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The New European Legal Culture – Ten Years On

Martijn W. Hesselink

Introduction

Almost a decade has passed since I wrote *The New European Legal Culture*.¹ In that essay I argued that Europe was facing a shift from a rather formal, dogmatic and positivistic approach to a more substance-oriented and pragmatic approach to private law. 'The instrumentalist and impressionist approach of directives, the pragmatic style of the ECJ, the subversive role of comparative law with its functional method, the external economic, cultural and political perspectives given by academics, the success of soft law which is based on substantive authority rather than on formal enactment, and the depositation of legal education as a result of the implementation of the Bologna Declaration', I argued, 'together contribute to a new European legal culture that is significantly less formal, dogmatic and positivistic than national legal cultures in Europe have been.' 'The emergence of this new European legal culture', I wrote, 'is a result of these separate but related developments, and of the Europeanisation of private law in general.' The publication of a Chinese translation seems a good occasion for taking stock.² Ten years on, has the trend towards a less formal legal culture in Europe been confirmed or is there now a reverse tendency? In this short paper I will argue that the picture is mixed. There are both examples of neo-formalism and new examples of a more substantive approach to private law. I will discuss four milestones and their implications for European legal culture: the sudden end of the postmodern era after 9/11 (Section II), the failed European constitution and the related neo-nationalism (Section III), the arrival of the new Member States (Section IV), and the CFR process (Section V). I will conclude that overall today the neo-formalist tendencies seem to be stronger (Section VI).

9/11 and the end of postmodernism

When I was writing the original paper, postmodernism was still thriving, also in legal academia.³ Indeed, many of the elements of the new, post-formal European legal culture that I described had a post-modern flavour, for example the 'disruptive directives' that undermine the hope for a coherent legal system, or the 'subversive

¹ M.W. Hesselink, *The New European Legal Culture* (Deventer: Kluwer, 2001). The book is now sold out but the same essay was re-published, as chapter 2 (pp. 11-71), in M.W. Hesselink, *The New European Private Law; Essays on the Future of Private Law in Europe* (The Hague, London & Boston: Kluwer Law International 2002). Moreover, the text is now freely available at SSRN: <http://ssrn.com/abstract=1029573>.

² The book was also published in Italian, as *La nuova cultura giuridica Europea* (Napoli: Edizioni Scientifiche Italiane 2005), in Romanian, as 'Noua cultură legală europeană' in: *Studii de Drept Privat Comparat* (Bucharest: Themis Cart 2008), 5- 70, and (in an abbreviated version) in Dutch 'De nieuwe Europese rechtscultuur', in: A.F. Salomons, M.W. Hesselink en C.E. du Perron, *Uitgesproken teksten* (Amsterdam: Vossiuspers UvA, 2001), pp. 19-30.

³ See, for example, J.H.M. van Erp, 'European Private Law: Postmodern Dilemmas and Choices. Towards a Method of Adequate Comparative Legal Analysis', vol 3.1, *Electronic Journal of Comparative Law*, (August 1999).

effect' of comparative law that erodes the faith in right answers to questions of law.⁴ However, since then the intellectual climate has changed quite dramatically. Without any doubt the turning point was 11 September 2001. After the terrorist attacks on the Twin Towers in New York, in the eyes of many our times suddenly seemed far too serious for deconstruction and relativism. Since then there has been a renewed desire for certainty, stability and objectivity.

In legal scholarship, one example among many is the recent success of neo-empiricism. Science is measurement. Although 'empirical legal studies' is more a response to the limits of (neoclassical) economic models that were based on unrealistic assumptions than to shortcomings of legal analysis, which is normative and therefore hard to quantify (except for its factual assumptions), it is certainly exemplary for the new intellectual climate.⁵ There is a renewed hunger for hard data instead of subversive theories. More specifically in relation to European legal culture, after the emphasis a decade ago on the inevitability of legal fragmentation and incoherence, today the idea of a European Civil Code is gaining explicit support.⁶ At the same time, projects, like the Common Core Project, that do not focus on rule making and are more deconstructive (notably in relation to the received notion of 'legal families') are less prominently present on the academic scene today.

Neo-nationalism and the failed Constitution

The main argument in the original essay consisted of two elements: 1) a new European legal culture is emerging; and 2) that new culture is distinctly less formal than the existing national legal cultures in Europe. The end of postmodernism relates to the second element, i.e. the nature of legal culture, but what about the first element, i.e. its Europeanisation?

When the Treaty establishing a Constitution for Europe was rejected in the French and Dutch referendums, in May 2005, the conclusion became inevitable, even for the political and cultural elite, that a new step forward in European integration was lacking broad popular support. This had its implications for the Europeanisation of private law as well. Indeed, Diana Wallis MEP caught the new sentiment very well when she pointed out that 'it is hardly the time to be seen to be moving towards anything that remotely resembles a European Civil Code; if the voters of Europe did not want a constitution it is hardly the moment to force a civil code, even just a contract code on them. The political moment, the political context is not right; however, as with the constitution, the practical arguments in favour of greater harmonisation will remain.'⁷

Of course, the constitutional debacle was part of a broader change in the political climate in Europe. Multiculturalism, cosmopolitanism and post-nationalism gave way,

⁴ See Sections IV.A and IV.C respectively.

⁵ The *Journal of Empirical Legal Studies* started in 2004.

⁶ See eg H. Collins, *The European Civil Code: the way forward* (Cambridge: CUP, 2008).

⁷ D. Wallis, 'European Contract Law – The Way Forward: Political Context, Parliament's Preoccupations and Process' in: *ERA-Forum Special Issue on European Contract Law - Developing the Principles for a "Common Frame of Reference" for European Contract Law* (Trier, 2006), 8-11, 8).

throughout Europe, to outbursts of xenophobia, neo-nationalism and protectionism. All of a sudden, Asian countries such as India, that were previously regarded as developing countries in need of our aid, came to be perceived as our most dangerous competitors, and therefore a threat, in spite of the fact that the standard of living of the people in those countries, although improved, remains spectacularly lower (in terms of GDP, capabilities or any other standard, such as earning less than a Euro per day) than our own. During the recent financial crisis governments came to the rescue of their national champions (ABN Amro, Opel) at the price of direct job losses in their neighbouring countries (Belgium). And Turkey, a country whose entire history (Constantinople, the Ottoman Empire) has been intertwined with that of a great many other European countries is denied accession to the European Union because it is 'culturally different' (i.e. most of its citizens are Muslims).

A strong example in law is the openly nationalistic language ('das Deutsche Volk') used by the German *Bundesverfassungsgericht* in its recent *Lissabon Urteil*.⁸ In private law, resistance against directives from Brussels is not new, of course. What seems to have changed, however, is the perspective. Ten years ago, the debate on European private law was predominantly international. There were many large international projects, research groups and conferences. Today, many scholars and other actors have a more internal, national focus and discuss the implications of Community private law for their own national system. (This is due in part, of course, also to the steady growth of the *acquis* and the resulting scale of the exercise of transposing EC law into national law.)

Having said that, today the tide may be changing again. The entry into force, after all, of the Lisbon Treaty in December 2009 may lead to a new boost for European integration. Also in the area of private law the European Commission may regain the courage to present bolder plans such a European consumer contract code or an optional code of contract law, which had been kept in the drawer until the second Irish referendum was completed and the Czech president had finally ratified the Treaty.

The arrival of the new Member States

Another major development in Europe has been the entry into the European Union of the new Member States. In 2004 and 2007 ten Central and Eastern European countries joined the EU. What has been the impact of these former communist countries on the emerging European legal culture? It is somewhat early to say after only five years, but the inhabitants of these new Member States do not necessarily seem to be more enthusiastic about the European Union than their disaffected fellow European citizens in 'Old Europe'. Indeed, some of the most fervent Euro-sceptics and nationalist politicians are to be found exactly in the new Member States, notably in Poland and the Czech Republic, as the ratification process for the Lisbon Treaty

⁸ BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), www.bverfg.de/entscheidungen/es20090630_2bve000208.html. In order to avoid any confusion, by nationalism I mean 'a political principle, which holds that the political and the national unit should be congruent'; nothing more. See E. Gellner, *Nations and Nationalism*, 2nd ed. (Oxford: Blackwell Publishing, 2006), p. 1. For similar definitions, see e.g. E.J. Hobsbawm, *Nations and Nationalism; Programme, Myth, Reality* (Cambridge: CUP, 1990), 9; J. Leerssen, *National Thought in Europe; A Cultural History* (Amsterdam: Amsterdam University Press, 2006), 14.

made very clear.

Specifically, in relation to legal culture there seems to be an interest in rediscovering pre-communist national roots. The characterisation by others of these Member States as 'former communist' or 'Eastern European' countries (instead of 'Central European') is often resented,⁹ as being some sort of Euro-orientalism.¹⁰ However, the issue is controversial. Others have pointed to examples of communist continuity still existing two decades after the fall of the Berlin Wall, and have criticised the conclusion by comparatists like Kötz that the Communist legal culture in Europe is 'dead and buried'.¹¹ What is the implication for the nature of European legal culture? On the whole, it seems fair to say that the arrival of the new Member States has not strengthened the shift towards a less formal legal culture in Europe. Rather, on average the newcomers seem to feel more comfortable with the dogmatic and positivistic approach to private law that I referred to in my paper as 'classical legal culture'.

The CFR Process

A third milestone, much less significant for Europe and the world in general, but potentially momentous for European private law, were the Action Plan and the ensuing CFR process. In 2003, the European Commission published a communication called *A More Coherent European Contract Law, an Action Plan*. The first aim formulated in that plan was 'to increase the coherence of the EC *acquis* in the area of contract law'.¹² And the key tool for achieving this aim was going to be a 'Common Frame of Reference' (CFR). This CFR, the Commission announced, would be 'a publicly accessible document which should help the Community institutions in ensuring greater coherence of existing and future *acquis* in the area of European contract law',¹³ and would be drafted by legal academics. The academic draft CFR was published by the academics in 2009.¹⁴ How does this development fit into the picture of a new European legal culture?

The CFR will undoubtedly contribute to the further development of a common European legal culture. It may even become a pivotal in it by providing us with a common language (indeed a common frame of reference) for discussing (and teaching) issues of private law, and possibly even with a common model for shared

⁹ See e.g. M. Safjan & A. Wiewiórska – Domagalska, 'Political foundations of private European law – what kind of division lines do we need?', in R. Brownsword, H. Micklitz, L. Niglia and S. Weatherill (eds.) *The Foundations of European Private Law* (Oxford: Hart publishing, 2010 (forthcoming))

¹⁰ Cf. E. Said, *Orientalism* (London: Penguin Classics, 2003 [1978]).

¹¹ R. Mańko, 'Is the Socialist Legal Tradition «Dead and Buried»? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure', in: T. Wilhelmsson, E. Paunio, A. Pohjolainen (eds.), *Private Law and the Many Cultures of Europe* (Alphen a/d Rijn: Kluwer Law International, 2007), 83. Cf. K. Zweigert & H. Kötz, *An Introduction to Comparative Law* (Oxford: Clarendon, 1998) (Preface to the 3rd edition).

¹² *Communication from the Commission to the Council and the European Parliament, A More Coherent European Contract Law, an Action Plan*, Brussels, 12.2.2003, COM(2003) 68 final, p. 2 (Executive Summary).

¹³ *Ibidem*, no. 59.

¹⁴ C. von Bar et al. (eds.), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR) Outline Edition* (Munich: Sellier, 2009), hereafter: *DCFR*.

standards and values in private dealings between European citizens. More broadly, it can contribute to developing a European civil society, as Hugh Collins and Bénédicte Fauvarque-Cosson have recently advocated.¹⁵ In sum, the CFR could become a symbol of what one might call Euro-nationalism. Limited more specifically to legal methodology, the CFR could play a central role in developing a European legal method.¹⁶

However, concerning the other element, post-formalism, the picture is somewhat more complex. On the one hand, the CFR may be regarded as another example of the success of soft law, just like its predecessor, i.e. the *Principles of European Contract Law* (Lando Principles).¹⁷ This is certainly the case for the current 'academic' draft CFR, which is not law in any formal sense but nevertheless is currently being taken into account e.g. by the European Parliament with a view to amending the Commission's proposal for a Consumer Rights directive.¹⁸ If the European Commission (and Council and Parliament) were to commit themselves (e.g. through an inter-institutional agreement) to some degree (e.g. 'comply or explain') to a 'political' CFR then to that extent the role of the CFR would become more formal. Obviously, this would be even more strongly the case for an optional code based on the CFR.¹⁹ However, the issue is delicate because of the obvious lack of a legal basis for European legislation having a scope similar to the CFR (i.e. the whole of patrimonial law).²⁰

On the other hand, however, the CFR is likely to re-affirm, on a European level, the classical dogmatic approach to private law. Indeed, the first reactions to the draft CFR have evaluated (and criticised) it in exactly this sense.²¹ Also, the outlook of the draft CFR is distinctly formal. This is in stark contrast with the informal style of the

¹⁵ See H. Collins, *The European Civil Code: the way forward* (Cambridge: CUP, 2008) and B. Fauvarque-Cosson, 'Theoretical foundations of European private law: the need for codified guiding principles and model rules in contract law', in: R. Brownsword, H. Micklitz, L. Niglia and S. Weatherill (eds.) *The Foundations of European Private Law* (Oxford: Hart publishing, 2010 (forthcoming)).

¹⁶ See M.W. Hesselink, 'The Common Frame of Reference as a source of European private law', 83 *Tulane Law Review* 4 (2009), 919-971.

¹⁷ H. Beale & O. Lando (eds.), *Principles of European Contract Law, Parts I and II, Prepared by the Commission on European Contract Law* (The Hague: Kluwer Law International, 2000); O. Lando, E. Clive, A. Prüm & R. Zimmermann (eds.), *Principles of European Contract Law, Part III, prepared by the Commission on European Contract Law* (The Hague: Kluwer Law International, 2003).

¹⁸ *Proposal for a directive of the European Parliament and of the Council on consumer rights*, Brussels, 8.10.2008, COM (2008) 614 final.

¹⁹ On the possibility for consumers buying online to opt for the European code by clicking on a logo representing the European flag, see H. Schulte-Nölke, 'EC Law on the formation of contract - from the Common Frame of Reference to the "Blue Button"', 3 *ERCL* 2007, 332-349.

²⁰ See M.W. Hesselink, J.W. Rutgers, T.Q. de Booy, *The legal basis for an optional instrument on European contract law; Short study for the European Parliament on the different options for a future instrument on a Common Frame of Reference (CFR) in EU contract law, in particular the legal form and the legal basis for any future optional instrument*, PE 393.280 (February 2008) (available at SSRN: <http://ssrn.com/abstract=1091119>).

²¹ H. Eidenmüller, F. Faust, H. C. Grigoleit, N. Jansen, G. Wagner & R. Zimmermann, 'Der Gemeinsame Referenzrahmen für das Europäische Privatrecht - Wertungsfragen und Kodifikationsprobleme -', 63 *JZ* (2008), 529-584; Nils Jansen, 'The Authority of the DCFR', in: Hans Micklitz & Fabrizio Cafaggi (eds.), *After the Common Frame of Reference - What Future for European Private Law?* (Cheltenham: Edward Elgar 2010 (forthcoming); available at SSRN: <http://ssrn.com/abstract=1264011>).

Principles of European Contract Law and the *Unidroit Principles of International Commercial Contracts* that I described in the essay as the new trend. However, the DCFR is also criticised for its neo-formalist style and many observers have argued that the abstract concepts of 'juridical act' and 'obligation' should be substituted with the more concrete notion of 'contract'.²²

Conclusion

As a general conclusion, almost a decade after I wrote the original essay, I think it is fair to say that although there are still signs of a transformation from a rather formal, dogmatic and positivistic national legal culture into a more substance-oriented and pragmatic European legal culture, the neo-formalist tendencies seem to be stronger today than they were when I wrote the original essay.

²² See Ole Lando, 'The Structure and the Legal Values of the Common Frame of Reference', *ERCL* (2007), 245-256; Reiner Schulze & Thomas Wilhelmsson, 'From the Draft Common frame of Reference towards European Contract Law Rules', 4 *ERCL* (2008), 154; Hugh Collins, 'Review', *Modern Law Review* (2008), 840-844; M.W. Hesselink, 'The Consumer Rights Directive and the CFR: two worlds apart?', 5 *ERCL* (2009) 290-303; Fauvarque-Cosson, *loc. cit.*, who all advocate a return to contracts, instead of juridical act and obligations, as the central categories.