COMMON MARKET

LEGAL CULTURES IN EUROPE

COMMON LAW?

Scott Veitch

What role is there for law in the integration of Europe?

Is it possible for 345 million people to share a common legal culture? Given that they are differentiated by 12 separate national representations and a myriad of other national identities and histories, is it desirable? And if European integration is a worthwhile goal what role should law play in the process? Is it the best instrument for achieving a plausible union or the worst? In asking these questions we have begun thinking not only about hard political choices, but have also raised issues centrally posed in legal theory. In as much as theory's domain is at the heart of practice, we ought to be aware of how legal theory informs and responds to the challenge of perceived practical requirements. For where theory and practice are separated it is practice that is the poorer for it.

The best way to address this issue is through education. If students are denied an awareness of the theoretical underpinnings and impacts of their legal studies, we cannot be surprised when practitioners and others, including politicians, continue in the same unthinking vein. In order partly to address this need, as well as to key into the possibilities of a new emerging legal order in Europe, a European Academy of Legal Theory has recently been set up in Belgium. It is an addition to already existing centres of research working within the European Community framework such as the European University Institute in Florence and the International Institute for the Sociology of Law in Onati, Spain. Here I shall concentrate on the new Academy precisely because of its commitment to giving a platform for critical approaches to education and research in a European context. What should not be forgotten is that clashes of legal cultures and assimilation through law are not unique to Europe: that is why the theoretical aspirations are of much broader import.

The Academy

According to its prospectus, the aims of the Academy are three-fold and correspond to three 'bridge building' exercises. The first of these seeks to build a bridge 'between countries, national cultures, and legal and university traditions'. In so doing, the founding premise is that legal theory ought to be seen as forming an integral part of the development of the new Europe. To the extent that the problems Europe faces are shared, and are indeed bound up with new legal issues, the idea is both to consolidate and progress in union. In this way similarities between traditions should be brought out, yet seemingly intractable differences should not stand in the way of the development of new solutions to new legal problems. The message is that while we must accept and endorse local legal cultures and their histories, we should not be fatally constrained by them. The plan to build bridges is a grand one, the achievement of which lies in the development of a common European legal culture.

Clearly, a crucial element in the realisation of this program is an awareness of the role of, and the attitude toward, theory itself. Thus the second bridge building exercise involves the integration of the study of legal theory and positive law. The belief is, rightly, that where theory and practice are seen as incompatible disparate entities, the danger is always that theory itself will become marginalised within legal education and, as a consequence of that, be absent from the viewpoint of the practitioner. In order to overcome the problematic of such a separation, for the danger is a real even if philosophically untenable one, the Academy stresses its aim

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of 'placing theory and critique at the very heart of positive law and legal practice'.

One of the ways in which this task can be approached is by attempting to overcome the trend, brought on by the constant drive toward specialisation, which 'artificially compartmentalises different branches of theory itself'. Bridge building in its final sense is concerned with the need to hold different conceptual approaches in mind at the same time. This technique, which it would be inadvisable to see as unifying, must be interdisciplinary, meaning by this 'not just a juxtaposition of several disciplines, but a dialogue in which each type of knowledge is inspired and nourished by other approaches'.

Legal theory degree

It is with these aims in mind that in 1992 the Academy, organised by the Facultés Universitaires Saint-Louis and the Katholieke Universiteit Brussels, commenced offering a Master's degree in legal theory. Its parent universities have, however, been running annual ERASMUS seminars in legal theory for some years. The combined pulling power of the perceived need for European legal argumentation and of the Academy's hosts has ensured that guest professors, giving seminars over two days, have included Ronald Dworkin and Niklas Luhmann among others.

The one year Master's course is taught in English and French and involves both course work and a dissertation. It is aimed at students 'with a law degree who wish to expand their horizon, either before starting a career as a practising lawyer, or at the beginning of a doctoral thesis in one of the branches of positive law or in one of the fields of legal theory'. Though its intended students and graduates are seen as being interested in practice as well as theory, the program itself is primarily theoretical. It seeks 'to offer a critical and interdisciplinary synthesis of the current disciplines, trends and paradigms in the field of legal theory'.

The program is based on a core group of teachers from Community countries who give general courses (Jurisprudence, Moral and Political Philosophy, Theory of Comparative Law and of European Legal Integration) and a range of more specific ones (such as legal anthropology, legal semiotics, criminology, and sociology of law). There is also a large pool of 'specialists' in various fields who are invited to hold seminars throughout the year in their particular field of interest. Not only does this help to strengthen the chances of successful 'bridge building', in all its senses, but it also provides the possibility for the exchange of ideas across national boundaries — of vital importance, of course, not just to students, but to academics too.

The 'exchange' element has been built into the structure of the degree itself. After two terms of coursework in Brussels, the students, in the final trimester are given the opportunity to write their paper 'either in Brussels or at their home university or at one of the universities or research centres of the European network established by the Academy'. This provides, in practice, for the student to choose amongst a number of institutions within the Community and outside, including in the latter category institutions in Poland, Finland and Sweden.

The involvement of countries outside the formal boundaries of the European Community is one that must be maintained. The organisers recognise that ideas cross these artificial borders and are therefore keen not to be exclusive in their outlook. This is particularly important when one of the main theoretical aspirations of the Academy is a comparative one. It is also recognised in the representation of nationalities of the students. The Academy's first academic year was 1992-93. The completed selection process provided 30 students from 14 countries. From information provided by Professor Mark Van Hoecke, co-director – with Francois Ost – of the Academy, we find that 22 of these students came from within the Community, one came from Finland, three from Eastern Europe (Poland, Hungary and Slovakia), three from Latin America (Mexico and Brazil) and one from Zaire. I am told that applications from Australian candidates are welcomed, this being the only continent from which they have not yet received applications.

The Academy is thus attempting to fulfil an educational role intricately bound up with the (legal) future of Europe. In order to do so it has realised that this educational role cannot be properly carried out or maintained without input from the research perspective. In that sense the future of the Academy itself must be seen as one in which it aspires to becoming a centre of European research in legal theory. Given the huge size of the project it is not sufficient simply to rely on the individualist tendencies of research carried out by academics and doctoral students. According to Professor Van Hoecke 'in order to really develop some common European Legal Culture, to develop a theory of (European) comparative law, we need a more intensive and structured cooperation'. What is intended by this is the involvement of longer-term work being carried out by academics on sabbatical at the Academy. Once again, the community of scholars would extend to include those working in related areas in Australia. The commitment to research at PhD level is evidenced by the recent creation of a European Award for Legal Theory to be given bi-annually for the 'best doctoral thesis in legal theory (in a broad sense) in Europe'. Of course, while the biggest prize for most doctoral students is the end in itself, such an idea can only help to raise awareness of the issues the Academy seeks to promote.

Some issues

The Academy's outlook on the possibilities of a common legal culture are overtly optimistic. Though there is no harm in this, there are realistic problems which scholars in this area must necessarily come up against. I shall only mention a couple, though the potential candidates for inclusion are numerous. First, there is the unoriginal challenge of coming to terms with the differences between the two dominant legal traditions within the Community, the civilian and the common law. Rooted as they are in different political and intellectual histories, they provide ongoing fascination for the comparative lawyer at a conceptual level. But here the practitioner's perspective ought also to be acknowledged. Though, of course, we must keep an eye out for the dangers of caricaturing the difference, it is perhaps best summed up anecdotally by Lord Cooper in a discussion of the problem from the (rather unique in this connection) Scottish point of view. The civilian lawyer, he says, putting faith in the syllogism begins by 'first silently asking himself [sic] as each new problem arises, "What should we do this time?"', while the common lawyer 'asks aloud in the same situation, "What did we do last time?"' So it is that, while important to the comparative lawyer, one of the real points to be addressed is the hold the difference has on the mind-set of practising lawyers as they come to construct and argue legal issues. And though it may be argued that the importance assigned to the difference is on the decline, partic-

ularly in regard to Community law, it is the attitude of practitioners which in this area is perhaps most in need of assessment if a new legal culture is to be promised. Once again, we shall find that this can only begin to be dealt with in the law schools, and only if they themselves perceive the problem as being more than just a question about which black letter law techniques should be learned. In that regard, the issue must not just be reserved for the domain of postgraduate work, but forced through into considerations for undergraduate teaching. So Roy Goode, Professor of English Law at Oxford, may be well-founded in this sense when he writes: 'I wonder whether we are right to begin a study of European Community law with Community law itself rather than with the history and development of legal ideas in one or more jurisdictions on a comparative basis'.

Goode's remark raises a second problem. How are such comparative studies to be carried out, given that the way in which law generally is perceived in different countries, by both lawyers and citizens, may vary greatly. In considering differences between Italian and English attitudes David Nelken has recently drawn attention to the way in which the respective communities react differently to the institution of law and, in particular, to the differences in how they conceive the role of the State in personal and political life. As he points out:

> In England, for many purposes, it is an ideal of law (and even the rule of law) that it should be linked to the supposed 'common sense' of (certain sections of) the community. In Italy, partly as a result of differences in the history and conception of 'the State', law's role is seen as necessarily opposed to many normal social and business practices.

The real difficulty here is whether, given that these great attitudinal differences must be picked up in any comparative work, a common legal culture can surmount such apparently ingrained differences. More important than that, however, is the democratic issue of whether such an attempt would be desirable in itself, for the implications of change run straight to how people choose to run their lives, with how they try to assert their political identities, and with how they rank the institution of law in facing up to these questions.

In thinking about these issues we must reassess how we are to view law and its study within the university. Importantly, if research is indeed to be concerned with the study of legal culture it must shake off the residual vestiges of overly positivist-inspired philosophy, with its ideas of a rational and scientific unity of knowledge and its association with statist politics. Law cannot be seen as an island of modernity in an otherwise fragmented collection of local traditions and knowledges. As such I would imagine the most interesting and fruitful work could be carried out in the area of critical and comparative anthropologies of law. For only in this way can the work of the university be seen to properly inform and be informed by its wider setting. As moral philosopher Alasdair MacIntyre reminds us, this can only be done:

> when and insofar as the university is a place where rival and antagonistic views of rational justifications are afforded the opportunity both to develop their own enquiries, in practice and in the articulation of the theory of that practice, and to conduct their intellectual and moral warfare.

Putting conflict at the heart of universities' teaching and research is the only way to make the study of law at all viable.

Conclusion

My aim here has been to show a small part of a much broader and ongoing debate. It is only fair to say that while the signals from the Academy are clearly hopeful, they would not be shared by all scholars, far less by all politicians. But it is certainly warming to find that more complex theoretical issues are not being abandoned in what some might see as simply the relentless pursuit of the ideals of the free market in the European Community. Conflict and cooperation between legal systems, competing theories of democracy, and the recognition of tradition are thus at the heart of debate in Europe. But, of course, not only there. Similar and different problems relating precisely to these issues are being faced in Australia. What is important about the Academy is its commitment to legal education and research, and the promotion of theory as integral to how we see our legal and political futures. This is always a lesson worth listening to.

LEGAL STUDIES

Based on 'Confessions in the High Court' by Andrew Palmer, p.203

Questions

1. What do you think a fair trial is?
2. What procedures should police follow to ensure fairness to an accused before a trial?
3. How does the common law attempt to ensure that the trial is fair?
4. '[I]f the police infringe one of the rights of a suspect in custody or any of the procedural rules designed to protect a suspect against unfair methods of obtaining evidence, the fact of this infringement should, *prima facie*, lead to the exclusion of any resulting confession on the grounds that it would be unfair to allow its use at trial.' If this is the effect of *Pollard* and *Foster* is that a good thing?
5. The author discusses the imbalance of power between police and accused, particularly in the context of an Aboriginal accused person. What do you think could be done to redress that imbalance?

(a) in relation to accused people generally; and

(b) in relation to Aboriginal accused people in particular?

6. (a) When will 'fairness' demand the exclusion of a confession?

(b) When will 'public policy' demand the exclusion of a confession?

Should the courts exercise their direction to exlcude confessions either on the basis of a 'fairness' or on the basis of 'public policy' more liberally? Justify your answer.

7. 'In Australia, where there is no Bill of Rights, the "cat out of the bag" approach must instead be pursued by broadening the concerns of the fairness discretion from a solely reliability-based conception of fairness, to a protective one.' Would an Australian Bill of Rights provide more effective protection to an accused than does the common law? What provisions would need to be included in such a Bill of Rights in order to provide such protection?

Research

'In *Pollard*, Brennan, Dawson, Gaudron and Toohey JJ said that the breaches by police of their statutory duties were relevant to the public policy discretion.' What statutory obligations are the police under in your jurisdiction in relation to the obtaining of confessions?

Debate

That the public interest in seeing the guilty brought to justice is more important than the interest of the public in ensuring that the police themselves respect the law.

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