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One European legal culture or several?

Introduction: European legal integration

United Europe as a concept has been pursued with considerable vigour since the collapse of Communism in 1989. Political and economic integration has been sought through European Union (EU) enlargement to the east and deeper integration within the EU, through the European Economic Area (EEA) and the European Neighbourhood Policy (ENP). Integration is being implemented primarily through the streamlining of institutional frameworks and the harmonisation of national legislation.[1] However, former British Member of the European Parliament (MEP), Glyn Ford, has argued that 'genuine partnership (in Europe) can only develop on the basis of shared common values – in particular, democracy, the rule of law and respect for human and civil rights' (Kuzio 2004) – which presupposes some harmonisation of legal culture as well as legislation and legal institutions.

More than a decade ago Lawrence Friedman (1997, p. 34) noted that 'we have, for almost every society, precious few data about legal culture, because we have never bothered to gather them'. Since then we have systematically collected such data in three EU member states (the United Kingdom – below referred to as the UK,[2] Poland and Bulgaria), one EEA member state (Norway) and one ENP[3] member (Ukraine).

These countries not only have distinct legal cultures, but they also differ on a number of dimensions of relevance to legal culture. Yet, they are all exposed to the same external factors and pressures intended to facilitate

[1] European elites are also using culture as a tool for forging a sense of cohesion and belonging among Europeans (Shore 2000; Checkel and Katzenstein 2009).
[2] As England, Wales, Scotland and Northern Ireland have different legal systems we collected data in England only.
[3] For an overview, see http://ec.europa.eu/world/enp/index_en.htm

(legal) convergence.[4] As a result, all of them are formally transitioning from *less* to *more* integration and thus possibly also from *less similar* to *more similar* legal cultures.

This book provides a comprehensive and empirically based analysis of these five national legal cultures, with a view to establishing whether – and to what extent – national legal cultures in Europe are converging.

Legal culture

Legal culture may be defined as a 'way of describing relatively stable patterns of legally oriented social behaviour and attitudes' (Nelken 2004, p. 1).[5] To some scholars this phenomenon constitutes an inherent part of the wider political culture. Others argue that legal culture, political culture and economic culture carry equal weight and are closely interconnected, even dependent on each other (Trubek 1985, p. 919; Ewing 1987, p. 487; Tamanaha 1995, p. 470). They all agree, however, that the study of legal culture facilitates a better understanding of the context into which legal transfers (i.e. the transfer of law from one geographical, cultural, political and/or economic setting into another) are introduced, and thus also some explanation as to why some such transfers succeed while others fail.

Legal culture may manifest itself at different *levels*, for instance as *supranational legal culture*, *national legal culture* or *subnational culture* – at regional or local levels within a country (De Sousa Santos and

[4] These include EU law (Regulations, Directives and Decisions), case law from the Court of Justice of the EU (CJEU), the European Convention of Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR), the United Nations (UN) Human Rights Conventions, international trade agreements and others. Norway, for instance, is bound by the decisions of the EFTA (European Free Trade Association) Court and the EFTA Surveillance Authority (ESA), which oversees the implementation of the EEA Agreement.

[5] Some academics (Legrand 1996; Spamann 2009) prefer the terms *legal mentalities* or *legal families* over the term *legal cultures*. It could be argued that the former are more narrow concepts than the latter in that they primarily – though not only – refer to legal traditions rather than the wider, cultural setting within which law and legal institutions operate. The same may be said for the concept of *legal consciousness*. Silbey, cited in Smelser and Baltes (2001, p. 8626), describes the difference between the two terms as follows: 'if research on legal culture focuses attention on the myriad of ways in which law exists within society generally, the study of legal consciousness traces the way in which law is experienced and interpreted by specific individuals as they engage, avoid, or resist the law and legal meanings'. For an in-depth discussion of legal consciousness, see Barclay and Silbey (2008).

Rodriguez-Garavito 2005). Such legal cultures may also reflect *religious traditions*. Within Europe it makes sense to talk about the existence of a *Judeo-Christian legal culture* and an *Islamic legal culture,*[6] though there are clearly subcultures within both of these.[7] Added to this, the *different actors* operating within the wider supranational, national or religious legal culture may have different legal cultures.

Research on *supranational legal culture,* for instance, has addressed global legal culture (Menyhart 2003), the Western European legal tradition (Gessner, Hoeland and Varga 1996) and European legal culture.[8] Studies of the latter tend to focus on specific aspects of European legal integration,[9] such as compliance or non-compliance with EU directives (Falkner, Treib, Hartlapp and Leiber 2005) or with the rulings of the Court of Justice of the European Union (CJEU) (Carrubba and Murrah 2005) – with a view to establishing whether or not legal systems in Europe are converging. Hesselink (2009, p. 7) claims that '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'. Others suggest that on some levels there is convergence, whereas on others there is divergence. Kjær (2008), for instance, believes that language both hinders and facilitates European legal integration.

Research on *national legal culture* (Zirk-Sadowski 2006) usually addresses one or two key formal features of the legal culture of a country (see, e.g. Nethercott 2007), such as its economic basis (Ogus 2001) or historical context (Nenner 1977; Watson 1983; Wieacker and Bodenheimer 1990). Studies of the legal culture of one or several countries during particular historical period(s) (Lemmings 2000; Burbank 2004; Sunde 2007) or contemporary national legal culture are also common.

[6] For an overview of human rights as a concept in Islam and the West, see Sadurdin (2010). Ramadan (2005) advocates the modernisation of Islam – including its legal aspects.

[7] For discussions of the link between religion and (legal) culture, see McConnel, Cochran Jr and C. Carmella (2001); Yilmaz (2005); Mayer (1991); and Katz (2008).

[8] Although some scholars believe that a European legal culture already exists, others claim that it is being created through the Europeanisation of law (Wieacker and Bodenheimer 1990; Michaels in Basedow, Hopt and Zimmermann 2012, p. 4).

[9] Madsen, Kjær, Krunke and Petersen (2008, p. 1) claim that there is 'surprisingly little consensus on what is implied by the terminology *European legal integration*'. Referring to Gessner and Nelken (2007), they suggest that 'the term covers a plurality of processes and subject-matters, ranging from basic analysis of the European institutions and their competences to the impact of supranational law-making on national ways of producing law, even national ways of life'. We address this issue by exploring attitudes and perceptions rather than specific law or institutions.

The study of *subnational legal* culture tends to focus on the legal culture of specific ethnic minority groups (Ravna 2010) or nations within larger states (Forte 2010).

Friedman (cited in Nelken 2004, p. 1) distinguishes between *internal legal culture* (i.e. the ideas and practices of legal professionals) and *external legal culture,*[10] which refers to the opinions, interests and pressures brought to bear on law by the wider society, from political elites to the general public. Other terms used to distinguish between those working professionally with the law and those being affected by law are *professional* and *popular legal culture*, or the legal culture of *legal insiders* (i.e. those working professionally with the law) and *outsiders* (i.e. non-legal professionals who are affected by law). Subcultures exist within both sets of categories.

The rationale behind these concepts is that the views and behaviour of legal professionals are likely to differ depending on the educational establishment in which they received their training or on the type of institution or even the part of the country within which they operate.[11] The attitudes, perceptions and behaviour of the general public, on the other hand, may differ by gender, age, level of education, area of residence, ethnicity or religion, to mention but a few.[12]

The link between law and popular culture has been given considerable – and increasing – attention in recent years (see, e.g. Black 2010; Freeman 2010; Menkel-Meadow 2010): legal scholars have investigated the manner in which law, legal institutions, legal professionals and legal negotiations are depicted in religious texts as well as in world and/or national literature (Freeman 2010), and in films and television series (Machura 2010; Nead 2010).[13] Much attention has also been given to the manner in which the latter affects perceptions of right and wrong, law and legal institutions amongst legal outsiders (Harding 2010), legal insiders (Denvir 2010) as well as contemporary law.

There is a considerable literature on *legal outsiders* – either *within* or *across* national legal cultures. Such works usually explore perceptions

[10] Some scholars use the term *popular legal culture* instead of *external legal culture* (MacAuley 1989).

[11] To give an example, the style of judgement in the first instance court in Bergen (West Coast) is said to differ considerably from that of the first instance court in Oslo (Bratholm 1957).

[12] For an account of several dissimilar subcultures within popular legal culture in America, see Yngvesson (1989, p. 1694).

[13] Films and television series addressing law and legal issues in a popular manner are referred to as 'reel justice'.

amongst legal outsiders on key dimensions of legal culture, for instance, attitudes towards norms, tradition, religion and state law (Bierbrauer 1994); support for the rule of law, perceptions of law as a non-neutral, repressive force, and support for individual liberty (Gibson and Caldeira 1996) and punishment preferences (Sanders and Hamilton 1992).

The legal culture of *legal insiders within national or supranational legal cultures* has also been studied in-depth. Such studies have investigated the behaviour of a specific type of legal insider (usually lawyers or judges, but also prosecutors) within one single country (Barry and Berman 1968; LoPucki 1996; Polak and Nelken 2010), within several countries whose legal traditions are similar,[14] or within countries whose legal traditions differ (Goutal 1976; Kűhn 2004).

More recently, academics have turned their attention to legal insiders operating at a supranational level. Arold (2007), for instance, in her study of the legal culture of judges at the European Court of Human Rights (ECtHR) in Strasbourg, concludes that even though judges from 47 different countries are represented in that court, they have developed a distinct legal culture. Franklin (2010) reaches similar conclusions with regard to the CJEU in Luxembourg.

The majority of studies of legal culture have been conducted in a limited number of countries – usually one or two (Blankenburg 1994), considerably more rarely in more (Blankenburg, Tromp, Kana, Notten, Maracz and Geerts 2000; Nolan Jr 2009). Further, they tend to draw on written materials (usually formal texts or formal legislation), small-scale qualitative data or quantitative survey data collected for purposes other than the studies for which they are used. One of the largest studies of legal culture conducted by means of large-scale quantitative data to date is that of Gibson and Caldeira (1996).[15]

Legal transfers and legal culture: convergence versus divergence

The world is becoming increasingly interconnected due to globalisation and economic integration. Globalisation and European integration have

[14] For examples, see Blankenburg (1994), Blankenburg, Tromp, Kana, Notten, Maracz and Geerts (2000), and Herron and Randazzo (2003).

[15] Gibson and Caldeira's study of legal culture in Europe is based on data from the 1992 Eurobarometer Survey – for which they commissioned several questions concerning the CJEU, and on re-interviews of subsamples of the 1992 Eurobarometer respondents as part of the 1992–3 Panel Survey.

largely been law-driven. Although some analysts perceive globalisation as a process of homogenisation or convergence, others argue that globalisation also brings about heterogenisation, localisation or divergence – as local environments reject the dominant global culture. Yet others believe that the end result of globalisation is more likely to be some kind of 'hybridization'(Berger) or 'glocalization'(Roland), that is, 'difference-within-sameness', rather than sameness or differentness only (Nolan Jr 2009, p. 25).

The idea that political and/or economic reform may be achieved by legal 'borrowing' – that is, by introducing legislation from systems perceived to be more efficient or successful – is not new. As the purpose of such borrowing is typically to enhance economic performance or to promote democracy – including the rule of law – transferred law may be referred to as 'liberal' transfers. Perhaps the two most wide-ranging liberal transfers carried out to date are the democratisation of Europe's post-communist states and their adjustment to, and eventual admission to, the EU.[16] Studies of the link between legal culture and globalisation (Friedman and Pérez-Perdomo 2003) and legal culture and democratisation in developing states (Gloppen, Gargarella and Skaar, 2004) provide in-depth analyses of such legal borrowing. The 'war on terrorism', on the other hand, has produced what could be described as a set of 'illiberal' legal transfers – that is, laws curtailing basic civil and human rights in the name of national security.[17]

One group of scholars believes that legal systems are not easily altered and that for this reason they simply cannot converge. Balas, La Porta, Shleifer and Lopez-de-Silanes (2008, cited in Voeten 2008, p. 420), for instance, claim that differences among legal systems have deep historical roots that are not easily open to external influences and that have enduring effects on the performance of legal, economic and political institutions. Legrand (1996, pp. 61–2) is even more pessimistic, maintaining that 'legal systems, despite their adjacence within the European Community (EC), have not been converging, are not converging and will not be converging. It is a mistake to suggest otherwise . . . such

[16] Ajani (1995, pp. 93–4) notes that 'Central and Eastern Europe, as well as Russia, has again openly become a large-scale borrower of Western models. During the Socialist era, despite declamations on the "originality of socialist law", Western models were borrowed, even if a careful legal scholarship disguised them, or judges were unaware of their origin. But the scale was slight, if compared to today's situation'.

[17] A more detailed discussion of the literature on legal transfers is provided in Chapter 7.

convergence, even if it were thought desirable (which, in my view, it is not), is impossible on account of the fact that the differences arising between the common law and the civil law *mentalités* at the epistemological level are irreducible'. Even when some of the formal legal rules are converging, they continue to have a different meaning in common law countries due to cultural and historical differences in the nature of legal reasoning.

Another group of scholars believes that legal systems may converge *given certain conditions*. The 'culturalists', for instance, hold the view that 'the success or failure of a legal transplant depends on the culture from which the law originates and the culture into which it is transplanted'. Consequently, legal transplants from 'same-type' cultures are more likely to succeed than transplants from 'other-type' legal cultures.[18] Graziadei (2009, p. 697) suggests that 'legal systems can accommodate a plurality of models, though most transplants probably still occur across legal systems that already have much in common'.[19]

By contrast, Husa (2004, p. 13) and Reimann (2002) – both referred to in Voeten (2008, p. 429) – claim that legal systems are converging *regardless of whether they are similar or different* due to regional integration and the prominence of international legal rules. As noted by the 'transferists' (Small 2005, p. 1431) 'law is autonomous from culture and, as such, good law is transplantable irrespective of culture'.

Legal transfers usually, though not always, occur at the initiative of an external party and tend to be accompanied by some pressure (Hiscock 1995; Mayhew 1998; Van Olden 2002, p. 4; Kochenov 2008). For this reason, some scholars believe that legal transfers are not likely to succeed given that they tend to be 'exported to' rather than 'imported by' its new setting. They therefore tend to be perceived as non-legitimate in their new setting and are simply unused (Seidman 1978). There is also some evidence that legal transfers frequently fail to perform as intended because they are based on legal paradigms that do not fit the recipient state's context (Miller 2003, p. 840).

As regards the question of whether legal transfers within Europe facilitate convergence or divergence, findings are not conclusive. Levitsky

[18] Other scholars study legal transplants in relation to context – that is, those circumstances that specifically drive the development of a particular rule, rather than in relation to culture – that is, 'a society's entire background' (Small 2005, p. 1438).

[19] Nolan Jr (2009), for instance, explores the 'export' of American-style problem-solving courts to five other common law cultures.

(1994) claims that there is such convergence in the English legal system due to influences from the EU, whereas Ajani (1995, p. 113) observes that countries in Central and Eastern Europe (CEE) and the Commonwealth of Independent States (CIS) seem to have adopted 'common law solutions, because of the insistence of proponents and commentators who are more familiar with such solutions in a body of law having continental style and structure'. Weick (1999, p. v) claims that a dualism between competition and convergence is found in 'the whole spectrum of the law of the (EU) Member States' and that such dualism is beneficial for – rather than posing an obstacle to – European (legal) integration.

Although there is some disagreement with regard to the various factors that either on their own or in combination affect and ultimately determine the outcome of legal transplants (Kahn-Freund 1974, p. 7), legal culture is perceived as a key component. Wang (2010, p. 83) notes that 'since transplantation involves the transfer of the conceptual thinking of the imported law, legal transplants often bring about a transfer of legal culture'.[20] Friedman and Scheiber (1995, p. 9) are somewhat more cautious, suggesting that 'just as we are seeing a palpable convergence in popular culture worldwide ... we may also be witnessing a convergence in legal cultures'.[21]

Methodological approach

Our starting point is that whereas there appears to be convergence of European national legal cultures as a result of globalisation and European integration, there simultaneously appears to be divergence of such cultures – due to (i) the historic divide between common law and civil law, (ii) the legacy of Communism, and most recently (iii) the pressure of international terrorism and (iv) to some extent also between broader society, on the one hand, and Muslims, on the other – all of which divides European national legal cultures. On some of these issues the divisions are historic and possibly fading, but on others they are contemporary and possibly increasing.

[20] Some academics view the translation of legal texts as a legal transfer (Mochny 2002).

[21] Wiegrand, for instance, has identified several ways in which American legal culture has shaped European legal culture, institutions, law and legal practices (ibid., p. 12). Most studies of legal convergence focus on contemporary legal integration processes. However, Watson (1997) investigates legal transfers in the historical context.

This is therefore a time and place to explore legal cultures in similarities, in traditions and in transitions. Such a study merits considerable depth rather than breadth at the expense of depth – valuable though studies with a wider but more superficial approach are. This book does not pretend to be an 'all-inclusive' or 'representative' study of national legal cultures across Europe: with finite resources (albeit with large – but limited – resources) we could not and should not 'trade breadth for depth'. In generating new knowledge on legal cultures in five European countries and the manner in which they respond to current pressures towards greater similarity this book makes an important contribution to debates over legal transfers, global governance, as well as the relation between universal norms and cultural differences.

Western versus Eastern Europe

Comparative studies usually apply a *most similar* or a *most different systems design*. In the most different systems design one selects a number of very different countries that do, however, share the phenomenon in which one is interested (Lor 2010). Our project compares the perceptions and experiences of *legal outsiders* and *legal insiders* in five countries across Europe from east (Poland, Ukraine) to west (the UK) and from north (Norway) to south (Bulgaria) on several key dimensions of legal culture. Our five countries belong to 'new' and 'old' Europe (Case 2009, p. 112), and they differ significantly as regards a number of factors 'informing' legal culture. Yet they are all exposed to the same external pressures towards greater similarity.

To start our discussion with the differences, our choice of countries first allows for an investigation of legal culture in countries that *belong to different legal families* (Legrand 1997): the common law family (the UK), the Nordic – sometimes also referred to as the Scandinavian – legal family (Norway) and civil law legal family (Bulgaria, Poland, Ukraine). The latter three countries belonged to the socialist legal family and traces from the socialist legal tradition are still present in all of them.[22]

Second, nation states never exist in complete isolation from one another and neither do their legal systems. Consequently, national legal culture reflects not only internal factors but also external factors that

[22] In the late 1990s Kőtz claimed that the Socialist legal family was dead and buried. However, some legal academics, such as Mańko (2013a; 2013b) disagree, claiming that the Socialist legal tradition is still affecting Eastern Europe.

have influenced – in some instances even shaped – the former, over time.[23] The five countries selected for our study *have different legal traditions*. Poland has historically been affected by three distinct legal cultures: the Prussian Rechtstaat culture (characterised by a strong, but law-bounded state and an uncorrupted civil service), the Austro-Hungarian multicultural society under one legal regime, and Russian legal culture, where the law was subordinated to absolutist rule (Skąpska 2003, pp. 588–9). Bulgaria was under Turkish rule for more than 500 years and has therefore been heavily influenced by Ottoman legal culture. Ukraine has been affected not only by Polish and Russian legal culture but also by Austro-Hungarian and Ottoman legal culture. England has a common law tradition, whereas legal tradition in Norway combines features from both civil law and common law (Sunde 2005). Such influences and experiences have produced a set of distinct, contemporary legal cultures, some more 'liberal' than others.

Third, these countries *have different relations with Brussels*: three countries are EU members (UK, Poland, Bulgaria), one is an EEA member (Norway) and one has signed up to the ENP (Ukraine). Norway and the UK are generally Euro-sceptic: Norwegians have rejected EU membership in two national referenda (1972; 1994). A recent poll conducted by the Chatham House (2012, p. 25) shows that 49 per cent of the Brits are in favour of pulling out of the EU.

Despite being one of the most ardent critics of legislation and regulations emanating from Brussels, England is one of the most conscientious implementers of the very same legislation and regulations (Nelken 2004, p. 1). Norway's compliance with EU law is also high (NOU 2012, p. 125). Poland and Bulgaria were very keen to join the EU[24] and did so in 2004 and 2007, respectively. Ukraine aspires to EU membership but is politically unstable and currently embroiled in civil war.

Legal reform undertaken in post-communist states has been referred to as 'voluntary harmonisation' with EU standards (Vachudova 2006). In practice, however, these states had little choice but to comply if they

[23] Ajani (1995, p. 94) notes that 'before socialism, the legal systems of Central and Eastern Europe were deeply influenced by Roman-Germanic law, by scholarly works and statutes originated in the French, German and Austrian, but also Italian and Swiss, legal systems'.

[24] Poland held a referendum on EU membership on 7–8 June 2003. Of the votes cast, 77.5 per cent were in favour of membership. Bulgaria did not organise a referendum prior to joining the EU, but opinion polls conducted before the accession showed that there was huge support amongst Bulgarians for EU membership.