

Why a European Law Institute?¹

I. Introduction

It is important to start these short remarks by some observations related to the current quality of European law. Sometimes, I am under the impression that we observe, at least in some fields of European law, the phenomenon illustrated in the famous work of Lon L. Fuller on the 'Morality of Law', describing a lot of unresolved difficulties, which inhibit making good laws, by the metaphoric figure of King Rex. As we know, Lon L. Fuller tries to identify and to categorize the rules of law not compatible with the minimal standards of decent law. In my view, European law at its present stage of its development shows some typical defects, as presented by Fuller: the law is not stable, not comprehensible, not entirely coherent, too detailed and unpredictable, and sometimes retroactive. It can happen that even judges are not sure of the interpretation given by themselves because of the ambiguity and lack of clarity of the legal rules applied in the context of European law. However, the problem of the quality of law is universal. By way of example, one might mention the judgment of the Constitutional Court of Poland which held tax law provisions to be unconstitutional because judges were not able to understand their content and goals. I am afraid that such a 'quality test' when used for the verification and review of some rules of European law could bring about similar results.

This observation is certainly exaggerated; however, it expresses widely-held opinion that the improvement of the quality of European law is necessary and urgent. This assumption does not deny that there are also lots of other motives for this activity:

- stimulation of the integration process;
- enhancement of the acceptance by Europeans of the legal space of EU;

¹ Speech held at the ELI Founding Congress, Paris 1 June 2011.

- development of the mechanisms of the common market;
- strengthening of the guarantees of fundamental rights and freedoms, etc.

II. Weaknesses of European Law

1. General Remarks

The present weakness of European law is clearly visible to judges at the European Court of Justice. We are systematically confronted with the enormous complexity of secondary law which seems to be a kind of mosaic, or puzzle, hardly transformable into a regular shape and, above all, deprived of transparent content. It is not surprising that the ECJ, since the beginning of its activity, has made enormous efforts to enhance transparency, coherency, as well as predictability and last, but not least, a coherent axiology of EU law. Judge-made law today constitutes an important part of the European legal system and it is inscribed into the concept of the development of European law. Judges are not capable of replacing the legislature because case law – however wise or creative – can never fully compensate for the lack of good legal provision. If we accept the message contained in the famous Montesquieu formula that ‘there are no bad laws, only bad judges’, then we should add that it would definitely be better to have perfect laws, as well as perfect judges. We cannot deny that, at the present stage of development of EU law, we have a very solid and strong legal framework – a construction which should be ‘modernized’, transformed into a new ‘fascinating building’ better adapted to our ambitions, visions and ideas, but also able to face new challenges raised by the future development of the European Union.

However, one can see in many fields of European law the lack of clear and convincing concepts as to future developments and goals to be reached. To answer the questions which appear at the present stage of integration, we need a new approach and a new methodology. European law has, up till now, been created step by step, and this methodology has been fully

justified by the necessity to concentrate all efforts on some selected branches of law which were most significant for the enhancement of an efficient functioning of the common market. It is beyond doubt that the scope and European law is now larger than 50, or even 20, years ago because of the strong impact of European regulations on all fields of law. One can say that the expansion (it could even be said: the ‘infiltration’) of the mechanisms of EU law constitutes a necessary and inevitable element of the current legal reality in contemporary Europe. This tendency towards the expansion of European law and its ‘radiation’ to all branches of law will be, one might suppose, even stronger under the newest legal framework created by the Lisbon Treaty and the EU Charter of Fundamental Rights. New impulses have been triggered by some crucial ideas of European law including e.g. the widely understood concept of European citizenship² and the principle of equal treatment.³ For such reasons, at this present stage, we need new instruments facilitating the mobilization of these intellectual achievements and visionary or courageous ideas stimulating future development. We need the very ‘rebirth’ of European enthusiasm which has been absent now for at least 10 years. Good law – transparent and friendly – should be placed without doubt among the most important means to ensure the achievement of this goal.

2. Private Law Perspective

Strong motives for such an approach are present in my field of specialization, meaning private law. Firstly, there is neither clear and convincing vision, nor the concept of harmonization. It is necessary to decide what is more suitable: full or minimal harmonization, or maybe optional instruments. Secondly, no decision has been made, as far as the concept and methodology of the creation of European private law is concerned. In my opinion, it is obvious that EU law should not be a simple ‘puzzle’ composed of the parts originating from

² Case C-135/08, Rottmann [2010]; C-34/09, Ruiz Zambrano [2011].

³ Case C-236/09, Association belge des Consommateurs Test-Achats asbl [2011].

different legal systems. Thirdly, there is no convincing and clear vision related to the final goals to be reached through the ‘Europeanization of private law’.

My personal judicial experience confirms these observations. In numerous cases coming before the ECJ, one has to look for answers to essential questions without having sufficiently precise and clear indications normally sourced in normative rules or doctrinal writing. Examples of this situation can be found in matters concerning numerous consumer law directives including ‘unfair terms’,⁴ ‘product liability’⁵ or ‘consumer credits’. The secondary, but not marginal, effect of the development of EU law is the growing discrepancy between European private law and national systems, resulting in a lack of their mutual consistency. In consequence, the impact of some European mechanisms on domestic laws becomes unpredictable, even for judges. This also concerns the essential private law mechanisms, such as ‘causal connections’, ‘notion of damages’, ‘concepts and sources of contractual relations’, ‘notion of tenders’, ‘scope of civil liability’, etc. Perhaps this lack of consistency is more visible and more delicate in private law, such as civil law, for instance, in which there tends to be a longer development, strong national traditions and the necessary precision and internal logic of its structures.

The growing discrepancy between private EU law and domestic systems is confirmed by well-known ECJ judgments in the abovementioned cases regarding consumer protection and by the recent case law related to e-commerce.⁶ It clearly proves that broadening the field of application of European law inevitably leads to greater ‘interference’ with domestic laws. For these reasons, the complexity of European law requires good cooperation among different groups of experts and a multidisciplinary approach. One can assume that we will not be able to understand the present process of development if private law is separated from public law.

⁴ Case C-240/98 to C-244/98 *Océano Grupo Editorial i Salvat Editores* [2000] I-4941.

⁵ Case C-358/08 *Aventis Pasteur SA* [2009] I-11305.

⁶ From the case C-236/08, *Google France sarl* [2010], to the still pending cases C-324/09, *l’Oréal*; C-70/10, *Scarlet Extended SA* and C-360/10, *Sabam*.

From my perspective, such a clear-cut separation seems to be slowly going into the past, as it becomes more and more anachronistic. This does not, however, mean that the core features of private law, e.g. party autonomy and contractual freedom, are to be abandoned.

III. Needs of Europea Law

The increasing expansion of European law highlights the need for a systemic and profound analysis of EU rules. Only research cutting across the boundaries of a particular question can provide useful answers. It would allow for the identification of the multilateral consequences of different solutions adopted with regard to many branches of European and domestic law. The experience emanating from 60 years of the development of the ‘acquis communautaire’ has proved that a more structured and systematic approach is becoming inevitable. Recent ECJ case law shows perfectly the points where strategic choices should be made in the near future and what is at stake when making choices from the possible solutions. We can illustrate this hypothesis by a short analysis of three different topics requiring systemic research.

1. Strategic Issues

A) Constitutional Identity

Shortly after the entry into force of the Lisbon Treaty and the European Charter of the Fundamental Rights important discussions have taken place regarding the application of fundamental principles and the essential mechanisms of European law. One of them is the debate on the content and importance of the ‘national and constitutional identity’ being, at

least apparently, in opposition to the expansion of European law, characterized by the tendency to harmonize national systems.⁷

B) Horizontal Effect of Fundamental Rights and Freedoms

Another strongly discussed issue is the horizontal effect of fundamental rights and freedoms guaranteed by European law. If I want to limit my observations to general remarks only, two elements should be stressed. Firstly, one of the core questions with regard to the horizontal effect touches on the relationship between the fundamental rights guaranteed by the Charter and secondary law. The question as to whether the Charter of Fundamental Rights could enlarge the content of some 'key notions' of the European secondary rules must be answered.⁸ Secondly, there is no doubt that establishing the scope of 'horizontal effect' is decisive for the designation of the demarcation line between the principle of freedom of contract and public law constraints, in other words for the determination of the scope of application of European law outside the vertical relations. I suppose that without a clear systemic answer related to the future development of European private law – which inevitably has to touch on the question regarding the scale of harmonization – these issues cannot be resolved.

2. Particular Problems

Independently of these 'strategic issues' – which, in my view, require deep research and analyses – we can cite a much longer list of important questions raised by the recent case law of the ECJ in different matters of EU law which are also awaiting answers.

⁷ See cases C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, [2004] I-9609; C-208/09 Sayn-Wittigenstein [2010] or C-391/09, Runevič-Vardyn and Wardyn [2011].

⁸ Case C-282/10, Dominguez, still pending.

A) Immigration Policy

One of them is the future of EU immigration policy requiring not only purely political solutions among the Member States but also a comprehensive, coherent vision of possible legal measures to be applied in the near future. The recent decision of the ECJ in the El Dridi case⁹, concerning the overlap of national prerogatives to apply criminal law on the one hand, and the European directives on the other, illustrates well the ongoing discussion as to which legal provision should prevail.

B) International Cooperation

For the ECJ, the necessity of a profound analysis related to the three foremost topics of international cooperation is clearly visible: The first is about the relationship between EU law and international conventions, including the so called ‘mixed agreements’.¹⁰ The second topic concerns the famous issue of ‘coexistence’ of the different international legal orders, EU law being one of them.¹¹ The third covers the future of judicial cooperation among EU Member States, with special focus on the issue of mutual recognition of judicial decisions. This question is particularly interesting in light of the proposed amendments of the EU regulations e.g. Brussels I¹² and Brussels II.¹³

C) Additional Examples

Over the last few years, the ECJ has highlighted a lot of particular, substantive issues which also require systemic and in-depth analysis, numbering among them:

⁹ Case C-61/11 PPU, El Dridi [2011].

¹⁰ Case C-263/08, Djurgården-Lilla Värtans Miljöskyddsförening (the Aarhus convention case) [2009] I-9967.

¹¹ Avis 1/09 [2011] regarding the future cooperation in the field of European patents which is an example of the ongoing tension and the complexity of the issue.

¹² Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16/01/2001, p.1.

¹³ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ L 338, 23/12/2003, p. 1.

- the protection of intellectual property rights and its extent in the context of e-commerce and on-line advertising;¹⁴
- the procedural issue – ‘the battle of courts’;
- the scope of fiscal autonomy of the Member States;
- the limits of the European citizens’ rights regarding access to medical services in other Member States;¹⁵
- the ‘effects in time’ and the extent of potential retroactivity of ECJ judgments;
- the complex relations between EU law and the different branches of national law which remain, in principle, within the scope of Member States’ prerogatives (tax law, criminal law, etc.).

This list is not exhaustive and it does not include numerous other issues requiring a new systemic approach.

3. Possible Solutions

Now the question as to what features the systemic approach should have has to be addressed:

Firstly, a specific ‘European methodology’ in the framework of research, allowing us to abandon schematic reasoning is needed. To achieve this goal, a permanent, solid cooperation among the representatives of different legal traditions and the different legal professions, academics and practitioners alike, should be assured. In many fields, there is a need for a confrontation of different styles of legal reasoning and legal values. European law does not belong to politicians and it can not be created exclusively in order to fulfill current political needs, because its goals are autonomous, and not simply an expression of political will. Close cooperation among the representatives of different legal milieus is necessary

¹⁴ Case C-585/08 i C-144/09, Pammer and Hotel Alpenhof [2010] not yet reported.

¹⁵ Case C-173/09, Elchinov [2010] not yet reported.

because good laws can never be adopted without a thorough knowledge of the institutional environment and the practical context to which they are to be applied. That multidisciplinary and multi-professional approach, marked by the necessary independence and solid research, if this were the case, could make the European Law Institute a very interesting and attractive partner for numerous European institutions, including the ECJ. The latter could take advantage of research, especially in matters regarding complex issues raised by case law. No doubt, the adoption of good laws based on good ‘model laws’ constitutes a necessary condition for a predictable and stable jurisprudence. Clearly identified axiology and goals of European law in different fields and transparency within the scope of protected values could facilitate the application of legal rules, not only by national jurisdictions but also by the European Court of Justice.

For the above reasons, we welcome the creation of the European Law Institute and have high hopes with regard to its future activities.