objectives* have been proposed for the creation of ELI:

***a) Assisting legislators and regulators***

It has been suggested that a new ELI should

- identify the need for legislative initiatives;
- support the legislator (and also the ECJ) by drafting principles common to the laws of the member states;
- accommodate in particular the debate on the CFR and the Acquis principles, and in particular involve the judiciary in this;
- coordinate legislation and policies in areas still primarily attributed to member states;
- coordinate public and private law-making in areas where private parties play a significant role;
- help implement the principles of subsidiarity and proportionality.

In a democratic society, any interested person, stakeholder or institution is free to call for legislation at their discretion and without having regard to the consequences of the proposed legislation on the general good or the consistency of the law. It is of course for the legislator to decide on these aspects and to conduct his own impact assessments, but it would seem appropriate and useful for him to be able to cross-check such initiatives with the findings and proposals of an independent academic institute. A European Law Institute officially entrusted with this mission, the authority of which would exclusively rely on the impartiality of its approach and the scientific quality of its work, would definitely be an added value, notwithstanding the work of numerous think-tanks and other institutes also active in the area.

As ELI would have to base its evaluation of legislative proposals, its conclusions and suggestions on the existing constitutional framework of the EU, a careful scrutiny of their compliance with the subsidiarity and proportionality principles would be an obvious part of its work. In this perspective ELI should indeed contribute to the effectiveness of these principles.

Also the drafting of common principles as a result of comparative studies and analysis is certainly a valuable tool for assessing legislative needs at EU level and for introducing harmonised legislation at EU level. The achievements of the various groups restating principles of European private law (contract law, tort law etc.) and the impressive Draft Common Frame of Reference on European Private Law clearly illustrate the usefulness of the work on such principles, whether they serve as a mere "toolbox" for the European legislator or provide the basis for an optional European law regime which would quite resemble a European code. The example of the CFR also illustrates the need or usefulness of providing a formal institutional framework for the updating and further development of its contents, as the CFR drafting project is now finished. However, any initiative to entrust a new institute with this mission has to be reconciled with the parallel initiative of the authors of the CFR to create their own ELI.

The remaining proposed objectives however seem less convincing. There is hardly any scope for a European institute to "*coordinate*" legislation and policies in areas still primarily attributed to member states, first of all because this is precisely a competence of the member states, not of the EU, and the unification of laws is not a value in itself, as the subsidiarity principle teaches us. Moreover, it seems a little over-ambitious for a European Law Institute to want to coordinate activities that form an essential prerogative of sovereign elected bodies such as national parliaments and governments. Similarly it is unclear what role the institute could assume in "*coordinating*" public and private law-making in areas where private parties play a significant role: if this aims at the regulatory or contractual powers of private parties or bodies, it goes without saying that as a matter of *law* these can never validly contravene public (mandatory) laws; within their margin of autonomous regulation however they are and have to be autonomous, so a need for any kind of external "*coordination*" is anything but obvious.

***b) Assisting judiciaries***

It has further been suggested that ELI should

- improve coordination between national judiciaries and the ECJ to ensure effective legal harmonisation;
- give national courts guidance for the implementation of EU law and provide "higher and better" horizontal coordination of the application of European law by national judiciaries (and administrative authorities), as legislation is only one tool of legal integration and in itself insufficient;
- enhance judicial cooperation in particular in the new member states.

For a very long time it has been clear that the national judge is the first judge of Community (or European) law, that he has to apply and give effect to European law the same way as he has to apply and give effect to domestic law of which European law has become a part. In a Union of 500 million citizens and 27 member states, the decentralised judicial application of the European *acquis* requires specific efforts to ensure consistency, or even uniformity, and efficacy in this application. So no doubt there is a need for *coordination* in the jurisprudence of the national courts and also in relation to the ECJ; yet again, ensuring such coordination cannot be the role of an institute outside the judiciary, as judicial coordination is a judicial task in itself and all judiciaries are quite rightly insisting on preserving their *judicial independence*.

While *coordination* of national courts' jurisprudence in European law has to remain an exclusive prerogative of the national Supreme Courts and the ECJ in the last resort, national courts need a different kind of support to ensure a more consistent and effective application of European law. First of all, they need to *know* European law as much as they need to know their domestic law, so judicial *training* is clearly a priority and has been considered as such by the EU institutions since the 1999 Tampere conclusions of the European Council.

However, training is being provided by specialised institutions such as ERA and the national judicial training institutions which together are coordinating their efforts through the European Judicial Training Network (EJTN), and although there is need and scope for more, it would make more sense to strengthen these specialised institutions rather than to entrust ELI with yet another activity. Secondly, national courts need *information*, for example on other member states' laws when they have to apply this as a consequence of the Rome I or Rome II regulations. Thirdly, for the sake of coherence of their jurisprudence in European law it would seem useful for national supreme or appeal courts, as well as for the ECJ, to have access to a systematic collection of *case-law* of other member states in the same area.

If at all there still is a *specific* need to enhance judicial cooperation between the new member states, this relates to the fact that their judiciaries and legal practitioners have been practising the *acquis* for

some six years only. This specific need is then a need for additional *training*, in quantity and perhaps also in quality, as the judges in the new member states may still be less prepared for their role as European law judges than their colleagues in the old member states (a statement that appears quite questionable). A specific role for ELI is not obvious and not recommended in this area.

### *c) General issues*

In addition, it has been proposed that ELI should

- address the international (extra-European) dimension of trade and Private International Law;
- promote the European legal model throughout the world;
- contribute to the consolidation of "a" European legal community.

The external or international legal dimension of EU policies has for a long time been somewhat neglected by scholars and practitioners. With the Lisbon Treaty, the external competencies of the Union have been given a boost, and in a globalised legal environment the need to monitor legal developments outside the EU as well as the impact of EU policies on the legal relations of the EU and its members with the outside world does not require further justification. This transcends in many respects classical European trade policy. Last but not least, in the fast developing area of judicial cooperation and harmonisation of the conflict of law rules, it would seem beneficial to develop uniform European rules on judicial cooperation and conflict of law rules also in relations with third countries. A European Law Institute could certainly make a valid contribution to this debate.

It is less obvious that there would be scope for ELI to "promote the European legal model throughout the world". What should this European legal model be − the institutional model of supranational integration by law? the Common Frame of Reference? the 6th VAT Directive? Promotion of the European model will at best be a side-effect of the successful regular work of a European Law Institute when the rest of the world takes due note.

Finally, how can a European Law Institute contribute to the consolidation of a European legal community? Assuming that this slightly enigmatic notion is aimed at all European lawyers who should feel part of a larger community, and to enhance mutual trust between them, it goes without saying that the larger the body of law is which is shared by all European lawyers, the more they should feel part of a single *corps juridique* or *judiciaire,* called to use and apply this body. Unfortunately many European lawyers still resent European law as an alien legal body which is imposed on them from outside. ELI could help remedy this situation by providing information and possibly by associating European lawyers on a large scale in the debate on European law and legal policy.

### *d) Conclusion*

We note a specific need for action by a European Law Institute in

the analysis of the state of European law and its application and the identification of the need for further legislative initiatives, while ensuring the respect of the principles of subsidiarity and proportionality;

the comparison of the national law of the member states and the statement of common principles, in particular in the area of private law;

assisting the national judiciaries and the ECJ by providing targeted information on the law of other member states and on their case-law;

researching the international dimension of EU law and policies.

## 3. The mission: what activities should ELI engage in?

### *a) Suggested activities*

Our findings on the needs which a European Law Institute should accommodate suggest that ELI

1. conducts targeted *research* on the state of European law, its implementation in the member states, the need to update and consolidate it, the need to adopt new legislation in areas which require regulation at European level;
2. conducts comparative *research* on specific areas of law which are still essentially governed by national law, not only in private law, and distils the common rules and principles (cf. the Draft CFR);
3. conducts *research* on the international dimension and impact of European law;
4. based on the findings of its research, identifies areas in need of EU legislation and, where appropriate, makes proposals for bringing national law in line with European law;
5. develops and updates *information tools* on the specific national legislation of all member states which have to be applied by foreign courts because of EU conflict of law rules (e.g. family law, maintenance law, law of succession) and provides expert opinions to courts and private parties;
6. develops and updates *information tools* on the case-law of national (supreme) courts which have a potential impact on European law and its practice in other member states.

Of the concrete activities which the promoters of ELI have proposed, the following can be attributed to the list above:

ad (1): Research on European law

- to monitor implementation of EU law and to facilitate coordination between national regulators and judiciaries

ad (2): Research on national law

- to draft, and periodically revise, common legal principles in the areas of constitutional, private, criminal and fundamental rights law, following the model of the ALI

ad (3) Research on the international dimension and impact of European law

- to cooperate with twin institutes such as ALI

ad (4): Legislative proposals

- to produce Green and White Papers for legislative reform following the model of a Law Commission

These proposals are essentially in line with the considerations in this paper, even if one might question the suitability of the terms “Green” and “White Papers”, imitating Commission practice. And the concept of proposals for legislative reform does not necessarily include the drafting of model laws or fully-fledged bills unless there are procedures in place which guarantee the broadest possible consensus in adopting them as recommendations by the Institute.

The drafting of common legal principles, as a core mission of the institute, should in particular assess the achievements by the "case-book approach" by Walter van Gerven and his colleagues.[9] The additional proposal “*to foster cooperation between the ECJ and national courts through databases and glossaries*” can easily be integrated in the information activities (e) and (f), although due account has to be taken of the fact that ECJ rulings are already easily accessible in all official languages and

[9] Ius commune Casebooks for the Common Law of Europe, Hart Publishing, Oxford; cf. e.g. the volume on Tort Law, 2000.

that other institutions or networks such as the Association of Councils of State and Supreme Administrative Courts[10] or the publisher Caselex[11] already provide informative and regularly updated websites which include databases with national case-law.

***b) Activities suggested with reservation or not suggested***

However, there are three further proposals where a degree of scepticism seems appropriate:

- to establish "permanent judicial conferences" addressing specific topics and targeting Supreme Courts and their network, constitutional courts and their network, the ECJ and the EJN (civil)
- to foster the dialogue between the judiciary and national regulators, to link the various networks of regulators and of the judiciaries and to *coordinate* them with ECJ and ECtHR, to set up a "Florence school of regulation" and a "Florence school of judicial governance"
- to promote a EU law training programme for national judiciaries, with particular attention to judges in the new member states, possibly in association with ERA or other training institutions

The organisation of "permanent judicial conferences" should be ruled out if this means actively "coordinating" jurisprudence of the courts, as this would contravene judicial independence. There is also no need to provide an additional framework for the already existing regular meetings of the networks of these courts, where they discuss issues of common concern according to their own agenda. This does not at all rule out ELI's involvement in such meetings if so requested by these networks, nor the regular (annual?) organisation of conferences by ELI gathering members of the European and national judiciaries, the purpose of which would be to discuss the findings and proposals of the Institute or to collect information for ELI's research work.

The ambition of the initiators of the ELI project to "coordinate" the rest of the world has already been criticised, and although the intention to foster dialogue between judiciaries, regulators and European courts is welcome, the question is how this can best be linked to existing platforms, initiatives, networks. While it is true that Europe has seen a proliferation of networks in the past years which makes it difficult even for experts to see the full picture, it seems illusionary to think of creating a kind of "network of networks" which would be able to coordinate them all: these networks have different legal statuses (some EU-law based, others being private associations); often they have quite diverging roles and missions with limited overlap between them (the European Judicial Network in criminal matters has little to do with the association of supreme administrative jurisdictions); and last but not least, where there is an overlap, the personal or political ambitions or agendas of their leading members might resist being coordinated.

There are already two regular pan-European conference platforms for legal policy debate between institutions, courts and the legal professions which have to be considered in this context: the FIDE congress and the European Jurists' Days (*Europäischer Juristentag*). Both are organised biennially in an alternating sequence. While the FIDE congress, the event of the association of societies of European law, is organised by the member association of the country hosting the congress, no such natural organisational structure is available for the *Juristentag*: The concept of the *Juristentag* is German and dates back to a time in the 19th century when Germany was composed of a multitude of states organised as a federation not unlike the EU of today. In those days, Germans from all these states set up an association with the task of regularly organising this lawyers' congress to discuss legal or legislative matters of common concern, and this concept still exists today. However, no such pan-

[10] See http://www.juradmin.eu/en/jurisprudence/jurisprudence_en.html. It is stated that the database actually contains 20.300 references to national decisions concerning Community law from 1959 to 2009.

[11] Caselex (www.caselex.com) was set up in cooperation with the Council of the Bars and Law Societies of the EU CCBE, the European Company Lawyers Association ECLA and the European Association of Judges EAJ with the support of the European Commission's eContent programme.

European association is available to organise the European homologue and it might be worth considering whether a future European Law Institute, in particular if it is based on a Europe-wide membership, should be associated with the concept of the European *Juristentag* and in due course take over its organisation.

Finally, the promotion of judicial training programmes is certainly an important objective, but it is doubtful whether adding this activity to the numerous activities already drawn up for ELI would really make sense. The Stockholm programme sets the target that "a substantive number" of European judicial staff should be trained by 2015[12] and the Commission and Council, together with stakeholders, are currently reflecting on how this very ambitious target can be reached. To "avoid duplication of programmes and structures" the European Parliament has twice adopted a resolution requesting the creation of a European Judicial Academy composed of the EJTN and ERA,[13] and although the legal structure and governance of this is still open, it is clear that only a systematic and consistent concept combining judicial exchanges, e-learning and face-to-face training at European as well as at national level will enable us to achieve the ambitious goal. ERA and the EJTN have already worked hard on this aim. In the ten years from 2000 to 2009, ERA organised 132 judicial training events which were attended by 6.591 judges and prosecutors. Since 2005, the EJTN has been in charge of organising a judicial exchange programme, which until now allowed some 1.400 judges and prosecutors to become familiar with a foreign legal and judicial system. And members of the EJTN have developed detailed training guidelines in areas such as judicial cooperation in criminal matters (a subgroup led by ERA), which offer training modules for national providers and provide guidance for the organisation of horizontal European training courses. The challenge here seems more to enable these specialised actors to intensify or even multiply their endeavours rather than to encourage ELI to also organise some judicial training.

### *c) Closing remark: Looking at ALI*

It is perhaps interesting to compare the list of activities drawn up for ELI to those implemented by its American model, ALI. The American Law Institute

- develops restatements of the (common) law in specific areas;
- develops model statutes (such as the UCC), essentially for parallel adoption by the States;
- analyses the need for legal reform and presents recommendations to this end;
- cooperates with the American Bar Association on the development and provision of professional training.

The parallels of the three first activities to proposals (a), (b) and (d) developed for ELI are obvious. Not surprisingly the difference lies with the fourth, the development of professional training, which is not recommended for ELI and which, in the case of ALI, does not in any case target the judiciary but the bar.

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[12] Chapter 1.2.6 of the Stockholm Programme ("Training"), Council doc. 5731/10 of 3.3.2010, p. 17.

[13] Initiative report by Diana Wallis MEP on the role of the national judge in the application of Community law, adopted by the EP on 9 July 2009 (INI/2007/2027); European Parliament recommendation of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme, P7-TA-PROV(2009)0090; rapporteurs: Luigi Berlinguer on behalf of the Committee on Legal Affairs, Juan Fernando López Aguilar on behalf of the Committee on Civil Liberties, Justice and Home Affairs and Carlo Casini on behalf of the Committee on Constitutional Affairs.

## 4. Interim conclusion: will the creation of an ELI be an added value?

We conclude that there will be an added value in the creation of ELI if it:

1. Conducts research on the state of European law, monitors its implementation in the member states, examines the need to update and consolidate the *acquis*, and examines the need to adopt new legislation in areas which require regulation at European level, while ensuring the respect of the principles of subsidiarity and proportionality;
2. Conducts comparative research on specific areas of law which are still essentially governed by national law such as constitutional law and fundamental rights, penal law and in particular private law, where it assesses the Draft CFRF, and drafts and periodically revises the common rules and principles;
3. Conducts research on the international dimension and impact of European law, and develops and maintains cooperation with similar institutes in third countries;
4. Develops proposals for EU legislation and, where appropriate, for bringing national law in line with European law;
5. Develops and updates information tools (databases, glossaries) on specific national legislation in all member states which has to be applied by courts of other EU countries because of the EU conflict of law rules, and provides expert opinions to courts and private parties;
6. Develops and updates information tools on the case-law of national supreme courts which have a potential impact on European law and its practice in other member states.

## 5. The structure: which model should be adopted?

On the basis of the above considerations, it would seem that ELI should, in the first instance, be an *academic* institution. To be able to carry out the required research with the necessary independence and to develop legislative proposals exclusively based on expert findings and analysis, academic freedom and sound material equipment and support for its staff are essential. Freedom from any political or economic influence would indeed seem guaranteed by close association with, or integration into the structures of the EUI. Any plan to this end should however be coordinated with the initiators of the parallel initiative by the contributors to the CFR project to set up a European Law Institute which is supposed to operate in a decentralised way.

The need to guarantee its full academic freedom does not preclude ELI from also conducting research activities or delivering expert opinions at the request of the EU institutions, national governments or third parties. The Swiss Institute of Comparative Law could well be considered as a model, not only as far as the possible status of ELI is concerned, but also its governance and financing. Furnishing expert opinions could well offer a welcome additional source of funding.

It is also recommended that ELI acquires independent legal status so that its governance can ensure smooth functioning and its budget remains under its own control. At a first glance, the notion of giving it Treaty status on the basis of an agreement between 27 member states or to create it by virtue of a decision by the competent EU institutions seems rather illusionary. The easiest way will probably be the creation of ELI in the form of an *association* or a *foundation* based on (Italian) civil law.

## 6. Governance: how should ELI be governed?

The advantage of setting up ELI on the basis of an act under public law would primarily be that this would guarantee permanent public funding. However, a private legal form would be more flexible as regards its governance and its reactivity.

If set up under private law, a foundation would offer the advantage that the initial founders could determine the objectives and the range of activities in a more permanent way than in the case of an association where a changing membership will much more easily be able to amend the Articles of Association. In the case of an association, it would again seem wise to consider the model of the ALI where elected members are judges, lawyers and law teachers, with a number of ex officio members, thus ensuring an optimum representation of the legal community and its development. In general terms, it would not seem appropriate to restrict membership to other associations but to open it up to interested or at least qualified individuals.

When drafting the statute of ELI it will be essential to ensure, on the one hand, the widest possible representation of the European legal community, institutions and stakeholders when deciding on the general strategy of the institute, its other bodies and its budget, and on the other hand to make it operational by giving the directors full authority and responsibility in its day-to-day management. It will also need an academic committee to decide on specific research projects.

## 7. Funding: how should ELI be financed?

It is likely that ELI will not be able to exist without public funding whatever its status is. Should it be set up in the form of a foundation, it is to be hoped that the founders will provide it with sufficient foundation capital which will reduce the need for (further) public funding to a minimum.

It has already been mentioned that the furnishing of expert opinions to the founders or to third parties should provide an additional source of income. Income raised through membership fees (should ELI take the form of an association) is unlikely to fund more than a fraction of annual administrative costs. Income from registration fees for conferences will, at best, cover the costs of these.

At some stage, it was also proposed to fund the institute through training courses organised for the national judiciaries. This is certainly not a viable approach to raise money for the institute. ERA's own experience (and that of many other providers) shows that judicial training at European level is only possible on the basis of major co-financing from the European Union and will very often require an additional financial contribution from the organiser.

## 8. Conclusion

As discussed above, the creation of a European Law Institute is desirable if it serves clearly defined objectives in the context of EU legislation and its application in the member states, and if it focuses on the corresponding activities in research, in the development of legislative proposals, in producing information tools on specific areas of national law and on the case-law of national courts. Last but not least, the furnishing of expert opinions should also be part of its mission. Such activities would complement and not duplicate those of other EU law institutes operating at European level and co-funded by the European Union.

# A European Law Institute: an Important Milestone for an Ever Closer Union of Law, Rights and Justice

Viviane Reding

Three months ago, I took office as the EU's first Commissioner for Justice, Fundamental Rights and Citizenship. When President Barroso entrusted this important task to me, he asked me to make, during my mandate, a strong contribution to develop and strengthen the EU as an area of law, rights and justice.

The starting point for this challenging endeavour are our fundamental values, which are now enshrined in the EU's Charter of Fundamental Rights. As you all know well, the Lisbon Treaty has made this Charter legally binding, and has given it the same legal value as the Treaties.

To achieve a European area of law, rights and justice, we must enhance the effectiveness of the rights granted to our citizens under the Treaties and under the Charter. Any citizen or company should have confidence in the EU's legal system. Such confidence will be created if there is a sound understanding by citizens of their rights and of the legal process. Most of all, in an evolving single market, citizens need to know their rights and the process for enforcing them when they sign a contract in a cross-border situation, when they shop online, when they want to enforce a court decision cross-border, when a bi-national couple wants to get married or divorced, or when a person living outside his home country wants to write a will.

With the entry into force of the Treaty of Lisbon and the Charter of Fundamental Rights, the European Union now has the capability and the tools to strengthen the Union as an area of law, rights and justice. In particular, we now have the tools to build effective cooperation in civil and criminal matters. These will create mutual trust between the legal systems of the 27 EU Member States.

How to transform this institutional input into concrete policy outcomes and results? How to make use of this input to strengthen the Single Market, and to put Europe's economy back on track?

The question that I want to ask you today in this context: Do we have enough legal consistency in Europe to ensure that the EU's Single Market serves our citizens and our economy?

Alain Lamassoure, a distinguished Member of the European Parliament, has given a very telling answer to this question. In his report on the Citizen and the Application of European Union Law, written in 2008, he explained that citizens and businesses are still missing the benefits of the Single Market. Because there are far too many legal barriers between Member States creating unnecessary bureaucratic problems in daily life.

I know that Alain Lamassoure is right. Because since I became EU Justice Commissioner, I have seen the many letters citizens and businesses have been writing on this to the European Commission and to Members of the European Parliament.

In these letters, citizens and businesses are telling us that, they are afraid of taking advantage of the Single Market because they don’t know how to recover debts. Today, companies only recover 37% of cross-border debts. Can you believe this? In our Single Market, more than 60% of cross-border debts cannot be enforced. That's hardly an incentive to do business in the Single Market! And that is a rather worrying situation in the present context of the economic crisis.

Citizens and businesses also are telling us that they don’t know how to get a legal decision recognised in another country, or that they have to pay an "exequatur" of up to 2000 Euros to do so. Just for getting a judgement from one country recognised as valid in another country.

Citizens and businesses are furthermore complaining about the problems to file an insurance claim after a car crash in another country.

Last but not least, citizens and businesses are explaining why they hardly ever buy from abroad, despite the possibilities of online commerce. Because citizens are not sure about their rights in other countries or online and they face too many legal and technical obstacles. In 2008 only 7% of transactions on the web in Europe were cross-border.

In my view, if this situation persists, the Single Market will not do what it could and what it should do. Jacques Delors once said that nobody falls in love with a single market. Well, we need to change this and make the EU's Single Market more lovable for citizens and businesses alike. By making it work in their interest.

We therefore urgently need better European legal cooperation to build a common and effective area of law, rights and justice so that citizens and businesses get the best from the Single Market.

However, a new Treaty, a new Charter and new procedures alone will not suffice to solve the problem. A European area of law, rights and justice can only be created if the lawyers are taken on board: judges, legal practitioners, barristers, solicitors, law professors. However, lawyers are, as you all know, rather conservative people. They will prefer to stick instinctively to the traditional concepts of their national legal systems. They will not easily want to recognise the concepts familiar to the lawyers in the neighbouring country, let alone trusting the decisions of a court in another EU Member State. In terms of legal traditions and concepts, Europe is a continent still coined very much by diversity, and not by uniformity.

But how can we make a source of strength out of the diversity of Europe's legal systems when discussions on new EU rules so often stumble over different legal concepts and solutions?

To me, the answer is clear: we need to create a European judicial culture embracing all aspects of the law.

I was EU Commissioner for Culture during five years (1999-2004). I know well how important culture is for national and regional identity. During the past months as EU Justice Commissioner, I got a good understanding that also lawyers have their culture. A culture with a long history. A culture with many different traditions, depending on country, language and region. But also a culture of listening to the other side: *audiatur et altera pars*. A culture of arguing with each other. And a culture of learning from each other. A clear evidence of this willingness to interact is the number of law students involved in the Erasmus exchange programme every year: for instance in 2007/2008, more than 10.000 young people decided to spend a period abroad and thus become familiar with a different legal system.

This is why I believe that a European Law Institute – as you are discussing it here in Florence in these days – could become an important milestone for an ever closer Union of Law, Rights and Justice. This is not only a belief that I hold; there are also calls from the European Parliament for such an entity. For example, in its Resolution on the Stockholm Programme adopted on 25 November 2009, the European Parliament called for the creation of a "European Judicial Academy", and several Members of Parliament have raised with me the idea of a European Law Institute during the past months, including in my hearing in the European Parliament.

## What are the reasons for having a European Law Institute?

Let me start with a very basic point: European law is the cement binding together our Union. Our Union has, within a remarkably short period of time, emerged into a unique political entity. Its successful and peaceful rapid growth and development has only been made possible because of the force and the rule of European law. Europe is a "Rechtsgemeinschaft", a Community of law, as Walter Hallstein already said, and until today, our Union is not held together by force or armies, but first of all

by the respect of the commonly created European rules. It is the very role and the effect of European law that distinguishes our Union from any mere intergovernmental organisation. Our European law therefore needs to be further developed and strengthened, including in academic research and judicial training.

The impact of European law on the daily lives of European citizens, consumers, farmers, workers, businesses and on national political and legal structures is profound. And European law is not static but results from a dynamic and open process of law-making and legal interpretation. This includes the daily role of countless legal practitioners, from lawyers and bailiffs on the one hand to judges and academia on the other. All these actors are increasingly interacting with European law. This means that every national lawyer and every national judge must also be a European law expert, capable of interpreting and effectively enforcing EU law alongside his own domestic law. And on the Union's decentralised legal system, national judges must become true "Union law judges" to be able to comply with their responsibilities.

Our success in facing up to the new challenges created by the Lisbon Treaty can only be achieved by assuring the coherence and consistency of the way in which the EU legal order interacts with our diverse national legal traditions and systems. And this requires, first of all, well informed and well trained legal practitioners, in particular judges.

*Jura Novit Curia* – Yes, a court has to know the law. But how sure are we that our national courts are aware of all the key features of the diverse national systems of our Union, built upon sometimes centennial layers of history and traditions. In reality, we are all grappling with the same problems, but over time, we nevertheless have built different ways of responding to them.

Sometimes a word in one legal order has a similar, not the same, concept in another national legal system. Just think of the word "bona fide", "bonne foi", "Guter Glauben". You all know that it is not sufficient to translate a legal term. The concept behind must also be well understood before one can really understand, work in and succeed in another legal system.

In our European Union, legal practitioners and authorities will be called upon increasingly to understand and apply decisions made in other EU countries. They will, also be called upon to live up to common minimum standards so that authorities in other countries will be able to trust those decisions.

Legal scholars will be called upon to better understand other legal cultures, and grow the common principles that bind them. Let me cite as an example, the work on civil law harmonisation and on drawing up the so-called "Draft Common Frame of Reference". Here, scholars from all over Europe have come together looking for what is common in our legal heritage, sharing the rich national traditions in search of a language that is European, but recognisable at the same time to national lawyers. This is an exciting area, and one which I intend to support. To me, the development of a European Contract Law, which could be chosen by businesses and consumers, is an important tool for strengthening the Single Market and legal certainty within this Single Market.

There are surely other areas worthy of our attention. The process of comparison and understanding and of reaching for common principles could also, for example, be useful in the area of civil procedure.

That is why it is more important than ever to build a common awareness and an understanding of our different ways of treating similar legal problems. I have always believed that with understanding comes respect. Respect is what we need if we are to build the trust that is essential for a system built on mutual recognition.

That is why the creation of a European Law Institute is such a good idea. It is certainly a symbol for a broader vision, that of a strong European area of law, rights and justice at the service of our

citizens. This is why I would call on all of you not to focus only on institutional details, but also to keep in mind the bigger picture.

Of course, at the end of the day, institutional details will have to be reflected upon. One cannot only dream, but at some point, vision will need to be followed and implemented by action. I am personally open in this respect. I could imagine that the private sector and academia jointly develop a European Law Institute as a place for legal exchange, training and of building a European legal culture. Thereby following the example of the American law Institute, which is non-governmental, but played a crucial role in developing the US Uniform Commercial Code. I could also imagine the public sector to take part in this, possibly under the umbrella of the European University Institute. And I could also imagine that we think about a structure similar to the recently created European Institute of Technology, possibly established in liaison with the European Court of Justice, which is after all the very centre for the further development of our European legal culture.

There are certainly also many other valuable forms that such a European Law Institute could take, for example a structure built on the European Law Academy in Trier. As said, I am open at this stage. But I also believe that form should follow function. And that we should never lose out of sight *why* we want to create a European Law Institute. To ensure that European Law even serves better the citizen, the economy and society than it already does today.

The creation of a European Law Institute alone will not be sufficient for creating the necessary European Legal Culture. We will in addition need at least four further steps to strengthen legal cooperation between our Member States and their legal authorities:

- First, cooperation between national authorities to put laws in place consistently;
- Second, training of the people who practice these laws, like lawyers, judges and notaries;
- Third, cross-border legal scholarships, allowing consecutive times of academic research at research institutions in countries belonging to different legal families;
- Fourthly, we need networks to help remove legal obstacles to the mobility of citizens and businesses in the EU:

- Networks of national authorities like the one created by EU governments between their justice ministries in 2008, to develop laws consistent with their neighbours.
- Networks, such as the Civil Law Initiative, that support the practitioners who help citizens and businesses to on a daily basis to understand the EU and its rules, and its common principles.
- Networks such as the Network of the Presidents of the Supreme Judicial Courts or the Association of the Council of State and Supreme Administrative Jurisdictions who exchange experiences and best practices on a regular basis assessing the impact of European and national law decisions in each others legal orders.
- Networks such as the Eurojustice network of European Prosecutors-General that has a wealth of knowledge and expertise to share among practitioners.

We must strengthen such networks so that they create ever closer links of mutual trust between legal practitioners in the European Union.

I hope I could make clear what the vital building blocks for a European area of law, rights and justice need to be: to build the mutual trust and understanding between national authorities; and to ensure consistency between the 27 legal orders that draws its strength from our diversity, but that is also able to bring absolute common solutions. A European Law Institute could be an important milestone in bringing about both mutual trust and consistency.

In my vision, a European Law Institute should take stock of input from both academics and legal practitioners. This would widen the range of possible solutions to common legal problems. It should

solve them by pointing out common principles from different legal systems, building mutual trust and understanding.

What politicians still would not (yet) dare say, discuss or explore, a European Law Institute could discuss and analyse. Depending on its quality, this academic input could then help legislators and later judges develop their own ideas and make up their own mind.

Lawyers who provide citizens and businesses with legal advice, bailiffs enforcing court decisions and other legal practitioners should contribute to this reflection and benefit from it. Their input to a European Law Institute's work would be a very valuable asset; and help ensuring that this new entity would not be an academic ivory tower; but closely connected to the economic and social reality of the European area of law, rights and justice.

By its mandate and its reputation, a European Law Institute should after some time have the opportunity to convince the best legal minds of Europe to work together and strengthen the walls of our common European house.

Four years ago, Commission President Barroso said in this very same University here in Florence that "European law is not some alien imposition forced on unwilling nations". European law is actually the key which unlocked 50 years of peace and prosperity in Europe. "The fact that we strive to improve it", he added, "only underscores this because it is the things we cherish that we aim to perfect."

I hope we will be able to say in three to four years time, then with an operating European Law Institute in place, that we have the best tools to perfect our most cherished common achievement – European Union law in a well functioning European area of law, rights and justice at the service of our citizens.

# The European Institute of Law –

# A Step towards Strengthening the Integration Processes?

Marek Safjan

## 1. Preliminary remarks

The European Union is now faced with great challenges. With the adoption of the Treaty of Lisbon and the Charter of Fundamental Rights, the EU has certainly entered a new stage of the integration process, whose importance and scale of difficulty we are probably still not able to identify and diagnose correctly. The European Law not only steps larger and larger into some domains (to mention only such issues as cooperation between courts in criminal cases, immigration, social or health policies, protection of industrial property or environmental protection), but also, thanks to its dynamism and expansion, interferes ever more strongly with all practical areas of Law, becoming a structure of considerable complication and complexity. The need for the development of a new approach is largely spread in European legal milieu. In order to develop new Law making instruments, we need to apply an overall rather than segmental approach (which strongly presently dominates), as well as maintain cohesion and coherence. It is also a good reason to pose essential questions as to how these goals can be achieved, or which institutions and concepts of cooperation may be useful in this process. *In my opinion* only against a question formulated this way can we attempt to evaluate the need to establish the European Institute of Law.

## 2. Doubts

Should the European Institute of Law be created and if so, why? Several doubts arise at the very beginning. Firstly, there already exist a number of European academic Institutes (Hamburg, Trier, Vienna, Roma Lyon, Lausanne etc.) specializing in different fields of the European, public or private law. Many of them conduct a broad range of activity and embrace an international milieu, offering also interesting educational programs. There is also – which we should not forget here – the European University Institute in Florence with its Department of Law, which for years has carried out research in many important disciplines connected with the functioning of the European Law. All major universities in Europe have departments specializing in this domain and being at the same time natural educational centers. This brief and rather general overview gives a clear indication that a new institutional solution cannot be found in yet another Institute of European Law, based on the similar structure and concepts of activity which would only stand next to the existing ones. Such an idea, in its very nature, would not be very attractive. Moreover, it should not be discussed at this forum at all as it is the competence of other academic milieux. The question for us to consider – if I understand correctly the idea of our meeting and debate – refers to quite a different matter, namely whether it is really necessary to establish an Institute, which – in terms of its competence, objectives, profile of research and educational activity, as well as its organizational form – would differ from the other centers, while contributing the so called new quality and addressing different needs than those fulfilled by the existing Institutes. It is therefore reasonable to define the needs we are interested in.

## 3. The needs

The assumption that the new Institute should specialize in the field of European Law, will not provide an answer as to the rationale for the creation of the Institute unless we try to define more precisely the areas of its activity and specialization. It seems that it should be an institution concerned with broadly understood Law making process. The first and fundamental instrument to enhance the integration process consists in new, effective legal instruments: the European Union is a body based on the rule of Law and there is no doubt that the very legal mechanisms, as well as original and autonomous legal solutions (established with great help of creative and „activist" approach of the community courts) allowed us to reach the present stage of integration. Fifty years after the European Community was founded, this pioneering period – characterized by the dispersed, dynamic but also quite chaotic legislation – in which great revolutionary changes took place (e.g. establishment of the principle of superiority of community Law) has already passed. We need a much more systematized approach – an approach subordinated to a regular and long term strategy ensuring a stable and cohesive development of European Law. Connections between the system of European Law and the diversified systems of national law of the EU Member States are becoming more and more complex and multi-dimensional. At the same time, it is always more difficult to draw the line of demarcation between the exclusive area of the internal (national) Law and that of the European Law (which is evident e.g. in the case of the ECJ jurisdiction related to the cases concerning the so called procedural autonomy of a Member State, tax issues, social security solutions or pension schemes). The „community" (European) ratio in the national regulations has now grown in importance in all fields of Law in the context of an increasing role of the guarantee of fundamental rights and the EU Charter of Fundamental Rights coming into force. It is now evident that we have to adopt a different methodology of European Law making. Today the European Law does not exhaust itself in narrow, fragmentary regulations which are a special „advance guard" for broader provisions (as for example in the field of private Law, where the EU regulations concerning the consumer law are such an „advance guard"), but in many domains we notice stronger and stronger aspirations to achieve comprehensive, in some sense codification legal regulations, which would synthesize and systematize what has been achieved so far, the rules, principles, fundamental structures and notions. Such systemic approach allows us to build better and more coherently the European legal order.

It seems that in the foreseeable future we will see three different levels of Law making in the European sphere. **Firstly**, strictly understood regulations of the European Legal Acts (directives, regulations, decision, recommendation, opinion ); **secondly**, model optional regulations (following the American Restatements) – constituting a model for national regulations, adopted in order to unify certain fields of relations – even in these spheres which mostly lie within the competence of the Member States, e.g. in the field of private Law; **thirdly**, regulations of national Law implementing the rules of the European Law strictly understood (first level) or model rules (second level). The need for a new approach to be constructed on the European scale is visible mostly in the first two areas.

## 4. Novum

The novelty element in the initiative called the „European Institute of Law" could therefore consist in developing broadly understood the best legal standards and legal policy (including the projects of European legal acts ; systematization and ordering of some legal mechanism and concepts, the strategy of development of European law in particular areas). Research carried out presently in most academic centers dealing with the European Law is quite different, although it often represents a high level of analysis and conclusions (also conclusions *de lege ferenda*): it focuses on finding a solution to a single specific academic problem rather than constructing a draft „European act „ or a model act, or ordering or systematizing broader domains of the existing European Law. Initiatives like, Christan von Bar commission or Ole Lando commission, Acquis Group – valuable and widely known among the European lawyers – concerning the private Law, are still exceptional in Europe. Moreover, they do not

have a clear structural base or stable financial support. They are based on the initiative and great commitment of single individuals, not on established and transparent procedures, while the spheres of their impact overlap, and sometimes duplicate. Obviously, it is not my intention to criticize it since in the present conditions this way of proceeding may generate quite interesting results, such as the largely debated in legal milieu „Draft Common Frame of Reference". Moreover, the approach represented by this kind of initiative shows us the desired direction of research, and most of all, its autonomy with respect of the classical legal-comparative studies. If, however, we conclude that this direction is correct and necessary, then it is not possible – in longer perspective – to rely on private and totally non-formalized activity of narrow milieux of respectable professors. The next step should involve establishment of an institution having clear goals and transparent internal procedures; an institution which will enjoy sound and stable financial basis and ensure – through its methodology – proper selection of its members, as well as a representative and credible „product", that is concrete normative proposals belonging either to the first segment (European Law – strictly understood) or to the second one (model law), and further translated into actual legislative initiatives.

## 5. Main Tasks

To conclude at this point the above considerations, we must stress that an institution of such a profile, scope of activity and structure, which, at the same time, would be sufficiently legitimized – does not exist as yet in the EU. The new stage of integration processes and their legal complexity will require another strategy and methods of activity different from the ones adopted so far by the academic research institutions. The tasks of the new institution would include in particular:

a) defining and prioritizing the essential goals of the development of European Law in individual domains;

b) systematizing, ordering and orienting present results (achievements);

c) developing good methods of Law making, and finally, proposing comprehensive normative regulations;

d) doing the impact assessment of particular legal mechanisms on European law and on national domestic systems.

## 6. Democratic institutions versus professionalism

In other words, on the European level, we need an institution which would create a link between the system, structural, legislative and academic research centers – serving as a special conveyer belt between the area of intellectual, expert and specialist domain and the one in which decisions concerning the shape of Law are formally adopted. The latter is therefore a domain in which democratically legitimatized political institutions operate. To be clear: ELI should not replace the legislative bodies and should not interfere in the democratic decision making process. No one can substitute the democratically elected representatives in their exclusive prerogatives to determine political goals of the law making process and to make the political choices among different alternative propositions. It is their natural, essential political responsibility (and at the same time, a specific political risk) which they cannot avoid especially in the sphere of most sensitive social areas of laws. And for these reasons we should not identify the „legislative activity" (precisely - legal meaning of such an expression) and the professional and specialized support to be given by the future European Institute (at the stage of preliminary legislative process when the alternative ideas and concepts would be analyzed), if it is established in accordance with the above presented premises. The politicians who make political choices do not create the professional law` projects because it is an exclusive matter of the professional bodies. Presently, the method of elaboration of the European legal acts projects seems to be not sufficiently transparent and in effect it does not ensure the coherence and the precise strategy of the legislatives works. For these reasons the European Law Institute could fulfill the specific

„vacuum“ at this preliminary stage of the legislative works which is identified by many experts. At the national level, such an institution has its counterparts in the bodies called Codification Commissions, legislative councils, or legislative centers, etc. Being a „link“, they work as transmission between ideas and concepts born at Universities and political bodies, which are legitimized to take decisions. It seems to be that for the future activity of ELI such well known Institutions as the American Law Institute or Unidroit would be an appropriate point of reference. There is no doubt that – considering the type of tasks, the nature of the secondary European Law (which is not a form of international law but constitutes an autonomous system making part of internal systems), specific character of implementation processes, the logic of the development of common European space – it seems more appropriate to refer to the concept and functioning of the ALI than to UNIDROIT (considering that the acts of model Law in the ALI are oriented towards creating rules in the relatively homogenous legal environment which is based on the similar legal traditions and which shares the same principal legal values as like in European space of law).

## 7. Other activities

As we mentioned above, The European Law Institute could assume also the other activities no directly related to the legislative process. One can propose among them preparation of highly specialized expert opinions in some particularly complex areas of laws including the impact assessment of existing or proposed European legal mechanisms on functioning of the national legal regulations or on the coherence of legal solutions in the scope of different fields of European law. However, it would be doubtful to enlarge too much the scope of the tasks of ELI and attribute to it for example the specific duties related to the training and educational program. Such purposes can be sufficiently realized by existing academic institutions. I am not also convinced whether the future ELI should play a specific role in the process of the judicial dialogue. That dialogue is now assumed by clearly defined procedural means- among them the main role is attributed to the preliminary questions referred by the national courts to ECJ.

## 8. Organizational formula

Apart from the tasks of the future Institute, it is equally important to define its organizational formula, methods of operation, composition and relations with other structures.

**Firstly**, this institution should be both a materialized structure with its headquarters and own infrastructure and a „network of networks“, which would animate and stimulate cooperation with other bodies conducting research in the field of European Law.

**Secondly,** it should enjoy considerable structural independence from the administrative and bureaucratic institutions, being at the same time somehow connected with these structures.

**Thirdly**, it should embrace scholars, representatives of academic centers, but also eminent representatives of legal practice (in this case inspiration can be found in ALI).

As for the first problem (whether an autonomous, materialized organizational structure or „only” a „network“), I share the view expressed in the assumption that this project envisages the creation of a certain organizational structure with its headquarters, staff and adequate administrative basis. Such an institution, however, cannot operate in vacuum, it must be based on the existing European intellectual resources, i.e. major centers carrying out their research on the European Law (hence the idea of a „network of networks“). The relation „Institute – present research infrastructure“ must not exhaust itself in simple organization of research cooperation and facilitating exchange between universities, as these task are fulfilled by other organizations supporting academic research within the EU. It should involve a specific and precisely directed cooperation focused on – possibly most representative – selection of outstanding exponents of the academic world and experts in individual fields of law. They

would be responsible for preparation of the strategy of the legal policy within the EU, and starting up works on related draft acts, also by initiating and coordinating related activity in various academic centers. Founding of the Institute should be concurrent with the launch of the above mentioned cooperation among the European Law centers – these processes should be parallel.

## 9. Autonomy

With regard to the second problem – autonomy of the Institute – we should definitely opt for the formula ensuring autonomous status of such a centre. It should not be a closed element of a bureaucratic EU structure, and therefore a fragment of administrative body operating at the European Commission. The Institute may not be limited in its activity by the tasks strictly defined by the administrative structures (e.g. designed for exclusive preparation of necessary normative acts for the legislative purposes of the European Commission and Council). Such a narrow status and scope of activity would contradict the above listed postulates concerning the potential role of the Institute in delineating the legislative strategy and making the model Law. At the same time the potential purposes and the future nature of the activity of ELI should strongly determine the organizational formula of the Institute. This formula observing the independence of the Institute should ensure however the effective exchange between the official structures of EU and ELI. For these reasons we should consider as a variant founding the Institute on the basis of an intergovernmental agreement (of EU Member States – perhaps even with the participation of the governments of the Associated States). Such a status of the Institute, based on the intergovernmental agreement, could ensure not only greater credibility but also more effective translation of its proposals into future legislative action. It would also offer a chance for stable and predictable financing of its activity. It seems reasonable to consider whether to repeat – to some extent – the concept of creation and financing adopted for the European University Institute in Florence. Also, the legal formula of the Institute should be based on close cooperation with the existing research centers in the field of European Law.

Thirdly, regardless of the adopted formula, the Institute should gather eminent personalities representing possibly the broadest spectrum of the legal world in Europe. Next to representatives of the academic milieu, there should be outstanding practitioners – judges, eminent lawyers, representatives of national codification commissions and legislative centers. It is also important to respect necessary geographical balance (representative character of the various legal systems of contemporary Europe), and appropriate relations between specializations and sections of European Law. Membership could be individual (natural persons) or institutional (legal persons – universities, associations of legal professions). The membership formula should be based on the criterion of professionalism. Therefore, in my opinion, membership of organizations and associations of non-legal nature should not be accepted.

# The European Law Institute

H. Schulte-Nölke

## Introduction

The purpose of a European Law Institute (ELI) would be to create a platform for pan-European research and debate in the field of European private law and public law. With individual as well as institutional members from all EU Member States and beyond, it would operate on a de-centralised organisational basis. It would be ready to embrace a variety of different approaches and views, which share in the quest for enhancing comparative knowledge and striving towards better law-making in Europe.

The principal aims of the ELI would be:

- to enable and enhance pan-European research in private and public law, either independent research or research commissioned by the EU or national governments, by individual members, by the staff of institutional members and by the ELI itself;
- in particular to establish an organisational frame for the drafting, critical assessment and revision of what have come to be called "restatements" of the laws of the Member States and to comment on EU legislation and submit academic proposals for the future development of the acquis communautaire,
- to organise discussion fora in which lawmakers, representatives of the legal professions, other stakeholders and academics can debate issues of European private and public law (possibly in collaboration with existing institutions such as the Academy of European Law (ERA)).

It is thought that in time the ELI might come to support or pursue other activities, such as:

- to develop common teaching tools and enhance postgraduate education in European private law, and
- to organise and provide professional training.

The initiative to found the ELI has been taken by a group of scholars from leading European Law Schools and of members of the legal professions with an outstanding reputation, all of whom have an active interest in European private or public law.

## 1. Why a European Law Institute

The initiative to found a European Law Institute at precisely this point in time is being taken because an overwhelming need for such a framework is felt by many of the scholars, stakeholders and institutions involved in the development of European private and public law.

### *a) Enhancing and enabling pan-European research*

Over the last twenty or more years an enormous amount has been achieved in the field of European private law. European public law – a field reaching beyond EU law in the traditional sense – is also quickly gaining ground. These achievements were made possible by pan-European research teams, by groups of scholars from across Europe meeting and sharing information and by scholars working on their own or with a few colleagues.

However, it has become apparent that research of the depth necessary to produce first-class results, work that is firmly grounded in comparative study of the different national laws, is difficult and expensive to carry out, particularly if it is to involve the laws of more than just a few of the EU Member States. Some projects (like the Principles of European Contract Law and the Acquis Principles) have relied on the expertise of groups of senior scholars from the different jurisdictions to provide the input from their own countries as well as meeting to draft texts. However, the time and energy that senior scholars can devote to providing the necessary information is limited. Other projects, like the Study Group on a European Civil Code, have relied on teams of young researchers led by senior scholars. Bringing together and maintaining research teams that have the required expertise is very expensive. But to date there has been little alternative to one of these approaches. Many scholars do not have contacts with researchers from a sufficiently broad range of European countries to be able to gather the necessary information in other ways. One of the principal aims of the ELI would be to enable its members and scholars working in member institutions to obtain the necessary information via researchers in the different countries, either through other member institutions or through researchers identified by those institutions.

The ELI would thus support the establishment of contacts and the creation of teams to carry out further pan-European research, drawing upon the excellent network of contacts built up by some scholars and research groups and constantly expanding it. This should lead to pan-European research being made possible for many more of our colleagues at much less expense.

Moreover, many researchers lack experience in bidding for EU or other funding. There is thus a huge untapped potential of excellent pan-European research projects which have not yet been realised for want of the necessary support and infrastructure. Another of the aims of the ELI would be that those scholars who have gained considerable experience with third party funding, in particular with funding provided by the EU, can share their experience and provide advice.

### *b). Promoting European principles, model rules and terminology*

Many of the achievements to date take the form of common European principles and rules or sets of definitions, i.e. of what have come to be called "Restatements", even if that label is not wholly accurate. The results may well be remarkable, but they are by no means set in stone. In particular, as far as the existing drafts are concerned, some of them compete within the shared quest for common European or even global principles and model rules, and some have triggered a Europe-wide debate as well as provoking fierce criticism. Now is the time to reflect and discuss thoroughly the comments and suggestions received in the meantime and to initiate a dialogue between the different groups. The ELI would offer the groups which developed such Restatements an organisational frame and forum in which the necessary revision and consolidation could take place.

Quite apart from revision and consolidation, a pressing need at the moment lies in keeping the various Restatements already compiled since the late 1990s up to date. Whether part of what has been produced finds its way into a 'political' Common Frame of Reference, or whether the Restatements remain primarily academic projects, they (e.g. restatements of the law of contract, of non-contractual liability or of movable property) can only develop into a long-term success story if they are kept abreast of the times, constantly keeping the comparative background materials up-to-date and, where appropriate, incorporating the knowledge gained into the relevant texts. Whether this work is to be done by the original teams or by others, it will be much easier (and less expensive) to gather the necessary comparative information if an effective network can be established to provide it.

Another task lies in gradually extending the material scope of the Restatements or at least – as excellent results take their time to achieve – in paving the way for their extension by future generations. Within the law of contract, important areas like financial services are not covered, and progress in the field of the law of property, not least in the area of the interrelation of secured credit and insolvency law, is of further particular significance. New pan-European research projects might also arise in land law, family law, the law of succession and procedural law. European administrative

law is so far regulated in an unsystematic manner with its rules and principles largely defined on a policy-by-policy basis, which frequently results in unclear distribution of responsibilities and problems for judicial review as well as for democratic accountability. Restatements in these fields may contribute to the rationalisation, simplification and improvement of central bodies of European law.

### *c) Raising a voice in the development of the acquis communautaire*

Among the missions envisaged for the ELI are the critical evaluation of steps taken by the European legislator and the further development of the acquis. One of the major tasks for the future is dealing with problems of development, inner coherence, implementation and efficiency of EU legislation. The necessity and success of aligning EU measures must be weighed up against the disintegrative effects of EU law on the national legal systems. In this context, issues of justice, methodology, the cultural self-understanding of the Member States' legal systems and the forming of a European identity play a role.

It is envisaged that the ELI would not only comment on steps taken by the European legislator but take a proactive role, thinking ahead in terms of the further development of the acquis. In this context, academic proposals for future EU legislation might be published, in particular such proposals as would contribute to a more coherent and efficient EU law. As is illustrated by the debate on the proposal for a new horizontal Directive on Consumer Rights, there is currently a trend towards the "codification" of areas thus far regulated by scattered EU instruments. This needs a strong foundation in research.

Large areas of the law are already today extensively permeated by EU law. However, regulations and directives hardly ever cover an area in full, but rather leave important issues to be addressed by national legislation. In particular against the background of the current Commission strategy towards full harmonisation, which leaves Member States ever less room for manoeuvre while making national legislation that conforms to the directives more and more difficult, there is a need for studies on transposition and for European (national) model laws. Such model laws might serve as sources of inspiration which Member States can draw upon where they choose to do so.

### *d) Bridging gaps between different approaches, perspectives and disciplines*

Many pan-European networks, research teams and individual researchers feel united in their quest for better law-making in Europe, as well as for a beneficial development of the European legal systems and of EU law. However, views as to how this common goal can best be achieved diverge widely. It is in particular the Draft Common Frame of Reference (DCFR), which has evoked strong responses, both negative and positive, from many members of the European scientific community Even though many ELI founding members were members of different working groups, contributing either to the DCFR or to other drafts, the ELI would not take any pre-defined position, nor would it wish to impose any restrictions as far as methodological approaches are concerned. Quite to the contrary, the revision and consolidation of existing drafts will reap success only when researchers and stakeholders with a critical attitude raise their voice, and, still more importantly, if they do so within a common institutional framework. The ELI therefore should explicitly invite all scholars and stakeholders to join and to contribute to the debate, irrespective of the position they have taken so far with respect to methodology, content and style of comparative legal research.

It is not just scholars who have been able to meet and establish contacts with colleagues across Europe. Over the years, very valuable discussions and contacts have developed with and between judges, lawmakers, practitioners and other stakeholders. It is of vital importance that pan-European debates among academics on the one hand and protagonists from the legal professions and policy-makers on the other do not remain separate. The ELI therefore would not only invite members from both legal science and practice to join it, but would encourage them to cooperate actively in the

pursuit of ELI activities. Stakeholders would not only contribute towards augmenting the work of the academics through critique and input, but would play a pivotal role in developing direct practical application of the comparative legal research and endeavours towards systematisation. A possible example for such cooperation could be Europe-wide standard form contracts, terms and conditions or business strategies, which could be collectively compiled and examined by practitioners and academics alike.

So far, research in European private law and European public law, including European criminal law, has been conducted more or less separately from each other. The countless problems of the interaction between procedural law, administrative law and private law have therefore largely remained unsolved. The law on cross-border services, the energy sector or the communications market are just some examples of this; in the plethora of European legal systems, numerous further problems have arisen with an extensive practical and theoretical reach. However, apart from bridging gaps between the legal disciplines it is also important to create and forge links for collective research with other disciplines. There have already been important contributions from economic science ("Law and Economics"); we would like to encourage also political science, linguistics, sociology and, particularly, history, as well as such interdisciplinary sciences as Behavioural Sciences and the discourse on Constitutionalism and Modern Governance.

### *e) Moving towards a European legal culture via European legal education*

Legal education is the cornerstone of legal thinking, and without further Europeanisation of the way law is taught at law schools, most of the academic and political endeavours to create a common legal culture will be thwarted halfway. To this extent, the Restatements mentioned above offer fascinating options. If their stabilisation is successful, then something can be realised that even today sounds like a blast from the future: parallel law courses using the same texts at a significant number of European universities. The Academic Member Institutions of the ELI would become the preferred destinations of those who are particularly interested in European and comparative law, thus forming a breeding ground for Europe's top jurists and securing a high degree of mobility for students and teaching staff. Pan-European textbooks and other teaching materials would almost certainly be needed and, consequently, have to be developed. The same is true for professional training. The ELI might play a key role in this context.

### *f) An independently-constituted organisation*

While the need for a European Law Institute has long been apparent, the impression is that an endeavour to create it as an EU institution is unrealistic, at least at the present time. Nor do we think it should be a physical institution. The model of the American Law Institute with a central location and library in Philadelphia would not be the right fit for the situation in Europe. While the organisation must have a working infrastructure, it should not be a physical building located in any one place. Rather it should be a decentralised, collaborative network. In part this is necessary, because unlike the situation in America, very few institutions have libraries with full collections of material from all Member States and even fewer have staff capable of working in the many different languages.

The network proposed for the moment is not an EU institution, but one that is constituted independently. The main aims to be strived at by the ELI's organisation are to ensure the high quality and independence of the ELI's results. If these are achieved, it may be that the European institutions might choose to set up an EU institution along similar lines, but that is a question for the future and not for us.

## *2. How the European Law Institute might Operate*

The ELI might be established as an "International (Scientific) Association" under Belgian law, which provides an appropriately flexible model.

### *a) Membership and contributions*

We envisage that the ELI would have as its core membership both academic institutions and individual members.

Invitations to be an institutional member of the ELI could be sent to a selection of law faculties, schools and research centres that have an established reputation of research in the field of European private and public law. The ELI could then gradually be opened to further institutions to join provided they meet certain entry criteria. Membership would be open to a range of bodies, schools or research centres.

Since institutional arrangements vary so much in Europe, ways should be sought to allow institutional membership irrespective of whether or not such bodies are legal persons. Candidates for institutional membership should be able to demonstrate substantial commitment to research in European private or public law. Member Institutions should, at least in principle, be prepared to run the Secretariat for a period of two or three years (see below).

It would have to be decided whether the Academic Member Institutions will have to pay a membership fee and, if so, whether it would also be necessary to negotiate individual solutions with regard to fees.

Organisations of the legal professions, such as associations of judges, advocates or notaries, could also be invited to become institutional members of the ELI. The details of nomination as well as the amount of a possible annual membership fee would have to be regulated or negotiated individually.

Organisations that have interests in European private or public law but which are not primarily of lawyers, such as trade associations or consumer groups, could be invited to send observers (see below).

Individual scholars and other interested persons such as judges, practitioners and other stakeholders with a high reputation could be invited to become Individual Members of the ELI. ELI membership could be construed as a distinct professional honour, and the number of members that can be admitted might be limited. Members could be selected by the Board on the basis of professional achievement and demonstrated interest in legal research. Members would be expected to take an active part in the ELI's activities. Current members could have the right to propose candidates for membership.

Ways in which members can participate would include attending the General Assembly and the Annual Conference, submitting comments on drafts, and joining Members Consultative Groups for ELI projects. Such Consultative Groups could be formed on request of each member (or a certain not very high quorum of members) for each ELI project. Individual Members whose institutions are not Member Institutions would have the same rights as the Individual Members who are on the staff of a Member Institution.

With regard to membership fees, Individual Members would probably be required to pay an annual subscription, say not exceeding EUR 50. If it is decided that Institutional Members will pay a fee, Individual Members who are on the staff of the Institution might be exempted from paying individual fees.

One of the conditions of Membership must be independence. Members must give an undertaking to make their oral and written contributions to the ELI, and to vote, on the basis of their own personal and professional convictions, without regard to interests of pressure groups or clients, so as to ensure the ELI's reputation for high quality and impartial analysis.

Individuals who are not able to give such an undertaking, and those who are nominated by non-legal organisations such as trade associations or consumer groups, could be admitted as ELI Observers. Observer status instead of membership may also be admitted to officials from national governments or EU Institutions, if they wish so.

Observers could have the right to attend the General Assembly, the Annual Conference and the Members Consultative Groups, but they would not have the right to vote. Restatement Committees could invite observers to attend their meetings.

It would also have to be decided whether to confer Honorary Membership on appropriate persons.

***b) Internal structure and organs of ELI***

The ELI's directional body could be a General Assembly. It would be to be held annually or on request of the Board (see below) or of a certain quorum of ELI Individual Members. The General Assembly would be comprised of the Individual Members. All Individual Members would have the same right to attend, to speak, to vote and to be elected. The General Assembly would elect the Board. The General Assembly would approve the ELI's budget and decide on the discharge of the Board members.

For the elaboration of Restatements as part of the ELI's own research programme, a procedure would have to be developed for the General Assembly (possibly on proposal of the Board) to appoint ELI Restatement-Committees and to approve Restatements. One could also envisage a specific Scientific Committee being appointed to approve a Restatement on behalf of the General Assembly. Draft Restatements could also be referred to a Member's Consultative Group established for the purpose for discussion and comment. The same would hold true for other major ELI publications.

The ELI Board could consist of a limited number of members [9-16?] elected by the General Assembly. One could envisage that membership in the Board should, as a rule, not exceed three [?] years in order to ensure rotation. In order to get a rotation system up and running, 1/3 of the first Board could step down already after 2 years, another 1/3 after 3 years and the last 1/3 (if re-elected) after 4 years. The Board might elect from time to time a President, a Treasurer and Secretaries and any other officers it may think necessary. Such officers might also be elected from ELI Individual Members who are not members of the Board.

The Board would be the ELI's managing body. It would be responsible for all decisions to be taken between the General Assemblies. It would prepare together with a Secretariat, the General Assemblies and Annual Conferences. It would decide on the acceptance of new members and of ELI projects. As the Board might be seen as rather big and therefore possibly not very efficient for everyday business, one could consider a 3-level-structure, under which the Board delegates certain tasks to the President or to a smaller executive group of its members.

There would need to be a central Secretariat to run the network: for example, to maintain membership lists, to receive membership fees and keep accounts, to distribute information and research requests and to organise meetings. The Secretariat should also be able to provide advice and assistance in raising funds for research at the European level.

The cost of the Secretariat is estimated as at least one post for a senior researcher, one post for an assistant, one post for an office employee, adequate office space and equipment plus administrative overhead, i.e., depending on actual wage level, up to 200.000 € per year.

For the beginning, at least until the ELI itself has secured the funding which is needed to run the Secretariat, a two or three years rotation system would be established, with different Member Institutions who are willing to do so successively hosting the secretariat and providing the resources needed to fill the funding gap between the income from membership fees and other income (in the first few years it may be necessary to raise some funds elsewhere to supplement the fees) and the requirements of the Secretariat.

### *c) ELI research management*

The ELI itself would organise and carry out research projects. An important form of this could be work commissioned by, e.g., the European Commission, Parliament or Council, and Member States' authorities. There would also be independent "ELI projects", i.e. projects organised and carried out by the ELI, but not commissioned by a client. Research under this heading might concentrate on the creation of further restatements or draft European legislation, but it might also include at least the evaluation of legislative proposals, studies on the transposition of directives and studies on terminology. The work might be organised centrally but the information would be collected via the network members or researchers identified by them, in the different countries. The necessary funding to pay for the researchers' time or posts would have to be provided, either through the contract with the client, if it is commissioned work, or otherwise. It is anticipated that the funds received would be channelled to the Academic Member Institutions, in particular where teams participating in the project are located. Where a Member Institution's involvement is merely to provide research assistance, appropriate payments might be passed on to it or directly to the researcher involved, as appropriate.

Projects which aim at the production of approved ELI restatements or other major ELI publications would have to be organised according to specific rules which particularly secure quality, pluralism, broad coverage and independence of the work. Such rules would have to be developed and refined in the course of time. The rules might regulate that the group which drafts the restatement needs to be formally elected as a Restatement Committee by the General Assembly, that a Members Consultative Group must be formed and that any ELI restatement needs a positive vote by the General Assembly or of a Scientific Committee established for that purpose. Given the high degree of diversity of methodological approaches and political views to be found within the ELI, procedures would have to be established to ensure that no Member has to lend their name to a project they do not agree with.

The ELI could also be given the task to assist researchers and practitioners at its Member Institutions who want to carry out wide-ranging pan-European research projects. They would be entitled to apply to the ELI for assistance. In particular the Secretariat could provide advice on matters of funding and research administration and use its best efforts to identify researchers in the various countries who might participate or provide information. The Secretariat could run a web based platform where calls issued by ELI members can be accessed. In any case the research project would be expected to cover the costs, e.g. payment at standard rates to research assistants or graduate students in the Member Institutions.

ELI assistance would possibly be provided only if the project (which at this stage may be only provisional, e.g. only a draft application for funding) is accepted by the Board, which could require that certain qualifications are met. Most obviously, the project would have to fall within the field of European private and public law. Further criteria might include the following: (i) research projects must be pan-European in nature, or at least involve collecting information from a significant number of Member States; (ii) they might have to be open to receiving applications to join the project from any ELI member (though obviously there would have to be some selection process and participation is by no means restricted to ELI members); (iii) there would have to be some vetting of the aims and methods of the project to see that it was academically sound; and (iv) there would have to be adequate budgets to cover the costs of members or researchers providing the information required.

Researchers who wish to do so could also be offered to submit their work for endorsement by the ELI. In this case the General Assembly (or the Board) could establish a Scientific Committee to decide whether the work may be approved. If the research results are approved, adequate reference to ELI endorsement would have to be made in the final publication. In this case, much as with the ELI's own research, the names of ELI members who formed the Scientific Committee would have to be published.

Needless to say, even though ELI members would be encouraged to participate in ELI projects or ELI endorsed projects, the bulk of research conducted by academics or practitioners who are members of the ELI will continue to be independent research. Any ELI member who conducts independent

research may draw upon the membership list and other information provided on the ELI website, even without making any reference to the ELI in publications, but cannot expect to receive further support from the Secretariat, e.g. when it comes to applications for funding, unless they decide to work thorough the ELI in one of the ways suggested above.

It is proposed that the ELI also organise newsletters, conferences and workshops to discuss legislative proposals and the outcome of research undertaken by or through the network and general meetings, in particular the ELI Annual Conference. At this conference there would be reports on recent developments in European private and public law and on the progress of ELI projects.

# Creating a European Law Institute?

C. Timmermaans

## 1. Introduction

I understand that we are supposed to have a brainstorming on this question producing ideas and suggestions.

Let me start with a methodological remark. When reading the questionnaire, I remembered the approach of the *Spaak Report*, the report prepared by a committee of governmental representatives of the then six Member States under the chairmanship of the Belgian politician *Paul-Henri Spaak*, a report sketching the outline and principles for the Common Market which formed the basis for the negotiations finally resulting in the EEC Treaty of 1957. This report resisted the temptation to start with institutions and procedures. It deliberately addressed first the questions of substance (what do we need to achieve?). It was only after having established the substance that it dealt with the institutional aspects: what institutions, instruments and procedures do we need to achieve that substance?

I think such an approach makes sense and could also be followed on the question we have to address today. So, I shall first address the question of what a European Law Institute should achieve, what should be its objectives? Only after having answered that question, we should, I think, discuss how to organise the Institute, what form to choose for it, what instruments it should have at its disposal, how it should be financed, etc. So let us first start with the substance and only after that discuss the form. For that reason I would prefer to first tackle questions one and three of the questionnaire. I shall limit my remarks to these two questions, not having sufficient time to deal with the remaining ones.

## 2. A European Law Institute, to achieve what?

There exist already in Europe, and even outside Europe, quite a number of European Law Institutes. Most of them are organised on a purely national level, sometimes they are linked in co-operational networks with institutes in other countries. There exist also already, as we all know, a number of European Law Institutes, organised on a European or international level, but these are much less numerous. We have this *Institute in Florence*, the *Academy of European Law* in Trier, the *College of Europe* in Bruges, and moreover there exist various other international groups or networks of lawyers dealing also with comparative law projects, sometimes covering European law aspects. We have the three intergovernmental organisations, sometimes called the three sisters, *Uncitral*, *Unidroit* and the *Hague Conference for private international law*. We all know the various groups of academics functioning as comparative law laboratories developing principles of European private law. At one time I was myself a member of a European wide group of academics in the field of company law, animated by Professor Klaus Hopt of the *Max-Planck-Institute* in Hamburg, and Professor Eddy Weymeersch, from the University of Gent. Finally, I should not forget the Ius Commune series of case books, the initiative taken by Professor Walter van Gerven. So, there is already a lot!

I think it would in all events be useful, first to draw-up an "état de lieu" of the already existing international Institutes and networks in the field of European law in order to give a well informed answer to the question what could be the added value of a new European Law Institute.
Thinking aloud about the possible fields of activity, functions and purposes of such a new Institute (it should first of all be a really *European*, European Law Institute), there immediately come to mind three possible main fields of activity:

- purely academic research;
- centre of expertise for legal practice;
- formation and training.

Now let us have a closer look at each of these three possible fields of activity.

1. A European law Institute as a centre for building up and making available European law expertise for academic research. My impression is that this is what the existing European University Institute is already about. So, at first sight, there would not be much added value of a new institute in that regard. But I may be wrong on this.
2. A European Law Institute as a centre of expertise more particularly focussed on making that expertise available for legal practice, legal practice meant in the broadest sense. I may distinguish in that regard three possible centres of activity.

➢ a) first of all, one might think of a European Law Institute as a possible centre of expertise that could be called upon to engage in specific studies in the context of the preparation of important EU legislative projects, or possible legislative initiatives which are being considered by the European Commission (in preparing green papers or white papers), for instance, harmonization initiatives requiring a specific comparative law input. The traditional approach in preparing the European Commission's initiatives in the field of harmonization has perhaps been somewhat haphazard. The usual approach was to ask experts from various Member States to prepare comparative law studies and submit the results of such studies to discussions between Commission officials and officials of the Member States who are experts in the field. Nowadays the preparation of important legislative projects has changed in so far as it has become much more systematic. Elaborate consultation rounds are being organised giving all the stake holders the possibility to present opinions.

➢ One could think, more particularly in this regard, of the ambitious legislative programme announced by the *Stockholm Programme* in order to further complete and achieve the area of freedom, security and justice. A European Law Institute could play a role in the preparation of such initiatives more particularly by carrying out comparative law studies. Normally, such an Institute would not have sufficient in-house expertise for the specific projects but it could, for instance, to do the job, organise networks of academic experts. New legislation or a reform of existing legislation in the field of consumer protection, environmental protection, information technology, telecommunication law, labour law, energy law might also be obvious candidates.

➢ Such an institute could play a role not only in the preparatory stage of legislation, but also in cases where an evaluation of experiences with the application of existing EU legislation is required to see whether reform or even abrogation of that legislation is to be considered. More and more new EU legislation is explicitly requiring such evaluation after a first stage of application. In recent cases at the European Court of Justice I have come across examples for that, for instance the *Arcelor* Case,[14] regarding Directive 2003/87 (greenhouse gas emission allowance trading scheme) which as a first step covered only a limited number of industrial sectors, another example being Regulation n° 717/2007 on roaming services for mobile telephony imposing maximum prices on the level of wholesale services, but also for consumer prices.[15]

➢ There is another aspect of growing interest and importance concerning the preparation of new EU legislation where a European Law Institute could possibly play a role. I refer to the preparation of impact assessment statements nowadays drawn up under the responsibility of the European Commission for important legislative proposals. These impact statements have become important tools to control conformity of such a proposal with subsidiarity and proportionality. They contain detailed analyses supported sometimes by statistics and quantitative economic

14 Case C-127/07 [2008] ECR 9895.

15 Vodafone C-58/08, judgment of 8 june 2010, not yet published.

analyses as to the need for legislation, its necessary scope, intensity and instruments to be used. These impact statements illustrate that the Union Institutions, the Commission particularly, are taking subsidiarity seriously. I came across recently of two of such statements and found them quite informative and useful. The first one concerned the question whether the Commission should submit a proposal for a fourteenth company law Directive on the transfer of a company's seat from one Member State to another. That statement was the more interesting because it arrived at the conclusion that, at that stage, there was no need for such a proposal.[16] Another such statement I recently read concerned the proposal for a regulation on roaming services, a subject I already mentioned. The Court recently had to deal with a case on that regulation. It was interesting to see how extensively the parties in the case used the arguments put forward in the impact statement in their pleadings as to the legal base and the proportionality of the Regulation.[17]

- To conclude on this point: I think it would be worthwhile to consider whether a European Law Institute could play a role as a centre of expertise in the preparation of EU legislation and possibly also the evaluation of existing EU legislation.
- b) A second possible range of activities for a European Law Institute focussed on legal practice could be to deliver legal opinions, legal advice on questions of European law on request of EU Institutions, EU Agencies, national administrations and others. A couple of weeks ago I participated in a hearing organised by the Commission for constitutional affairs of the European Parliament on questions raised by the accession of the European Union to the European Convention of human rights. One of the questions, rather hotly debated during this hearing, was whether in a situation where a complaint is lodged at the *Strasbourg Court* against a national measure implementing European Union law, that complaint putting into question the compatibility of the Union law measure with the Convention, the application of the principle of exhaustion of local remedies should not require to set-up a special mechanism in order to enable the EU Court of Justice to address the issue before the Strasbourg Court decides. One could imagine that on such a question a legal opinion issued by such a European Law Institute could be useful.
- Moreover, the Institute, functioning as a service centre for legal advice, could also be available for the private sector, for private organisations and businesses. More generally one could take inspiration in this regard from the German *Max-Planck-Institute*.
- c) Another possibility for such an Institute could be to function as a supportive structure in order to facilitate activities of existing networks of academics or European wide organisations for legal professions in the EU including national courts, councils for the judiciary and the like. These organisations and networks like, for instance, the network of Presidents of national Supreme Courts and the Association of the Councils of State and Supreme administrative Courts of the EU organise regularly international conferences for their members, sometimes also accessible to outsiders, academics. Normally the organisation of these conferences rotates between the Member States, deliberately so in order to enable colleagues to visit the different Member States and to acquaint themselves with the host country including its judicial Institutions. But one could imagine that occasionally specialised conferences on subjects of a more academic nature requiring also comparative law analyses could benefit in their preparation from the expertise of a European Law Institute. To give an example, the Association of Councils of State will organise next June a conference in Luxembourg at our Court on the subject which instruments and methods are being practiced in the various Member States in order to make court proceedings more efficient and less time consuming.

These three possible fields of activity I just mentioned for a European Law Institute to function as a centre of expertise for legal practice (preparation of EU legislation, legal advice, supportive structure

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16 Commission Staff Working Document Impact Assessment on the Directive on the cross border transfer of registered office, SEC (2007) 1707.

17 Supra n. 2.

for activities of professional networks) might also have a spill-over effect for the academic activities of such an Institute or for the European University Institute itself. Obviously there could be a cross fertilisation effect.

3. A quite different possible activity of a European Law Institute could be formation and training in the field of European law. A training for judges, civil servants of national administrations, and the like. But of course, we have already a number of Institutes active in this regard: the *Academy of European Law* in Trier, and the *European Institute of Public Administration* in Maastricht. There exist the programmes organised by the European Commission for legal professionals in States which are candidates for accession to the European Union. Moreover, within Member States often courses on European Law are organised by the existing European Law Institutes or by the professional organisations like, for instance, Councils for the judiciary, or *Écoles de la Magistrature*. So, in this regard, I think it would be necessary first to look carefully into what already exists to see whether a European Law Institute could have any added value as far as professional training is concerned.

## 3. Conclusion

I may conclude these, I admit, rather impressionistic observations on what could be the possible functions of a new European Law Institute with one remark, or rather a caveat.

It seems obvious to me that for such a European Law Institute to have a real added value and be a viable exercise, it must organise in-house expertise. A starting point could be to build upon existing sectors of expertise in the European University Institute. It should also be carefully considered whether or not to engage under the umbrella of this Institute the main domains of the law: private and public law, including penal law and of course European Union law itself; or, to put it differently, the main fields of the law already now and in a foreseeable future to be covered by EU law.

What should be avoided and what such a new European Law Institute in my view should not become is merely to function as an organising or facilitating centre of activities carried out by outside experts or outsourced to other institutes or organisations.

A European Law Institute in Florence should certainly not become an academic travel agency only.

# A European Law Institute? – A perspective from The Hague

H. van Loon

This contribution will deal with some assumptions and possible orientations of the (envisaged) European Law Institute, in the light of the current global realities, rather than detailed questions concerning the organisation of the Institute. I would start by submitting to you four very straightforward theses:

1. The developing European legal order should not be seen in isolation, but is itself part of a developing global legal order. The challenges of construing a European legal order should not obscure Europe's mission to contribute to the emerging global order.
2. Globalisation has the effect of turning an increasing number of legal issues into global issues, which should preferably be solved at the global level.
3. The European legal integration process, while incorporating a large variety of legal systems, also risks cutting across valuable legal connections with third systems – this requires particular attention.
4. The legal diversity existing within the EU presents not only challenges to integration; but it is also a source of socio-cultural richness. Legal techniques aimed at establishing and improving horizontal cooperation among courts and administrations may assist in reconciling both. Such techniques, moreover, are probably easily extendable to third jurisdictions – which is important in the light of (1) – (3) above.

The common thread of these theses is informed by my experience with the Hague Conference on Private International Law and its work, often in cooperation with other organisations. The Hague Conference is an intergovernmental organisation consisting of almost 70 Members, including, since 2007, the European Union, which together represent a population of some 4.5 billion people. In addition, the Organisation is connected with another 70 States or so; these other States, without being Members of the organisation, have joined one or more Hague Conventions. To many of them the organisation also provides support and technical assistance. The growth of the organisation – really a growth from an essentially European organisation to a global one – has been quite remarkable over the last ten years. It has made the effects of globalisation highly visible, both in terms of participation by different legal systems and in terms of the global nature of the themes dealt with by the organisation – from the law applicable to indirectly held securities to the intercountry adoption of children.

Our sister organisations, UNIDROIT and UNCITRAL, have lived through a similar experience, with one important difference, *i.e.* that the EU as such is not, not yet, a Member of these organisations. Together, UNIDROIT, UNCITRAL and the Hague Conference have produced an impressive body of multilateral instruments on private law available to the international community. Many of these instruments are the fruit of cooperation also with other global, regional and other organisations.
This leads to my first point:

## 1. The developing European legal order

The developing European legal order should not be seen in isolation but is itself part of a developing global legal order. The challenges of construing a European legal order should not obscure Europe's mission to contribute to the emerging global order.

A European Law Institute ("ELI") that would see the European legal order as the *nec plus ultra* or indeed the *ultima ratio* would be a mistake. A European Law Institute, as an initiative of the 21st Century, will start from a completely different point than, *e.g.,* the American Law Institute, founded in 1923 to respond to the uncertainty and complexity of American Law. Improving the administration of justice within the US was certainly a more than ambitious enough aim for the founders of the ALI, and at that time the global interconnectedness of our societies, economies and cultures was infinitely less than it is today. Interestingly, the work of ALI has evolved to recognise the global dimension of its work as testified by the ALI/UNIDROIT Principles of Transnational Civil Procedure.

Similarly, if the ELI is to be truly forward looking, it necessarily has to think in terms of a three (or even four) level legal order: the national (and sub-national) legal orders of the Member States, the European legal order, and the emerging global legal order. Yes, as the Conference paper says, the ELI "*should be… thinking globally*". And yes, it "*should also engage in cooperative relationships with the rest of the world*." But this should be seen not as a remote lofty aim for when the essential "European work" has been done, but as a necessary part of starting the job and doing it well.

Ideally, in addition to its crucial role in respect of integration of European law, the ELI would be the European antenna of a "Global Law Institute." At the heart of the ELI would be a concern that many of the most vital issues in Europe transcend the borders of the Union, and require a solution, if not at the global level, then at least forged in such a manner that it will fit in the global legal order. It is premature – at the very least – to say, as the Conference paper does, that the ELI "*should promote the European legal model in other jurisdictions*". That may or may not be the case, depending on the nature and stage of development of the model, what aspect of that model and the needs and aspirations of the other jurisdictions. And in any event, would it not be wiser to *involve* these other jurisdictions in the construction of the model before starting promoting it to them?

## 2. Globalisation

Globalisation has the effect of turning an increasing number of legal issues into global issues, which should preferably be solved at the global level.

Globalisation (including its manifestations at the interregional level) is much more a process brought about by private initiative than steered by governments. It causes an increasing number of legal issues to become global issues, and indeed cross-border issues. They should, where possible, be solved at the global level, the EU acting with leadership in global negotiations.

In a paper written for the conference on The Making of European private law, held in Fiesole in April 2006, I gave the example of the cross-border holding and transfer of securities[18]. The transfer of shares and bonds and other securities nowadays is generally being performed, through electronic book entries, in split-seconds, twenty-four hours a day, across the planet, at a value for the OECD countries alone of 2 trillion US dollars per day. This is an example *par excellence* of a continuously expanding integrated global marketplace. The private law rules of this "game" should be designed, not at the national, nor at the regional, but at the global level. This is why it is essential that any future European legislation in this field should embrace the work of the Hague Conference and UNIDROIT, which have, in good consultation with each other, developed common global rules on the conflict of laws and on the substantive aspects of these transactions. The European Financial Collateral Directive, adopted in 2002, only partially addressed the legal issues at stake, and was anyway expressly intended as a regional *interim* solution pending completion of a more comprehensive global regime. This Directive is now up for reform, and the Commission initially supported the signing of the Hague Convention. However, under the pressure of some EU-Member States, the Commission has now

[18] "Remarks on the needs and methods for governance in the field of private international law – at the global and regional levels", in: Fabrizio Cafaggi and Horatia Muir-Watt, Making European Private Law, Edwar Elgar, Cheltenham/Northampton, 2008, pp. 197-208.

dropped the idea and is searching for a regional solution – which, as the European Central Bank has pointed out, will fall short of its objectives if it does not, somehow, establish interconnectivity with the global regime. This is an example of where an ELI could bring objective analysis and support the European Commission in the global view that it initially adopted.

Moving away from the financial world, the mobility of capital, to the mobility of people, it is again important to see matters in a global perspective. In many developed countries the population has started both aging and declining. It is expected, e.g., that within the next fifty years, the population of Germany will decline by 12-17 million people, which is already raising fears about Germany's competitiveness in the future. In contrast, in the developing countries the population will grow by as much as 2.3 billion people in the next forty years – not much below the total number of people that lived on the planet in 1950 (2.5 billion). That is the future, but the future is *now* for many countries in Europe already, often without realizing it. The International Organisation for Migration estimates, e.g., that in Italy foreign workers – well over 7 % of its residents, not counting well over half a million illegal foreigners – already account for 9% of Italy's GNP. Spain, and Greece, among others follow closely. Labour migration is an issue urgently in need of governance through cooperation between countries of destination and countries of origin. The European Commission has developed some valuable initiatives in this respect, but Member States, in part for electoral reasons, tend to show less leadership. The ELI could be a valuable support to these initiatives – which have both private and public law aspects – by analysing the current European legislation and practices in the light of future realities and needs. The Hague Conference has developed some ideas which might assist in this work[19].

There is another aspect to mobility and private law. The ECJ in a series of bold judgments has ruled that traditional private international law rules for names (*Garcia Avello, Grunkin-Paul*[20]) and for the recognition of companies (*Centros, Ueberseering, Inspire Art Ltd*[21]) may stand in the way of the free exercise of the freedom of movement within the European Union. It is tempting to draw far-reaching conclusions from this jurisprudence, with the argument that freedom of movement should be the cornerstone of a new European system of private international law. But freedom of movement within the European Union extends to the citizens of the EU, not to non-citizens, an increasing number of whom are residents of the EU. Rules of private international law essentially founded on the freedom of movement principle, would not necessarily be adequate for them. Here again, the ELI could assist, by holding, and reminding of, the larger picture, which includes both EU citizens and non-EU citizens, within and outside of the EU.

One area of particular importance is the relations with Europe's neighbours and partners. It is of vital importance that Europe maintains close cooperation with its neighbours North, East and South of the Mediterranean, and beyond. Cooperation with initiatives *e.g.,* of Euromed and the Hague Conference's Malta process on cross-border family issues – which also includes countries like Qatar, India, Pakistan and Indonesia – should be high on the ELI's agenda.

## 3. The European legal integration process

The European legal integration process, while incorporating a large variety of legal systems, also risks cutting across valuable legal connections with third systems. This requires particular attention.

The historical-political perspective of the European legal integration process is quite different for different Member jurisdictions. For many jurisdictions in Central and Eastern Europe, European legal

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19 See Some Reflections on the Utility of applying certain techniques for international cooperation developed by the Hague Conference on Private International Law to certain issues of migration, last update accessible at http://www.hcch.net/upload/wop/genaff2010pd07e.pdf

20 ECJ 2 October 2003, C-148/02, and 14 October 2008, C-353/06, respectively.

21 ECJ 9 March 1999, C-212/79; 5 November 2002, C-208/00; 30 September 2003, C-167/01, respectively.

integration will mean a confirmation of their belonging to Europe, leaving the cold war divisions behind them. Other European jurisdictions, in contrast, have long time historical and cultural bonds with jurisdictions overseas. This applies *e.g.,* to Spain, with its bonds with Latin-America, to Portugal with its connections to Brazil, parts of Africa, Timor Leste, France with countries united in the *Organisation de la Francophonie* and the United Kingdom with the Commonwealth. In many cases, under the influence of globalisation, these bonds are being strengthened, not weakened. It is important for legal integration in Europe to take place with awareness of these traditional and in certain cases (due to recent international migration movements) relative new bonds, including legal bonds, because there is a risk that in its enthusiasm it may cut across valuable links.

In this regard, the position of the common law within the EU needs perhaps particular attention. Legal integration in Europe in the private law field is dominated by civil law systems. And as the EU will extend further to the East and the South of Europe, this will only increase, reinforcing the minority position of the common law. The global reality is different: the common law is widespread including in countries such as New Zealand, Australia and Canada, whose societies and cultures are also very much comparable with Europe.

If one looks at global legal reform, *e.g.,* within UNIDROIT, UNCITRAL and the Hague Conference, or in an academic body like the International Law Association, one sees that civil and common law systems can work together. This cooperation often produces interesting innovative solutions *transcending* the divide between these systems, solutions which can then find their way into many jurisdictions around the globe. I will mention just one example from the important field of international litigation, that of avoiding conflicting judgments[22].

The traditional civil law approach to this is that the court first seized by one of the parties *must* deal with the case, and the court seized secondly *must* cede jurisdiction to the court first seized. This is a sensible rule *within* a jurisdiction, but becomes more problematic at the international level, because it may then lead to a race to the court, e.g. in a country where the courts are notoriously slow, which may come close to *abus de droit*. The common law device of judicial discretion – *forum non conveniens* – which leaves the court with wide discretion to decline its jurisdiction is also problematic, in particular when coupled with the device of anti-suit injunctions.

The problem becomes particularly acute in cases where the parties have designated a court to deal with their disputes. In its *Gasser*[23] Judgment the ECJ confirmed the traditional civil law solution, according to which the court first seized *must* deal with the case, and the court seized secondly, even if it is the court chosen by the parties, must give way to the first court. This is not satisfactory, but neither is the common law solution that allows the chosen court – whether first or second seized – to decline jurisdiction despite the parties'choice, and to declare it self *forum non conveniens*. The obvious solution, as agreed in the 2005 Hague Choice of Forum Convention[24], is to establish as a firm principle that it is the chosen court that, except in defined limited circumstances, should have exclusive adjudicatory authority. And, in cases where no choice of court agreement has been made, a combination of the two approaches, as proposed by the ILA[25], is highly desirable from a global perspective (and would recommend itself in the context of a revision of the Brussels I Regulation on Jurisdiction and Enforcement of Judgments).

There are indications that awareness of the traditional or more recent enduring links (think of migration!) with third jurisdictions is increasing. Two recent EU Council regulations establish procedures allowing Member States to negotiate and conclude agreements with third countries in the areas of jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters,

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22 For an extensive discussion, see C. McLachlan, "Lis Pendens in International Litigation", in *RCADH, Vol. 336* (2008).

23 ECJ 9 December 2003, C-116/02.

24 See http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

25 Res.1/2000, (2000) 69 *ILA Rep. Conf.*13.

parental responsibility and maintenance obligations and in the area of applicable law in contractual and non-contractual obligations.

So, the historical and recent legal connections with relevant non-EU jurisdictions are important and will become even more important, and an ELI could play a valuable role as an observatory of these connections.

## 4. The legal diversity

The legal diversity existing within the EU presents not only challenges to integration; but it is a source of socio-cultural richness. Legal techniques aimed at establishing and improving horizontal cooperation among courts and administrations may assist in reconciling both. Such techniques, moreover, are probably easily extendable to third jurisdictions – which is important in the light of (1) – (3) above.

Legal diversity is not just an obstacle to European integration; it is also one of its assets, provided that coordination of, and communication and cooperation between, legal systems are ensured. One of the reasons why private international law in the European Union is expanding is that it is in harmony with a coordinated decentralised model (to borrow from the Conference paper), allowing for continuing diversity at the level of *substantive* law. In a decentralised constitutional architecture of Europe, private international law fits perfectly well. And there is all the more reason, then, not to develop this private international law in splendid European isolation, but to take the wider global context on board. Modern private international law instruments do not just deal with the traditional main issues (jurisdiction, applicable law, enforcement of judgments), but increasingly provide frameworks for direct cooperation across borders between administrations and courts. And such cooperation often extends beyond the European borders: this is the case for the Hague legal cooperation Conventions and the Child Abduction and Adoption Conventions.

Judicial cross-border cooperation may even occur without a treaty or other legislative basis. One example is insolvency where, following the collapse of the Maxwell publishing empire in 1991, the courts of the US and the UK worked together to avoid conflicting procedures. This and other initiatives led to the UNCITRAL Model Law on Cross-Border Insolvency – which has been implemented in four EU countries. Another example is given by the cross border protection of children. A worldwide network of judges has been established specialised in family matters. This network includes judges from twelve EU States, and from some 20 other States. A few of these States are not even bound by any of the international instruments in force that support judicial cooperation across borders. There is also an EU network of judges and a Latin-American network. Clearly, the aim should be, and is, to integrate these networks. A major step in that direction was made early 2009, when the European Commission and the Hague Conference organised a joint conference on judicial communications on family matters and the development of judicial networks. The ELI might play a significant role in researching and supporting such initiatives.

It follows from the preceding remarks that it would be very important in my view for the ELI to work in an interdisciplinary manner. The law is important, but its context – and in particular the mobility of people, goods, services and capital within and across European borders – must be continuously borne in mind. That requires cooperation with specialists, both academic and professionals in these areas, and I would recommend that this aspect be given particularly attention already in the early stages of the creation of the ELI.

# OVERVIEW OF CONVENTIONS AND OTHER INSTRUMENTS DRAWN UP UNDER THE AUSPICES OF UNCITRAL, UNIDROIT AND THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW[26]

## I. COMMERCIAL LAW AND FINANCE LAW

### A. Banking – Credit – Finance – Insolvency

*Conventions*

1. United Nations Convention on International Bills of Exchange and International Promissory Notes, adopted on 9 December 1988.[27]
2. United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, adopted on 11 December 1995.
3. United Nations Convention on the Assignment of Receivables in International Trade, adopted on 12 December 2001.
4. UNIDROIT Convention on International Factoring, Ottawa, 28 May 1988.
5. UNIDROIT Convention on International Financial Leasing, Ottawa, 28 May 1988.
6. UNIDROIT Convention on International Interests in Mobile Equipment and Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Cape Town, 16 November 2001; Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, Luxembourg, 23 February 2007; ongoing preparatory work on Protocol on Space Assets and possibly on other matters.

*Other*

1. UNIDROIT Model Law on Leasing, adopted on 13 November 2008.
2. UNCITRAL Legal Guide on Electronic Funds Transfers, adopted in 1987.
3. UNCITRAL Model Law on International Credit Transfers, adopted on 15 May 1992.
4. UNCITRAL Model Law on Cross-Border Insolvency, adopted on 30 May 1997.
5. UNCITRAL Legislative Guide on Insolvency Law, adopted on 25 June 2004.
6. UNCITRAL Legislative Guide on Secured Transactions, adopted on 14 December 2007.
7. [Draft] Supplement to the UNCITRAL Legislative Guide on Secured Transactions dealing with security rights in intellectual property.
8. UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, adopted on 1 July 2009
9. UNCITRAL Legislative Guide on Insolvency Law, [Draft] Part three: Treatment of enterprise groups in insolvency.

### B. Capital markets and securities

*Conventions*

1. Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary.
2. UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva Securities Convention), Geneva, 9 October 2009.

*Other*

3. UNIDROIT work on Securities and Capital Markets concerning: Enhancing trading on emerging capital markets; Netting; Standardised "global shares"; Legal framework regarding "delocalised" transactions; Worldwide take-over bids.

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[26] Overview prepared by the Permanent Bureau of the Hague Conference on Private International Law in consultation with the secretariats of UNCITRAL and UNIDROIT, as an update of Work. Doc. No 3 distributed during the Council of April 2007 on General Affairs and Policy of the Conference. Any errors or omissions should be attributed to the Permanent Bureau.

[27] Conventions are adopted by the General Assembly (with the exception of the CISG and the Hamburg Rules that were adopted by a diplomatic conference) and model laws, guides or other texts are adopted by the Commission (with the exception of the UNCITRAL Legal Guide on Electronic Funds Transfers, which was prepared by the Secretariat).

**C. Procurement**

1. UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, adopted on 14 August 1987.
2. UNCITRAL Model Law on Procurement of Goods and Construction with Guide to Enactment, adopted on 16 July 1993.
3. UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment, adopted on 15 June 1994.
4. UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, adopted on 29 June 2000.
5. UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, adopted on 7 July 2003.
6. [Draft] Revision of UNCITRAL Model Law on Procurement of Goods, Construction and Services.

**D. Law of contracts**

## *General law of contracts*

### *Conventions*

1. United Nations Convention on the Use of Electronic Communications in International Contracts, adopted on 23 November 2005.

### *Other*

1. Hague Conference Project on choice of law in international contracts.
2. UNIDROIT Principles of International Commercial Contracts (2nd ed., 2004); basis for the draft OHADA Uniform Act on Contract Law; work in progress at UNIDROIT on preparation of a 3rd edition of the UNIDROIT Principles.
3. UNCITRAL Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance, adopted in 1983.
4. UNCITRAL Recommendation on the Legal Value of Computer Records, adopted in 1985.
5. UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996, with additional Article 5 bis as adopted in 1998.
6. UNCITRAL Model Law on Electronic Signatures with Guide to Enactment, adopted on 5 July 2001.
7. UNCITRAL promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods, completed in 2007.

**E. Specific contracts**

## a. Sales and countertrade transactions

### *Conventions*

1. Hague Convention of 15 June 1955 on the law applicable to international sales of goods.
2. Hague Articles of 25 October 1980 on the Law Applicable to Certain Consumer Sales.
3. Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods.
4. United Nations Convention on Contracts for the International Sale of Goods, adopted on 11 April 1980.
5. Convention on the Limitation Period in the International Sale of Goods (as amended by 1980 Protocol), adopted on 12 June 1974.

### *Other*

1. Declaration relating to the scope of the Hague Convention of 15 June 1955 on the law applicable to international sales of goods whereby the Convention "does not prevent States Parties from applying special rules on the law applicable to consumer sales", adopted on 25 October 1980.
2. UNCITRAL Uniform Rules on contract clauses for an agreed sum due to failure upon performance, adopted in 1983.
3. UNCITRAL Legal Guide on International Countertrade Transactions, adopted on 12 May 1992.

## b. Agency

1. Hague Convention of 14 March 1978 on the Law Applicable to Agency.
2. UNIDROIT International Convention on Travel Contracts (CCV), Brussels, 23 April 1970.
3. UNIDROIT Convention on Agency in the International Sale of Goods, Geneva, 17 February 1983.

c. Franchising

***1. UNIDROIT Guide on International Master Franchise Agreements of 1998 (2nd ed., 2007).***

***2. UNIDROIT Model Franchise Disclosure Law, adopted on 25 September 2002.***

d. Carriage of goods

*Conventions*

1. UN / ECE Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR), as amended by the 1978 and 2008 Protocols, prepared by UNIDROIT.
2. United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules), adopted on 31 March 1978.
3. United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, adopted on 19 April 1991.
4. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"), adopted on 11 December 2008.

*Other*

1. UNCITRAL Unit of Account Provision and Provisions for the Adjustment of the Limit of Liability in International Transport and Liability Conventions, adopted on 28 July 1982.

**F. Law of torts**

*Conventions*

1. Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.
2. Hague Convention of 2 October 1973 on the Law Applicable to Products Liability.
3. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995.

*Other*

1. Ongoing Hague Conference work on the conflict of jurisdictions, applicable law, and international judicial and administrative co-operation in respect of civil liability for environmental damage.

**G. Law of trusts**

Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.

**II. ADMINISTRATIVE AND JUDICIAL CO-OPERATION, ACCESS TO JUSTICE, AND DISPUTE RESOLUTION IN CIVIL AND COMMERCIAL MATTERS**

**A. Administrative and judicial co-operation and access to justice**

*Conventions*

1. Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, including ongoing work on electronic Apostilles (in particular e-APP, the electronic Apostille Pilot Program).
2. Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
3. Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.
4. Hague Convention of 25 October 1980 on International Access to Justice.

*Other*

1. Practical Handbook on the Operation of the 1965 Hague Service Convention (3rd ed., 2006).
2. Hague Conference Project on accessing the content of foreign law.

### B. International Litigation

*Conventions*

1. Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, including the Additional Protocol.
2. Hague Convention of 30 June 2005 on Choice of Court Agreements.

*Other*

1. ALI / UNIDROIT Principles of Transnational Civil Procedure, adopted in 2004.

### C. Arbitration

*Conventions*

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), adopted on 10 June 1958.

*Other*

1. UNCITRAL Arbitration Rules, adopted on 28 April 1976.
2. UNCITRAL Conciliation Rules, adopted on 23 July 1980.
3. UNCITRAL Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under UNCITRAL Arbitration Rules, adopted in 1982.
4. UNCITRAL Notes on Organizing Arbitral Proceedings, finalised in 1996.
5. UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use, adopted on 24 June 2002.
6. UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted on 7 July 2006.
7. UNCITRAL Recommendation regarding the interpretation of article II (2) and article VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), adopted on 7 July 2006.
8. [Draft] Revision of the UNCITRAL Arbitration Rules.

## III. INTERNATIONAL PROTECTION OF CHILDREN AND OF VULNERABLE ADULTS, AND FAMILY MAINTENANCE

### A. International protection of children

*Conventions*

1. *Hague Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations.*
2. Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations.
3. Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.
4. Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.
5. Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.
6. Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.
7. Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

*Other*

1. Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Parts I-III, published in 2003 and 2005, and a range of other practical materials.
2. *Transfrontier Contact Concerning Children, General Principles and Guide to Good Practice under the Hague 1980 Child Abduction and 1996 Protection of Children Conventions, published in 2008.*
3. The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention, Guide to Good Practice, Guide No 1, published in 2008.
4. [Draft] Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement.
5. [Draft] Guide to Good Practice on Mediation in the context of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

6. [Draft] Guide to Good Practice on Accreditation under the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.
7. [Draft] Practical Handbook on the operation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.
8. [Draft] General Principles on Direct Judicial Communication in Family Law Matters.
9. [Draft] Practical Handbook for Caseworkers under the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

### B. International protection of vulnerable adults

1. Hague Convention of 13 January 2000 on the International Protection of Adults.

### C. International family and family property relations

*Conventions*

1. Hague Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations.
2. *Hague Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages.*
3. Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes.

See also *supra* J.

*Other*

1. Ongoing Hague Conference work on jurisdiction, applicable law, and recognition and enforcement of judgments in respect of unmarried couples (Report published in March 2008).
2. Hague Conference feasibility study on cross-border mediation in family matters.

### D. International inheritance

*Conventions*

1. *Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.*
2. Hague Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons.
3. Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition (see *supra* F).
4. Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons.
5. UNIDROIT Convention providing a Uniform Law on the Form of an International Will, Washington, DC, 26 October 1973.

*Other*

1. Ongoing Hague Conference work on jurisdiction and recognition and enforcement of decisions in matters of succession upon death.

## European Law Institute

Friedrich Graf von Westphalen

I have been instructed by the Presidency of the CCBE to underline that the CCBE is in full support of the initiative to establish a European Law Institute. The CCBE believes that such initiative will be extremely fulfil in order to improve the coherence of European Law in the future and thus will enable the lawyers to give adequate legal advice on any matters being connected with a large number of Directives, designed to improve the consumer protection within the European Union. But, of course, the activities of an European Law Institute will not be restricted to such contractual matters only, but will cover the large variety of European Law being or becoming part of the national law regime.

It is, however, open to doubt whether the legal profession at large will pro-actively support the initiative for an European Law Institute. The main reasons are the following.

The impression prevails that the large law firms, having branches in many European countries, will not be forced to support this initiative, as these law firms are in the position to get legal advice in almost all matters by simply asking the respective national branch to answer any given question. Of course, this answer will not serve any academic needs. But, from a practical view point any answer given by a competent lawyer will cover any problems that might arise from the interrelation of European law and the respective national law.

This writer also doubts whether the large law firms being established in Germany will support the initiative to establish a European Law Institute by way of sponsoring its activities. The impression prevails that pro-bono-activities of the large German law firms are rather restrictive. By not means these activities achieve the same level as is accepted by British or American law firms. Whether this attitude will change in the future, remains to be seen, but this writer is not over-optimistic in this respect.

With regard to the large and medium-size law firms, being located in Germany it must be stressed that almost all of them have international networks and are well interconnected. Consequently, almost the same argument applies to these law firms with regard to any practical need for an European Law Institute. Therefore, this writer is afraid that also the same observation is true with regard to the lack of sponsoring activities. Most of this law firms are inclined to only sponsor such activities that are directly related to their own business and, moreover, are part of a short-term thinking, being profit-oriented.

In considering the smaller law firms and the sole practitioner this writer believes that their interest in any legal questions being European oriented is rather limited and might be sufficiently answered by the instruments provided by the e-justice project of the EU, as this project provides adequate answers to the day-to-day-questions.

This writer – speaking on his own behalf – believes that an European Law Institute should be partly sponsored by the Government and partly by private sponsors. Such combination will serve two aims: The support of a government, be it a national government or the EU, will secure long-term financing, whilst any private sponsoring will guarantee that the Institute will be and remain independent from any financing sources with regard to the academic perspective of its work.

The work of the American Law Institute should and could serve as a prominent example how best to shape the scope of the work to be dealt with in a European Law Institute. However, its scope should mainly be designed to promote the integration of Europe. Needless to say, that academics, judges and lawyers should work together and cooperate in such an Institute. The work of such Institute shall be such that it should coordinate the existing and any future activities within the realm of judicial and

professional cooperation. Therefore, it is desirable that such Institute will not restrict its work to "Principles" but rather to publish "Restatements" in order to obtain the maximum degree of integration of the different legal system within the EU.

The European Law Institute should be a non-profit-organization, as such an organization is best designed to preserve independence.

# Reflections on a European Law Institute – based on the proceedings of the Florence conference

R. Zimmermann

When one is the 25th speaker in a conference one has to remind oneself that, while everything has to be said, not everything has to be said by everybody. I do not, therefore, want to cover the entire ground of our conference, and the questions that were put to us by its organisers, but merely want to highlight a few crucial issues in order to put my own gloss on them and to introduce the final round of discussion. I have been specifically asked to speak from the point of view of an academic; and I will only touch upon the core areas of private law. Diana Wallis said that Europe always presents the picture of unity and difference. In our case, the unity relates to the general goal. There is very widespread agreement that a European Law Institute is desirable. Giuseppe Tesauro has prefaced his remarks about the desirability of a European Law Institute with the remark: Why not? I suppose the question should rather be: Why? What would be the *raison d'être* of a European Law Institute? And what might be its tasks? A variety of answers have been given in the course of yesterday and today.

(i) *Research*. I would say that we do not need a European Law Institute to carry out or coordinate basic research. Research thrives on a difference of approaches, methods, goals of inquiry, and perspectives. It has to be evaluated by the quality of its end-product, i.e. the book or essay that is ultimately written. And it thrives on freedom. I would personally find it slightly offensive if research on European private law were to be "coordinated". (Of course, once a European Law Institute is established, it would be free to carry out research of its own; but we do not need it for that purpose; nor do we need it for the purpose of sparking off research in European private law in view of all of the activities that are going on already – some of them have been mentioned. It would be quite sufficient, for the time being, if what is produced would in fact be read.)

(ii) *Teaching/education*. Again, I would say that we do not need a European Law Institute for that purpose. We have been told this morning about what is going on in the field of judges' education. Let me, therefore, just concentrate on the education of academics. Going by the Dutch and German experience I would say that most of those who become professors today have an intellectual horizon covering European private law. They have been taught by Sjef van Erp and Jürgen Basedow, by Hans-Werner Micklitz, Reiner Schulze and many others. They know that the Dutch, French and German legal systems do not exist in isolation. And they know that they have to look at their own legal system under European auspices. Of course, there are limits, as far as the Europeanization of legal training is concerned. In Germany, for example, these are fixed by the state examination system. But a European Law Institute will not be able to do anything about that. The conviction that legal academics must no longer merely be national legal academics has to grow up and be fostered within the legal communities of the member states themselves. That is why initiatives such as those we were told about in France are very much to be welcomed; and we, as lawyers from other member states, should render our assistance on that level rather than by creating a European Law Institute as a teaching institution.

(iii) *Legislation*. Here I would say that a European Law Institute is probably desirable. As academic lawyers we should have an interest in our input being taken into account. Even at present, of course, there is some such input but in a haphazard and arbitrary way. A European Law Institute could help to make things more transparent and provide the process with some legitimacy. And it could constitute a partner for the European Commission (or the European Parliament) to which such institutions could turn for advice. It will be clear from what I say that I agree with much of what Christian Timmermans

and Stefan Grundmann said yesterday; and I will, therefore, not repeat but merely re-emphazise what they said. Like them, I am thinking here not only of the legislative process in the narrow sense, i.e. the input into the process of drafting new legislation but also, for instance, of tasks such as evaluation of existing EC legislation, comparative implementation studies, or impact assessments. It might eventually become standard practice that when acts of community legislation are prepared, the views of the academic community have to be canvassed through the European Law Institute. The new Consumer Rights Directive could be a good example.

(iv) Over the last two days, reference has often been made to a European Law Institute constituting a "network of networks". I do not really like this notion. A European Law Institute should not itself constitute a "network". I would rather envisage it as a facilitator, perhaps as little more than an address. That in itself would be very useful, for the picture of the existing networks in the field of European law is very complex. If the European Commission, or the Network of Supreme Court Presidents, or anyone else, wants some information to be gathered, some research to be done, some expertise to be made available, or a questionnaire to be drawn up or distributed, the European Law Institute could be approached, and it would refer those that approach it to the relevant network, or study group, or team of experts; or, if no such network, study group, or team of experts exists, it might decide to take the matter on as its own project and thus embark on the task of building up its own group from among its members. (What I have said here about legislation may, of course, be applied *mutatis mutandis* to the possible benefit of a European Law Institute for the judiciary. But because Sabino Cassese has just spoken about that I do not need do repeat it.)

One thing, I think, is of paramount importance. Whatever role one envisages for a European Law Institute, it must not replace existing groups, or networks. It must not be a kind of master-network in the shadow of which all the others will whither away.

A few words on the question of "restatements" are perhaps in order because the drawing up of "restatements" has often been mentioned as a key task for a European Law Institute. Diana Wallis said yesterday that there is a political impasse at the moment. I might add: There is also an impasse in matters of European private law. The reason for this is overambitiousness in the past few years. The Commission has been overambitious in having changed gear and having pursued a strategy of maximum harmonization. There has been a lot of criticism and so, I gather, one is now back at the drawing board and attempts to develop a strategy of "targeted" harmonization. Here, a European Law Institute might have a beneficial role to play. For it might establish a working group suggesting a revision of the consumer acquis – a task that has often been talked about but never really been undertaken. That working group, to take just one example, would not accept the rights of withdrawal from a consumer contract existing in EC legislation at present, and merely bring them into a better order, or generalize them. It would ask more fundamental questions such as: What is the rationale of the various rights of withdrawal? And how far does this rationale carry?

The Draft Common Frame of Reference is another document that has often been mentioned yesterday and today. It is overambitious in having pushed the idea of a restatement much too far, i.e. into the area beyond general contract law and the law of sale; and it may thus have had the effect of jeopardizing what has been achieved so far. What we need at the moment, and Commissioner Reding has confirmed this, is a document on European contract law. Here we can, with some plausibility, apply the idea of a "restatement", for there is a very considerable common core (based on a common tradition as well as on decades of research, starting with Ernst Rabel). If the Commission, or the European Parliament, wants to endorse a contract law document (be it as a toolbox, or as an optional code), a European Law Institute might have an important role to play. For it could fashion, on the basis of the many already existing restatements (including Books II and III of the Draft Common Frame of Reference and the UNIDROIT Principles [which, of course, aim at global harmonization]) a "restatement of restatements" for the European Community. That is a task that is presently undertaken by a remodelled "Lando-Commission"; but that task might have been carried out under the umbrella of a European Law Institute, had it already existed. On the other hand, however, I would suggest that a

European Law Institute should leave its fingers from other areas such as tort/delict, unjustified enrichment/restitution, "benevolent intervention in another's affairs", or movable property. Here a "restatement" does not make sense in view of the fact that there is nothing to "restate". There is no common terminology, there are no common structures, and there is sometimes not even a common value basis. If a European Law Institute were to issue sets of principles in these fields, it would overstretch its authority. For it would essentially try to promote the concepts and structures of one of the existing national legal systems, or it would promote newly designed concepts and structures which cannot be regarded as expressions of an existing European legal culture. "European Law Institute" should not become a trade mark for acquiring the definitional sovereignty over large areas of private law.

I still wanted to say something about the authority of legal texts, but will now confine myself to just one point. "Soft law" instruments such as the Principles of European Contract Law, or as the UNIDROIT Principles of International Commercial Contracts, do not acquire their authority *ratione imperii*. If they have some impact (and both of them have had, and continue to have, some impact), they do so *imperio rationis* (though even for Roman law this was only true in a manner of speaking, for Roman law was not only applied because it was so rational but also because it was Roman law). Key factors for the authority and the success of the UNIDROIT Principles are (i) the authority and diversity of origins and backgrounds of the members of the relevant working group, (ii) the quality of its product, as well as the fact that it is based on a long and distinguished line of comparative research, reflecting a considerable degree of consensus (the "restatement" aspect of the document), (iii) that they have been published in English, (iv) that they are backed by a well-established and generally recognized institution; possibly also (v) that they have benefited from the input of interested groups and (vi) the transparency of the proceedings (the working papers and discussions are published in the internet). The success of the Principles of European Contract Law demonstrates that factors (v) and (vi) are dispensable and that even (iv) is not indispensable.

This brings me back to the question, often raised yesterday and today, whether, or in which respects, the American Law Institute with its Restatement project can serve as a model for a European Law Institute. I think that one will have to be very careful here. It has already been pointed out that the situation in Europe is different in a number of respects. One point, however, has not yet been mentioned. The American Law Institute traditionally appointed one person as reporter to draft a restatement. We were told that it is essential to acquire the services of the best expert in the field for the job. That can certainly not be a model for Europe. For while it may not matter whether the reporter comes from Nebraska or Oklahoma, it does matter whether he or she is an English, Dutch, or Spanish lawyer. Apart from that, the Restatement reporters traditionally had to deal with what Geoffrey Hazard has called "lawyer's law". The success of their work used to depend not so much on fundamental value choices than on technical expertise. With at least some of the issues on the agenda of a European Law Institute matters would be different. Consumer contract law provides an example. Here I can imagine a number of excellent lawyers drawing up excellent texts which will, however, look entirely different from each other. The crucial test of fire that a "European" text has to go through is whether a group in which different viewpoints and different nationalities are represented can produce a document that provides acceptable yet workable solutions.

Winston Churchill once said "that a camel is a horse designed by a committee". If the decision is taken to create a European Law Institute (and that appears to be the overwhelming wish of those assembled here in Florence) it should not follow any grand design that may be desirable in theory. One should resist the temptation to bring home under its umbrella too many tasks – tasks for which there are already a number of other networks and institutions. The European Law Institute will only have a chance of success if it starts unambitiously, largely in the role of intermediary and facilitator, and perhaps with two or three projects of its own. It should, of course, be completely independent, particularly from the "political" Europe. It may then gradually and organically develop and, in the process, acquire the kind of reputation and legitimacy that it requires for more ambitious tasks.

## A European Law Institute: what for?

Sabino Cassese

If we consider the extent to which the volume of European legislation has expanded in the preceding decades, and the very high degree of complexity that it has reached, then a European Law Institute would appear to be a desirable institution. However, presuming that the EU might indeed require such an Institute, one must inquire into what its function should be and the tasks it should take upon itself.

To explain what could be, in my view, the purpose of a European Law Institute, I shall consider two examples.

The first example stems from a project realised some years ago by the Council of Europe. At the end of the 1990s, the Council promoted research and subsequently published a book entitled "The Administration and You". This book concerned administrative procedure regulation and its principles, such as transparency, right to a hearing, duty to give reasons, etc. The book collected national statutes on administrative procedures, national case law, European Court of Human Rights decisions and common core principles.

This book, published in two editions, one in French and the other in English, spread the knowledge of principles of good administration and contributed to the development of these principles. It was persuasive, not binding, and can be considered the first step for the establishment of principles of good administration in the European Charter of Fundamental Rights. It was also important for other reasons: it assisted in the preparation of supranational legislation, in adjusting national legislation bringing it into line with supranational law, and it channeled the process of the self harmonisation of national legislation through imitation and transplants.

This effort made by the Council of Europe can be highlighted here to exemplify that European law can grow not only through restatements and codification, which are often perceived as centralization attempts, but also by way of the dissemination of certain basic principles. A European Law Institute, if it were to be created, could undertake the same work, on a subject by subject basis, starting from the most critical one: it could focus on the vertical dimension of European law taking into account the combination of national and Community law which represents the peculiarity of the European legal system. If this were to occur, then subsequently, perhaps even within in few years, there would be a "rapprochement" of national legal systems by way of persuasion and imitation.

The second example emanates from the meetings periodically organised by members of the Constitutional Courts of several European countries. In this way, judges often meet each other, at an average of 15 times a year, on a bilateral or on a trilateral basis. These meetings are prepared by prior agreement whereby participants select the topic to be discussed, the rapporteurs and the materials to be distributed. Discussions are not open to the public, and they are instrumental for an exchange of experiences, comparison and informal coordination. In other terms, formal meetings are accompanied by informal exchanges.

Important topics are discussed at these meetings, for example, how to resolve a case that poses both a question of constitutionality and a question of conformity with European law? Which one comes first? How to interpret the Lisbon Treaty? How to balance fundamental rights with other rights that are granted by Constitutions? What is the relationship between the EU Treaty and the European Convention on Human Rights? During these discussions, new courts have the opportunity to learn from the old courts, thereby strengthening common principles.

This work produces important results that remain unknown to those outside the sphere of participants and partners since there is no common secretariat preparing the meetings, keeping a record or channeling documents.

These two examples suggest the kind of tasks that could be accomplished by a European Law Institute.

Firstly, it should study international, supranational and national legislation, placing domestic and European regulation alongside each other, comparing them, and developing common core principles on some strategically selected topics. The Institute, therefore, should establish connections with the most prominent academic centers and institutions in Europe, in order to promote the creation of an EU Law network capable of leading research in this field. Moreover, the Institute should take into account the policies regulated by European Law so that it could carry out research on their implementation by European and national institutions. It should also examine the role of European Law at the global level, in order to assess, on one hand, its impact on the growing activity of international organisations, and, on the other hand, how the latter affect national and European legislation.

It has been ten years since the publication of "The Administration of You". Perhaps the time is right to publish an updated handbook.

Secondly, if we look at the example set by the Constitutional Courts' Judges, a European Law Institute could act as a go-between, a liaison officer among national and European institutions, keeping a record of their relations. From this perspective, the "clients" of the Institute should be both European and national institutions. In other terms, the Institute could help connect different institutions. The Institute could also assist the EU institutions in law-making as well as providing the European Court of Justice with concise studies and research results. In fact, in realising a mix of both formal and informal relationships, the Institute could become an actual EU independent "think tank".

These two sets of tasks are very complex and certainly not easily carried out. But this in fact makes the creation of a European Law Institute even more desirable. It would require an in-depth analysis of the most appropriate functions and most appropriate governance structure to be assumed in order to successfully reach such ambitious and noble goals.


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