EAST EUROPEAN FACES OF LAW AND SOCIETY: VALUES AND PRACTICES

Edited by

WILLIAM B. SIMONS

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Foreword

William B. Simons

This volume continues a fine tradition which was started after the II World Congress for Soviet and East European Studies (now the International Council for Central and East European Studies [ICCEES]), held in Garmisch-Partenkirchen (Germany) in 1980: publishing revised versions of the Congress papers dealing with law-related topics in the *Law in Eastern Europe* series.

The following volumes already have been published:

F. Feldbrugge & W. Simons (eds.), *Perspectives on Soviet Law for the 1980s*
No.24 *Law in Eastern Europe*, The Hague, 1982 (Garmisch-Partenkirchen Congress);

F. Feldbrugge & W. Simons (eds.), *The Distinctiveness of Soviet Law*
No.34, *Law in Eastern Europe*, Dordrecht, 1987 (Washington, DC Congress);

F. Feldbrugge & W. Simons (eds.), *The Emancipation of Soviet Law*
No.44, *Law in Eastern Europe*, Dordrecht, 1992 (Harrogate Congress);

"The 1995 ICCEES Conference Law Papers", Parts I-II
22 *Review of Central and East European Law* (1996) Nos.3-4, 251-454
(Warsaw Congress);

F. Feldbrugge (ed.), *Law in Transition*
No.52, *Law in Eastern Europe*, The Hague/London/New York, 2002 (Tampere Congress); and

Ferdinand Feldbrugge (ed.), *Russia, Europe, and the Rule of Law*
No.56, *Law in Eastern Europe*, Leiden/Boston, 2007 (Berlin Congress).

The chapters in this book were originally presented at the VIII ICCEES World Congress held in Stockholm on 26-31 July 2010 and organized by ICCEES together with Stockholm University, Södertörn University College and the Stockholm School of Economics as the academic hosts and *Sällskapet för studier av Ryssland, Central- och Österuropa samt Centralasien* (The Swedish Society for the Study of Russia, Central and Eastern Europe and Central Asia) as the local organizer. The VII Congress banner was: "Eurasia. Prospects for Further Cooperation".

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As in the past, this volume of *Law in Eastern Europe* likewise contains many, but not all, of the law-related papers from the Congress. They have been revised by the authors; in part to take account of the discussions in Stockholm and, also, to respond to remarks of anonymous referees. Other law-related contributions to the Stockholm Congress can be found in more specialized collections or appear as articles.

It is with heartfelt gratitude that I acknowledge the invaluable efforts of the referees in assisting the contributors to this volume to see their own works through the eyes of another. Furthermore, I am indebted to several other people. First and foremost, of course, this debt is to the authors whose works in this volume are brought to light for the reader; for updating their Congress papers, interacting with the referees and, also, for being patient. It has taken longer to bring this collective work to the light of day than we had anticipated. A multi-author work to which scholars and practitioners contribute who are from different jurisdictions and different fields of endeavor—ensuring that this is done with maximum emphasis on clarity of thought and sufficiency of evidence—is a labor-intensive undertaking to say the least.

Also, I am extremely grateful to Dr. Alice Engl at the European Academy of Bozen/Bolzano for contributing to this work her many skills in thinking-and-doing without which this volume could not have been finished and, also, to her EURAC colleagues. Many thanks also to two of the "brightest and best" of the Tartu Law Faculty—Ms. Kärt Pormeister and Ms. Tea Kookmaa—for their fine work in helping to "rub and polish" this collection: reading chapters with precision and enthusiasm and, also, in compiling the index to this work, respectively. Last but certainly not least, thanks to our publisher: Brill Nijhoff. The thought-provoking work of the contributors to this volume would be as the tree that falls in the woods without the continued dedication of Brill Nijhoff to this series and the professionalism of its good people at their offices in Leiden and Boston.

Tartu,
Winter 2013/2014

Historical Faces

Modern-day Faces

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Dimensions of Popular Legal Culture in Contemporary Europe*

William L. Miller

By "popular legal culture" we mean street-level ideals, attitudes towards law, and perceptions of law and law-enforcement: what the public think "law" should be (= "attitudes"), and what the law actually seems to be in practice (= "perceptions"). Public attitudes may be perverse, and public perceptions erroneous; but, together, they nonetheless constitute "popular legal culture". In focusing on "legal cultures", the objective is not to investigate laws and legal systems but to understand public opinion—public attitudes towards law, and public perceptions of law.[1]

State law is only one of several alternative systems of law, authority, and dispute resolution. So, we also investigate public attitudes towards, and perceptions of, alternatives to state law—both supra-state and sub-state approaches to setting standards or resolving disputes.

We focus on five countries spread across Europe from Norway and England, through Poland, and on to Bulgaria and Ukraine. To varying degrees, public opinion in these countries may be affected by moves towards European Unity (which exerts pressure in a generally liberal direction, protecting or extending the legal rights of individuals and minorities) but, also, the concurrent "war on terror" (which exerts pressure in a generally authoritarian direction eroding the legal rights of individuals and minorities—especially Muslims).

After reviewing a total of 84 focus-group discussions in 2008 with groups drawn from the general public, from Muslim minorities, and from "Euromigrants" (*i.e.*, people born in one European country but now living in another), in order to draft a questionnaire that covered the range of freely expressed public attitudes and perceptions of law, we proceeded in 2009 to interview a representative cross-section of around 1000 drawn from the general public, plus a "booster" of

* This chapter is part of the research project—"Legal Cultures in Transition"—which is funded by the Norwegian Research Council under Award No.182628. The project period is 2007-2011.

1 For more extended definitions of "legal culture", see J.L. Gibson and G.A. Caldeira, "The Legal Cultures of Europe", 30(1) *Law and Society Review* (1996), 55-86; and D. Nelken, "Using the Concept of Legal Culture", 29 *Australian Journal of Legal Philosophy* (2004), 1-26.

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around 200 Muslims, within each of five countries: Norway, England,[2] Poland, Bulgaria and Ukraine—approximately 6,000 interviews in total.[3]

Our five chosen countries range from the north-west to the south-east of conventional geographic "Europe": three are members of the EU, and two are close associates. They range from near top to near bottom on the World Bank's global scores for European countries governed by the "rule of law". In its 2005 index, for example, the World Bank put Norway at the top end on the 99th percentile for the "rule of law", England (more strictly the "UK") on the 94th, Poland on the 60th, Bulgaria on the 49th, and Ukraine on the 35th.

Together these five countries permit a reasonable test of how popular legal culture varies across Europe, and how it has responded to the twin pressures of "European unity" and the "war on terror".

The timing of terrorist acts and of public responses to terror can be important. The "war on terror" was declared by President Bush after the destruction of the twin towers in New York on 11 September 2001. The London Underground bombing was on 7 July 2005, followed by an unsuccessful repeat on 21 July 2005, and other failures in London on 29 June 2007, and in Glasgow on 30 June 2007. These were preceded by the Lockerbie/PanAm bomb in December 1988—but kept in the news by the repatriation of the alleged bomber to Libya. All of these focused attention on terrorism—especially within England—but none were so close in time to our interviews as to encourage a very short-term and misleading response to our focus groups (held in 2008), and still less encourage short-term responses to our survey questions (asked in 2009). A long period of years without a "war or terror" would almost certainly affect public opinion and legal cultures. But in the meantime, these events and the subsequent measures to combat terrorism are likely to make the English—and the Muslim minority

2 By "England", we mean England, not the UK. Laws and legal systems vary within the UK, though popular legal cultures vary much less. See, for example, the comparative study of Scottish and English legal cultures (despite its title of "political" culture) in William L Miller, Annis May Timpson and Michael Lessnoff, *Political Culture in Contemporary Britain* (Oxford University Press, Oxford, 1996). Nonetheless, the legal culture of "legal insiders" working in different legal systems may differ more than the legal culture of "outsiders", the public. So, for clarity of analysis, we have focused on England rather than Britain or the UK. In population, England comprises 84% of the UK, Scotland 8%, Wales 5%, and Northern Ireland 3%. To do justice to cultures in Scotland, Wales and Northern Ireland would require another 1200 interviews in each, another 3,600 in all.

3 "Legal cultures" are not restricted to the "popular legal culture" of the general public however. Our research is designed to compare and contrast the "legal cultures" of "insiders and outsiders" (*i.e.*, legislators and legal professionals as well as the general public); to compare and contrast the "legal cultures" of majorities and minorities (especially Muslim minorities in the post-9/11 world); and "Euro-migrants"—that is people born in one European country but living and working in another (including, for example, East-Europeans in England, and West-Europeans in Ukraine. Our research on "insiders" is currently in the field; but we have included in this chapter some results from our study of Muslim minorities.

in England—more sensitive than in other countries both to the risk of terrorism and to the authorities' anti-terrorist procedures. But this is a settled, relatively long-term sensitivity, not the shock of very recent terrorist action.

Public Attitudes towards Law in Principle

We begin by focusing on public preferences, attitudes and ideals rather than perceptions—what the public want, what they think law "should" be in principle, rather than any reality that they observe in practice. We look at public attitudes and ideals under ten headings, or "dimensions" of popular legal culture:

(1) Law as justice or oppression?
(2) Vicarious legitimacy: the proper basis for law
(3) An authoritarian public?
(4) The "nanny state"?
(5) Parliamentary supremacy?
(6) Flexibility versus rigidity?
(7) Reflect or reform?
(8) Exit, voice and loyalty
(9) Stepping outside the law?
(10) Supra-national law?

—before investigating public perceptions of the law in action.

1. Law as Justice or Oppression?

Before going into detailed questioning, we asked at the start of our interviews: "When I say the word 'law', do you think primarily of justice, fairness and legal rights, or do you think of unfair and oppressive laws?" The instinctive response was "justice", not oppression (Table 1). As might be expected, the Norwegians are the most likely to equate law and justice; but three out of four Ukrainians also cite justice, fairness and legal rights. Differences between countries are not nearly as great as a cynic might expect.

Table 1.	NOR	ENG	POL	BUL	UKR	*Mean (SD)*	N-MUS	E-MUS	P-MUS	B-MUS	U-MUS	*Mean*
Q2 Law is justice, not oppression?	95	87	76	83	73	*83 (9)*	89	84	89	90	73	*85*

Notes:
1. NOR, ENG, POL, BUL,UKR indicate the General Publics in these five countries; N-MUS, E-MUS, P-MUS, B-MUS, U-MUS, indicate Muslims in these five countries.
2. In each country, samples comprise approximately 1000 interviews with the general public plus 200 with Muslims.
3. For simplicity, all percentages in this chapter are calculated by excluding "mixed", "both", "neither", and DK/NA from the calculations.
4. Comparisons between Muslims and the general public within a single country are inevitably based on a small sample of Muslims. However, overall comparisons between Muslims and the general public across all five countries (by comparing "means" or "averages") are more securely based on comparing approximately 1000 Muslims with 5000 of the general public.
5. SD indicates the "standard deviation" which summarizes the cross-national variability of the General Publics opinion across the five countries.

2. Vicarious Legitimacy—The Proper Basis for Law

Overall, both the general public and Muslims put most weight on "general moral values" as the proper basis for law followed by "current life-styles". In third place, the public cite "custom and tradition" while Muslims cite "European and International standards". "Religion" is bottom of the list for both the general public and Muslims (Table 2).

Attitudes towards "general moral values" and "religion" vary little across countries: public support for "general moral values" is uniformly high and for "religion" uniformly low. But there are greater cross-national differences on "European and International Standards"—which are given much more weight in the former Communist countries than in Norway and England.

Table 2.	NOR	ENG	POL	BUL	UKR	*Mean (SD)*	N-MUS	E-MUS	P-MUS	B-MUS	U-MUS	*Mean*
Q41 Strongly agree: Base law on:												
Q41D general moral values?	41	51	36	41	42	*42 (5)*	50	51	25	41	32	*40*
Q41B current life-styles?	37	38	32	49	34	*38 (7)*	50	48	11	45	24	*36*
Q41A custom & tradition?	32	46	28	41	31	*36 (8)*	31	23	12	37	11	*23*
Q41F Euro or International standards?	14	12	24	45	24	*24 (13)*	27	23	22	55	24	*30*
Q41C religion?	4	4	10	10	12	*8 (4)*	13	25	10	13	9	*14*

To be "truly European", the public suggest it is most important to "respect ethnic and religious minorities" and least important to have a "Christian tradition". The importance assigned to "respect for ethnic and religious minorities" is uniformly high. But there are sharp cross-national differences on the importance of a "Christian tradition"—which is given much more weight in Bulgaria and Ukraine than in Norway and England. Muslims, especially in Ukraine, put less weight on a "Christian tradition". But Bulgarian Muslims, like other Bulgarians, associate "Europe"—for good or ill—with a Christian tradition (Table 3).

Table 3.	NOR	ENG	POL	BUL	UKR	*Mean (SD)*	N-MUS	E-MUS	P-MUS	B-MUS	U-MUS	*Mean*
Q122 Agree: To be truly European a country must have:												
Q122H respect for ethnic/relig minorities (v not)?	90	83	93	81	91	*88 (5)*	88	93	99	96	91	*93*
Q122I respect for sexual minorities (v not)?	85	82	66	48	54	*67 (16)*	76	77	72	36	41	*60*
Q122E a secular system (v not)?	58	62	70	80	65	*67 (8)*	75	48	88	74	50	*67*
Q122D a Christian tradition (v not)?	41	30	55	87	85	*60 (26)*	36	20	43	76	33	*42*

3. An Authoritarian Public?

"Justice" can be authoritarian: over 90% in every country want "harsher" rather than "more lenient" penalties. Over 70% in Norway and England think "stricter implementation and enforcement" is more important than having "better laws"—though attitudes are more balanced between "stricter enforcement" and "better laws" in the three former Communist countries. But across all countries, around two-thirds make "ensuring order" a higher priority than "individual freedom".

When faced with the choice between "combating the threat of terrorism" and "protecting individual freedom", Bulgarians and Ukrainians come down strongly in favor of "individual freedom"; but Norwegians and Poles are evenly divided, and two-thirds of the English prioritize "combating the threat of terrorism". By that measure, Ukrainians are the most liberal, and the English the most authoritarian! In a different part of the interview respondents were faced with the choice between "combating the threat of terrorism" and "protecting the rights of individuals and minorities".

In every country except England, that additional focus on the "rights of minorities" evokes a more authoritarian response from the general public.

On average, only 32% prioritize "individual freedom" over "ensuring order". But 56% prioritize "individual freedom" over "combating the threat of terrorism"—though only 47% prioritize "the rights of individuals and minorities" over "combating the threat of terrorism".

Muslims take a more liberal stance on all three questions: on average, Muslims are 9% more likely than others to prioritize "individual freedom" over "ensuring order"; 13% more likely than others to prioritize "individual freedom" over "combating the threat of terrorism"; and 22% are more likely than others to prioritize "the rights of individuals and minorities" over "combating the threat of terrorism". In the post-9/11 world, Muslims are even more sensitive to the rights "of minorities" than the rights "of individuals" (Table 4). In part—though only in part—this liberal stance is because Muslims are much less willing than the general public to agree there is a "real threat of terrorism" in their country: on average, 38% of the general public (rising to 68% in England) feel "there is a real threat of terrorism in this country" but, on average, less than half as many Muslims, only 17% accept that view.

Table 4.	NOR	ENG	POL	BUL	UKR	*Mean (SD)*	N-MUS	E-MUS	P-MUS	B-MUS	U-MUS	*Mean*
Q8 want harsher penalties (v more lenient)?	91	94	94	96	92	*93 (2)*	92	86	90	96	87	*90*
Q5 stricter implementation & enforcement (v better laws)?	70	72	54	67	58	*64 (8)*	58	46	41	69	65	*56*
Q6 protect individual freedom (v ensuring order)?	36	37	26	30	31	*32 (5)*	33	52	56	30	35	*41*
Q7 protect individual freedom (v combat threat of terrorism)? (Muslim % minus General Public%)	50	36	54	67	74	*56 (15)*	53 (+3)	56 (+20)	84 (+30)	74 (+7)	76 (+2)	*69 (+13)*
Q115 More important to protect rights of individuals & minorities (v combat threat of terrorism)? (Muslim % minus General Public%)	37	40	44	48	67	*47 (12)*	58 (+21)	66 (+26)	76 (+32)	61 (+13)	82 (+15)	*69 (+22)*

4. The "Nanny State"?

We asked respondents whether they would prefer "more legal controls—for example on safety at work, the quality of goods in shops, or house-building standards" or, alternatively, "less legal controls—leaving people to make their own choices about such things". Support for the "nanny state" interfering in the details of everyday life is most popular in Bulgaria and Ukraine, less so in Poland and Norway, and by far the least popular in England where opinion is almost evenly divided (Table 5).

Table 5.	NOR	ENG	POL	BUL	UKR	*Mean (SD)*	N-MUS	E-MUS	P-MUS	B-MUS	U-MUS	*Mean*
Q11 want more legal controls (v less)	73	52	65	95	81	*73 (16)*	74	70	41	95	79	*72*

5. Parliamentary Supremacy?

Public support for the concept of "parliamentary supremacy" is remarkably weak—even in England, despite England's historic association with that concept. We asked: "If Parliament passed a law but the courts said it was illegal, who should have the final say?—Parliament, because it is democratically elected by the people, or the courts because they are the guardians of the law?" On average, only 36% (35% in England) would back Parliament against the courts if the courts declared a law illegal (Table 6).

And there is even less support for Parliament "forcing" the courts to apply a law, rather than redrafting it—on average only 18% (still less, 13% in England and 10% in Norway). In "constitutional regimes", the Constitution and the Constitutional Court are, in theory, supreme; but in countries such as the UK, there is no Constitution, and no Constitutional Court (despite the recent introduction of a misleadingly titled "Supreme Court"). Moreover, the contemporary public finds it difficult to distinguish between the Government (which cannot claim supremacy over the courts even in England) and the Parliament (which does claim supremacy in England).

Table 6.	NOR	ENG	POL	BUL	UKR	*Mean (SD)*	N-MUS	E-MUS	P-MUS	B-MUS	U-MUS	*Mean*
Q20 If Parliament passed a law but Courts declared it illegal, Parl should have final say (v Courts)?	41	35	35	35	34	*36 (3)*	38	34	16	44	41	*35*
Q29 If Courts refuse to apply a law, Parliament should force Courts to apply it (v change law)?	10	13	15	33	17	*18 (9)*	16	9	5	34	16	*16*

6. *Flexibility* versus *Rigidity?*

A "top-down" view of the law envisages an enormous amount of detail, fully specified at the top, leaving little or no discretion at the bottom. The model is that of the Old Testament story of the Ten Commandments "carved on tablets of stone" and brought down the mountain by Moses to be applied rigidly without debate, discussion, interpretation or discretion.[4] The alternative model—the New Testament commandment to "love thy neighbor as thyself"[5]—leaves greater scope for interpretation and discretion, in which courts and judges "interpret" and even "make law" as well as "apply law".

Not surprisingly, given England's "common-law" tradition, the English are the most inclined to reject the concept of "detailed laws"—and its corollary "applying the letter of the law"—rather than deciding "what is fair and reasonable". Public support for "detailed laws" runs at only 31% in England. It is somewhat higher in Norway, though still supported only by a minority of 41%. But there is clear majority support for "detailed laws" in Poland (60%), Bulgaria (70%) and—most of all—in Ukraine (78%).

Support for courts to "apply the letter of the law" rather than deciding for themselves what is "fair and reasonable" follows the same cross-national pattern—though at a significantly lower level: there is only a clear majority preference for applying the "letter of the law" in Ukraine. Whether that reflects the Imperial tradition or simply the very low opinion of the public about Ukrainian judges, is not immediately clear (Table 7).

4 See Exodus 20:2-17 or Deuteronomy 5:6-21.

5 See John 13:34-35 and Matthew 22:35-40.

Table 7.	NOR	ENG	POL	BUL	UKR	*Mean (SD)*	N-MUS	E-MUS	P-MUS	B-MUS	U-MUS	*Mean*
Q27 laws should be very detailed (v set principles, for court to decide)?	41	31	60	70	78	*56 (20)*	45	31	62	76	65	*56*
Q26 courts should apply letter of law (v decide what is fair & reasonable)?	34	26	48	53	64	*45 (15)*	35	30	57	72	46	*48*

When asked to reflect upon disputes among the "people you meet at work or in your neighborhood" and about whether it is most important to settle these disputes "strictly according to the letter of the law", or "generally accepted ideas of right and wrong"—or in such a way as to "preserve good human relations between those in dispute"—Ukrainians are more likely than those in other countries to cite "the letter of the law"—and less likely than those in other countries to cite "good human relations". But, nonetheless, "good human relations" are the top priority within each and every country (Table 8).

Table 8.	NOR	ENG	POL	BUL	UKR	*Mean (SD)*	N-MUS	E-MUS	P-MUS	B-MUS	U-MUS	*Mean*
Q37 most important												
letter of the law?	5	11	18	26	28	*18 (10)*	14	11	24	28	24	*20*
accepted ideas of right & wrong?	43	41	36	25	29	*35 (8)*	37	36	47	24	33	*35*
preserve good human relations?	52	48	46	49	43	*48 (3)*	49	53	28	48	43	*44*

Court judgments that take account of individual circumstances can sometimes prompt the legislature to re-write the law. But there can be a degree of flexibility built into the law itself. This is particularly relevant for minorities rather than individuals. We asked whether "ethnic and religious minorities" should be required "always to obey the law"; whether the law should be so "tolerant of individual freedoms that it does not offend these minorities"; or whether "some laws should not be enforced on these minorities, provided this does no harm to other people" (Table 9).

On average, 56% of the general public—but only 30% of Muslims—said minorities "must always obey the law"; conversely, 51% of Muslims—but only 32% of the general public—said the law should be designed to avoid offense to minorities; and 20 % of Muslims—but only 11% of the general public—opted for "not enforcing" some laws on minorities "if they did no harm to other people".