

Law and Cultural Diversity

A Cognitive Approach

Law & cultural differences

- central both in positive and in normative legal analysis

Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (Tony Weir trans., 3d rev. ed. 1998): “The legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results” (p. 34); “different legal systems give the same or very similar solution, even as to detail, to the same problems of life, despite the great differences in their historical development, conceptual structure, and style of operation” (p. 39).

R. Hyland, *Comparative Law, in A Companion to Philosophy of Law and Legal Theory* 184, 193 (Dennis Patterson ed., 1996). “In every society, the issues of practical life are already shaped by history, culture, religion, and language before they are posed as legal questions (. . .) The influence of a society’s vision extends beyond complex political issues and affects the way even the simplest activity is perceived—and regulated by law”.

Each legal tradition must be seen as a discrete epistemological construct. Starting from different epistemological premises, people from different legal systems “cannot ever reach perfect understanding between each other”. Legal traditions are discursive formations incommensurable with one another. “Incommensurability” is a key word in this literature.

P. Legrand, *The Impossibility of ‘Legal Transplants’*, 4 Maastricht Journal of International and Comparative Law 111 (1997), at p. 114: “Anyone who takes the view that ‘the law’ or ‘the rules of the law’ travel across jurisdictions must have in mind that law is a somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage. Indeed, how could law travel if it was not segregated from society?”.

neo-Savignyan resistance to the European legal unification, accused both of impracticability and of totalitarianism

P. Legrand, *European Legal Systems Are Not Converging*, 45 Int'l & Comp. L.Q. 52 (1996), at pp. 61-62: "If one forgoes a surface examination at the level of rules and concepts to conduct a deep examination in terms of legal *mentalités*, one must come to the conclusion that legal systems, despite their adjacence within the European Community, have not been converging, are not converging and will not be converging. It is a mistake to suggest otherwise. Moreover, I wish to argue that such 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

R. Caterina, *Comparative Law and the Cognitive Revolution*, 78 *Tulane Law Review* 1501 (2004)

R. Caterina, *Human Diversity? The Contribution of Cognitive Science to the Study of Law*, in *Human Diversity and the Law*, 121 (M. Graziadei & M. Bussani eds., 2005).

The cognitive sciences, linking part of the cognitive processes to deep, innately specified mechanisms characteristic of our species, associated with specific neural systems, describe something similar to a universal, trans-historical human mind.

P. 128:

“This approach [the neo-romantic position inspired by a radical cognitive relativism] seems strongly related to (...) the reconstruction of man as a mere product of culture. Faced with the existence of some innate and universal basis of human cognition, and with the recognition of some universals of human experience (all cultures face some common problems, deriving from the world and from human biology), that reconstruction is scarcely convincing.

Human beings from different cultures use different categories; however, human categorization is not arbitrary: categories reflect, besides principles of cognitive economy, the perceptual structure of human beings, the kinds of actions they can carry out, the physical structure of the world, and there is considerable evidence for the existence of universal principles of categorization for specific fields of knowledge. Without denying the diversity of human thought, we can speak of the “constraints of nature on thought given the human condition”.”

- Cognitive sciences can offer a look inside the blackbox of culture; a way to gather empirical data on cross-cultural differences, and to measure the cultural differences in reasoning and decision making. This may constitute an alternative to the holistic and quasi-mystic way in which some comparative law literature speaks of cultures and traditions as spiritual entities, opaque to description and impermeable to evaluation.

- Universal character of neo-classical economic theory, both from a descriptive and from a normative point of view
- Universal character both of positive and normative (mainstream) law & economics

- behavioural economics and experimental economics - experimental economists have demonstrated that human economic reasoning deviates from the predictions of rational choice theory under a number of important conditions - including risk, bargaining, cooperation, and so on. Economists have begun to modify economic theory to incorporate what has been learned from this laboratory research. Behavioural economics is concerned with the empirical validity of the neoclassical assumptions about human behaviour and, where they prove invalid, with discovering the empirical laws that describe behaviour as accurately as possible.
- These new approaches, implicitly or explicitly, make certain universalist assumptions about the nature of human economic reasoning; they assume that humans everywhere deploy the same cognitive machinery for making economic decisions.

- Some of the deviations from the standard economic model of human behaviour evidenced by behavioural economics may be universal. Others may be heavily influenced by cultural differences. This possibility has been explored in a series of cross-cultural experiments, with fascinating results.

- The new law & psychology
- E.U. Weber & C.K. Hsee, Culture and Individual Judgment and Decision Making, *Applied Psychology: an International review*, 2000, 49, 32-61, at p. 34
- “Most psychological models are solely based on the observation of American college students (...) Aside from issues of generalisability, investigations of psychological theories that restrict themselves to small subpopulations of the human species (be it Americans or American college students) unduly restrict the range that the theories’ predictor variables can be expected to take”

- Trust, fairness, reciprocity

- **ULTIMATUM GAME:** two players are allotted a sum of money. The first player offers a portion of the total sum to a second person. The responder can either accept or reject the first player's offer. If the responder accepts, she (or he) receives the amount offered and the proposer receives the remainder (the initial sum minus the offer). If the responder rejects the offer, then neither player receives anything.
- UG experiments demonstrate substantial deviations from the predictions of positive game theory. Positive game theory unambiguously predicts that proposers should offer the smallest, non-zero amount possible, and responders should always accept any non-zero offer. In contrast, experimental subjects behave quite differently: in a wide-ranging number of experiments over many years, the most common proposal is for a 50-50 split, and the mean proposal has been for a 63-37 split. Responders usually accept average offers, but often reject offers lower than 20% of the total sum. UG results are very robust. It is usually concluded that both the desire to treat others fairly and the desire to be treated fairly can cause deviations from self-interested behaviour.

- Are the proposers simply maximizing given their belief that respondents will reject low offers?
- Apparently not.
- **DICTATOR GAME:** the same as UG, except that responders are not given an opportunity to reject – they simply get whatever the proposer dictates. In many experiments, the mean offer falls in the 20% to 30 % range; the desire to treat others fairly is a real factor.

- First multinational experiment designed to test the hypothesis that cultural factors have a relevance in this context: the experiment was run recruiting subjects from the student populations of the University of Pittsburgh, the University of Ljubljana, the Hebrew University of Jerusalem and the Keio University of Tokio (Roth, Prasnikar, Okuno-Fujiwara & Zamir, 1991). The experiment evidenced small but significant differences, which were interpreted as cultural in character.

- J. Henrich, *Does Culture Matter in Economic Behavior? Ultimatum Game Bargaining among the Machiguenga of the Peruvian Amazon*, in *American Economic Review*, 2000, 90, pp. 973-979.

- Experiment run among the Machiguenga, a people living in the southeastern Peruvian Amazon. The Machiguenga possess little social hierarchy or political complexity, and most sharing and exchange occurs within extended kin circles. Cooperation above the family level is almost unknown.
- The Machiguenga data differ substantially. The mean proposal was only 26%; on the receiving end, Machiguenga responders almost always accepted offers less than 20%.
- In post-game interviews, the Machiguenga often made it clear that they would always accept any money; rather than viewing themselves as being “screwed” by the proposer, they seemed to feel it was just bad luck that they were responders, and not proposers. Taken together, these data suggest that Machiguenga responders did not expect a balanced offer, and Machiguenga proposers were well aware of this.

- “It becomes increasingly difficult to account for UG behavior without considering that, perhaps, subjects from different places arrived at the experiments with different rules of behavior, expectations of fairness and/or tastes for punishment”; “cultural transmission can substantially affect economic decisions” (Heinrich 2000 p. 978).

- In a subsequent large cross-cultural study of behaviour in UG and other experimental games, twelve experienced field researchers, working on four continents, recruited subjects from fifteen small-scale societies exhibiting a wide variety of economic and cultural conditions.
- J. Heinrich, R. Boyd, S. Bowles, C. Camerer, E. Fehr, H. Gintis & R. McElreath, *In Search of Homo Economicus: Behavioral Experiments in 15 Small Scale Societies*, in *American Economic Review*, 2001, 91, pp. 73-78.

- PP. 73-74: “We can summarize our results as follows. First, the canonical model is not supported in *any* society studied. Second, there is considerably more behavioral variability across groups than had been found in previous cross-cultural research (...) Third, group-level differences in economic organization and the degree of market integration explained a substantial portion of the behavioral variation across societies: the higher the degree of market integration and the higher the payoffs to cooperation, the greater the level of cooperation in experimental games (...) Fifth, behavior in the experiments is generally consistent with economic patterns of daily life in these societies”.

- The selfishness axiom was not supported in any of the society. Even the groups with the smallest offers have mean offers greater than 25 %.
- Industrial societies: mean offers always close to 44 %
- Mean offers range from 26 % to 58 %
- Rejection rates also quite variable. In some groups, rejections extremely rare, even in the presence of low offers; in others the rejection rates are high, and include rejection of offers above 50 %

- In some cases, a plausible interpretation of the subjects' behaviors is that when faced with the experiment they looked for analogues in their daily experience, and then acted in a way appropriate for the analogous situation. For instance, the high number of hyper-fair UG offers (greater than 50 percent) and the frequent rejections of these offers among the Au and Gnau of New Guinea reflects the culture of gift-giving found in these societies: among these groups accepting gifts commits one to reciprocate at some future time to be determined by the giver, and establishes one in a subordinate position. Consequently, excessively large gifts, especially unsolicited ones, will frequently be refused because of the anxiety about the unspecified strings attached.

- The experiment sheds some empirical light on the social norms and internalized values elaborated by different cultures; it shows that people belonging to different cultures may respond to the same incentives in different ways.

- How does culture influence behavior?
- different social and cultural environments may foster the development of differing generalized behavioral dispositions (equity, altruism, etc.) applicable across many domains;
- the game structures may cue one or more context-specific behavioral rules or sets of preferences;
- both.

- Altruism (trust? cooperation?): a human universal?

- Some researchers hypothesize the existence of a “social exchange heuristic,” a cognitive bias in the information processing of social exchange, according to which humans “deform” incentive structures, intuitively perceiving mutual cooperation as a desirable result even when objectively it does not produce the best outcomes. This cognitive mechanism predisposes humans to cooperation. See Toko Kiyonari, Shigehito Tanida & Toshio Yamagishi, *Social Exchange and Reciprocity: Confusion or a Heuristic?*, 21 *Evolution & Hum. Behav.* 411, 411-26 (2000).

- Measuring the differences: there is little variation across industrial societies. A set of shared assumptions may have emerged across large societies. Is this related to globalization?

- Less dramatic, more nuanced differences across industrialized societies

- Buchan, N., Croson, R., Johnson, E., 2000. Trust and reciprocity: an international experiment. School of Business Working paper, University of Wisconsin, Madison.
- They examine trust and reciprocation in an experiment run in China, Japan, Korea, and the United States using the trust game.

- **Trust game:** two players, the sender and the responder are each given an endowment.
- The sender is told she can send some, all, or none of her endowment to the responder. Any money sent is tripled. The responder then chooses how much of his total wealth to return to the sender. Any money the responder does not return is his to keep; thus the responder plays a dictator game. The unique perfect equilibrium for this game is for the responder to return no money, and thus for the sender to send none.
- It has been found, in several experiments, that the great majority of senders deviate from this equilibrium and send some of their endowment to their partner. Responders usually return some money to senders; in a significant number of cases they return more than was sent.

- The experiment investigated also the effect of **social distance**. The traditional way of manipulating social distance in experimental games is through the creation of groups in the experiment. A player is partnered for the game either with a member of his group (the ingroup) or with someone not from his group (the outgroup). A robust finding in the United States is the ingroup bias, i.e. a significant increase in the amount of cooperation extended to a member of an ingroup rather than to a member of the outgroup.

- Participants in the study were organized randomly into groups, engaged in some type of non-relevant discussion, and then paired to play the trust game. Half of the subjects were paired with a counterpart who was in their discussion group (the ingroup), and the other half, with a counterpart from another discussion group (the outgroup).

- Across all countries subjects largely ignored the equilibrium of sending no money and instead opted to trust
- Limited support for country-level difference in trusting behaviour: Chinese subjects sent more to their partners than did American subjects; results for American, Korean and Japanese subjects were not significantly different.

- “Americans sent more to ingroup partners than to outgroup partners, consistent with previous work in the US using group membership to manipulate social distance. However, in China and Japan, in contrast, more is being sent to outgroup members than to ingroup members. These results indicate that while the manipulation of social distance in the United States was effective in increasing trust, that effect was not consistent internationally”.

- Similar results for the proportions returned across countries.
- “Chinese subjects reciprocated more to outgroup members than to ingroup members, while American subjects reciprocated more to ingroup members than to members of the outgroup. As with the results for amount sent, these results expose the differential effectiveness and influence of social distance across national groups”.

- Different social rules?

- M. Yuki, W. Maddux, M. Brewer & K. Takemura, *Cross-Cultural Differences in Relationship- and Group- Based Trust*, in *Personality and Social Psychology Bulletin*, 2005, 31, pp. 48-62
- “Although people in Western cultures tend to emphasize the categorical distinctions between ingroups and outgroups, East Asians may have a stronger tendency to think about groups as predominantly relationship-based. In group contexts, East Asians tend to perceive themselves as a “node” embedded within a network of shared relationship connections (i.e., family members, friends, colleagues, acquaintances, friends of friends, etc.) rather than within strict, bounded groups per se. Within this framework, the ingroup for East Asians is cognitively represented as a relatively stable and structured network of relationships among group members”.

- Maybe East Asians are less influenced by “artificial” groups. This would have obvious effects also in the real world.

- N. Hayashi, E. Ostrom, J. Walker & T. Yamagishi (1999), *Reciprocity, trust and the sense of control: A cross-societal study*, in *Rationality and Society*, 1999, 11, pp. 27–46

- Participants played a one-shot Prisoner's Dilemma game with a partner in another room. Each participant was given 500 yen/ 5 dollars by the experimenter and then asked to decide whether or not give that sum to the partner. When the participant gave 500 yen/ 5 dollars the partner received 1000 yen / 10 dollars. When the participant did not give 500 yen/ 5 dollars, he could keep the sum. He received an additional 1000 yen/ 10 dollars if the partner gave his 500 yen/ 5 dollars to him.

- Participants were assigned to five experimental conditions:
- *Self-first/knowledge*: they made their decision before their partner; they were informed that their partner would be informed of their decision prior to the partner's decision.
- *Other-first/knowledge*.
- *Self-first/no-knowledge*.
- *Other-first/no-knowledge*.
- *Simultaneous*.

- Both Japanese and Americans responded predominantly by not cooperating when they were informed that their partner did not cooperate.
- A majority of Americans (61%) and of Japanese (75%) responded by cooperating by a partner who cooperated.
- The cooperation rate in the self-first/knowledge condition among American participants was significantly lower (56%) than among Japanese participants (83%).
- The cooperation rate in the other-first/no-knowledge condition was higher among American participants (38%) than among Japanese participants (12%).

- Two bases for cooperation: general trust and sense of control.
- P. 41: “The closed and stable nature of social relations in Japanese society breeds a sense of mutual dependence and mutual control in social relations”.
- Americans have a higher level of general trust; Japanese follow more strictly a norm of reciprocity and have a stronger expectation that the partners will reciprocate to their own cooperation.

- R. Ellickson, Law and Economics Discover Social Norms, in 27 Journal of Legal Studies 537 (1998), at p. 551:
- “The founders of classical law and economics were oblivious to important phenomena, especially the centrality of informal systems of social control. The mounting appreciation of those systems has destabilized the classical paradigm”.
- But social norms are different in different cultures.
- For instance, the social rules and values may have an important influence on transaction costs.

- Descriptively, one cannot understand the legal equilibrium reached in a given country without understanding the informal social norms and values and their interaction with formal institutions

- Prescriptively, social norms and values, being a powerful determining cause of behavioral choices, have important implications for legal policymakers

- Law and economics of development: the American-centrism of mainstream law and economics raises evident problems when approaching legal systems of the so-called Third World countries; in this peculiar context, it is of the foremost importance to pay attention to the social norms and ethical codes prevailing in society.
- In a society with a weak state and a corresponding underdeveloped legal system, exchange relations are conducted primarily through social institutions other than competitive market. Law and economics cannot prescind from the stratified nature of such legal systems. The modern layer of the legal system cannot act as if there were an institutional vacuum.

- Transaction costs, and especially negotiation costs and enforcement costs, may be heavily influenced by prevailing social attitudes towards trust and cooperation.
- This can be relevant, e.g., for the choice between property rules and liability rules for protecting entitlements.

- Over-confidence, risk perception, risk preference

- Yates, J. F., Lee, J-W., Shinotsuka, H., Patalano, A. L., & Sieck, W. R. (1998) *Cross-cultural variations in probability judgment accuracy: Beyond general knowledge overconfidence?*, in *Organizational Behavior and Human Decision Processes*, 74, 89-117.

- “Over the past two decades, there have been numerous and consistent demonstrations of cross-cultural variations in probability judgments about general knowledge. (...) The subject is first asked: “For which is the gestation period longer: (a) humans or (b) chimpanzees?” After picking an alternative, the subject then reports a probability judgment between 50 and 100% that the selected answer is indeed correct. (...) Usually (although not always), people’s probability judgments about their general knowledge are miscalibrated in a particular way. On average, they are higher than the proportions of questions respondents actually answer correctly, a phenomenon commonly described as “overconfidence.” It comes as a surprise to most people that such overconfidence is typically greater for subjects in Asian cultures than for those in the West. Responses of subjects in Japan and Singapore provide notable exceptions to this pattern”.

- Overconfidence seems to be especially strong in Chinese cultures; there are indications that it is weakest among the Japanese.

- Do cross-cultural differences in risk preference exist? There is robust evidence that, at least in some contexts, Chinese are significantly less risk averse than Americans in their choices between risky options and sure outcomes, both when outcomes involve gains and when they involve losses.

- **Cross-Cultural Differences in Risk Perception, but Cross-Cultural Similarities in Attitudes towards Perceived Risk**
- Elke U. Weber; Christopher Hsee
- *Management Science*, Vol. 44, No. 9. (Sep., 1998), pp. 1205-1217

- Groups of American, Chinese, German, Polish students were asked to indicate how much they were willing to pay to get a chance at different risky financial investment options, and to indicate how risky they perceived the investment option to be.
- Respondents from all four cultures were risk-averse (offered to pay less than on average than the option's average expected value).
- Chinese respondents were closer to risk neutrality; they offered to pay a significantly larger amount than Polish respondents, who in turn, offered to pay more than Germans, who in turn offered to pay more than Americans.

- However: Chinese perceived the riskiness of the investment to be the lowest, Americans the highest, with Germans and Poles in between.
- P. 1212. “This correspondence between national differences in risk preference and national differences in risk perceptions allows for the possibility that (...) the Chinese respondents did not offer higher prices than the members of the other three cultures because they are truly less averse to risk (...) but because they perceived the risk to be smaller”.

- “Cushion Hypothesis”: members of socially collectivist cultures can afford to take greater financial risks because their social networks insure them against catastrophic outcomes; the social network serves as a cushion which can protect people if they take risks and “fall”

- C.K. Hsee and E.U. Weber, *Cross-National Differences in Risk Preference and Risk Predictions*, *Journal of Behavioral Decision Making*, 12, 165-179 (1999)
- to test the cushion hypothesis, they measured the size and quality of American and Chinese social network

- After completing a questionnaire on investment choices in a series of hypothetical scenarios, the respondents answered a series of questions (With how many members of your family do you live? With how many members of your family do you maintain contact? etc.)
- The Chinese had a larger social network of family and friends who could render help; in a regression model that tested the effect of a respondent's nationality on risk preferences, the nationality variable became insignificant once the social network information was added to the model.

- This may suggest that social network serves as a mediating factor between culture and risk preference.

- Different results for Japanese.
- Heine, S. J. & Lehman, D. R. (1995). Cultural variation in unrealistic optimism: Does the West feel more invulnerable than the East? *Journal of Personality and Social Psychology*, 68, 595–607
- A total of 510 Japanese and Canadian students completed a questionnaire packet that included 15 potential life future events (10 negative and 5 positive). They were asked about the chances that the events happened to them, compared to other students of their university.
- Canadians showed a strong optimism bias; Japanese showed a (lesser) optimism bias for the negative events, and no bias for the positive events.

Problematic data: East Asian Self-Enhancement

- The notion that people are motivated to view themselves positively, that is, to self-enhance, is one of the most widely embraced assumptions regarding the self-concept. Decades of research with Western participants has documented that this is a deeply rooted and pervasive motivation. Evidence for self-enhancement has emerged in a variety of diverse methods, such as tendencies to recall information about successes better than failures, tendencies to think of oneself as better than average, and tendencies to have stronger implicit associations between oneself and positive words than between oneself and negative words.

- There has been much research suggesting that self-enhancing motivations might be weaker, if not largely absent, among people of East Asian descent (not just Japanese, but also Chinese) compared with Westerners. The most common pattern of results identified by this research is that Westerners self-enhance significantly more than East Asians.
- For instance, Chinese students rate their efficacy beliefs lower than Western students, and display a tendency to self-criticism.

- Chinese are humble, but over-confident
- Explanations:
- Modest self-presentations are valued in much of East Asia. It is plausible that the tendency to feign modesty is so firmly entrenched among Chinese that it shapes their responses to anonymous questionnaires.
- There is some evidence that Chinese think less probabilistically than Westerners. Overconfidence may be not related to an high opinion of themselves, but to a tendency to equate “probably” with “definitely”.

- A stronger overconfidence bias may justify stronger state intervention.
- Traditional law & economics objections to legal paternalism are based on the idea that, since “man is a rational maximizer of his ends in life, his satisfaction – what we shall call his ‘self-interest’” (Posner) citizens are thought to be the best judges of what will promote their own welfare. Overconfidence and unrealistic optimism call this idea into question.

- However, the existence of important cross-cultural differences in overconfidence and unrealistic optimism may justify different degrees of legal paternalism.
- Americans show a relatively weak overconfidence and a relatively strong risk aversion. The same laissez faire models may work in the American society, but be inadequate in other societies.
- E.g.: rules of the financial markets.

- A vicious circle?
- “cushion hypothesis”: collectivist cultures increase risk-seeking
- a risk-seeking culture needs more legal paternalism and state intervention
- legal paternalism and state intervention may strengthen collectivism

- Ulen T. and R.B. Korobkin (2000), ‘Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics’, *California Law Review*, 88, 1051-1143, at p. 1092.

- “The overconfidence bias could have a wide-ranging impact on deterrence policy in a variety of areas of law. Policymakers rarely wish to deter 100% of even undesirable conduct, because the costs of doing so would likely be too great. For any type of conduct that the state wishes to discourage, from criminal behavior to carelessness likely to lead to a tort, rational choice theory advises policymakers to set the penalty for the undesirable conduct such that the desired fraction of the population- (...) -will calculate that the expected costs of the conduct exceed the expected benefits to them. Where the targets of such policies exhibit overconfidence, however, policymakers will have to set the penalties higher (...) than they would in a world of utility-maximizing actors who are not systematically overconfident. (...) For policymakers to be able to make effective use of the insights provided by the overconfidence bias, more empirical research needs to be done on which groups and in what situations overconfidence is likely to be most severe”.

- These experimental cross-cultural studies confirm that law and economics can hardly aspire to universalist, abstract models, because people belonging to different cultures may respond to the same incentives in different ways.

- They provide an empirical basis for research on cultural diversity and its relevance to the law.

- Experimental research on cultural diversity may be precious for measurement of the cultural differences. Some of the “neo-romantic”, post-modernist, radically relativist literature on cultural diversity jumps from the fact that cultural differences exist to the conclusion that “it is not possible for a civilian to think like a common-law lawyer” (Legrand).

- The experimental research shows that: a) cultural differences exist; b) they are modest among the Western industrialized societies (at least relatively to other societies).
- Difference is a functional and relative concept, and there is no “great divide” between what is different and what is not. Difference must be measured, not contemplated.