

# European Legal Cultures & Globalisation

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by

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# European Legal Cultures & Globalisation

*Hard times for legal positivists in academia:*

- Comparative Law vs Positivism
- Europeanisation of law vs Positivism
- Globalisation vs Positivism: non-Western Legal Cultures

# European Legal Cultures & Globalisation

- ‘Culture’ refers to “*habits, customs, conceptions, values, principles, ideologies and worldviews governing a society or some group within that society*” (mvh) or
- “*the complex of beliefs, attitudes, cognitive ideas, values and modes of reasoning and perception which are typical of a particular society or social group*” (Cotterrell)

# European Legal Cultures & Globalisation

- Legal culture: *“one way of describing relatively stable patterns of legally oriented social behaviour and attitudes”* (Nelken)
- ‘Legal culture’ in comparative law refers to a combination of positive law and attitudes towards it within the legal profession. The comparatist has to detect hidden understandings in foreign legal cultures

# European Legal Cultures & Globalisation

The hard core of a legal culture (paradigm) contains views on:

1. A conception of 'law'
2. A theory of 'legal sources'
3. A methodology of law
4. Legal argumentation
5. Legitimation of law
6. Some common values and world view

# European Legal Cultures & Globalisation

- Through their hard core of shared understandings, that guide the way legal rules are handled and interpreted, legal cultures create their own identity.
- Cultures are influencing each other
  - ➔ there are no 'pure' legal cultures left in the world
  - In areas such as *commercial contracts* or *human rights* law tends to become a universal language with local 'dialects'
- Cultures are changing (slowly), because of internal or external tensions

# Tensions within European Legal Cultures

## 2.1. Private Law – Public Law

- This distinction as such is a cultural product: very strong in France, weak in the Common Law
- May have fit with 19<sup>th</sup> century societies, but increasingly less today:
  - binding (public) rules for (private) contracts protecting:
    - workers (19<sup>th</sup> Century)
    - tenants (20<sup>th</sup> Century)
    - consumers (21<sup>st</sup> Century)
  - constitutionalisation of private law through human rights
  - use of private law techniques by public authorities


# Tensions within European Legal Cultures

## **2.2. Domestic Law – European Law**

- Europeanisation of domestic law has created a new tension between both:
  - Foreign body in domestic law, esp. Continental concepts and principles in the Common Law
  - Different underlying principles: eg liberal 19<sup>th</sup> century contract theory vs consumer protection
- European rules are simply inserted, not integrated in domestic law



## Tensions in European Legal Cultures

- The tension between European Law and domestic law affects legal cultures in 2 ways:
    1. Domestic law is changing
    2. Some differences between cultures are bridged
-  Eventually it will lead to some new common European legal culture

# Tensions within European Legal Cultures

## 2.3. Substantive Law – Procedural Law

- Differences as to the tasks of the Supreme Court  
Eg: House of Lords vs *Cour de cassation*
- Enforcement of rights is determined by the available procedures: some may be more attractive and more frequently used (eg summary proceedings)
- This will determine what the judge may decide or not and, hence, the content of the substantive law
- Differences as to the role conception of the judge (active/passive, law applying/ law creating)

# Tensions within European Legal Cultures

## 2.4. 'Social' Law – Free Market Liberalism

- ▲ As from 19<sup>th</sup> Century: tension between liberal ideology (eg Civil Codes) and more socially oriented ideologies (eg labour law) in domestic (continental) laws
- ▲ Today: also within European Union law, including as a tension with domestic law (different competences)

# Tensions within European Legal Cultures

## **2.5. Common Law – Civil Law**

- Continental law is invading the Common Law countries through European Union law and European Human Rights law
- However, as in the Common Law, those European laws are largely judge made law

# Globalisation

## 3.1. Legal Monism vs Legal Pluralism

Development from legal monism in 19<sup>th</sup> century centralised Nation States to *legal pluralism today*:

- sub-State regionalisation (UK, France, Germany, Spain, Belgium)
- EU (Mercosur, Asean, OHADA in other continents)
- increasing acceptance of specific rules for some religious or indigenous communities, sports organisations, etc.



Tensions between State law and non-State law (eg headscarves)

# Globalisation

## **3.2. Europeanisation & Harmonisation of Law**

- In the nineties, in order to be able to join the EU Central European countries took over large parts of Western European law
- Common societal developments have led to new legal concepts, principles and rules
- Increasing incorporation of foreign words and concepts in legal languages
- European courts deducting common principles from varying but similar approaches in the Member States

# Globalisation

## 3.3. European Legal Cultures in a Globalising World


Strong influence of European law worldwide, because of

- (a) Colonisation
- (b) Well developed legal doctrine and Codes (as for Continental Europe, mainly France and Germany)



Local cultures have acted as interpretative framework, but the legal technique has been largely globalised



The strong position of the American economy has made American (business) law quite influential, including as to its underlying ideology  tensions with local ideologies