Towards a European Legal Culture
by Geneviève Helleringer and Kai Purnhagen (eds.)
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*Thomas Wilhelmsson**

'Legal culture' has been a highly topical issue in European legal discourse during the last decade(s). Numerous books and articles have been published offering the interested a web of perspectives on the past, present and future of European legal culture. The book to be reviewed offers yet another contribution to this debate. And, it may be said already in the beginning, a contribution of high quality and interesting insights concerning a difficult topic.

Or one should rather speak about contributions, in plural. This is not a monograph with a coherent perspective. It is a collection of essays by various authors that do not share the same concept of culture or legal culture. By necessity therefore the questions posed in the various contributions are different and the answers given vary across a broad range as well. But this is not meant as a criticism, just as an advice to the reader. One should not look for *the* answer in the book, but rather enjoy a multitude of answers given in papers that almost without exception are well written and documented.

The systematisation of the book pretends to offer the reader a structure. It is divided in three Parts. In the first Part six papers are collected under the heading 'Law and Culture – Two Uneasy Bedfellows', the second Part called 'Shaping Legal Norms with Culture' contains four papers, and the last Part with five papers is named 'Shaping Culture with Legal Norms'. At least for a one-time reader it is almost impossible to find the key according to which the papers have been distributed to the different Parts of the book. In particular the opposite chains of influence in Parts II and III were not easy to find in the concrete papers in the different sections. But again: who cares about the structure and headings of the Parts, as long as the papers are interesting?

I must admit, though, that I find the heading of the first Part somewhat irritating. The metaphor of law and culture as bedfellows – be it easy or uneasy ones – is difficult to understand. To me law *is* a cultural phenomenon. And Western culture is not imaginable without law. Law and culture are not bedfellows that could separate if life becomes too uneasy, they are parts of each other that cannot be separated. A deep legal perspective necessarily contains culture and a deep perspective on (Western) culture necessarily contains law. And this is in fact obvious also for the editors of the volume: 'From the starting point that law and culture are uneasy bedfellows it has become clear that legal norms are as much shaped by culture as culture is shaped by legal norms.' (p. 13)

The way in which these processes take place are, as is said before, described in various ways in the individual articles. It is not easy, if at all possible, for the reader to connect the insights of the various papers to each other. There is no real dialogue going on between the papers. This is at least partially due to the fact that the key concepts of the book, namely 'culture', 'legal culture' and 'European legal culture' are not defined and used in any coherent – or even semi-coherent – manner throughout the book. Very often authors use the same concepts when one is speaking about apples, the other about oranges.

The distinction between 'culture' and 'legal culture' – which could be defined for example as the professional culture prevailing among legal actors – is not always made. And 'legal culture' for some are the basic features of the rule of and administration of law, for others the substantive principles upon which the legal system is built, be it fundamental rights (Chantal Mak) or the ideals of the free market (Ari Afilalo, Dennis Patterson and Kai Purnhagen, 'market-state theory'), whilst yet others rather tend to focus on the peculiarities of legal reasoning. And all these ways of speaking about 'legal culture' are of course fully legitimate.

What I miss is an analysis of the various levels of legal thinking and activity, connected in different ways to the more cultural strata of society. I have always found the analytical apparatus offered by Kaarlo Tuori (Critical Legal Positivism, Ashgate 2002), distinguishing the surface level of law, consisting of legislation, cases and other concrete legal material, from which concepts, principles and patterns of legal reasoning are slowly sedimenting down to the legal cultural level – which of course in turn affects

* Chancellor, Professor of Civil and Commercial Law, University of Helsinki.

the way in which the surface level materials are understood and applied. Below both surface level and the level of legal culture Tuori places the deep-structure, consisting of exceptionally slowly moving features of Western legal civilization, such as human rights and the rule of law itself. All the levels interact with each other in various ways. The editors of the reviewed book of course rightly conclude their introduction by noting that 'European legal culture is not static', but 'describes the outcome of an iterative process, being constantly developed and reflected on by the "legal society"' (p. 13). A further analysis of the structure of those processes could have brought the papers more in dialogue with each other.

In the reviewed book some, like Stefan Vogenauer in his Foreword (p. VI), seem to focus on joint deep-structural elements of Western legal tradition, whilst others move more on the legal cultural level, in the sense described by Tuori. Still others take their starting point rather in the surface level European law and discuss possible sedimentation processes towards a Europeanised European legal culture.

In many contributions European legal culture is looked at in a harmonisation perspective. The question then is dynamic: is there evolving a joint European legal culture? Or is diversity to be seen not as an obstacle to a European legal culture, but rather as an important feature of this culture, 'united in diversity'. As the editors note: 'The diversity of solutions is already an expression of the richness of European legal culture.' (p. 12-13). Or as Hans-W.Micklitz emphasises in his impressive analysis of the dynamics of an emerging European legal culture: 'My conclusion is that we should emphasise the **un**-systematics of law as an element of European legal culture.' (p. 88).

One answer to the challenges that respects diversity is to look at procedure rather than content. Klaus Mathis in his contribution analyses cultures of administrative law in Europe: 'modern administrative law governs value pluralism by the formalization of interactions between players instead of the formalization of values, and traditional hierarchical regulation is supplemented by cooperative control structures such as networks.' (p. 140). It is interesting to note how the conclusion, based on analysis of New Public Management, new administrative law scholarship and the Governance Approach, comes close to concepts like proceduralisation (Rudolf Wiethölter) and reflexive law (Gunther Teubner) from the 1970s and 1980s, before the wage of Europeanisation.

All papers have some particular point of view that would deserve closer scrutiny and presentation. However, I will mention only a few, as examples of the high quality of the volume.

A new kind of bottom-up perspective to the issue is offered by Geneviève Helleringer, who discusses the potential for contract clauses to build a European legal culture. To her the emerging shared contract clause vocabulary in Europe represents a 'do it yourself' dimension of European legal culture (p. 271). I think she points at an important, and often undervalued element of the processes of Europeanisation and globalisation of law, an element which we to a growing extent can feel around us in our day-to-day legal work.

If practice runs ahead of culture, so should education. Nicos Simantiras in his contribution discusses how to reach a common culture in European legal education. He notes the great diversity in the field, and offers as a strategy to move forward the focusing on European legal method, horizontal coordination of curricula and academic mobility (p. 236-237). I do agree, even though I am a little pessimistic, as the European legal faculties have not yet even been able to agree on whether to employ the Bologna bachelor-master structure for law studies or not. Some have implemented it, usually successfully, whilst others find it 'impossible'.

Martijn W. Hesselink as usually offers an interesting contribution. In this case though I would personally like to defend the somewhat younger Hesselink against the re-evaluation made by the contemporary Hesselink. I think his book The New European Legal Culture (Kluwer 2001) in a very convincing way demonstrated the development of legal culture in Europe from formalism towards a more pragmatic approach (a claim that was easy to like by a Nordic lawyer, as Nordic law at least in its self-understanding sees itself being on the more pragmatic end of the scale). In the present volume Hesselink analyses the situation ten years on, and concludes that 'the neo-formalist tendencies seem to be stronger today than they were when I wrote the original essay.' (p. 23). However, the arguments for this, such as 9/11 and the end of postmodernism, neo-nationalism, the new member states and the CFR process, are on a level the effect of which on legal culture is still im-

possible to measure. Legal cultural perspectives of this kind cannot be judged based on such a short period as ten years. So I will not yet put the original book on the shelf.

For the readers of this journal it should finally be mentioned that risk regulation is particularly analysed in one of the papers. Hugo Barbier writes about the freedom of risk-taking in European legal cultures. He poses the question whether risk is treated in the same way in French, English, American, and German law (p. 212). Even though he spots some differences, he hopes that 'risk will soon be approached from the same perspective across Europe.' (p. 220). For his conception of the social order this is an important claim, as he sees 'risk' as a new notion that structures the social order in the same manner as in earlier phases the notion of contract and the notion of the firm. This theory is based on, among others, the well-known and established ideas concerning the emergence of the risk society (Ulrich Beck, Risikogesellschaft, 1986). However, the concept of 'risk' is not very clearly defined in the short paper, which leaves the author's defense of an emerging (fundamental) legal 'freedom of risk-taking' still somewhat unconvincing in this context (his thesis La liberté de prendre des risques, PUAM 2011 looks deeper into this issue). Anyway, the paper offers yet another new perspective on European legal culture.

And this is the strength of the volume as a whole. It gives the reader a large variety of possible ways to approach and think about European legal culture. Such a well-written pluralist collection of essays gives what its title promises: various roads 'Towards a European Legal Culture'.