European Law Faculties Association & European Law

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Attending the meeting on behalf of the European Law Faculties Association (ELFA), my paper will first present ELFA and its role (I.). It will then highlight three important features of European Law in my perspective (II.) and end-up with a short concluding remark.

I. European Law Faculties Association (ELFA)

ELFA[1] was founded in 1995 in Leuven by more than 80 Schools of Law located either in the European Union (EU) and the European Free Trade Area (EFTA) or outside the EU, but situated in a State member of the Council of Europe. Some international associations, such as AALS, have a status of observers within this Association. The composition of its members makes ELFA a truly European Association. ELFA regroups today about 160 Law Schools[2]. Currently, the most important focus of ELFA's activities is on the reform of legal education in Europe. Indeed, since the Declaration of Bologna of June 1999[3], the Higher Education landscape in Europe underwent a tremendous (r)evolution. All schools of Law across Europe had to adapt to the new structural scheme: *bachelor/master*. Some countries went further; some others have not yet changed anything. However, everywhere Law Schools and Faculties had to rethink the structure and content of legal education.
ELFA members are therefore involved in the policy development work of the organisation. Our Association tries to offer its members useful information via the organisation of conferences and seminars, and via the publication of the *European Journal of Legal Education*[4], which tackles actual topics on legal education in Europe.
In a way, ELFA is the European counterpart of the Association of American Law Schools (AALS) or, in its regional perspective, of IALS. Through its annual conferences, ELFA tries to enhance the understanding of current issues in legal education. For instance, in Feburary 2007 in Barcelona, the members tackled the issue of *Transnational education*, trying to focus on how to strengthen the *European* Dimension of Legal Education.

II. The three most important features of European Law that you should know

As a representative of a European Association, I will briefly mention some important features of **European Law** that might be of importance for the future work of IALS in designing curricula in Law. I will touch on three points: (1.) Some legal elements shaping the nature of

[*] I would like to thank my colleague, Prof. Samantha Besson for some very helpful ideas on the topic.

[1] The official website is at: http://www.elfa-afde.org.

[2] For the complete list of members, see: http://www.elfa-afde.org/html/frameset.html.

[3] The declaration is to be found on: http://www.bologna-bergen2005.no/Docs/00-Main_doc/990719BOLOGNA_DECLARATION.PDF; on the process itself, see http://ec.europa.eu/education/policies/educ/bologna/bologna_en.html.

[4] http://www.informaworld.com/smpp/title~db=all~content=t742221219~tab=issueslist.

the EU; (2.) The judicial structure of the EU and its impact on national Law; (3.) the Impact of the EU's partial competence on other national matters.

1. Some elements shaping the nature of the EU

1.1. From an economical to a political structure

The areas of competence of the actual European Union are the result of the adoption of successive treaties and modifications of them by the Member States. Thus, building on the success of the Treaty establishing the European Coal and Steel Community of 1951, the six founding Member States expanded cooperation to other economic sectors. They signed on 25th March 1957 the Treaty establishing the **European Economic Community** (EEC-Treaty or so-called Treaty of Rome) and furthermore the Treaty establishing the European Atomic Energy Community (1957).
From this purely economical cooperation perspective, the EEC has enlarged in numbers (27 Member States on 1st January 2007), but has at the same time also evolved. The three initial Treaties were completed by the Single European Act of 1986.
On 29th July 1992, the Treaty on the European Union was signed by 12 Member States in Maastricht. It created the **European Union**. The goal was to go further than to have just a "common market"; one goal was to create an "internal market", i.e. a higher degree of European Integration. The Treaty of Amsterdam (1997) as well as the Treaty of Nice (2001) amended the Treaty on the European Union, by giving more and more competences to the EU in non purely economical fields, as well as by integrating fundamental rights into the frame of the Treaties.
Finally the Treaty establishing a Constitution for Europe of 2004 had as a purpose to update and merge all other treaties and, thus, make a decisive step towards a higher degree of pooling sovereignties of Member States together, among other aspects by regulating the decision-taking process within the EU, and specifically within the European Parliament and European Council. Despite its rejection, an intergovernmental conference has been launched to establish a revised Treaty, dealing with these issues and others.
Through these successive treaties and amendments, the EU evolved from a Community aiming at establishing a *common market*, with freedom of movement for people, for goods and for services, to the creation of an *internal market* of the EU, with even larger economical rights, such as freedom of movement for capitals, but more and more common policies, such as common foreign and security policies.

1.2. A postnational democratic integrated Union

The nature of the European Union is not easy to fix. It is not (or not yet) a federal State, neither a centralistic State. Some scholars describe it as a *postnational democratic integrated Union.* Over the years, its institutional structure has been very much developed; it might resemble national structures. However, by looking closer, one can see that these various institutional bodies ensure a **democratic process of co-decision** and a degree of pooling of competences, without depriving the 27 Member States of their sovereignty.
This means that the Member States delegate some of their decision-making powers to shared EU institutions. Thus, the EU's decision-making process in general and the co-decision procedure in particular involve **three main institutions**:

a) **The European Parliament (EP)**[5]. It represents more than 490 million EU citizens and is directly elected by them. It has today 785 members from all 27 EU countries. The European Parliament passes *European laws* – jointly with the Council in many policy areas (procedure of codecision, placing the Parliament on equal footing with the European Council). The fact that the EP is directly elected by the citizens helps guarantee the democratic legitimacy of European law. It exercises supervision over the other EU institutions and in particular the Commission and has the “power of the purse”.

b) **The Council of the European Union**[6]. The Council is the EU's main decision-making body. It represents the individual Member States and *each* State is represented by a minister of its national government, who is able to bind the whole government. Which ministers attend which meeting depends on what subjects are on the agenda. Besides passing EU legislation with the European Parliament, it coordinates policies between the Member States, concludes international agreement, adopts the budget and ensures a Common Foreign and Security Policy. The weight of each minister is a delicate question, which has been discussed many times over the past months, in order to find a modus operandi, which enables effectiveness and respect of minorities.

c) **The European Commission**[7]. The Commission is independent of national governments. Its job is to represent and uphold the interests of the EU as a whole. It drafts proposals for new European laws, which it presents to the European Parliament and the Council. Each 27 Commissioners (one from each Member State) are at the head of a Division of the EU Administration. In its role as the EU’s executive arm, the Commission is responsible for implementing the decisions of Parliament and the Council. It ensures the day-to-day business.

This ‘institutional triangle’ produces the policies and laws that apply throughout the EU.
The democratic aspect of the EU decision-making process is or should be guaranteed by the Parliament, with its right of co-decision on equal-footing with the Council. This however has not yet been fully achieved.
At the same time however, once the institutional bodies have taken a decision, it has to be implemented by the national Member States.
Based on the **principles of proportionality and attribution**, the EU legislative activity only imposes rules insofar as the achievement of the internal market requires it. According to the principle of **subsidiarity**, the EU should use its competence only when needed. This sometimes implies the adoption of *regulations* – directly applicable in the Member States–, or of *directives*, which have to be transposed into national legislations by national bodies. These Directives represent usually a minimal standard of harmonization, which still leave room for national specificities.

2. The Judicial structure of the EU and its effect on national Law

The EU also has a judicial structure. Thus since 1989, the **Court of Justice**, with one judge

[5] http://www.europa.eu/institutions/inst/parliament/index_en.htm.

[6] http://www.europa.eu/institutions/inst/council/index_en.htm.

[7] http://www.europa.eu/institutions/inst/commission/index_en.htm.

from each Member State, and the Court of First Instance, make sure that EU law is interpreted and applied in the same way in all EU countries, thereby ensuring that the law is the same for everyone. The Court also makes sure that EU Member States and institutions do what the law requires them to do. The Court is located in Luxembourg and has one judge from each member country, i.e. 27 judges, and eight Advocates General, who assist the Court by presenting, with complete impartiality and independence, an 'opinion' on the cases assigned to them.

2.1. One key-feature: the reference for preliminary ruling

The European Court of Justice (ECJ) is not a constitutional supreme Court. Breach of fundamental rights might be considered by the ECJ, as well as by national Courts.
Each national court in each EU country is, however, responsible for ensuring that EU law is properly applied in that country. There is a risk however, that courts in different countries might interpret EU law in different ways. To prevent this from happening, there is a 'preliminary ruling procedure' to the ECJ.
The procedure of **reference for preliminary ruling** is initiated by national courts. When a national Court has any doubts on the *interpretation or the validity of EU law,* it submits its question(s) to the ECJ, and exceptionally to the Court of First Instance, generally in the form of a judicial decision in accordance with national procedural rules.
The Court of Justice's reply does not decide on the outcome of the case which is in front of the national Court. It is, however, more than an opinion on the interpretation or validity of EU Law; its takes the form of a judgment or reasoned order. The national court to which it is addressed is, in its judgment of the dispute brought to it, bound by the interpretation given. The Court of Justice's judgment likewise binds other national courts before which the same problem is raised.
It is thus through references for preliminary rulings that any European citizen can seek clarification of the Community rules which affect him. Although such a reference can be made only by a national court, all the parties to the proceedings before that court, the Member States and the European institutions, may take part in the proceedings before the Court of Justice. In that way, several important principles of Community law have been established by preliminary rulings, sometimes even in reply to questions raised by national courts of first instance.

2.2. Direct and indirect impacts of ECJ decisions on national legal systems

Decisions by the ECJ may have direct and indirect impacts on national legal systems.
They have **direct impacts** on the solution of the questions referred to the Court. For instance, in the *Leitner case of 2002*[8], the Court decided that art. 5 of the Directive 90/314/EEC on package travel confers the right to consumers to compensation for *non-material damage* resulting from the non-performance or improper performance of the services constituting a package holiday. Despite former national case-law on this question, from that judgement onwards, all Member States had to interprete the transposed provision of their national legislation in accordance with this ruling.
ECJ decisions have however also **indirect impacts**. In the former *Leitner case*, the ECJ

[8] Case C-168/00 (Reference for a preliminary ruling from the Landesgericht Linz): Simone Leitner v TUI Deutschland GmbH & Co. KG, OJ C 192 of 8.7.2000.

defines the notion of damage. By doing so in the field of package travel, it has an indirect impact on the notion of damage in national legislation. Indeed, should the ruling of the ECJ be restricted to some subject-matters or expanded? In other words, ECJ rulings may further the convergence of non EU-legislations. This is of course also enabled by the common roots in Roman Law of the Civil Law systems of most Member States.
There are even **larger indirect impacts**, such as the import of new legal concepts into a national legal system. For instance, Common English Law did not really use the idea of proportionality as such. However, since the English Courts had to implement ECJ rulings using this concept, they had to import it in a way into English Law.
Thus, even if ECJ judgments as such respect national sovereignty, the indirect effects of their rulings have impact on national legal systems.

3. Impact of the EU's partial competence on other national matters

Lord Denning, paraphrasing himself, said in 1990: "*European law is no longer an incoming tide flowing up the estuaries of England. It is now like a tidal wave bringing down our sea walls and flowing inland over our fields and houses—to the dismay of all*"[9]. This is certainly an exageration. However, EU Law has an impact even on areas which are basically of national competence. I will just give two short examples.

3.1 European Citizenship

European Citizenship is based on art. 12 and 17 EC Treaty. This central topic has become more and more important in recent years, leading the European Commission to release an action plan for 2009-2013 on this topic.
European Citizenship has a direct impact on some aspects of national legislation of the Member States. One can take the **Garcia Avello case of 2003**[10] as an example. The Court applied directly the principle of Union citizenship (art. 12 and 17 EC), by forcing the Belgian administrative authority to grant the application for a change of surname made by Mr Garcia Avello and his wife Mrs Weber, on behalf of their two children, who had the dual Belgian and Spanish citizenship. According to Belgian Law, the children were registered under the surname *Garcia Avello*. However, according to Spanish Law and tradition, the patronymic surname of children of a married couple consists of the first surname of the father (i.e. *Garcia*) followed by that of the mother (i.e. *Weber*). Their parents wanted the children to have the surname *Garcia Weber*. This was refused by the Belgian administrative authority, which invoked the fact that the children were Belgians and had to comply with Belgian Law.
Using the concept of Union citizenship, the Court considered that the children should not be discriminated because of their Belgian citizenship. Indeed, if they had only Spanish citizenship, Belgium would have allowed them to have their surname according to Spanish Law and tradition. Therefore, although the rules governing a person's surname were matters coming within the competence of the Member States, they had nonetheless, when exercising that competence, to comply with Community law, in particular with the principle of European Citizenship, which forbids discrimination based on nationality within the scope of the Treaty

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[9] Introduction to The European Court of Justice: Judges or Policy Makers? (London: Bruges Group, 1990).

[10] Case C-148/02 (Reference for a preliminary ruling from the Conseil d'État): Carlos Garcia Avello v État Belge, OJ C 144 of 15.6.2002.

provisions, in particular the freedom of every citizen of the Union to move and reside in the territory of the Member States. Therefore, Belgium was not allowed under EU Law to prevent these children to change their surname into Garcia Weber.

3.2 From national civil codes to a civil code for Europe ?

Private Law as such is within the competence of the Member States. However, the EU is enacting directives and regulations in the field of Private Law, mainly to implement a policy of high level consumer protection (art. 153 EC-Treaty) on the one hand, and to ensure the functioning of the internal market (art. 95 EC-Treaty) on the other hand. This sectorial approach has led to the question whether it would enhance the functioning of the internal market to establish a so-called **Common Frame of Reference on Contracts**, in other words a kind of civil code for Europe. It is yet not completely clear whether art. 95 EC-Treaty would enable the EU to enact such a codification. However, the Commission supports several working groups trying to set up common principles and rules on Contracts and related matters.
Even if a future *Common Frame of Reference* is not agreed to by Member States, it will certainly have a deep impact on their national competence in Private Law (Contract, Tort or even Family Law).

A short concluding remark

This very short overview shows that it is certainly no longer possible to teach national Law without taking into account the EU evolution in all subject-matters. There is a high level of denationalization of the law of the Member States in most of the subject areas.
This should lead to rethink the way legal education is set up throughout Europe. In a way, that is exactly to what ELFA's work should lead. It should help the members rethink not only the structural aspects of legal education, but mainly the **perspective in which national Laws are taught to national students**. To train the European Lawyers of today and tomorrow, it is of tremendous importance to show them that national regulations, even in fields of national competence, can only be understood by capturing the European legal aspects influencing them more and more.