Legal Culture as Mental Software, Or:

How to Overcome National Legal Culture?

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Legal Culture as Mental Software, or: How to Overcome National Legal Culture?

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Abstract
The concept of legal culture plays an important role in the debate about the unification of private law within the European Union. The question whether national cultural differences or differences between the civil law and the common law tradition, in particular, stand in the way of establishing a uniform private law led to a fierce debate. The aim of this contribution is to offer a general account of how we should deal with legal culture in the European context. In doing so, we build upon the work of Geert Hofstede. The point is made that when discussing the Europeanization of private law, we should turn away from national legal cultures and pay more attention to so-called ‘cultural segments’, legal cultures that are not national but functional in nature and that cross state borders. This is not to say that such an approach can be applied easily: the problems it raises will also be discussed.

1 Introduction

The concept of legal culture plays an important role in the debate about the unification of private law within the European Union. The question whether national cultural differences or differences between the civil law and the common law tradition, in particular, stand in the way of establishing a uniform private law led to a fierce debate.¹ The aim of this contribution is to offer a general account of how we should deal with legal culture in the European context. The point I am making is that when discussing the Europeanization of private law, we should turn away from national legal cultures and pay more attention to so-called ‘cultural segments’, legal cultures that are not national but functional and that cross state borders. This is not to say that such an approach can be applied easily: the problems it raises will be discussed as well.

The structure of this chapter is as follows. First, building upon the work of Geert Hofstede, a definition of culture is provided that differs from the usual way in which legal culture is described (section 2). This definition allows us to investigate what types of legal culture actually exist within the European Union (section 3). In section 4, the main question of this contribution is discussed: how to deal with such diverse legal cultures? This leads me to elaborate a ‘strategy of differentiation’

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(section 5) and to discuss the consequences this may have for the current debate on social justice and democratic input in the unification process (section 6).

2 What is Legal Culture? Applying Hofstede’s View of Culture as ‘Mental Software’

The preliminary question to be answered in this paper is what is to be understood by ‘legal culture.’ This term is often used in a somewhat fuzzy way, but it is beyond doubt that a more precise definition is needed to make it a workable concept. Most authors describe legal culture as being about attitudes towards the law. This is clear from the well-known definition of legal culture by Lawrence Friedman, who describes it as: ‘what people think about law, lawyers and the legal order, it means ideas, attitudes, opinions and expectations with regard to the legal system.’ This emphasis on attitudes (such as what role law should play in society) was taken over by Merryman & Clark in their well-known casebook on comparative law where they describe legal culture as the ‘historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system’. And finally, Legrand takes these attitudes to be constituent for the identity of a legal community when he defines legal culture as ‘the framework of intangibles within which an interpretive community operates, which has normative force for this community . . . and which, over the longue durée, determines the identity of a community as community.’

What to think of these definitions? They are certainly right to emphasize that legal culture is about attitudes and values underlying the law. Still, two reasons explain why these definitions of legal culture are not completely satisfactory. First, they are rather static: they take legal culture as something existent that cannot be changed and that individuals cannot run away from, even if they want to. For example, when Friedman defines legal culture as being about deeply rooted attitudes, he seems to regard culture as a mysterious thing, reminiscent of Von Savigny’s

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Second, Friedman, Merryman & Clark and Legrand tend to regard legal culture primarily as national legal culture, whereas many legal cultures may still exist within one country.

This raises the question whether another definition of (legal) culture is not to be preferred. In other areas than law – such as in the field of cultural studies – it is emphasized that culture is not so deeply rooted, but primarily something that is learned by individuals belonging to a certain group. This is particularly clear in the definition of culture of the well-known Dutch sociologist Geert Hofstede. He understands culture to be ‘the collective programming of the mind which distinguishes the members of one group or category of people from another’. This definition of culture as ‘mental software’ consists of two aspects.

First, this definition emphasizes the fact that culture is learned by individuals and not something that comes automatically from being part of a group or a people. Individuals are not born knowing that white is the colour of purity (which it is indeed not in some cultures) or that good faith should be observed in performing a contract. This view of culture allows us to look at it as something that can change, not only over time but also through conscious individual choices. Culture is about attaching meaning to facts and behaviour and those that wish to do so should be able to apply the meaning of others. The otherness often referred to by Pierre Legrand certainly exists, but it does not mean that one cannot become the other oneself. Deviating from the culture one was born into may not always be easy, but it is important to recognize that culture is not intrinsically linked to a person: one can move from one cultural group to another depending on one’s preferences. In the legal domain,

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6 F.C. Von Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft (Heidelberg, Mohr und Zimmer, 1814), although Von Savigny himself never used the term Volksgeist as such.
7 Although this may not be clear from the definitions themselves, it is clear from the context in which they are being used by these authors.
9 Hofstede, n. 8 above, p. 5.
12 Legrand, n. 1 above; and cf. id., ‘Antivonbar’, 2006 (1) Journal of Comparative Law, 13 et seq.
13 This is also apparent in the terminology used by, for example, Montesquieu (‘Comment peut-on être Persan?’) and John F. Kennedy (Berlin speech on 26 June 1963: ‘All free men, wherever they may live, are citizens of Berlin . . . ich bin ein Berliner’).
traditional way in which such preferences are satisfied is through a choice of law. Private international law offers a range of possibilities to choose another legal system than the one applicable by default – although we should keep in mind that these can only be choices for national jurisdictions. This leads me to the second aspect of Hofstede’s alternative definition of culture.

Second, in a view of culture as mental software, culture is something that is shared by a group of people and that need not be defined on the basis of nationality. Traditional accounts of legal culture emphasize the relationship between nation-states and culture, but this seems to neglect that important subcultures can exist within one country and that these subcultures may even cross national borders. The key question is of course to what extent the law should take these subcultures into account. Before an answer to this question can be given, it is useful to elaborate somewhat further on the existence of various legal cultures within the European Union.

3 Legal Cultures within the European Union: Pluralism

Still following Hofstede’s definition of culture, we are now able to establish how many legal cultures can be identified within the European Union. Various types of cultures meet the requirements of a shared mental programming. First, various national legal cultures can be identified on the basis of criteria like the substance of law, the method of reasoning, the interpretation of statutes, the attitude towards the law. Traditionally, the analysis of legal culture has been on this national level: the existence of legal cultures is usually assigned to countries or groups of countries (like the civil law and common law tradition or Nordic legal culture). Good reasons exist for this emphasis on countries. One is that it is practical: it is relatively easy to establish a person’s nationality. Another is that statistics are often only available for countries and not for other segments of society. But a substantive reason also exists for this emphasis on national culture: the age-old presumption that people are indeed shaped the most by their country of origin. Although this probably was true in the past, increasing Europeanization and globalization may have made the situation different.  

14 Hofstede, n. 8 above, pp. 13 et seq.
15 Cf. e.g. T. Friedman, The World is Flat (New York, Farrar, 2005). We should also not forget that in European history, to think in terms of nation-states is a relatively new phenomenon.
The level of analysis can therefore also be another than that of the nation-state. No doubt, many orders meet the requirements of a culture as defined by Hofstede. Such cultures include professional cultures (like those of accountants or international corporate lawyers), cultures based on ethnic origins, religion, language or gender as well as cultures derived from a social class. One can for example speak of European (or even global) business culture and of consumer culture.

These ‘local cultures’ can be relevant for private law in various ways. Most of the time, they find their way into the law through open-ended norms like good faith or duty of care. Thus in contract law, many legal systems allow supplementation of the party agreement with what is customary in the circle of the parties. Also in tort law, the question whether a duty of care is violated can depend on the local culture within which the allegedly wrongful act was committed. A clear example of such influence of local culture on private law is provided by a Dutch case in which Muslim culture played a role. In Dutch contract law – as in many other European jurisdictions – the prospective buyer of a used car has to investigate to a certain extent whether the purchased car has any defects. If the buyer does not fulfil this duty, he cannot avoid the contract if the car does turn out to have these defects. In this particular case, a Moroccan, who had been living in the Netherlands for a long time, bought a second-hand car from another Moroccan. The seller of the car had sworn to Allah that the car was in excellent condition, on the basis of which the buyer bought the car without any further inspection. When the car turned out to be a wreck, the buyer tried to avoid the contract for mistake, arguing that he did not have to inspect the car because if a Muslim swears to Allah, he only does so if he is absolutely certain of his case. This was indeed an argument that the court had to take into account when it decided the case.

This example shows that there may be something like a Muslim contract culture that crosses borders and is not linked to specific countries. Such a ‘cultural segment’ does not coincide with the nation-state and may have relevance for the law.
This intermingling of national legal systems and local or international legal cultures is an important feature of present-day society. The legal pluralism that follows from it raises pertinent questions. One deals with the relationship between national legal cultures and the extent to which these prevent European harmonisation from taking place. Another is about the exact role of local cultures in the legal domain: to what extent should they be recognized? In the next two sections, it will be shown that, if one takes a closer look, these two questions are closely related.

4 Three Different Strategies for Dealing with Diverse National Legal Cultures

The question how to deal with diverging national legal cultures has been intensively debated over the last decade. It would seem that three different strategies can be adopted to determine whether the 25 different national legal cultures stand in the way of unification.

The first strategy is to simply deny the close relationship existing between law and national culture. It is to say that law and society are not closely related and that creating new law by way of – for example – a binding European civil code is not prevented by diverging legal cultures within the European Union. This position of law as being relatively autonomous from national culture can be found in the work of Christian von Bar, but also in the many writings of legal historian Alan Watson. To them, law is not primarily a mirror of society, but something autonomous. If, as Watson claims, law can be transported from one society to another without at the same time losing its original meaning, this is only possible if law is not intrinsically related to national culture. In itself, this view is too extreme: in some cases, legal culture does stand in the way of unifying national laws. On the other hand, however, the positive aspect is that national culture does not always stand in the way of unification and the important question is therefore to find out when this is the case. As

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22 See, e.g., T. Wilhemsson, ‘The Legal, the Cultural and the Political – Conclusions from Different Perspectives on Harmonisation of European Contract Law’, [2002] EBLR, 541 et seq.
will be shown below, it takes a *transnational cultural segment* as just discussed before real unification can happen.

The second strategy is the other extreme. It claims that law and national culture are so closely linked that *any* attempt at unification will fail: national culture will *always* stand in the way of legal convergence. Pierre Legrand is probably the most outspoken representative of this view. In his extreme version of multiculturalism, an escape from one’s own culture is impossible. It is telling that Legrand regards each English child as a ‘common-law-lawyer-in-being’ and there is no escape for this child: it will never be able to understand a civil law jurisdiction. This view is also too extreme as it denies that the law sometimes does move rather easily from one jurisdiction to another. Yet, Legrand’s view rightly emphasizes that culture is *sometimes* prohibitive for a change of the law.

Both these views have in common that they make individuals completely dependent on their culture. To von Bar, one is European and therefore European private law should apply as a reflection of one’s European identity: only one European law fits for Europe. To Legrand, each individual is *either* part of the civil law or the common law tradition (and of one specific national legal tradition as well). These are static views that look at culture as something indivisible, turning one’s life into destiny: they emphasize that everyone is destined by tradition (either European or national in nature). And yet: we must ask ourselves if the fact that people are English or live in the United Kingdom automatically implies that national English law has to apply to everything they do. It may be that *levels of governance* exist that are better regulated at another level than the national one.

A third way of dealing with legal culture is therefore the strategy of *differentiation*. This strategy should acknowledge that people are not confined to their national culture in everything they do. National culture may determine their behaviour when they support their national football team, but does not bind them when they conclude a commercial contract. Such a strategy fits the generally accepted view that every individual can act in different capacities; the law should reflect this. It may well be that in international commercial contracting, not so much national law, but some

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26 Legrand, n. 1 above, 51.
other segment of law (say, lex mercatoria) best reflects the parties’ interests. On the other hand, if one wants to marry the love of one’s life, it could be that the rather liberal Dutch family law is liked the most by some while Irish law is preferred by others. This strategy of differentiation should therefore make it possible to leave one’s ‘own’ legal culture. Which law is to be applied to the things one does, should primarily be decided by individuals themselves. I will now elaborate on this view.

5 Differentiation: Choosing One’s Own Legal Culture

Let us, once more, reiterate Hofstede’s definition of culture. He emphasizes that culture is mental software learned by individuals. This view of culture opens the possibility that culture is unlearned: mental programming can change. The idea that people should be able to escape from the tradition they were born into, was recently taken up by Amartya Sen in his book ‘Identity and Violence.’

In this book, Sen discusses the European practice of multiculturalism in which people are primarily categorized in terms of inherited traditions: the fact that a Muslim is born into a certain community provides him with an identity that he has not chosen, but which still to a large extent decides his fate. Western multiculturalism often means being tolerant towards other cultures, meaning that we have full understanding for the fact that homosexuality is condemned in the Muslim world or that in some cultures women are denied an education and marriage is arranged for them by their family. To Sen this is clearly wrong: we are not destined by our tradition and anyone who wants to break out of it should be able to do so. One has the right to make one’s own choices and choose how one wants to live. It is the responsibility of the State to allow for such freedom.

The point Sen is making on a general level should also interest those who discuss the role of culture in unifying private law. Sen stresses that people should be able to choose another culture than the one in which they grew up. But this does not mean that one should accept the other culture in all its aspects. The core of Sen’s view is that culture is not indivisible: everyone belongs to diverse categories at the same time, has multiple identities. This is also true for the law: it may be that

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30 Sen, n. 28 above.
31 Ibid., pp. 150 et seq.
32 Also see A. Sen, Development as Freedom (Oxford, Oxford University Press, 1999).
33 Cf. Sen, n. 28 above, pp. 4 et seq.: ‘[W]e see ourselves as members of a variety of groups – we belong to all of them. A person’s citizenship, residence, geographic origin, gender, class, politics,
English contract law suits the interests of commercial parties better\textsuperscript{34} than French contract law, whereas some may prefer Spanish family law to Dutch family law. But these other jurisdictions are not preferred because of the fact that they are English or Spanish, but because of their content: they come closest to the cultural segments that cross national borders because they are preferred by a group of people regardless of their nationality or place of residence. As Gunther Teubner put it:\textsuperscript{35}

Globalising processes have created one world-wide network of legal communications which downgrades the laws of nation-states to mere regional parts of this network which are in close communication with each other.

In my view, individuals should be allowed to choose the cultural segments (Teubner’s ‘networks’) created by this globalization process. If we allow individuals to choose the segments they like best, it will automatically become clear where unification of law is possible. Or, to be more precise, the fact that individuals from different countries are willing to choose a given cross-border cultural segment implies that they prefer this segment to their own national law. This makes this area ripe for unification. Legal convergence takes place where society feels the need for it.\textsuperscript{36}

We are now also able to come back to the question raised in section 3: what is the exact relationship between national law and the local or international cultural segments to which this contribution seeks to give a larger role? Clearly, not every cultural segment should be allowed to prevail over national law. If, for example, Muslim culture (including the \textit{sharia}) were recognized as always prevailing over national law, that would mean violating European standards of what is a fair society. This calls for the formulation of a (European and national) \textit{minimum level} of fairness.

\textsuperscript{36} Also see M. Hesselink, ‘The Politics of a European Civil Code’, 10 (2004) \textit{ELJ}, 679, emphasizing that the differences between common law and civil law are not tied to these traditions, but only to some parts of them.
Once this minimum level is established, it is possible to give more leeway to cross-border segments and subsequent individual choices.

One important practical question still remains: how to put all of this into operation? As already indicated, present-day private international law is not designed to allow a choice of other than national jurisdictions. In my view, a promising method is therefore to design optional European jurisdictions that are functional in nature. Apart from company law, this idea has already gained support from the European Commission in the field of contract law. If contracting parties can choose such an optional jurisdiction, it will automatically become clear to what extent a uniform European culture exists in this respect. It is an experimental method: if an optional code is created, one can see how many parties choose it and if they do so, this is a clear sign that an area is ripe for perhaps more binding uniform rules. Outside of contract law, it is more difficult to work with optional codes, but there too one can imagine that – for example – European codes of family law and property law might be created to serve the interests of the parties involved. However, what the exact scope of such optional codes should be and how they should come into being are pertinent questions that cannot be discussed in this contribution. Suffice it here to refer to a previous publication in which I defended the view that optional codes should become applicable by opt-in and should primarily be put in place by way of self-regulation.

6 Two Objections Discussed: the Role of Social Justice and Democracy

The above-cited plea for individuals to choose the segment of law they prefer the most is at odds with the now popular view that European private law should to a greater extent reflect social justice and should be put in place in a more democratic way than is the case right now. By leaving more to the parties, my plea seems to

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40 See in more detail Smits, n. 38 above, pp. 55 et seq.
weaken the role of the national States and the European Union in the unification process, undermining democracy and a high level of protection for the weaker citizen. Thus, an optional code in the field of contract law would work in favour of the commercial party that tries to limit the rights of the consumer.42

My response to this criticism is of a principled nature. There is no doubt at all that it is the task of the European legislator to set a minimum level of protection for the weaker party. This is in fact what the European legislator has been doing over the last 20 years, putting into place more than 20 directives aiming at consumer protection43 and allowing consumers to make better informed choices. The true question is whether this level of protection should go beyond a minimum level and whether it is the task of the European Union to aim for a high level of social justice regardless of the specific circumstances of the countries involved. With regard to this question, my reply is firmly in the negative. In my view, legal cultures differ in Europe with regard to the desired level of protection. There is no need for the European legislator to impose the same level of protection on for example the Poles and the Germans. This would not be in line with the need to satisfy different preferences.44

As to the lack of democratic input, my response is another one. It is generally acknowledged that in the age of globalization, we need to look for new methods of governance:45 a democratic global state is impossible. This means that democratic input in the lawmaking process that goes beyond the minimum level set by the national legislators is necessarily limited. In the case of an optional code, its legitimacy lies primarily in the fact that it was chosen by the contracting parties themselves. In addition to this, optional codes should be drafted with as much stakeholder input as possible, tying these cultural segments as closely as possible to the people for whom they are intended to have value. In this sense, the national state is indeed no longer always the best level for regulating private law: next to rules

44 I now leave aside other objections against the idea of social justice. For a more detailed account, see Smits, n. 38 above.
issued by the European legislator, it is private self-regulation that will play an increasingly important role.\textsuperscript{46}

7 An Organic View of the Law

The argument I have presented above consists of three main points. The first is that our focus should shift from national legal cultures (or from the civil law-common law distinction) to cultural segments that cross national borders. Second, we should acknowledge that legal culture is not indivisible: a person can belong to one legal culture in doing one thing and to another in doing something else. The law should recognize this. The third and final point is that unification of law only takes place where uniform culture exists. A promising way to uncover such culture is by creating optional jurisdictions that parties can choose if they feel these best serve their interests.

Finally, it seems appropriate to return to Von Savigny. His view of the law as being intrinsically tied to society, and developing like an organism, is still true. But Von Savigny was wrong in one respect. To him, society was a national one, based on a national \textit{Volksgeist}. Present-day society is in need of a somewhat different conception of law: law is tied to society, but this society consists primarily of cultural segments that cut across nation-states. The task ahead is to identify them.

\textsuperscript{46}Cf. J. Vranken, \textit{Exploring the jurist’s frame of mind}, (Deventer, Kluwer, 2006), pp. 70 \textit{et seq.}
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