Contemporary Legal Cultures - Introduction

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Course contains:

- exercices:
    - general introduction to the problem of legal culture and legal tradition (1st class)
    - outline of
        - civilian tradition (2nd class)
        - common law tradition (3rd class)
        - hybrid legal system phenomenon (4th class)
- lectures (dr Aleksandra Szymańska, dr Tomasz Dolata)

Grading:

- exercises grade based on attendance and oral presentation on office hours
- maximal grade with perfect attendance (4.0)
- every absence - half of grade down
- if you have less than half attendance - oral presentation is required for passing this part of course
- deadline for presentation - 16th January 2020
- I will be discussion on one of four subjects of our classes (legal traditions, civil law, common law, mixed jurisdictions) - one for absence, all for higher grade

Sources for future reading (and presentation):

Class I: H.P. Glenn, Legal Traditions of the World: Sustainable Diversity in Law, Oxford 2014 (chapter 1, 1-33) - preview available at google.books

Class II: H.P. Glenn, Legal Traditions of the World: Sustainable Diversity in Law, Oxford 2014 (chapter 5, 132-180) - preview available at google.books

Class III: H.P. Glenn, Legal Traditions of the World: Sustainable Diversity in Law, Oxford 2014 (chapter 7, 236-287) - preview available at google.books

Class IV: W. Tetley, Mixed jurisdictions : common law vs civil law (codified and uncodified) (**https://www.cisg.law.pace.edu/cisg/biblio/tetley.html**)

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  - office hours: Thursday 1 pm - 3 pm
  - room 205, building B

- The concept of “culture” is among the key, vague, broadest and most controversial concepts of social sciences, which range from sociology to anthropology from philosophy to law.

- Therefore, the definition may differentiate, depending on different social sciences and also on different approaches within a particular social science.

- According to one scholar, “culture consists of learned behaviours, attitudes and values;” thus, legal culture also encompasses the same components that concern legal issues.

- This was criticised as concept and then alleges that it is an ideological usage, after giving almost the same definition which is “when we talk of traits which are neither universal nor idiosyncratic we often use the term „culture“ to describe the collection of such traits, or of such behaviours, or of such values, or of such beliefs. In short, in this usage, each group has its specific culture.”

Definition of legal culture and legal tradition:

- **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).**
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- 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.

- 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.

- 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)

- 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.

- No two national legal systems are the same, but there are sufficient similarities between some of them to allow classification;
- Different criteria have been used for the purposes of such classification, incl. historical background and development, ideology, sources of law, division of law in the legal system, etc.;
- Most authors agree on existence of two major legal traditions:
  - the Romano-Germanic civil law tradition;
  - the Anglo-American common law tradition.
- Then, there are systems that in the same religious legal traditions', such as:
    - Hindu law,
    - Jewish law,
    - law of Islam
    - Canon law (the law of the catholic Church);
- Some authors also distinguish African (indigenous) customary law.
- However, many legal systems are mixed, they have elements of more than one legal tradition.

Reasons to study comparative law:

- world as a global village
- comparative insights into own legal system
- tool for further harmonisation of law
- natural convergence of different law systems

Concepts (or reasons) of convergence:

- evolution of law
- law of nature
- ius commune
- globalisation

Methods of convergence:

- natural convergence
- legal education
- reception of law
- legal transplants
- codification
- unification of law

Legal transplant

- In the theory of legal transplant (transfer, reception, or transformation- whatever it is called), there are different opinions on the subject.

- Thibaut, a German legal thinker, claimed, following the natural law theory at the beginning of the nineteenth century, that law is a product of human reason, and it can, thus, have the common elements in different countries. Accordingly, legal transplant would then be possible.

- On the other hand, Friedrich Karl von Savigny, another German legal theorist, took the opposite point of view in his reply to Thibaut. According to Savigny, law reflects the culture of a given society, and thus reception in another culture is not possible, because law is a product of that society and of its particular attributes or idiosyncrasies, like other institutions such as language, family, religion and so on.

- These contested opinions between two thinkers was taken up and evaluated by Professor Cahit Can who in his unpublished thesis, stated that Savigny‟s position in terms of reception was conservative and aimed at providing an instrument to delay the revolutionary influences of his time. Thibaut, in this sense, was regarded as progressive, since his idea was found to be supportive of the bourgeoisie revolutionary movement on-going at that time.

Barriers:

- language
- world-view
- ethics system / morality
- history

Public Law and Private Law

- Distinction is very important for civil law countries, and much less important in common law countries;

- However, no unifomity exists among civil law countries in distinguishing public and private law;

- Generally speaking , public law is the law that governs the relationship between the individuals (physical or legal persons) and the state . Thus, in public law state is directly involved as a legal actor;

- Public law includes at least :
  - constitutional law
  - administrative law, and
  - criminal law.

- By contrast, private law governs the relationship between private individuals without intervention of a state or government. In this areas of law state is not directly or primarily a party;

- Private law includes at least:
  - civil law, and commercial law.

- Or, depending upon legal system and accepted classification of branches of law, one can say that private law includes the following branches: contract law, tort law, family law, property law,

Public law

- defines the state or governs the relationship between the state and its citizens,
- tends to be more general, may involve multiple parties or interests,
- more likely to be prospective (forward looking),
- in some cases goes beyond awards of monetary damages (e.g. imprisonment)

Private law

- governs relationship between citizens,
- often retrospective, concerns with resolving secific disputes about past conduct between identified parties,
- rarely has public policy implications.

Public law vs. Private law

Natural law vs Positive Law

- Natural Law: Assumes that law, rights and ethics are based on universal moral principals inherent in nature discoverable through human reason.

- Positive Law: Law is what is formally correctly promulgated