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A European Law Institute: what for?¹

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,

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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.