Universidad Carlos III de Madrid

Universities in the XXI Century.

The future of legal studies in Europe

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Dear Dean, distinguished guests, fellow professors, students, ladies and gentlemen,

It is a great honour and a privilege for me to be here today to receive an Honorary Doctorate by the University of Örebro. I bring with me the most warm and affectionate greetings from the Rector and the Dean of Universidad Carlos III de Madrid.

I want to express my thanks to the Dean of the Faculty Board of Humanities and Social Sciences, the teachers and the managers of this University for proposing me for such an honour. In particular, I want to thank Professor Annina Peerson for her interest and cooperation at all times, without whose intervention and support I would not be here today. And I do not want to forget and thank Professor Eleonor Kristoffersson.

I remember the first time I came to Örebro. I then asked to please be able to come in spring because I thought that due to my Mediterranean nature it was going to be difficult to stand the cold of the Swedish winter. Now I know I was wrong. Not only I find Sweden absolutely beautiful in winter but also I feel the welcome even warmer. Well, the first time I came, I was happy to find at Örebro University several students from Universidad Carlos III de Madrid, who

were here within the Erasmus exchange program, and with whom I had the opportunity to meet. They told me how comfortable they found themselves at Örebro, how easy the exchange procedure had been and how interesting it was to learn about a similar-different legal system. That first time I also arrived to Örebro University within the Erasmus Program, in my case for the Mobility of Teachers. It was a brilliant experience. It gave me the opportunity to give lectures abroad, and it was a pleasure to find out that students were interested in how legal subjects are treated and how legal problems are solved in other jurisdictions. It is no doubt a mind-opening experience for students to learn about others problems and their solutions.

But that first visit was not only successful at the teaching level. It was an occasion to learn about the research conducted at the Department of Law at Örebro University and to start a collaboration also in the field of research, not only with the exchange of investigation results but also with the idea of cooperating in research programs.

For all these reasons, I feel very proud and very comfortable to come back to this well know University, with the hope that many other fellow professors from Universidad Carlos III de Madrid might follow my steps to build longer and solid bridges between our two universities.

When I understood that I had to speak here today it took me a while to decide on the subject of my lecture. My first thought was to speak about my last research project regarding non-contractual liability (Tort law) in Europe and, in particular, liability for damages caused by animals. Then I thought that I should speak about my favourite subject. And in my case that is Art Law. I wrote the thesis for my Doctorate in law about the sale of works of art, taking mainly into account the problems of lack of authenticity or wrong attributions of the works sold and the remedies in the hands of the buyers.

But when I realised that the audience was not going to be made of lawyers I thought I could not torture you with a very legal explanation and complicated legal concepts. It was then that I realised, thinking on what I have told you about my different visits to Örebro University, that I should talk about University cooperation and the future of the legal studies in Europe.

I participated in April last year in an international conference of the Swedish Network for European Legal Studies held at Stockholm, organized by professors of Örebro University, about the future of European Private Law and how far should harmonization go in that field. There were different

views, but most of the participants coincided in the idea that a full harmonization is not necessary, nor desirable.

It depends of course on the field of the Law we are considering. The difficulties to arrive to common rules shall not be as hard with regard to Contract Law as to other fields, such as Family or Succession Law more influenced by the culture of each country. Let's think for example about divorce. In Malta they had a referendum only in 2011 to decide if they were going to incorporate divorce to their legal system. And they did, by a slight difference of 52% of the votes in favour. In Spain divorce was admitted in 1981 and the causes of divorce were set, being completely free only since 2005. Divorce has been known in Sweden for a long time. When other European countries did not regulate it, I have a very funny Swedish colleague who said that there was only one condition for divorce in Sweden; you had to be married.

But also in areas where convergence is easier, there are certain matters strongly influenced by cultural roots or by the character of the individuals of the different countries, what we call "Legal Culture". We can take as an example the role of good faith in different European Legal systems. For instance, German Law is open to the possibility to adapt a contract in the name of good faith when the change of

circumstances produces such an unbalance in the rights of the parties that it would be unjust to go on with the contract as it is. Spanish Law is stricter with regard to that possibility and the change of circumstances that produces an unbalance in the rights of the parties shall only entail the modification of the contract in very exceptional cases. In English Law of contract there is no general principle of good faith and therefore it does not have any presence whatsoever in the performance of contracts; the contract has to be performed as agreed.

Another good example we find with regard to the transfer of ownership. In France (due to the influence of the rationalist school of natural law) and in Italy the contract itself transfers the right of property no matter if delivery has taken place. In France and Italy delivery is the mere fulfilment of the previous consent of the parties expressed in the contract. But in Germany, (due to the influence of Savigny and the historical school) it is the delivery of the thing that transfers the property. The conclusion of the contract which precedes delivery is not a requirement for the transfer of ownership, but only the element to show that there is a will to transfer the right of property. Furthermore, in the case of immovables, the delivery of the thing is substituted in Germany by the need of registration. In Spain the contract itself does not transfer ownership, it is of a pure obligatory

nature in the sense that it compels to a future real exchange. For the transfer of property delivery (the roman *traditio*) has to take place, but it shall be based in a valid entitlement (*iusta causa*); the preceding contract that justifies the efficacy of the transfer (and not in an abstract cause as in Germany). In England the transfer of property shall depend on the intention of the parties as to when ownership should be transferred, and the intention of the parties shall be ascertained by applying an objective test which takes into account the terms of the contract, the conduct of the parties and the circumstances of the case. And there are also statutory rules to find the intention of the parties.

And, in this regard, we cannot forget the specialty in the Nordic countries that follow a *functional approach* to the transfer of ownership, based on the idea that the different faculties provided by the right of property over a thing can be transferred in different moments of time, as opposed to the *unitary approach* followed in the rest of the European countries which considers one moment in time (generally the conclusion of the contract or the delivery of the thing) in which all the faculties comprised in the right of property are transferred. And, furthermore, the particularity of Swedish Law according to which the buyer of goods is not protected against the seller's creditors until delivery of the thing

(unless it is a consumers' sale), a rule that cannot be set aside by the parties agreement.

Clear examples of differences in basic concepts of Civil Patrimonial Law.

The great debate about the necessity for the convergence of the European Legal systems shall continue, but for the time being we have to adapt to the situation. And in the current circumstances I have to say that I am an enthusiast of the different non-binding initiatives promoted by several working groups to modernize the Law of obligations and contract Law in Europe (Principles of European Contract Law, Principles of European Tort Law, DCFR…). And I am due to several reasons. First, because most of them look for the better solution, and do not impose the solution of the most powerful legal system. Therefore, they are a tool in the hands of scholars to learn about other legal systems and to think on the best way of regulating a particular issue. But also, because these initiatives influence the activity of European legislators, who shall take them into account in new regulations, and they also influence the activity of the judiciary. National Courts quote and use these principles in their judgments, being this a less radical way of harmonization and more adapted to the legal traditions and

necessities of the different European countries. Although, we have to admit that the courts of some European countries are ready to consider these initiatives (e.g. Spain and Sweden), while others are not so open to this influence.

So, which is the role of a modern university in Europe?

Modern universities need a new approach, or I should better say a subsidiary approach in the legal studies. They shall prepare students with knowledge about other jurisdictions but without losing the focus on their local Law. In this respect educational programs like the Erasmus European program are ideal. Students need to have a basic knowledge of other legal systems and not only for transnational transactions or for legal acts with a scope bigger than a national scope. Even the potential affection of an act by a legal system different from the one of the country in which it takes place has to be taken into account.

The world has changed. In the time of our parents the possibility of a legal act to have an international connection or aspect was immensely lower that today. Globalization brings new possibilities, but also new problems. European lawyers have to be ready to face them.

To start they have to have a basic legal knowledge of the systems which might more likely influence their legal practice. For European lawyers the study of other

European countries' law is a must. For instance, continental lawyers need to know the main features of Common Law. Qualified students of Law in Europe need to learn about other jurisdictions. Only with this kind of knowledge we shall have students prepared with the necessary theoretical and applied skills needed for a successful career within the European territory.

I am not a comparative lawyer but all of us need to be a little comparative in the future. Comparative Law is a very useful science. We can learn from others good choices as well as from their mistakes. I shall give you an example. I was invited to Bucharest last fall to attend an international conference. It was taking place because they have enacted a new Civil Code in Rumania and they have translated it into French. I have to say that they have had the courage and the political support to do it. We in Spain, have an official project for the modernization of our Contract Law and the Law of Obligations that lies somewhere in a drawer in the Ministry of Justice since 2009.

Well, the Faculty of Law of the University of Bucharest wanted to have a view from the outside and a view from the inside on their new Code and invited scholars from all over Europe and America to give their view on different subjects. I chose to speak about non-contractual liability because

they had made an interesting regulation of it. A regulation sometimes too influenced by French Law and French jurisprudence (like in their choice of strict liability for things), but very new in other cases, like with regard to damages caused by the mentally incapable, influenced by German and Canadian Law.

I did not want to talk in that conference about contractual liability, because the new Rumanian Civil Code is stuck in the old concept of hidden vices and has not incorporated the common law oriented concept of “lack of conformity”, a system more adequate to the current necessities of the exchange of goods. But I was happy to discover that they, themselves, were already very critical about it. A lesson for other European Countries who, like Spain, are in the way of modernizing their Law of Contracts and of Obligations.

But we, European lawyers cannot make the mistake to think that the European agreement about certain matters is the only “better solution”. In a globalized world we have to consider the importance of other legal systems that differ from ours and we have to think on how to solve the clash between very different regulations (e.g. China, India,…). And we have to do this without forgetting the needs of our countries, of our citizens and areas of influence. This is a matter, I am afraid, where practice goes far ahead the

regulation. We have good solutions and initiatives for this crash (e.g. the success of the CISG, the UN Convention on Contracts for the International Sales of Goods or the UNIDROIT Principles for International Commercial Contracts), but a long way has yet to be walked in this regard.

A University in the future has to face all these challenges. The effort for the internationalization of universities is a key issue. Universities have to prepare students to deal with these new needs. Law students have to come out of university being able to act in Europe and in a globalized world with the same precision, confidence and accuracy as before.

Universidad Carlos III de Madrid has made and is making an enormous effort for internationalization. We promote the exchange of students and teachers. We encourage cooperation in the area of research. But of course, these goals need bigger economic resources. In times of economic turbulence universities are in danger of not being able to cope with these new challenges due to the lack of resources. Universities have to be open in the cooperation with society, and society has to understand the importance of a quality education and a successful research in order to give back to universities what they receive from them. In

this regard, in Europe (maybe with the exception of the UK) we are far beyond U.S. universities that have had the precaution of convincing their society of the need to finance universities and to contribute to the development of knowledge.

[At Universidad Carlos III we are making a big effort to increase the raising of external funds and we are having quite a success. For example, in 2008 19.884 million Euros were raised, representing a 56,18% increase from the funds raised in 2007].

I shall end with a little reference to the new teaching techniques and new materials. Well, they are more than welcome in as much as they can help the goal of a better and more solid education. Free software, open on-line courses, ... are new tools in the hands of students and teachers that we cannot underestimate. However, we should not overestimate them either. For instance, online courses I think have their role to play, but not in every case. I don't find on-line courses appropriate for the acquisition of basic knowledge, for example, for a whole law degree. I think online courses are interesting for students who already have a base of legal studies and want to deepen in a particular field. Or they might have even a more interesting application. They are a fantastic way of keeping

the knowledge of teachers in their particular field of research. For instance, we could record lectures by teachers who retire and whose knowledge and savoir faire would otherwise be lost for good.

And a last consideration with regard to the web. In my experience students tend to rely on the materials they find in the web as if it was the Bible of modern times. We have to make students aware of the dangers of the lack of quality in many of those materials. They should only rely on materials which have gone through a quality control and these controls are still today barely existent on the internet.

Now let me end by reiterating how grateful I am for this honour and how happy I am to be back to Örebro once more. I am sure this day is not the end of the road, not even half-way, but only another step in a long lasting cooperation between our two universities. Thank you.