

Towards a European Legal Culture

European integration has been and is integration by law. The European Union was founded by a treaty and its enlargements are also based on contractual agreements. With the entering into force of the Lisbon Treaty and the announcement of the Stockholm Programme the quest for developing a European judicial culture has been intensified. One of the tools to that end are networks of professionals as they exist already in great number. One of these Networks is the Network of the Presidents of the Supreme Judicial Courts of the EU.

A representative of the Network I feel both honoured and pleased to be invited to speak at the Opening Congress of the European Law Institute. The Network and the European Law Institute are somewhat related, one might say. Both are mentioned in the Stockholm Programme and both are mentioned as tools to create a European legal culture.

The Network was established in 2004. Its first Assembly was also held in Paris, another parallel between both institutions.

What were the reasons to establish the Network of the Presidents and what has it achieved so far? Has it gained experiences that could benefit the European Law Institute?

The Network of the Presidents was established to provide a forum through which European institutions are given an opportunity to request the opinions of supreme courts and to bring them closer by encouraging discussion and the exchange of ideas. Two procedures have been followed so far. There were questionnaires distributed to all members in preparation of a colloquium and there were questionnaires distributed on behalf of one of the supreme courts. In both cases – as for instance, in the first case, on practical aspects of independence or, in the second case, on legal aid – it would have been desirable to have some academic follow-up. This could consist in research based on the data which were collected. So, for example, it has been very interesting to learn whether and how independence of the judiciary is safeguarded in the different Member States and to discuss the pro and cons of the different ways. But collecting information and discussing it are not ends in themselves. They aim or at least should aim at improving the

administration of justice in the different States to the benefit of the citizen. This aim could be furthered by research and the research could be provided or at least organised by the ELI.

In 2006 the Network has started to develop a Common Portal of jurisprudence which allows its members to search in all the national law databases. The Common Portal is equipped with an automatic translation program. It is not a perfect translation but one which gives a first impression and enables further research. There is room for further improvement. This but also the chances offered by the availability of such a comprehensive overview about the jurisprudence of different Member States could provide a field of activity for academics. Therefore, also in connection with the Common Portal academic support could be helpful and again the European Law Institute could be of assistance.

An important topic in the discussions within the Network is the fact that as judges we are being confronted with an ever increasing number of European rules. At the time being the feasibility study on European Contract Law is under discussion and also the Network is invited to comment on it. As in this case also in other cases there is academic input in the European legislative process but the process is in many cases far from transparent. In addition, very often there is no sufficient input from judges, despite the fact that judges have to cope with the situation before the rules are enacted and to apply them afterwards. Particularly judges must have and have a fundamental interest in rules that are practical and workable and will enable citizens to understand the law more easily. Such rules will also enable judges to deliver timely and effective justice.

From the point of view of a judge the European Law Institute enriches the European legal landscape. In the fairy tales, which are our common European heritage, a new born prince or princess is often greeted by a fairy granting three wishes. If the European Law Institute were met by such a fairy the wishes could be that the European Law Institute should have power in three different aspects: The European Law Institute should have convening power, catalysing power, and thus identifying power. What is meant by these attributes?

1. Convening Power

The European Law Institute could and should provide a forum for discussions and cooperation, not only among academics and among practitioners but also between these two groups. An essential task will be to organize conferences on topics which are of interest to both academics and practitioners. Conferences organised by the European Law Institute offer a realistic chance to integrate academic research and practical experience. A joint effort of both sides promises excellent results.

2. Catalysing Power

If theory and practice join their efforts to solve legal problems this guarantees workable solutions. But its positive effects are not confined to mere practicability. Working together is for both academics and practitioners inspiring, it deepens the understanding, and it has a catalysing effect on European legal culture.

3. Identifying Power

The European Law Institute offers the chance to give EU law a face and thus serve as a means of identification. A face is given also to the European jurist, be it an academic or a practising lawyer, not as an individual person but as a type of person. The European Law Institute can and will make it easier to identify ourselves as European jurists and it can and will thus further developing a European legal culture.

What is meant by a European legal culture? Is it a unified legal culture or is it a common legal culture?

For me European legal culture A European legal culture which will probably be less formal, less dogmatic, and less positivistic as it used to be at least in most countries.

It could help to ensure that European law is developed in a clear and pragmatic way so that it is fair and as simply expressed as possible to the benefit of both citizens and legal practitioners.

This is an enormous task since European courts of law have to face major challenges:

- The law is in a continuous process of change; and it is becoming ever more European.
- Fundamental rights have become and are becoming more and more important in both civil and criminal law.
- Changes in society and developments in science, especially in the medical and biomedical sciences, are raising new questions.

If we are to meet these challenges, we will need to fulfil a number of prerequisites in regard to the resources required. The discussions and the exchange of ideas that are taking place among the supreme courts may be of great help here, especially since this colloquium focuses on the very essence of a judge's work, the decision making process.

II. The role of courts in general

Judges and therefore courts are indispensable for any society. There have been judges before there had been kings. The first kings were servants of the law; they were subject to the law.

To be a judge is therefore not just a profession, it is a fundamental task of mankind. Independence is a sine qua non of this office; independence is therefore no achievement but a constituent feature of judgeship. Independence is not a privilege but entails responsibility. Unlike a civil servant a judge has no boss or senior who would be responsible.

European culture and tradition is characterized by respect for human dignity, freedom, tolerance, and the rule of law. The rule of law restricts power, René Marcic, a well known Austrian legal philosopher, called it the "Maß der Macht", the measurement of power. The rule of law implies an independent judiciary. Also the judge is therefore one of the

constituents of European culture and tradition. The judge represents the idea of measurement and forms a bastion against arbitrariness.

This holds true for any judge, be it a judge at a Supreme Court or at a trial court. A fundamental difference lies in their task. A trial court judge's task is twofold: first, they have to establish the facts; second, they have to apply the law to the facts.

It is quite clear that the facts of the case determine the outcome. It is therefore an essential task, if not the essential task to find out what really happened. In our system the responsibility for ascertaining the facts lies with the judge. The judge directs the proceedings and determines which evidence is taken. That is one of the main differences between our system and the common law system where the main responsibility lies with the parties' attorneys.

When the facts are established the judge has to apply the law. But what does that mean, apply the law? Judges are often criticised for overstepping their competences by not just applying the law but making the law. The underlying notion is that applying the law can be a quasi automatic procedure and that applying the law should or could function like a slot machine. You insert the problem and get the result.

Real life is different. Applying the law almost always means interpreting the law since only a very small number of statutes and provisions are really clear and unambiguous. Interpreting the law always is a creative act. The judge has to find out the meaning of the law.

The New European Legal Culture

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THE NEW EUROPEAN PRIVATE LAW: ESSAYS ON THE FUTURE OF PRIVATE LAW
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Abstract:

Europe is currently facing a shift from a rather formal, dogmatic and positivistic to a more substance-oriented and pragmatic approach to private law. It would probably be exaggerated to speak of a European revolt against formalism. However, it is undeniable that as a result of Europeanisation private law is undergoing a major transformation. Unlike a century ago, in Europe legal culture is undergoing a radical change (at least as far as private law is concerned). The instrumentalist and impressionist approach of directives, the pragmatic style of the ECJ, the subversive role of comparative law with its functional method, the external economic, cultural and political perspectives given by academics, the success of soft law which is based on substantive authority rather than on formal enactment, and the depositivation of legal education as a result of the implementation of the Bologna Declaration together contribute to a new European legal culture that is significantly less formal, dogmatic and positivistic than national legal cultures in Europe have been. The emergence of this new European legal culture is a result of these separate but related developments, and of the Europeanisation of private law in general.

The emerging new European private law and the new European legal culture are definitely less formalist than the classical method of national legal cultures in Europe. Actors in European private law seem to share a much more moderate belief in the powers of abstraction and of concepts. Moreover, they seem to be less concerned with system, and, on the whole, their approach to the law is less dogmatic and less deductive. Private law is regarded more as instrumental to political, economic, social, cultural and other aims, and there is a pervasive use of the functional approach. More generally, the approach to the law is pragmatic: there is more attention to the consequences of rules and legal decisions. There is less belief in right answers and in integrity (making law means making choices, law is politics) and in the necessity and rationality of a given legal system, which is more considered as contingent (e.g. depending on decisions made by politicians in Brussels) and therefore also uncertain. The (external) perspective is

frequently more critical. Moreover, there is less positivism and more pluralism: we recognise the relative importance of our national positive laws. There is also less focus on texts; especially on codes, and more on other legal formants, legal institutions, legal actors (lawmakers, 'men of law') and their strategies, in other words on law in action. Finally, European law is not very respectful of traditional boundaries between disciplines (between public and private law, between law and social sciences); it is largely interdisciplinary.