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Towards a European Legal Culture

C.H. Beck · Hart · Nomos

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Foreword

If there is any such thing as a notion that is capable of generating passion amongst lawyers, 'legal culture' surely falls into this category. Legal scholarship, with its customary time-lag, has recently begun to catch up with the broader social sciences and embarked on its very own cultural turn. The idea first gained currency in comparative legal studies when the discipline realised that, in a globalised world, it had to engage more deeply with the non-Western legal traditions. And while comparative lawyers had for a long time preached that legal comparison involved much more than a mere juxtaposition of rules of law, the cultural embeddedness of these rules in the broader social, political, economic, philosophical and religious context of societies became much more obvious once comparative enquiries reached out beyond the Western world.

As it became more widely acknowledged that comparison requires a consideration of the broader context of legal systems, the notion of legal culture quickly rose to prominence in the debates surrounding the harmonisation of European law, particularly European private law. This process had been prepared and supported by comparative studies that were primarily concerned with similarities, be they at the level of functions or with regard to substantive outcomes. These studies had paid less attention to the question how legal rules operate in foreign cultural contexts and, more specifically, how pan-European rules would fare in different national legal cultures. In contrast, those opposed to further legal harmonisation focused intensely on these issues. For them, any move towards a Europeanisation of law was doomed: since all law was an expression of legal culture and there was no such thing as a European legal culture, the idea of a harmonised European law as a mirage. Even worse, harmonised European rules would inevitably lead to unexpected and often undesirable results when parachuted into different national legal cultures. The cultural challenge thus emerged as one of the central theoretical arguments against a further Europeanisation of law.

There are at least three possible responses to this challenge. The first is to point out that there undoubtedly used to be a common European legal culture in the past: it emerged in the Middle Ages, persisted during the early modern period and only vanished with the rise of the modern nation state and the nationalisation of private laws from the late 18th century onwards. Tracing the roots of modern national private laws to their common origin would help to revitalise this common legal culture, albeit in a new form.

A second possible reply to the cultural challenge is to question its fundamental assumption, namely that there is no European legal culture at present. Such an approach would highlight the deep-seated commonalities of European legal

systems, all of which are secular and capitalist democracies committed to the protection of human rights. Of course all these features are conceived of in slightly different ways in the different European countries with their domestic understandings of, say, the rule of law, private autonomy, social welfarism and the relationship between church and state. Yet they represent fundamental values that are absent in most non-Western legal systems. And even within the Western legal tradition it is possible to discern distinctively European characteristics of legal culture that distinguish Europe from the United States, such as a persistent belief in legal reasoning based on formal rules which will generate broadly predictable outcomes in adjudication, a comparatively state-centred vision of the administration of justice, the conception of law as an autonomous discipline with a corresponding focus on black-letter law, a dearth of interdisciplinary scholarship and a very different attitude to legal education. From this perspective, even the very existence of marked diversity across legal systems within an overarching European discursive and structural framework might be viewed as just another peculiar feature of a European legal culture that is already in existence.

A third possibility is to regard the cultural challenge to legal harmonisation as meaningless. Law and legal cultures are man-made, it might be argued, and as human beings we are not ruled by the dead hand of the past. Even if we were to concede that a European legal culture never existed and does not exist at present it would not be beyond the capabilities of European lawyers to bring it about. Legal cultures are not static. They are subject to constant change and, while some of them disappear for good, new ones emerge. Such an approach would focus on the future, and it would primarily be concerned with instigating changes in legal education and the other social and institutional features that tend to combine to make up a specific legal culture.

The vast majority of contributions to the present book might be understood as making an argument within the second or the third of these categories of responses. Some of them argue that a European legal culture is already in existence, albeit perhaps a rudimentary existence, and it is here to stay. Others provide a blueprint for a future European legal culture and suggest how some of its building blocks ought to be shaped. The very title of the book suggests that, while European lawyers may still be on the move ‘Towards’ a European legal culture, they have at least agreed on the aim of establishing such ‘a European Legal Culture’. It is hard to tell whether such a shared ambition across Europe does indeed exist or whether it is still the vision of an avant-garde. Be that as it may, the following contributions are, even where they identify significant obstacles to the exercise of building a common European culture, pervaded by a constructive spirit. This does not, however, necessitate a sterile uniformity of outlook, and many diverging, sometimes even opposing, positions are adopted.

Indeed, any such uniformity would come as a surprise, given the heterogeneity of topics covered. The editors of the present book faced a problem that in-

evitably arises whenever the legal culture of a legal system is explored: the very breadth of the term 'culture', coupled with its indeterminacy and fuzziness, permits for the discussion of a broad of variety of prima facie unrelated issues under a common label. It is very much to the credit of the editors and their authors that the various chapters in their entirety provide a clearer idea of the features of the emerging European legal culture as it currently stands and of its possible characteristics once this culture might have been fully established. A close analysis of 'Towards a European Legal Culture' will thus yield rich rewards for a wide variety of readers: not only lawyers but also other social scientists, not only Europeans but also those from further afield, and finally all of those interested in very different areas of law, ranging from administrative law to corporate governance. I recommend this book most warmly to its readership.

Stefan Vogenauer,
Oxford, September 2013

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Shaping Culture with Legal Norms

List of Contributors

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Hugo Barbier is a Professor at the Faculty of Law at Nice University in France. His main fields of research are contract law and company law. His doctoral thesis “Freedom of risk taking” (under the supervision of the deacon Jacques Mestre) was recently published as a book (PUAM, 2011). This study supports the admission of freedom of risk taking in legal order. Major current legal debates, such as the precautionary principle, the functioning of the capital markets, revolve around the necessary reconciliation of the freedom to take risks and the need for security. Law has a mission to create a legal regime enabling this freedom, and taking into consideration its foundations, limits, sanctions and awards, so as to encourage risk taking whenever it is necessary for the social order and to discourage it whenever it is excessive. Hugo Barbier studied law at the University of Aix-en-Provence and passed the French *agrégation* competition exam.

Guido Comparato (law graduate of the University of Ferrara, Italy) is Academic Assistant at the European University Institute, Florence since 2011 and a PhD candidate at the Centre for the Study of European Contract Law at the University of Amsterdam since 2008. His doctoral research focuses on nation-

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