

Why a European Law Institute?

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It will come as no surprise when I say that the American Law Institute (ALI) has been and will be a source of inspiration for the European Law Institute (ELI), which is presented during this conference. The ALI was an initiative by legal practitioners and academics in response to the ever increasing flow of legal information (cases, statutes, academic writing) and the growing complexity of the law, resulting from the expansion of interstate commerce. The United States are, as is the European Union, an internal market without borders. The expansion of commerce within this internal market took place as a result of the Industrial Revolution, the railways, which made rapid transport possible, new means of communication (telephone and telegraph) and the need for the federal government to facilitate and regulate this expansion through federal law. Focussing on the law of a lawyer's home state was no longer sufficient in light of all these developments, because more and more cases involved more than one state and/or touched upon federally regulated issues.

To assist practising lawyers and courts two major initiatives were taken: the establishment of the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) in 1892 and the foundation of the American Law Institute in 1923.¹ The founders of the ALI felt that the law had become too uncertain and complex and was in need of rationalisation. This process of rational analysis resulted in the famous Restatements of the Law, but also in model laws. The most famous of these model laws, drafted in cooperation with the Uniform Law Commission, is the Uniform Commercial Code.

The strength of the ALI, in my view, is that practitioners take the initiative regarding what they see as their need for practical solutions to the problems they encounter and that academics are being asked to use their knowledge and skills for providing possible answers. It is this combined effort, which has proved to be the ALI's core strength.

In today's Europe the situation is not very much different from what can be found in the United States. The internal market is no longer a mere ideal laid down in the European treaties, but has become a reality. The background for this development is not an Industrial Revolution, but the digital

¹ For more information I refer to their respective websites: www.nccusl.org and www.ali.org.

information society in which we are living. Cross-border travelling and transport have also increased enormously. The four freedoms of the European internal market – the free movement of goods, persons, services and capital – are no longer promising statements, but are becoming the actual situation. The result is that national legal systems are no longer “stand alone” traditions, but interact with other national legal systems and, perhaps most importantly, European law. The result is a growing osmosis.² Although from a European viewpoint this osmosis is a stage in a process of europeanisation of the national legal systems, from the perspective of a lawyer in one of the EU Member States European law sometimes feels like a “*corpus alienum*” with which he or she is not familiar and which may even create a fear that what seemed certain and just now becomes uncertain and only just from a national perspective, not from a European viewpoint. A national lawyer may therefore feel antagonistic to the impact of European law.

A recent example of how these different viewpoints may collide with one another concerns cross-border conveyancing of land and houses. Until recently, the experts on the continent of Europe who dealt with such conveyancing were the notaries and land registrars. They were all trained not only to look at the interests of the parties, but also at the general interest, such as the well-functioning of the land registry. Notaries and land registrars are appointed by the government and are therefore seen as performing a public function. It was not realised that notaries and land registrars in fact had created national monopolies by, e.g., restricting access to the profession by nationality requirements. It was also not realised that from the perspective of the European treaties, which rather look at economic substance than at legal form, notaries (and land registrars) are service providers and that the service they provide can be given by any European lawyer, irrespective of his or her nationality, who, through studies of his or her own, has acquired the knowledge and expertise to work as a notary in a particular EU Member State. For experts in European law, however, it came as no surprise that the European Court of Justice ruled that the nationality condition for access to the profession of notary violated European law.³ National monopolies are no longer allowed under the treaties and this also applies to monopolies of legal services providers. One can certainly understand that in some Member States the decision must have caused nervousness and perhaps even a culture shock. What seemed a secure and predictable national environment to work in suddenly appears to be open to “outsiders”.

² See with regard to this growing osmosis in the area of property law my Van Gerven Lecture: European and National Property Law: Osmosis or Growing Antagonism?, to be found electronically at the website of the Social Science Research Network (SSRN): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995979.

³ The European Court of Justice (Grand Chamber) decided this with regard to several Member States, such as Germany. See *Commission v. Germany*, Case C-54/08, to be found on the ECJ’s website: curia.europa.eu.

It is important that this negative view on European law, as almost being a burglar who comes at midnight and steals security and predictability, is turned into something more positive. The breaking down of national monopolies means that notaries, if they have the required expertise, now can provide services all over the European Union. A good example of this more positive approach is the so-called CROBECO (Cross Border Electronic Conveyancing) project, initiated by the European Land Registry Association, which is aimed at supporting reliable cross-border conveyancing without attempting to change any national law.⁴ This is done by building upon legal traditions while at the same time using the opportunities created by European law. The land registrars involved are faced with numerous practical problems and they greatly value academic input with regard to possible solutions. One of the major problems they encounter are hidden charges and unrevealed public law limitations. A notorious example of the latter is the limitation on construction of houses in coastal areas (being public domain) created by the Spanish Ley de Costas (Coastal Law). Here the European Law Institute could be of great practical assistance by doing research concerning the problems which notaries, solicitors and land registrars encounter when land or houses are conveyed cross-border. The ELI could map the hidden charges and unrevealed public law limitations and thus provide valuable information to practitioners by laying the results of that research down in a Database on Cross-Border Conveyancing. It could also attempt to solve the problems by proposing a model law for registration of hidden charges and public law limitations or propose action at a European level.⁵

By doing so, the European Law Institute would follow the footsteps of the American Law Institute, but at the same time would also follow its own path. The United States and Europe have a very different legal, cultural and linguistic background, which cannot be ignored. This does not, however, prevent us from being inspired by what the American Law Institute has achieved.

⁴ See for more information: www.elra.eu.

⁵ Reference can be made to a seminar organised by the ALDE party in the European Parliament on "EU property Rights and Wrongs" on June 14, 2011. For more information see: <http://www.alde.eu/event-seminar/events-details/article/eu-property-rights-and-wrongs-37447/>