5. EU criminal justice and the diversity of legal cultures in Europe

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1. INTRODUCTION

This collective volume aims to examine the governance of criminal justice within the EU as it seeks to respond to common security threats and transnational crime. Tensions between the national and the supranational are likely to be central to developments in the coming years. The Lisbon Treaty has given the EU significant new legal powers to pursue harmonization in criminal law and procedure. Yet there is manifest and continuing sensitivity amongst Member States – and their electorates – about national sovereignty (and its loss). The difficulty of negotiating relationships between the national and supranational is likely to manifest itself most clearly in the tensions between, on the one hand, EU aspirations for the harmonization of criminal law and procedure, and on the other, commitment to established local and national ways of doing criminal justice. That such tensions are an important issue is recognized very clearly in the Treaties themselves. The principles of subsidiarity and proportionality (Art. 5 of Treaty on European Union) limit the power of the Union in delineating the respective competences of EU and Member States.[1] The preambles to the Treaty on European Union and the Charter of Fundamental Rights emphasize the attachment of the EU to the diversity of the cultures of the peoples of Europe as well as the 'national identities' of the Member States. More specifically in the context of criminal justice harmonization, Articles 67, 82 and 83 of the Treaty on the Functioning of the European Union (TFEU)[2]

[1] For further discussion of this question, see chapter 6 of this volume (by Maria Bergstrom on 'National Parliaments, Subsidiarity and the Democratic Deficit in the Area of Freedom, Security and Justice').

[2] For a variety of statements on the need to respect diversity of cultures, traditions and specifically legal systems and traditions see the Preambles to the Treaty on European Union (TEU) and Charter of Fundamental Rights and Art. 4(2) TEU and Arts 67, 82 and 83 Treaty on Functioning of the European Union (TFEU). Art. 67 sets out general principles underpinning the creation of the Area of Freedom, Security and

require any such harmonization to 'take account of' and 'respect' differences in legal systems and traditions. The possibility of tensions between legal cultures is also recognized by the so-called 'emergency brake' procedure (Arts 82.3 and 83.3 TFEU) allowing Member States to request conciliation procedures to be adopted and to withdraw from a legislative measure if they consider that 'fundamental aspects' of their criminal justice system are likely to affected by it.

But very little is said in the texts as to how the inherent tension between these specific injunctions and the underlying overall project of harmonization might be negotiated. In what follows we examine the challenge posed to any EU harmonization project by the diversity of national legal cultures and the challenge of building a common EU criminal justice culture.[3] First, we discuss the concept of legal culture, particularly as it has been developed in comparative law, and ask what it may tell us about the prospects for attempts to reform the underlying assumptions of national legal systems. We then focus more specifically on its application in the particular sphere of criminal justice by examining the experience of various jurisdictions that have seen significant transformation of criminal procedure in recent years. To what extent have established legal cultures or procedural traditions influenced the reception of these new reforms and the impact in practice of the changes on the ground? What lessons might be learnt from these experiences about the challenges involved in harmonizing criminal justice in the EU? We then focus specifically on evidence from the EU harmonization project itself. On the one hand, we discuss examples of the ways in which national criminal justice cultures have resisted the common application of EU norms. On the other, we examine the prospects of creating a common EU criminal justice culture.

2. CONCEPT OF LEGAL CULTURE AND ITS LESSONS FOR LEGAL REFORMERS

The recent flourishing of interest in comparative law and legal studies has been linked to increasing global interdependence and processes in which law and legal practices are borrowed, imitated or imposed across national bound-

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Justice while Arts 82 and 83 set out the legal basis for harmonization of criminal procedure and substantive criminal law.

[3] This chapter draws on the arguments and findings of a collective project that started with a workshop at the European University Institute in Florence in 2013 and culminated in an edited volume: Renaud Colson and Stewart Field, *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016).

aries.[4] Despite the contested status of the concept and considerable variation in its definition,[5] much of this work chooses to frame comparison using the concept of legal cultures as a way of bringing out interconnections between law, society and culture.[6] We do not have space here to set out a fully argued defence of at least some uses of the concept.[7] For us, it provides a conceptual framework that enables and encourages comparative legal analysis that goes beyond a focus on formal legal rules and doctrine, embracing not just established institutional practices but also the interpretations and meanings accorded to those rules and practices by local actors. Those interpretations and meanings may be found not just in the elaborate expositions of formal legal documents: they can also be seen in the patterns of established institutional practice and the half-articulated common sense and implicit assumptions of legal actors and the broader public. In the context of EU attempts to harmonize aspects of criminal justice, a concern for legal culture enables us to ask about the prospect not just for common transnational legal rules, but for common transnational institutional practices and cultural interpretations. A recent study by the World Bank argued:

> Legal culture is often considered as a given feature of the local environment to which proposed legal reform projects must adapt; many argue that legal and judicial reform programs must be tailored to fit local legal culture or they will fail. Other times, the prevailing legal culture may itself be the object of reform, rather than merely a constraint. Thus, understanding the arguments related to the concept of legal culture will become increasingly important for aspiring legal reformers.[8]

So the concept of legal culture may enable us to address the fear that the EU harmonization project might lead to harmonized legal rules which are nevertheless understood in diverse local ways and applied through diverse local

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[4] David Nelken, 'Comparative Law and Comparative Legal Studies' in Esin Örücü and David Nelken (eds) *Comparative Law: A Handbook* (Hart 2007), 3.

[5] For a variety of key positions see the chapters by Roger Cotterrell, Lawrence Friedman and David Nelken in D Nelken (ed) *Comparing Legal Cultures* (Dartmouth 1997). See also the chapters by Sally Merry and Roger Cotterrell in D Nelken (ed) *Using Legal Culture* (Wildy, Simmonds & Hill 2012).

[6] David Nelken (2007, n 4) at 6, David Nelken 'Defining and Using the Concept of Legal Culture' in Örücü and Nelken (n 4) at 109. For an overview of the use of the concept see David Nelken (ed) (2012, n 5).

[7] One of us has set out his position, derived from the work of the Welsh cultural theorist Raymond Williams, in Stewart Field 'Finding or Imposing Coherence? Comparing National Cultures of Youth Justice' (2010) 5(2) *Journal of Comparative Law*, Special Issue on Legal Culture 216, reprinted in David Nelken (ed) (2012, n 5) 306.

[8] Cited by David Nelken (n 6) at 109.

institutional practices. Furthermore, using the term legal culture rather than (for example) legal order or system also encourages us to think about the sense of the normative that is present in everyday legal practices. Established ways of doing things may not just be thought effective or efficient but may be seen as 'our' way of doing things.[9]

What does research tell us about the constraints and possibilities in constructing significant change in legal cultures (particularly where change is driven by external influences)? There is a strong element in the general literature on legal cultures that sees them as reinforcing coherence and stability in legal practices and thus maintaining established local traditions.[10] Yet there is also theoretically informed empirical work that suggests that legal cultures are today characterized as much by fluidity as they are by stability, by complexity as much as by unity and by mutual influence rather than by isolation or independence. Thus, the leading anthropologist of law Sally Merry writes:

> Under contemporary conditions of globalisation and the wide spread of legal knowledge and technique, legal culture tends to be hybrid. Legal systems in the current era typically consist of procedures, institutions, rules and practices that are imported from other legal systems and translated into the local context....[11]

This division in the literature between those who associate legal cultures with stability and coherence and those who emphasize its fluid, creolized nature is understandably reflected in different views about the ease and predictability of engineering change with ideas from elsewhere. On the one hand, a 'technocratic' approach emphasizes the ease with which legal concepts, institutions and practices can be deliberately transferred. On the other, strong 'culturalist' positions exist: that such transfers are either simply not possible or will have dramatic unintended outcomes because the recipient legal system transforms the new external elements in its own image. [12] Tom Ginsburg has drawn from the work of Lawrence Friedman the view that the way to deal with these con-

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[9] We do not have the space here to consider the competing arguments around the desirability of harmonization: see Renaud Colson and Stewart Field '*Legal Cultures in Europe: Brakes, Motors and the Rise of EU Criminal Justice*' at 13–16 in Colson and Field (eds) (2016, n 3).

[10] David Nelken 'Using Legal Culture: Purposes and Problems' in David Nelken (2012, n 5), 1, 40–46.

[11] Sally Merry 'What is Legal Culture: an Anthropological Perspective' in David Nelken, ibid., 68.

[12] For exposition of both positions, see Tom Ginsberg 'Lawrence M Friedman's Comparative Law, with Notes on Japan' in David Nelken (ed) (2012, n 5). Pierre Legrand is a trenchant exemplar of this 'culturalist' view with a wholly pessimist view of the outcome of legal transplants. See for example his 'What "Legal Transplants"?' in David Nelken, *Adapting Legal Cultures* (Hart 2001).

tending views is to take a more contingent approach: whether legal transfer can be achieved with its intended outcomes depends on the 'cultural embeddedness' of the particular area of law.[13] If this is the critical factor in transferability, then it makes sense to examine examples specifically of the outcome of transfers and shifts in the underlying cultures of criminal procedure.

3. REFORMING CRIMINAL PROCEDURES: CONSTRAINTS AND POSSIBILITIES IN TRANSFORMING LEGAL CULTURES

In recent decades, a number of attempts have been made in different jurisdictions to reform national criminal procedure in ways that have not just altered particulars but challenged the underlying assumptions of the established procedural tradition. Many of these examples are ones in which jurisdictions from the inquisitorial tradition of criminal procedure have introduced practices associated with the adversarial tradition. Across both Continental Europe and South America we have seen widespread introduction of practices of negotiated settlement that have been long associated with the United States of America and the United Kingdom.[14] Beyond that, attempts have been made to enhance defence rights of participation in ways that qualify the traditional inquisitorial dominance of prosecuting and investigating magistrates in the pre-trial process.

The drivers have been in part internal: in some countries suspicion of the state's coercive power has played a part and in many an increasing sense that a modern conception of citizenship should imply active participation in state processes affecting individuals.[15] One example of such reforms occurred in France in the 1990s, when defence lawyers were given enhanced rights of access to their clients in police custody, to see the official dossier, to attend judicial hearings and new powers to request investigative acts of examining magistrates. The underlying objective was to place greater accent on dialogue

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[13] Though he acknowledges that Friedman's position is a hypothesis which remains still largely untested empirically: Ginsburg, ibid., 107–8.

[14] On Europe see Marianne Wade 'Why Some Old Dogs Must Learn New Tricks: Recognising the New in EU Criminal Justice?' in Colson and Field (eds) (2016, n 3). On South America, see Maximo Langer 'From Legal Transplants to Legal Translations: The Globalisation of Plea Bargaining and the Americanization Thesis in Criminal Process' (2004) 45 *Harvard International Law Journal* 1.

[15] Chrisje Brants and Stewart Field, *Participation Rights and Proactive Policing: Convergence and Drift in European Criminal Process* (Deventer: Kluwer 1995), 19–29.

between prosecuting and investigating magistrates on the one hand and defence lawyers on the other.[16]

But changes in defence participation rights have also been shaped by external influence. The need to respond to reinterpretation by the European Court of Human Rights (henceforth ECtHR) of the right to a fair trial under Article 6 of the European Convention of Human Rights (henceforth ECHR) has provided at several points an external challenge to national legal cultures. [17] Most famously the ECtHR has itself required increased defence participation rights in the police custody phase, traditionally the most 'inquisitorial' phase of criminal procedure on the European Continent. Debate continues as to the implications of this for the established procedural traditions.[18]

How might an examination of this range of attempts to challenge or qualify existing legal cultures in criminal procedure help us to understand the prospects for EU driven harmonization of criminal procedure? It must be recognized that these shifts or qualifications to the culture of criminal procedures have not been attempts at harmonization as such. Academics have examined them more as evidence of possible 'convergence' between jurisdictions of different procedural traditions.[19] Harmonization is a different kind of project: it is politically conscious but more limited in its objectives than convergence. It is often used in a sense which necessarily implies the continuing existence of difference. The intention is to ensure that distinct procedures work together well or effectively. In musical harmony different notes sound pleasing in combination: if all the notes were to be the same, that would not be harmony. Thus, the Treaty on the Functioning of the EU emphasizes that the particular purpose of European approximation of Member States' criminal laws is to enable police and judicial co-operation through mutual recognition of different national practices rather than to create a single transnational practice.[20]

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[16] Stewart Field and Andrew West, `A Tale of Two Reforms: French Defense Rights and Police Powers in Transition (1995) 6(3) *Criminal Law Forum* 473; Stewart Field and Andrew West 'Dialogue and the Inquisitorial Tradition: French Defence Lawyers in the Pre-trial Criminal Process' (2003) 14 *Criminal Law Forum* 261.

[17] Brants and Field (n 15).

[18] John Jackson (2016) 'Responses to Salduz – Procedural Tradition, Change and the Need for Effective Defence' (2016) 79(6) *Modern Law Review* 987; Chrisje Brants 'The Reluctant Dutch Response to Salduz' (2011) 15(2) *Edinburgh L.R.* 298; Aude Dorange and Stewart Field 'Reforming Defence Rights in French Police Custody: A Coming Together in Europe?' (2012) 16(2) *International Journal of Evidence and Proof* 153.

[19] Renaud Colson and Stewart Field, *The Transformation of Criminal Justice - Comparing France with England and Wales,* (L'Harmattan 2011).

[20] See, e.g., Art. 82 TFEU.

Despite these differences, there are reasons for feeling that the experience of these recent cultural shifts in criminal justice may be informative. The development of a series of EU Directives on the criminal process demands rather more – and more specific – movement in local criminal justice cultures in Europe than we have seen before. We have noted the external influence of the ECtHR's interpretation of Article 6 on various European jurisdictions in recent years. But this has been a broader-brush approach to procedural requirements. The ECtHR has accepted a broad margin of appreciation in the application of standards. It has been prepared to accept very different ways of achieving a fair trial in which weaknesses of protection at one point and in one form may be compensated for by protections elsewhere and in a different form.[21] Recent EU Directives on suspects' rights are much more specifically demanding in this regard: they set out clear objectives to be achieved in particular areas of criminal process.[22] Even if this is subject to transposition by national legislatures, any post-Lisbon local cultural resistance may be confronted not only by new legislation, in the form of new EU Directives, but also the interpretative supremacy and sanctioning power of a Court of Justice of the European Union (henceforth CJEU) committed to the project of harmonization.

The very transformative potential of these strong harmonizing levers suggests greater risk of tensions and local cultural resistance on the ground. The effective transposition of EU Directives on criminal procedure into national laws and local practices may well require significant shifts in the cultural attitudes of judges, magistrates and legal practitioners at the Member State level.[23] Thus, experience of local cultural resistance to criminal justice ideas from elsewhere may have relevance to the issues facing EU harmonization. So what does the experience of these attempts to shift underlying assumptions

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[21] Jacqueline Hodgson, *The Metamorphosis of Criminal Justice: A Comparative Account* (Oxford University Press 2020).

[22] See, e.g., Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, or Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

[23] Most obviously, EU Directives aimed at enhancing defence pre-trial rights are central to the EU's attempt to build the transnational trust necessary to the operation of mutual recognition (which in turn is fundamental to judicial and police co-operation within the EU). Yet enhanced defence participation rights in the pre-trial phase run counter to the inquisitorial tradition of a pre-trial process dominated by the active truth-finding magistrates (and/or the police supervised by such magistrates).

suggest about the relationship between reforms and established local cultures of criminal procedure?

4. SOFT DETERMINISM OF LEGAL CULTURES

First, the existing research does not suggest that the influence of national legal culture dictates unchanging practice or even precludes the changing of fundamentals. In Continental Europe and South America, the established assumptions of the inquisitorial tradition have been significantly re-shaped by both enhanced defence participation rights in the pre-trial process and the rise of negotiated settlement.[24] But the extent to which the two shifts have taken hold or been resisted seems to have been quite different. Marianne Wade, after a critical review of the rise of negotiated settlement across the EU, has described it as 'the one convergent feature to be found amongst our diverse jurisdictions'.[25] The rise of abbreviated forms of settling cases, more or less with the consent of the defence, is seen as now part of a 'common culture born of working practices'. Explicitly she concludes that this has produced across Europe 'an important and fundamental change affecting the working culture of criminal justice systems' which has gone so far as to affect the expectations of practitioners in terms of what constitutes a 'just outcome'.[26] Given that the truth-finding judge is a fundamental cultural starting point of the inquisitorial tradition and the tension between that and any notion of party bargaining to resolve issues, this suggests the capacity for fundamental transnational cultural change. This is not to say that local traditions of legal culture and criminal procedure do not shape the reception of these fundamental transformations in the detail of how negotiated settlement plays out on the ground.[27] But the outcomes seem to illustrate Merry's[28] vision of the creolized hybridity of contemporary legal cultures with their capacity to borrow practices from elsewhere while translating them into local legal idioms.

The experience of seeking to enhance defence participation rights across Europe in the pre-trial process has been more variable. There may be reasons for reluctance to develop such rights that exist across Member States, namely political domestic emphasis on crime control rather than fundamental rights. Unlike the development of negotiated settlement, which might be thought to promote efficient responses to criminality, stronger defence rights are politically controversial in many European jurisdictions because they are

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[24] Hodgson (2020, n 21).
[25] Wade, (n 14), 65, 84.
[26] Ibid., at 73.
[27] Langer (n 14).
[28] Merry (n 11).

seen as impeding police investigations. But opposition is often expressed through adherence to traditional local criminal justice cultures. Even domestic legislative attempts to shift established practices have been limited not just by traditional interpretations of the defence role but also by the underpinning contexts of implementation: the availability of legal aid and its calculation, the institutional organization of criminal defence within the local legal profession and in particular the organization of duty-lawyering by local Bars.[29] All these provide a particular material context that supports traditional cultural assumptions as to the limited role of the defence lawyer in the pre-trial process. Comparing defence lawyers' practices across a range of European jurisdictions, the impact of both local cultural interpretations and institutional contexts on the real meaning of access to a lawyer is very evident.[30] Concluding their survey of defence practice in a range of European countries in 2010, Cape and others concluded:

> There are aspects of the constituent elements of the right to effective criminal defence that are largely beyond the reach of legislation, or which are so entrenched in a criminal justice system that legislation is either not appropriate, or is not sufficient, to create the necessary conditions for effective criminal defence. Our analysis shows, in particular, that there are cultural attitudes and practices that will require considerable effort over time in order for them to change.[31]

The impact of national cultural resistance to developing defence participation rights inspired by European influence has already been seen in the various responses to the ECtHR's decision in the *Salduz* case (which determined that a right to legal advice in police custody was an aspect of fair trial rights under Art. 6).[32]

The most obvious conclusion that seems to flow from these experiences is that local and national legal cultures can best be seen as determining in the sense of exerting pressures towards particular ways of thinking and placing obstacles in way of alternatives. But this is a soft determinism without guarantees: the pressures of established ways of doing things are not irresistible

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[29] For an illustration based on an empirical study in France, see Field and West (2003, n 16).

[30] Ed Cape, Jacqueline Hodgson, Ties Prakken and Taru Spronken (eds), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Intersentia, 2007); Ed Cape, Zaza Namoradze, Roger Smith and Taru Spronken, *Effective Criminal Defence in Europe* (Intersentia, 2010); Jodie Blackstock, Ed Cape, Jacqueline Hodgson, Anna Ogorodova and Taru Spronken (eds), *Inside Police Custody: an Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia, 2014).

[31] Cape et al (2010), ibid., at 611.

[32] Jackson (2016, n 18), Brants (2011, n 18), Dorange and Field (2012, n 18).

and the obstacles to new ways of thinking not insurmountable.[33] The second conclusion is that the transformation of legal cultures is as much about the way legal practice is carried out on the ground as it is about the way it is defined in legal rules. The transnational rise of negotiated settlement has been driven exactly by institutional and material pressures on the ground: the demand for visible state response to a widening range and thus number of offences. The cultural shifts observed have been quite dramatic. But the consequences for EU harmonization of procedural rights through EU Directives are less easy to predict.

If criminal justice cultures are fundamentally shaped by institutional and material practices, the danger is that we may see converging texts being accompanied by continuing divergence in practice on the ground. Criminal justice practice, such as defence lawyering, is as much shaped by how professional practice is financed and organized through selection, training and organization through professional associations as it is by the drafting of the relevant Code of Criminal Procedure. This has particular relevance to the EU's attempt to develop effective pre-trial participation rights. Establishing a formal right to the presence of a lawyer in the police station is one thing. Establishing an effective common standard of active defence lawyering across the EU is quite another: this is not just a question of traditional assumptions about the 'inquisitorial' nature of the police custody phase. It is the way that national legal cultures are expressed in established local institutional practices around appointment, organization, training and finance of duty lawyering in the police station. Thus, when Article 7 of the 2016 EU Directive on legal aid requires Member States to ensure that legal aid services are of a 'quality adequate to safeguard the fairness of the proceedings'[34] the likelihood is that this will be interpreted nationally in the light of very different local legal cultures. Even more so, given that these guarantees of quality and indeed local provision for lawyer training must show 'due respect for the independence of the legal profession'. The independence of the legal profession may in particular jurisdictions be thought to require that the local Bars be allowed to continue designating duty lawyers in criminal practice who are generally inexperienced and/or not specialist in criminal matters and may lead to wide variation in training requirements.[35] So the broader evidence of attempts to significantly shift criminal justice cultures seems to counsel not necessarily dark pessimism

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[33] For an account of 'soft' determination see Raymond Williams, *Marxism and Literature* (Oxford University Press 1977) 84–9.

[34] Directive 2016/1919 of the European Parliament and the Commission of 26 October on legal aid for suspects and accused persons in criminal proceedings and for required persons in EAW proceedings.

[35] See, Field and West (2003, n 16) on French practice.

but certainly caution and suggests close attention should be paid to the material and institutional conditions of legal practice. But what of existing evidence of national cultural resistance to the specific project of EU harmonization in criminal justice?

5. NATIONAL LEGAL CULTURES AND RESISTANCE TO HARMONIZATION

There is great variety in the legal forms by which EU norms are implemented, and when there is harmonization of legal rules, local cultural resistance is often quite visible. The very nature of Framework Decisions and EU Directives – the two main legal instruments used to legislate in the field of criminal justice – leaves significant leeway to Member States.[36] A close analysis of national legislation shows that the room for manoeuvre left to the states has resulted in both minimalist and maximalist transposition of legal norms. There can be both 'gold-plating' where some countries go beyond the terms of the Directives ('over-implementation') and instances where clear substantive requirements are sometimes lost in the process of transposition ('under-implementation').

The variability in Member States' implementation of EU law is sometimes evidence of overt cultural resistance to a full embracing of EU norms by particular nations. This is very clear in the case of the opt-outs from the Area of Freedom, Security and Justice negotiated by the two common law jurisdictions, Ireland and the UK.[37] But such resistance is also visible in civil law jurisdictions. The case of the European Arrest Warrant (EAW) is particularly illustrative in this respect. Compared to the quick adoption of the Framework Decision, its national transposition did not always go smoothly.[38]

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[36] According to Art. 288 TFEU, these instruments are 'binding, as to the result to be achieved, upon each Member State (…) but shall leave to the national authorities the choice of form and methods'. Of course, since the Lisbon Treaty, Framework Decisions are no longer used as an instrument for harmonization of criminal law since the Lisbon Treaty. Art. 288 TFEU now covers the legal effect of Directives, Regulations and other measures (but not Framework Decisions).

[37] For an analysis of the ways of which fear of the inquisitorial Continental 'other' has shaped response to harmonization in criminal justice in the UK and its negotiation of 'opt-outs' from such measures see John Spencer, 'EU Criminal Law' in Catherine Barnard and Steve Peers (eds) *EU Law* (2nd edn, Oxford University Press 2017). For further discussion of these questions, see Chapter 3 of this volume (by Annegret Engel on the UK's negotiated opt ins/outs) and Chapter 2 (by Valsamis Mitsilegas on Brexit).

[38] For a pan-European perspective, see R Calvano (ed), *Legalità costituzionale e mandato d'arresto europeo* (Jovene 2007); Elspeth Guild (ed), *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers 2006); Elspeth Guild and Luisa Marin (eds), *Still not Resolved? Constitutional Challenges to the*

The last country to introduce the EAW into its legal system, Italy, provides a good example of how domestic context influenced the pace of the reform as political ambiguity towards the new instrument met academic and practitioner criticism.[39] Far from being an exception, the Italian scenario is only one among many others which saw national legal elites express reservation towards the paradigm of mutual recognition and some of its consequences, especially extraditing nationals or partial elimination of the double criminality requirement.[40] In some countries the incorporation did not seem to pose any problem but in others doubts about the validity of the scheme prompted *ex ante* constitutional reform (France).[41] Where the constitutionality of implementing statutes was contested in front of the supreme courts,[42] judges sometimes rejected the objecting arguments (Belgium, Czech Republic). But in several cases implementing statutes were deemed contrary to the Constitution leading either to their annulment and the adoption of new legislation (Germany) or to the amendment of national constitutions (Poland, Cyprus).

The EAW offers a good example of the way the process of transposition can hardly claim to reduce national diversity. While some countries made some or all of the optional grounds for refusal mandatory in their national legislation, others also added additional bars to extradition relating to national security, to political offences or to human rights.[43] There are also differences in time-limits allowed to issue or execute a warrant, in conditions of reciprocity in EAW procedures, in lists of offences not covered by the double criminality test and in the seriousness of offences which render citizens liable to surrender. Moreover, in implementing the EAW scheme on a case-by-case basis, the judges of Member States have interpreted their national legislation in the

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European Arrest Warrant: A Look at Challenges Ahead After the Lessons Learned from the Past (Wolf Legal Publishers 2009).

[39] Luisa Marin, 'The European Arrest Warrant in the Italian Republic' (2008) 4(2) *European Constitutional Law Review* 251–73.

[40] The case of Germany is emblematic: see F Gayer, 'A Second Chance for the EAW in Germany: The "System of Surrender" After the Constitutional Court's Judgment of July 2005', in Guild and Marin (2009, n 38), 195–208, with good bibliographic references.

[41] R Errera, "The Implementation of the EAW in France. Constitutional Issues and Scope of Judicial Review", in Guild and Marin, ibid., esp. 167–9.

[42] For a comprehensive list of these constitutional challenges, see P Zeman, "The European Arrest Warrant: Practical Problems and Constitutional Challenges", in Guild and Marin, ibid., 107–11.

[43] For a general overview, see *Commission Staff Working Document* SEC(2011) 430 final (esp. pp. 3–8) attached to the European Commission *Report on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*, COM(2011)175 final, p. 3.

light of their own national understanding of the law. Diversity of local legal cultures (both in underpinning constitutional frameworks and in more specific approaches to criminal justice) meant that some national judges have given themselves discretion as to whether or not to execute a warrant in circumstances where courts from other jurisdictions would regard similar requests as either mandatory or inadmissible.[44] As a result, what we have in Europe is 28 different EAWs, not one.

Judicial resistance sometimes develops into full-blown opposition. Estella Baker, discussing a recent decision of the Criminal Division of the English Court of Appeal, has pointed to an example where national judges evoked fundamental elements of national legal culture in manifesting both 'rhetorical resistance' and 'substantive resistance' to EU laws in relation to criminal justice.[45] In the conjoined appeals in *Interfact* and *Budimir and another*,[46] the Lord Chief Justice, the head of the English judiciary, evoked the spirit of AV Dicey and the sovereignty of the British Parliament to express impatience with the suggestion that national prohibitions on marketing pornographic videos might be unenforceable for non-compliance with European laws. Baker argues that this cultural resistance even affected the substantive reasoning of the court to the point whereby key elements of European law were not appropriately considered.[47] If this is perhaps a rare overt example of cultural resistance written into a judgment, other examples can be given of the difficulties posed by national legal cultures in the transposition of European laws. For example, European legislation may conceive of problems requiring criminal intervention in ways very different from those traditionally adopted in particular national legal cultures.

Chrisje Brants[48] has examined the implementation of the 2008 EU Framework decision on combating racism and xenophobia and its requirement that 'hate crime' be criminalized. She shows that the Netherlands has historically constructed its response to such issues in terms of 'group discriminatory defamation' seen as a public order offence aimed at promoting tolerant public discourse. The concept of hate crime constructed by EU legislation, based

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[44] For details see Renaud Colson 'Domesticating the European Arrest Warrant: European Criminal Law between fragmentation and acculturation' in Colson and Field (2016, n 3), 199.

[45] Estella Baker 'Crimes, Remedies and Videotape: An Unhappy Encounter with EU Law' in Colson and Field, ibid., 241.

[46] *Interfact Ltd v Liverpool City Council (Secretary of State for Culture, Media and Sport intervening); R v Budimir and another (Same intervening)* [2011] 2 WLR 396.

[47] Baker (n 45), 257.

[48] Chrisje Brants 'What limits to harmonising justice?' in Colson and Field (2016, n 3) 221.

on racist motivation of the individual, thus sits ill with Dutch concepts of group discrimination and the general irrelevance of motive to the definition of offending. She concludes that current Dutch legislation now conforms in theory to the demands of the Framework decision but, in the exercise of the traditionally wide discretion given to Dutch police and prosecutors, local legal actors can quite happily continue to work with the grain of established national ways of doing things. She concludes that the top-down mechanism that is harmonization is confronted by differing bottom-up national cultures in the social construction of crime. This may not necessarily involve the overt resistance that Baker identifies in the *Interfact* case. Even the underlying assumptions – the taken for granteds – of established local legal cultures can provide structural resistance to ways of thinking from elsewhere.

The two examples above refer to particular national cultures. But there can be resistance to EU attempts at harmonization that stretches across national boundaries. An example is provided by John Jackson's assessment of the drafting and implementation of the recent EU Directives on access to a lawyer.[49] He concluded that cultural resistance to the EU's original conception of what an effective role for a defence lawyer in the police station might mean came from a number of Member States from both adversarial and inquisitorial traditions. A number of countries resisted the development of an active defence role both before and after transposition. The effect is that EU requirements allow continuing differences in relation to key issues that determine the real significance of defence lawyer presence: the definition of permitted intervention during interrogation and lawyers' access to information on the case in the police station.[50] In different ways, jurisdictions from different procedural traditions have sought to preserve state dominance of the policy custody phase and thus their capacity to manage the pre-trial process. For our purposes, it reinforces the view that established national ways of thinking about particular aspects of legal practice are clearly setting obstacles in the way of EU harmonization.

6. DEVELOPING A DISTINCTIVE EU CRIMINAL JUSTICE CULTURE?

One way of binding together an EU project of harmonization against the centrifugal forces of diverse legal cultures is by constructing a distinct but common EU culture of criminal justice. What is the evidence for the existence of such a culture and what are the mechanisms by which it might develop?

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[49] John Jackson 'Cultural Marriers on the Road to Providing Suspects with Access to a Lawyers' in Colson and Field, ibid., 181.

[50] Jackson, ibid., and Hodgson (2020, n 21).

Certainly, the limited scope of EU law and legal institutions make the concept of legal culture appear more elusive than at a national level. The elements that we would want to associate with legal cultures are much more evident at national than EU level: traditions, institutions, intellectual formations (ideologies) as well as structures of feeling (underlying attitudes and beliefs toward the law).[51] Although there are dangers in overemphasizing the unity and stability of national legal cultures, for many it does not seem implausible to talk about French or Italian legal culture.[52] This is not just a question of scope but also of history. Legal cultures draw on the normative force of tradition and need time to become embedded. In relative historical terms the EU is still a very new institution, particularly as one that aspires to be more than a common economic market, to be a site of citizenship and belonging. And the pre-existing diversity of legal cultures in Europe, not just as between civil and common law traditions but also the national differences within those broader traditions, also makes the concept of an EU legal culture seem on the surface rather improbable. And yet, there are some signs that something is going on.

Where should we look for signs of European acculturation in criminal justice? Three distinct phenomena will be highlighted here: the development of a shared narrative, of judicial dialogue and the work of transnational bodies. We argue that the groundwork for an EU criminal justice culture may be established in political rhetoric, and its doctrinal concepts may be capable of co-ordination through judicial dialogue. But in the construction of EU criminal justice policies and the operation of transnational bodies on the ground there are still only limited signs of a collective EU culture.

6.1 Shared Narrative

First, a common culture might be seen as emerging from the sharing of political values and ideological beliefs underpinning the enterprise of building an Area of Freedom, Security and Justice. This project relies on a set of explicit values and implied beliefs expressed in various policy documents which convey an unfolding narrative establishing the European engagement in criminal matters. This new development was first presented according to a functional logic of 'spill over'.[53] The development of an EU capacity in criminal justice was described in terms of a necessary reaction to the security deficit arising from the abolition of internal borders within an integrated Union. But it then gained

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[51] Field (2010, n 7).

[52] Though it might be better to talk of French or Italian legal cultures in the plural: see John Bell, *French Legal Cultures* (London: Butterworths 2001) v.

[53] On the spill over theory, see Maria Fletcher, Robin Lööf and Bill Gilmore, *EU Criminal Law and Justice* (Cheltenham / Northampton: Edward Elgar 2008), 22–31.

momentum with the advent of a discourse around 'citizenship of the Union' which empowered the EU as a guarantor of the security of nationals of the Member States in exercising their freedom of movement within the Union.[54] Improving the experience of transnational victims and transnational defendants (both seen as EU citizens) justifies new common legal rights and practical legitimate expectations. This critical incremental step in the Union's rationale has allowed wider intervention in the field of criminal justice on the basis of the need to build mutual trust and the diffusion of market-based mechanisms of integration (e.g., mutual recognition and its accompanying free circulation of judicial decisions).

Whatever the reality of the security deficit and the degree of mutual trust between Member States, these ideas feed a certain vision of the EU and provide the building blocks for a useful political myth about the Union's past and future.[55] This narrative is given material expression in legal techniques which in turn confirm the contemporary relevance of the European project. Devices such as the EAW and now the European Investigation Order[56] are not only justified by the new powers of the EU but they also contribute to the development of its constitutional identity as an actor which promotes the public goods of security and justice in all Member States. This narrative may be viewed in different ways. It may be seen as too weak to win the assent of all stakeholders, be they politicians, professionals or academics. It is nonetheless taken up by them, if only for them to criticize it, and it is thus circulated even among those who do not embrace it. As such the development of EU criminal legislation contributes to the entrenchment of a political myth which at least evokes the idea of an EU legal culture.

6.2 Judicial Dialogue

There is also evidence of a developing judicial dialogue between national and EU courts in the construction of a shared conceptual vocabulary. The role of the CJEU has become crucial in this respect since the Lisbon Treaty even

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[54] Stephen Coutts, 'Citizenship of the European Union', in Diego Acosta Arcarazo and Cian C Murphy (eds), *EU Security and Justice Law* (Oxford / Portland: Hart, 2014), 92–109.

[55] On the unavoidable mythical dimension of the European integration project, see Vincent Della Sala, 'Myth and the Postnational Polity', in Gérard Bouchard (ed), *National Myths: Constructed Pasts, Contested Presents* (Oxon: Routledge 2013), 157–72.

[56] The European investigation order came into force in May 2018: Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

though its jurisdiction was restricted with regard to 'third pillar' measures until the end of 2014.[57] Despite the reluctance of some domestic courts to initiate a 'judicial dialogue' with the Court of Justice , there has been the opportunity to produce preliminary rulings on the interpretation (and validity) of EU criminal legislation. Through such declaratory rulings, which bind all Member States with respect to the meaning of EU law, the Court can promote uniform interpretation of EU legislation. Thus, the CJEU required national courts to interpret EAW domestic legislation as far as possible 'with a view to ensuring that (it) is fully effective and to achieving an outcome consistent with the objective pursued by it'.[58] In so doing, the Court of Justice can resist the fragmentation of EU criminal law by limiting the margin of interpretation of national courts in the application of domestic legislation.

But the work on the meaning and the significance of EU legislation carried out by the Court goes further in that it leads to the creation of distinct European legal concepts. These pan-European judicial standards are crucial to the development of a distinct EU legal culture. In order to manage diversity in a non-harmonized field, the Court of Justice has developed a number of autonomous concepts and has thus superimposed on to national legal systems a Union meaning in relation to concepts which may have had an earlier, different ordinary meaning in domestic law.[59] In a recent survey, Mitsilegas cites a number of examples: 'judicial authority in criminal matters', 'same acts' for the purposes of the determination of the scope of the *ne bis in idem* principle and the concept of 'residence' for the purpose of recognising and executing EAWs.[60] In this way, the Court of Justice ensures that the EU has not just the legislative power to transform legal cultures by changing the letter of the law by enacting Directives but also the capacity to shape judicial interpretation of underlying concepts. With it comes a much stronger capacity to shape perceptions and practices in national criminal justice systems.

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[57] Protocol n° 36 of the Lisbon Treaty (12008M/PRO/36) provides 'as a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty' that the powers of the Commission under Art. 258 of the TFEU shall not be applicable until five years after the date of entry into force of the Treaty of Lisbon. As a result, Member States were shielded from any infringement proceedings until the end of 2014.

[58] Case C-42/11, *Lopes da Silva*, 5 September 2012.

[59] Valsamis Mitsilegas 'Managing Legal Diversity in Europe's Area of Criminal Justice: The Role of Automomous Concepts' in Colson and Field, (2016, n 3).

[60] Ibid.

6.3 Transnational Bodies

The European legislature has created a variety of horizontal networks: these bring together judges and officials from all Member States to facilitate judicial co-operation and improve co-ordination in the investigation and prosecution of organized and cross-border crime. The most obvious examples are the European Judicial Network, Eurojust and Europol.[61] What these various instruments all have in common is the promotion of closer and more effective co-ordination between criminal justice systems through monitoring techniques which are not legally binding but are nevertheless normative.[62]

The European Judicial Network (henceforth EJN) and Eurojust do not have any regulatory power but they promote increased co-operation through peer-learning and the sharing of experience across Europe. To achieve this aim, these EU transnational networks rely, on the one hand, on regular face-to-face meetings between legal agents of different jurisdictions, and on the other, on the use of sophisticated IT facilities. Thus, the EJN website provides online apps to assist national judicial authorities to identify their competent counterparts and legal requirements in the executing Member State.[63] In addition, the EJN online library makes guidelines on good practice easily accessible (see especially the European Handbook on how to issue a European Arrest Warrant, which has been translated into all EU languages).[64]

Eurojust provides another example. Eurojust is an EU agency, a 'body of the Union' with legal personality, engaged in putting in place European procedures to resolve the many practical obstructions that arise in the daily management of transnational criminal cases (translation of national requests, simultaneous arrests, issuing and execution of EAWs, etc.). But a recent empirical study by Mégie suggests that there are limits to the creation of an EU criminal justice culture. Eurojust 'judges' (who may be judges, prosecuting magistrates or

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[61] For an introduction to the role of these and other key EU transnational bodies such as OLAF (the body charged with preventing fraud against the EU) and the emerging European Public Prosecutor, see Spencer (n 37), section 3.

[62] Monica Claes and Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8(2) *Utrecht Law Review* 100–14. From the same authors, see also, 'Courts United? On European Judicial Networks' in Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe. European Law as a Transnational Social Field* (Oxford/Portland: Hart, 2013), 75–100. See also J Thomas, 'Networks of the Judiciary and the Development of the Common Judicial Area' (2011) 2(1) *New Journal of European Criminal Law* 5–8.

[63] See the EJN Judicial atlas, URL: https://www.ejn-crimjust.europa.eu/ejn/AtlasChooseCountry.aspx (Retrieved: 15/12/2018).

[64] URL: http://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=13 (Retrieved: 15/12/2018).

police officers depending on the national legal cultures involved) seem to be riven by 'profound institutional and social divisions' which are impeding the development of a common European judicial culture.[65] In their search for legitimacy and credibility, these judges have focussed on facilitating the work of national judges by disseminating technical tools to assist in cross-border co-operation.

> Eurojust appears to be less involved in producing and disseminating a European judicial culture than in solving the concrete problems that arise in criminal investigations. It is therefore difficult to speak of any real convergence or harmonisation of cultures and practices in criminal matters through the mediation of Eurojust....[66]

Thus, if the foundations of a nascent European legal culture can be discerned in an underlying political narrative and judicial means of enforcing common interpretations of legal concepts, evidence of harmonizing culture of enforcement practices on the ground – as opposed to pragmatically working round differences – is much more elusive.

7. CONCLUSIONS: SOME FUTURE CHALLENGES IN BUILDING AN EU CRIMINAL JUSTICE CULTURE

We started by arguing that the concept of legal culture had become influential in comparative legal studies because it both enables and requires researchers to go beyond examining the legal rules in books to examining the other determinants of practice on the ground. Thinking about the building of the Area of Freedom, Security and Justice in these terms emphasizes that it is not enough to harmonize rules or even the interpretation of legal concepts in court. What is required is to harmonize their use and application by legal actors in diverse institutional and material settings and in the light of locally established ways of doing things which are often based on implicit assumptions. Harmonizing the legal rules of criminal procedure may be the easier bit for the EU. Harmonizing the lived experience of victims and suspects as they travel across Europe or the expectations of police and judges as they work with different national partners will be much more demanding.

Over the next few years, we will see the way in which the EU deals with themes of cultural diversity and harmonization in building an EU criminal justice. In particular we will see the CJEU's judgment of Member States'

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[65] Antoine Mégie 'Eurojust in Action: An Institutionalization of European legal culture?' in Colson and Field, (2016, n 3), 97–8.

[66] Ibid., 104–5.

efforts at implementing a variety of Directives establishing minimum standards for victims' and suspects' rights and the European Investigation Order. It might be assumed that the likely departure of the UK from the EU might reduce the potential for cultural tensions around criminal justice. It would certainly shift the balance within the Union further towards those jurisdictions with an inquisitorial tradition, effectively leaving Ireland as an outlier with opt-outs.[67] But differences in legal culture in criminal justice can no more be reduced to matters of procedural tradition than they can to formal legal rules. Across Continental Europe, different national criminal justice systems bear different relationships to the inquisitorial tradition exactly because those relations are mediated by particular national legal and political cultures. These express different concepts of the relationships between the state, citizen, legal professions and markets which in turn shape varied arrangements around the training, funding and organization of policing, courts and defence lawyering. If effective harmonization must encompass such matters of institutional practice, the challenge of diversity that will remain even after Brexit will be substantial. The recent Directive on legal aid is a symbolically important, but tentative, first step to confronting differences around the material conditions of criminal justice practice. But it may be that in the coming years, it will be the economic inequalities within Europe – and different accompanying perceptions of what it is possible to ask of the state – that become the major fault line in the EU harmonization project.

[67] This is taking the view that Italy's post-1989 criminal procedure should be seen as hybrid rather than primarily adversarial.