

THE ELI: A TRANSATLANTIC PERSPECTIVE

I thank Reinhard Zimmermann for paving the way for my remarks this afternoon by recording, while also being careful not to not exaggerate, the role that the American Law Institute (the ALI) may have played in the conception of the European Law Institute that is being inaugurated today in Paris.

The point of my remarks about the ALI – much as was the point of Reinhard's – is not of course to give the ALI credit for the idea of creating the ELI, or to hold out the ALI as a model for how the ELI , once created, should develop. As one who has observed the ELI's creation from very early on, I can say that the ALI was not held out during the discussions over the ELI during the last few years as a template for the ELI ... far from it. Yes, it was a common point of reference, but it was described at least as often during deliberations as a model not to be followed as a model to be followed.

There are many reasons for not analogizing the ELI to the ALI, and I would like to acknowledge just two of them before suggesting ways in which the premises on which the ELI is built resemble the ALI's and therefore ways in which the ALI experience may prove useful to the ELI.

First, even if the ALI and ELI have broadly comparable goals (which is not entirely the case), the legal and political circumstances under which those goals are being pursued in the two settings are strikingly different. The fields and bodies of law that the ALI sought to address – at least in its formative years – were ones in which the law of the several states (with the possible exception of Louisiana) derived in common from the same source – the English common law. They were Agency, Conflict of Laws, Contracts, Judgments, Property, Restitution, Security Interests, Torts and Trusts – in short, the proverbial common law domains. To be sure, the law of the several states in these fields differed from one another, but mostly on the margins. And, despite the differences, the law was articulated in much the same way and couched in the same vocabulary. It was certainly expressed – even by this time in Louisiana – in a common language.

Second, the ALI – again at least at its origins – was given a very specific task: the task of reducing the complexity and uncertainty of the law, and it targeted those fields of law that most suffered from that complexity and uncertainty. When the founders of the ALI spoke, as they also did, of “improving the law,” they had in mind chiefly improving the law by making it less complex, obscure and contradictory than it was. That may have been all that was meant by the notion of “improvement of the law” that surrounded the ALI’s creation. That premise is

reflected in the very term “Restatement” that the architects of the ALI coined at the start to denote the form that its projects would take. It was even said by some back then that the objective to be pursued was correctness and accuracy in the statement of the law.

It may be difficult to imagine the hostility in the early years of the ALI to the notion that the purpose of the ALI should be anything more than to render the law simpler, clearer and more consistent. Any founder of the ALI who may have had a reformist, progressivist agenda (and some we know did) might not have made that fact widely known.

The ALI’s sense of its mission has evolved since then. Few believe any longer that the ALI should pursue legal accuracy as such. Even the idea that the Restatement must reflect the views of the majority of the courts on all matters is no longer seriously maintained by any ALI member whom I know, nor should it be. Most believe that, in restating the law, the ALI should attempt to improve it substantively. It is even my own view – though by no means a universally shared one – that a Restatement may conceivably take a position that the courts have in the past overwhelmingly rejected, if it is one that is clearly superior and no

constitutional principle, no clear federal legislation, and no unambiguous precedent of the US Supreme Court stands in the way.

I suspect – I know – that the impetus behind the ELI in 2011 is rather different than the one that produced the ALI back in 1923. The law in this or that legal system within Europe may be more or less complex on a given legal issue, and could benefit from simplification. But it cannot be said that the heart of the ELI enterprise is or will be simply to make an existing complex body of law more simple. One simply cannot witness the discussions leading up to the ELI's creation and conclude that pursuit of legal certainty is the ELI's prime objective.

I believe that the ELI will begin its life in an intellectual environment much more similar to the one in which the ALI works today as compared to the one that prevailed at its origins. On the whole, this is good news. True, the ELI does not appear to be benefiting from as strong a consensus as to its mission as the ALI enjoyed at its founding 88 years ago, and the ELI's mission still very much remains to be defined. That will be a challenge, because there is probably no end to the kinds of worthwhile projects in which they ELI could engage. But that fact alone can be turned to the ELI's advantage, if the ELI seizes the opportunity to become the preeminent forum in Europe today for debate over the methods and

purposes of law reform. How vibrant that debate will be remains to be seen, as does the degree of ambition that the ELI will bring to whatever law reform tasks it chooses to undertake.

Third, it is difficult to fully disengage the mission of the ELI from all that has been developed and achieved at the supranational European level over the last decades. Law in the Member States is increasingly unrecognizable to an extent that virtually everyone in this audience appreciates better than I do. Even States not in the EU have drawn importantly and in a sense voluntarily upon EU law in fashioning their domestic law.

It will be both easier and harder to achieve harmonization and other forms of law reform in such an environment -- easier because of now-settled expectations that the law of no single European State can afford to remain indifferent, in principle or in practice, to developments in sister states and at the EU level, but harder because EU law's very existence may place constraints on what the ELI can realistically achieve by way of law reform. Still, while it must take care not to become an arm of the European institutions, the ELI cannot help but derive momentum from all that is afoot in Brussels.

Let me now set these contextual differences aside, and ask instead how the ALI experience resonates with the advent of the ELI, as well as what about that experience could possibly be of value to the newly-created ELI.

Allow me to offer 5 simple observations along these lines, starting with issues of “structure” and “composition,” before moving on to issues of “program,” then to issues of “process” and “permanence,” before finally concluding with some words about the ELI’s geographic “horizons.”

1. Structure:

Given the U.S. legal culture, it is unsurprising how large a role both the judiciary and the bar, alongside the legal academy, played in the launch and formative years of the ALI. Consider its incorporators: William Howard Taft (former US president and then Chief Justice of the US Supreme Court) and Charles Evans Hughes (then past US Supreme Court justice). Consider its first Honorary President: Elihu Root (secretary of state and member of the bar). Consider its first President: George Wickersham (Attorney General in the Taft Administration). Consider its first director: Professor William Draper Lewis of the University of Pennsylvania School of Law. Oliver Wendell Holmes attended the ALI’s first meeting.

But that has been among the ALI's strengths. Academics play a leading role in conducting the Restatements and other projects of the ALI, as their "Reporters." But the choice of projects themselves and the determination as to who will conduct them as "reporters" is made by the ALI Council, in which academics represent a distinct minority. The academic reporters eventually perform their tasks under the watchful eye of an advisory committee in which the professors are once again a distinct minority. In the Council and in the advisory committees alike, as well as the assembly practitioners predominate. It has been said that the ALI allows the academics to do its work, on condition that all that they do is carefully overseen by eminent judges and practitioners.

It may sound like a truism, but I remain convinced that the ALI has been as productive as it has, and its Restatements and other projects have been as positively received and as influential as they have, largely because they are the product of intense collaboration among academics, practitioners and judges and other government officials.

2. Composition:

The composition of the ELI, like the composition of the ALI, will be subject to criticism; in fact it already is. The criticisms will not be the quite the same.

Members of the ALI were sometimes cast as elitists, as the privileged class, anything but a cross-section of the legal professions. Their attitudes were sometimes criticized as well – as as overly formalistic, insufficiently progressive and too out of touch with the school of “legal realism” that was just entering its heyday in many of the great American law schools. As I implied earlier, some of the ALI’s founders were much more progressive and reformist in their intentions than they let on, but the fact is they were not widely perceived as such.

The ALI has prospered in large measure because, rather than dismiss criticisms of this sort as simpleminded stereotyping, it instead acknowledged the criticisms and addressed them. It did not do so quickly, or decisively, but it did so over time – so much so that by the 1970’s, the ALI’s demographics had changed in the direction of much greater diversity and some of its more controversial projects were being condemned as radical and activist, not as formalistic and conservative.

The ELI is already subject to critiques: Some will say it too is elitist and old-guard, and lacking in sufficient transparency. Reinhard Zimmermann has already pointed to other critiques to which the infant ELI may be vulnerable: that it is too academic, too private-law-oriented, too oriented to substantive law and too little

to procedural law; too oriented to western Europe and too little to eastern. As it launches and performs its projects, it is likely also to be called too politically this or too politically that.

The lesson if any to be drawn is that the ELI should adhere firmly and apologetically to what it comes to regard as its core mission, but at the same time remain attentive to critiques that may or may not be founded, but that if disregarded altogether may jeopardize the ELI's influence.

3. Program:

I have already mentioned the notion of a Restatement, and how powerfully production of Restatements, as originally conceived, shaped the ALI's self-image from the very start. But not only is the term Restatement, as I said, something of a misnomer, but the ALI has knowingly produced other instruments that, in varying degrees diverge even further from the notion that an ALI product should reflect the law as it is rather than as it should be.

Restatements may have been the initial paradigm, but today the ALI produces a much wider range of instruments. At one extreme, it contents itself with the elaboration of so-called "Principles", a term that suggests a greater freedom from positive law than a term like Restatement of the Law could possibly

suggest, and that make no pretense of supplying a rule of decision for a court to use in a case before it. At the other extreme, the ALI drafts model statutes for adoption by the several states, as well as draft legislation for Congress to enact at the federal level. If Restatements are “soft law,” some of these instruments are meant, ideally, to become “hard law” through legislative adoption. I seriously doubt that the ALI, though already nearly 90 years old, has by now exhausted its potential for new product development.

I have already suggested that the ALI’s early commitment to the Restatement as an instrument was a source of strength and identity – a strength and identity that eventually permitted it to embark on more far-ranging initiatives. I do not know whether the ELI will likewise develop a “hallmark” product. Frankly, I think it would be good for the ELI’s its identity and visibility for it to develop just such a “hallmark” product, though I am presently at a loss to say what precisely that instrument should be. Once it develops one, as I hope it will, it will – like the ALI – also avoid over time becoming its prisoner.

4. Process and Permanence:

Thanks to the resources that the European institutions bring to the challenges of legal integration in Europe, those in favor of that process have come

to expect to achieve dramatic results in a relatively short time span, and on ongoing and continuous basis.

You might be disappointed to learn how many years often pass between the moment at which an ALI project is launched and the moment at which that project is finally ready for adoption by the Council and the ALI membership. You might be surprised to learn how many drafts and redrafts a project typically goes through before it reaches that point. Whole nomenclatures have been devised to denote the exact part of the life cycle of a Restatement: successive numbered “Preliminary Drafts” when submitted to advisory committees; “Council Drafts” when submitted for discussion and approval to the ALI Council, and “Tentative Drafts” when approved by it and brought to the ALI Plenary. Moreover, Restatements are commonly broken down into chapters, each of which will separately and successively run this course – with the entire Restatement promulgated only after all of its parts have been completed and adopted.

Some ALI members complain about the length of time projects often take, and many individuals who might become Reporters recoil at the prospect of the number of years and the number of redrafts that will be required before a finished ALI Restatement finally emerges. But, I think that much of the success of

the ALI is due to a collective willingness to allow projects to go through a long and difficult maturation process, resulting in a higher quality product that enjoys a wide acceptance and influence across the legal professions. Americans are uncharacteristically patient when it comes to Restatements and like projects, and patience has served those projects well.

I suspect that the founders of the ALI and the drafters of the early Restatements expected their work to enjoy a high degree of permanence. You can be sure that the drafters of the first generation of Restatements did not call their Restatements the “Restatement (First),” as that first generation of restatements has retroactively come to be known, now that we have, for some subjects, a “Restatement (Second)” and a “Restatement (Third).” This is not to say that Restatements do not have long shelf lives; they usually do. But their shelf lives are limited. Living in the fast-changing world that we do, ELI members should not expect that the work they do is necessarily work “for the ages.”

5. Horizons:

Unlike the ALI, the ELI is inherently transnational, and addressing cross-border challenges in law is of the essence. For a body like the ELI to design and execute projects that have within their purview not only the 27 Member States of

the EU, but European States that are not members of the EU, as well as autonomous and semi-autonomous regions within States of Europe. ELI projects will for this reason alone dwarf in geographic range and institutional complexity anything the ALI ever had to confront. That fact alone will lend ELI projects a manageability challenge that few ALI projects have ever faced.

In this kind of environment, it may be unrealistic to imagine that the ELI will be able any time soon to construct and conduct projects that engage jurisdictions outside of Europe as seriously as some might want. It is worth noting, however, that, for its part, the ALI has found itself drawn into projects having an international dimension that the founders of the ALI could never have imagined. The ALI's turn to projects of an international character in recent years has been stunning. Whether we speak of (a) Restatements of an overtly international characters (like the Restatement of the Foreign Relations Law of the US, or the Restatement of the US Law of International Commercial Arbitration, of which I currently serve as Chief Reporter), or (b) ALI Principles of an overtly international sort (such as the Transnational Rules of Civil Procedure or the Principles of World Trade Law), or (c) Principles on matters of general transnational interest (such as Principles of Aggregate Litigation), the ALI is clearly "going global."

Preoccupied and distracted though it may be by intra-European divisions and differences,, the ELI will have no choice but also to engage internationally, and its work will be all the more useful for its doing so. In this respect, the ALI may have a special role to play. I know I speak for the Director and Deputy Director of the ALI who, significantly, are attending this ceremony in Paris. Their attendance at this meeting evidences the ALI's serious interest in the ELI. I believe that the ALI will seek energetically to pursue joint undertakings with the ELI, without however the slightest expectation that the ALI and ELI should enjoy a "special relationship" privileging the US over other parts of the world with which Europe must engage.

Bridging legal differences among the States of Europe is itself a formidable task, and the ELI should not encumber itself at the outset with an ambition of reconciling law in Europe with law elsewhere in the world. But this audience needs no reminding that the law reform that the ELI brings to Europe will itself be more durable and effective if it is informed by the legal norms and practices of jurisdictions with which Europe increasingly interacts. If an enterprise that was as initially inward-looking, if not nationalistic, as the American Law Institute was at its beginnings, how much more compelling must be the case for a cosmopolitan ELI.