View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by Duke Law Scholarship Repository

Ralf Michaels
Forthcoming in Oxford Handbook of European Private Law (Basedow, Hopt, Zimmermann eds., Oxford University Press)

Legal Culture

1. Term

Legal culture has been intensively discussed in legal discussions over the last twenty years or so, especially in connection with the Europeanisation of private law. Often, national legal culture is simply viewed as an obstacle to → European private law; a European legal culture is viewed as its prerequisite. What is actually meant by legal culture often remains unclear: legal culture is considered important, but an exact definition is not. Moreover, the problems bound up in the concept of culture, which related disciplines – especially anthropology and sociology – have tackled, are widely ignored.

The term legal culture refers to multiple different ideas, which are not always sufficiently separated. Legal culture often describes merely an extended understanding of law and is thus synonymous with „living law" (*Eugen Ehrlich*) or „law in action" (*Roscoe Pound*). Sometimes, the term legal culture is used interchangeably with the term → legal family or legal tradition. More specific concepts exist as well. Legal sociologists especially understand legal culture as the values, ideas and attitudes that a society has with respect to its law (*Lawrence M. Friedman*, *James Q. Whitman*). Sometimes legal culture itself is seen as a value and placed in opposition to the barbarism of totalitarianism (*Peter Häberle*); here, legal culture is used synonymously with the rule of law. Others understand culture as certain modes of thinking; they speak of episteme or mentalité (*Pierre Legrand*), legal knowledge (*Annelise Riles*) and collective memory (*Niklas Luhmann*), law in the minds (*William Ewald*) or even cosmology (*Rebecca French*, *Lawrence Rosen*). In addition, an anthropologically influenced understanding exists of legal culture as the practice of law (*Clifford Geertz*).

Sometimes, borders are fluid, both among these concepts themselves and between them and other concepts such as legal ideology (*Roger Cotterell*) or legal tradition (*H. Patrick Glenn*, *Reinhard Zimmermann*). Some definitions bring different aspects together. *Mark van Hoecke* and *Mark Warrington*, for example, name six elements: legal terminology, legal sources, legal methods, theory of argumentation, legitimising of the law and common general ideology. A similar combination of disparate elements underlies the definition of the styles of legal families (*Konrad Zweigert*, *Oliver Remien*).

2. Law and Culture

An interrelationship between culture and law has long been postulated. *Baron de Montesquieu* postulated in his "Esprit des Lois" (1748) the necessity for positive law to be adapted to the geographical features of the country and the cultural characteristics of its people. In the 19th century the idea of law as the cultural accomplishment of a particular people (as well as the attempt to

determine the „spirit" of particular law) became popular. At the same time, the term culture was also used for a higher stage in the development of law, which overcame the sectionalism of lower stages. When *Friedrich Carl von Savigny* explained law as a cultural achievement, what he had in mind was likely more a European legal culture of legal elites than a national "*Volksgeist*" limited to Germany. In the 20th century, Max Weber established a comparative cultural sociology of law and introduced with it the idea of rationality as culture, a core criterion for western law that still finds wide acceptance today, even though Weber saw considerable cultural differences within this western law, especially between civil law and common law.

Legal culture stands between law and culture, with unclear borders in both directions. According to a widespread understanding, legal culture represents that cultural background of law which creates the law and which is necessary to give meaning to law. This encompasses the role of law in society, the role of different legal sources, the actual authority of different actors and institutions, etc. However, nearly all such elements can also be described as part of law (as long as law is not limited to legal rules). This confluence is not surprising: Given that culture has traditionally been defined in opposition to nature, since the downfall of natural law, all law must necessarily be cultural. For the same reason, legal culture cannot sensibly be separated from law, and it is not entirely clear that the term legal culture provides analytical advantages over a broad and encompassing concept of law.

Equally problematic is the relationship between legal culture and general culture. Legal culture is often viewed as that part of the culture which concerns itself with law. However, law is relevant in nearly all areas of life, so it is difficult to draw a sharp division between legal culture and general culture. More useful is the division between internal and external legal culture introduced by *Lawrence M. Friedman* (but already visible in *Savigny*). Internal legal culture describes the attitude towards law of legal actors such as judges and lawyers; external legal culture describes the attitude towards law of the general population. Legal sociologists frequently consider the external legal culture as more important; doctrinal lawyers, by contrast, focus more on internal legal culture. The more autonomous law is within the society, the more important internal legal culture becomes in comparison to external legal culture. Often, these analyses presume a relatively homogenous and static concept of culture: Culture is used with a view to a community (frequently a nation-state) and provides this group with its identity, by establishing internal coherence and external difference, as well as relative consistency over time. All of these elements – focus on the nation-state, internal coherence, external isolation, lack of change – have in the meantime become very doubtful in anthropology and sociology. Nevertheless, in the legal debate they are often still presumed to be self-evident (see *infra* 6).

3. Relevance

Legal culture is frequently viewed as the cause for certain characteristics of a legal system. For instance, that Swedish law is less systematic than German law is

supposedly caused by the German preference for order. That English constitutional law prioritises the businessman and French law prioritises the consumer (→ Consumers and Consumer Protection Law) supposedly reflects the different attitudes of the respective countries toward the free market. That U.S. procedural law is friendlier to plaintiffs than European law supposedly rests on different understandings of the role of law in society.

Such conclusions are widespread but problematic. They presume that culture exerts influence on law, but they neglect that the reverse is also true, that law influences culture. They also overlook the difficulties of observing legal culture independently from law. In fact, this causal analysis is often circular. For example, → codification in civil law countries is sometimes explained as a reflection of the higher value civil law places on systematisation and completeness as opposed to common law (→ Legal Families, Doctrine of). At the same time, however, the proof that civil law countries prefer systematisation and completeness is found precisely in the fact that they are supposed to explain, namely, the fact that codification exists in civil law but not in common law systems. Cultural analysis like this can in the best case recognise coherence – a preference for order in law correlates with a similar preference in traffic – but not what is cause and what is effect.

Legal culture is more important in explaining and predicting the effect of law on society, such as in the extent to which promulgated laws will be adhered to and judgments will be implemented. Whether legal reform will be successful depends to some degree on legal culture. That is especially relevant for legal transplants between legal systems with different legal cultures (→ Reception of Law). Some believe that such transplants are possible without problems only for legal norms that are largely independent of culture, though there is no unanimity about which legal norms are included – almost all (*Alan Watson*), almost none (*Pierre Legrand*) or only those of economic law in contrast to family and inheritance law (*Ernst Levy*). Culturally dependent legal norms are thought to be transferable only between legal systems with similar legal cultures. Newer studies have shown it more probable that the success of a legal transplant depends on the legal system of the receiving country and its culture (*Otto Kahn-Freund*, *Daniel Berkowitz* & *Katharina Pistor*). If, as is frequently the case, the transplanted legal norm or institution interacts with the recipient legal culture in other ways than it does with the donor legal culture (*Gunther Teubner* speaks in this context of legal irritants instead of legal transplants), this does not signify a failed transplant.

Legal culture is also relevant for the creation of → uniform law. Even if the law of different states is formally unified, each state will likely adapt the unified law according to its respective legal culture. This can stand in the way of effective legal unification. The CISG (→ Sale of Goods, International [Uniform Law]), for instance, is interpreted differently in different legal systems. However, reciprocal effects can be found here as well: legal unification can also produce a unified legal culture. That was the case with the French Civil Code, which reconciled the Roman-law influenced culture of written law in the South (*Roman law*) with the

Germanic-law customary law in the North and spawned a French legal culture. Some hold similar hopes for a → European civil code.

4. National Legal Cultures

If one understands legal culture as applying not to individuals but to a group, legal culture requires a relatively homogenous group. Often, the nation-state is postulated as such a group; comparison is made between, for example, French and British legal culture (*John Bell*). Such inquiries often reveal substantial differences that arise, even between similar states: for example, the litigation rate in Germany is very high, in the Netherlands very low (*Erhard Blankenburg*). The institutional differences that are responsible for this – in the Netherlands many more alternative methods of alternative dispute settlement exist – need not, however, necessarily be described as culture. Be that as it may, studies have shown that attitudes and practices toward the law between nation-states have traditionally demonstrated large differences (*James L. Gibson*, *Gregory A. Caldeira*).

European private law has long taken different national legal cultures into consideration. Especially in private law, harmonisation through → Directives was long preferred over unification through → Regulations because Directives enable every member state to reach a common goal within and in accordance with its respective national legal culture. Member states can establish limited exceptions to regulations promoting the → European internal market based on their own legal culture, especially in the form of national values as → public policy (*ordre public*) or as general interest. However, such invocations of national legal culture are subject to control and restrictions by Community Law. Finally, the discussion about a → European civil code shows the power of national legal cultures. The resistance against rules, many of which would not even be mandatory, is widely grounded in legal culture. In England there is the fear that a European codification would destroy the very different legal culture of the common law (a similar criticism was brought against the Europeanisation of private international law). In France and Germany there is the reverse fear: by replicating national codifications on the supranational level, a European codification will effectively rob national legal culture of its most important achievement.

5. European Legal Culture

Besides invocations of national culture, the view exists that a European legal culture is either already existent or is being created through the Europeanisation of law. Even more than is the case for nation-states, this makes it necessary to justify why Europe is the reference unit, in what way a common legal culture encompasses European nations on the one hand and distinguishes them from non-European states on the other. The political and economic similarities between countries of the European Union are a somewhat arbitrary indicator for common legal culture because, for instance, Switzerland would then have to be left out.

A more promising foundation lies in the common legal heritage of the *ius commune*. The *ius commune* was always more a legal method and legal culture

than a unified corpus of legal rules. This asserted historical foundation necessitates, on the one hand, demonstration that the differences between common law and civil law are not as strong as are widely believed. Such demonstration has been impressively achieved in recent studies on the doctrine and argumentative structures of private law. On the other hand, non-European legal systems have also been influenced by this tradition – especially those of North America and Australia, but also those on other continents. European legal culture in this sense has become western or even global (modern) legal culture, for which Europe is merely the origin, but no longer the centre of reference.

Furthermore, European legal culture can be based on common European values. Here also the problem is to what extent such values are European or rather western. However, the emphasis on values makes it possible to distinguish European culture especially from that in the United States, because several elements of European culture are quite different from that in the United States: a less instrumental understanding of law, a stronger autonomous private law, stronger protections for the weaker party in contract law, stronger emphasis on human dignity and *privacy*, etc.

Some scholars have suggested concrete criteria for European legal culture. *Franz Wieacker* names three relatively abstract elements of European legal culture, which he sees as historically invariable: personalism, legalism, intellectualism. *Peter Häberle*, who sees Europe first and foremost as a "community of legal culture," enumerates six somewhat disparate criteria: historicism, scientific character of legal reasoning and doctrine, judicial independence, ideological and religious neutrality of the state, legal culture as both diversity and uniformity, and particularity and universality of European legal culture. *Reinhard Zimmermann* combines elements of both approaches and traces them back to the Roman law and Christian traditions. In addition to the tension between diversity and unity he names written character, rationality, adaptability, learned character, division between law and non-law (religion, morality), dominance of private law and centrality of the person.

Sometimes the EU itself is said to have its own legal culture – or non-culture (which analytically is the same thing). What is meant by that is especially the style of EU law in comparison to that of the member states: its dynamic character, sector-specific structure, its market-based legitimacy, etc. Responsibility for this style is attributed to EU-civil servants, who on the one hand represent their own different national legal cultures and on the other hand are relatively homogenous in their positive attitude toward the EU. However, these Brussels bureaucrats are assisted in the compilation of European private law through the advice and work of national lawyers all over Europe. Insofar as an EU culture exists, it is unclear which societal groups it encompasses and with whose legal culture it could be contrasted.

6. Criticism

At the same time at which the term culture became popular in legal studies, it began to be questioned, at least as a general concept, in anthropology and

sociology, the fields from which legal studies adopted the term. Many of the problems that those fields recognised with the term culture are relevant also for legal culture, but many lawyers have not yet sufficiently recognised those problems.

One major problem has already been mentioned: culture and legal culture are often used without exact definition and in relation to very different questions. Such vagueness not only puts the explanatory value of the term in question. Moreover, it creates the risk that an analysis of foreign law will be biased by stereotypes about the purported culture of that law

A connected problem is that of essentialised culture. Often, a particular legal culture is asserted to exist and then for this reason alone deemed either deserving of protection or (less often) of rejection. A national codification, for instance, is thought worthy of preservation merely because it represents a cultural achievement. Such discussions of legal culture frequently have the potential to be quite conservative or even reactionary: changes are rejected with an often consciously irrational reference to legal culture.

These problems stem from a conception of culture which has been found problematic. According to this conception, cultures are internally consistent, have relatively clearly defined borders, and are historically largely constant. Such a conception threatens to conceal differences within a particular legal culture while overestimating differences with other legal cultures. So it is, for instance, with the demarcation between civil and common law, which makes differences between them absolute while ignoring the considerable differences among individual civil law systems. Differences are often greater within individual legal systems than between them: the Milan partner of a large law firm has more in common with his colleague in Hong Kong than with a solo practitioner in his own city. New legal cultures emerge along functional differences, such as the global legal culture of arbitration (*Yves Dezalay*, *Bryant G. Garth*). In addition, a particular legal culture almost always faces internal tension. The values of a society, its way of thinking and its practices are constantly questioned in most societies. A unified legal culture is frequently claimed only by those who benefit from it.

On these grounds, the presumption that legal culture is unchangeable is also problematic. Its development certainly displays a certain path dependency (*Anthony Ogus*). But, for example, German law has experienced so many disruptions between 1800 and today that one can speak of a unified legal culture only at a very high level of abstraction.

On balance, the use of the term legal culture in general law and in European private law in particular is doubtful. The reason is not that legal culture describes something unimportant, rather that it describes inadequately something that is very important. Talk of legal culture can be helpful insofar as it sensitises us for important factors beyond legal rules and institutions: values, judicial knowledge, practices, etc. The term legal culture may sometimes be useful to refer to the aggregation of these factors, when the relationship between them is irrelevant. Otherwise, it is frequently more exact and productive, and less misleading, to discuss these factors themselves.

Literature

Lawrence M. Friedman, The Legal System: A Social Science Perspective (1975); *Franz Wieacker*, Foundations of European Legal Culture, AJCL 38 (1989) 1 ff.; *Csaba Varga* (ed.), Comparative Legal Cultures (1992); *James L. Gibson*, *Gregory A. Caldeira*, The Legal Cultures of Europe, Law & Society Review 30 (1996) 55 ff.; *Pierre Legrand*, European Legal Systems are not Converging, ICLQ 45 (1996) 57 ff.; *Mark van Hoecke*, *Mark Warrington*, Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law, ICLQ 47 (1998) 495 ff.; *Roger Cotterell*, Law, Culture and Society – Legal Ideas in the Mirror of Social Theory, 2007; *David Nelken*, Defining and Using the Concept of Legal Cultures, in *Esin Örücü*, *David Nelken* (eds.), Comparative Law – A Handbook, 2007, 109 ff.; *Thomas Wilhelmsson*, *Elina Paunio*, *Annika Pohjolainen* (Hg.), Private Law and the Many Cultures of Europe, 2007; *Reinhard Zimmermann*, Roman Law and European Culture, [2007] New Zealand Law Review 341 ff.