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Using Legal Culture: Purposes and Problems

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The papers in this special issue of the Journal of Comparative Law on legal culture were first delivered at a workshop held in Venice University (Ca' Foscari) 20-21 May 2010. Special thanks go to Professor Renzo Cavalieri of the Departments of Legal Sciences and East Asian Studies (and his collaborators Georgio Colombo and Sara d'Attoma) for the wonderful organisation and hospitality that made this event so memorable. There were no complaints from participants even when the presentations had to be occasionally interrupted because of the serenading of tourists on the Grand Canal by the gondoliers passing in front of the picture windows of the meeting rooms. Professor Michael Palmer, Professor of Law and Associate Dean for Research & Global Development, STU School of Law, China and Professor at the School of Oriental and African Studies of the University of London, conceived and inspired the workshop and the special issue and has been closely and productively involved at every stage of its planning and production. It is only because he is also a General Editor of this Journal that he is not described as joint editor of this special issue.

The term legal culture is widely and increasingly being used.¹ But the relationship between use and usefulness needs to be teased out carefully. For

¹ There are chairs in legal culture in places as distant as the University of Girona in Spain, the university of Lapland in Finland and the university of Wuhan in China. Scandinavians seem especially interested in using the term, there is a centre of legal culture in Copenhagen and a recent special issue of the journal by *Retfærd* (the Nordic Journal of Law and Justice (Vol 31 2008 4/123) edited by Hanne Petersen was entitled 'Legal cultures on the move'. There are also many examples of international collaboration which use this term. For example the five year project 'Legal Cultures in Transition – the Impact of European Integration' (involving researchers in England, Scotland and Norway and financed by the Norwegian Research Council) aimed 'to provide 'thick descriptions' of legal cultures in three EU member states (Britain, Poland, Bulgaria), one EEA state (Norway) and one Near Neighbourhood state (Ukraine), in order to establish the extent to which legal cultures in Europe are converging. It will investigate legal culture and the contrasting perspectives of legal insiders and outsiders; the impact of religious traditions, the communist legacy, and the more recent 'war on terror' on

example, the idea is used differently by lawyers, politicians, citizens and (groups of) scholars. And it does not have the same meaning and resonance in different places -and different languages. It does not follow that because a term is used it is necessarily scientifically useful (The same could be said about a question-begging term like legal system as compared to more careful uses of system theories).). Nor, on the other hand, does the argument that it is not useful for some purposes, for example for predicting the effects of legal transplants², show that it has no uses at all. So what then is it good for?

In her keynote address to the workshop Sally Merry tells us that 'legal culture is a very productive concept, as well as a very incoherent one. It means many different things to different scholars. Perhaps this is why it is so useful.' And Engel (in his response) agrees, suggesting that the heterogeneous group of contributors who have written for this special issue do at least have a shared sense that they have something in common to talk about. For its detractors, however, including the Benda – Beckmanns, it is this very polysemy that makes it inadvisable to use the term. They are especially worried by the way its reliance on the idea of culture oversimplifies explanations, because of its many meanings and tendency to lead to tautological swamps. But the issue is not just one of semantics. The Benda- Beckmanns do not define legal culture in ways that are very different from Merry. But whilst she advocates the continued use of the concept they call for it to be abandoned.

The papers chosen here from those delivered at the workshop range widely, but they have been grouped together so as to underline their many important points of overlap. Sally Merry offers a thorough and incisive survey of what she calls 'the dimensions' of legal culture. David Engel, in his reply, relates Merry's approach to the more mainstream ideas of Lawrence Friedman, who first pioneered the use of the term. He raises important questions about the applicability of the term in societies where law and religion are closely intertwined. The next paper by Franz and Keebet von Benda- Beckmann, appropriately entitled 'why not legal culture', focuses on the use of the term legal

legal culture; the impact of globalisation and intra-EU migration on legal culture; the interaction between legal culture and formal domestic law; and the interaction between legal culture and EU legislation.'

www.cmi.no/research/project/?1118=legal-cultures-in-transition.

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² See Gillespie, J. (2008) 'Developing a decentred analysis of legal transfers', in Penelope Nicholson and Sarah Biddulph (eds). *Examining Practice, Interrogating Theory: Comparative Studies in Asia*: Martinus Nijhoff : 25. The relationship between legal culture and legal transplants is not straightforward. On the one hand, scholars continue to look to the concept of legal culture to help them enquire into whether a legal transplants is likely to be successful (or why it worked- or more likely did not). But at the same time terms like legal culture play a role in debating whether transplants are even possible.

culture in situations of legal pluralism. They agree with Merry's arguments about the need to adopt more dynamic approaches to the term culture. But, just for this reason, they conclude that there is nothing to be gained by putting together the elements (or dimensions) she collects in a category (or level) labelled legal culture. The first section ends with a contribution by Tom Ginsburg who relates Lawrence Friedman's idea of legal culture to his efforts to show the importance of social forces in shaping law, as opposed to the emphasis on a more internal legal approach characteristic of doctrinal approaches (and of much work in comparative law).

Taking up Merry's invitation to examine the ways legal culture is actively drawn on and constructed, the second section focuses on the micro dimensions of law's engagement in everyday life rather than the more macro, aggregate, concept of legal culture. Susan Silbey and Debbie de Girolamo each provide rich case studies of the way people invoke law in situations of conflict and potential conflict. Marc Hertogh and Marina Kurkchiyan then go on to describe the results of their empirical research into public attitudes to national legal institutions over time and space. The last section moves to a more holistic conception of legal culture as a professionally administered set of laws and practices. Michael Palmer analyses and interprets the limits set by national legal culture to legal reforms for the protection of children in China and Sandra Hotz examines the extent to which women in Japan continue to suffer legal discrimination. But are national legal cultures monolithic? Stewart Field, in his careful comparison of youth justice in Italy and Wales, asks what gives coherence to the contrasting responses to youth crime in each jurisdiction. What about the fact that national legal cultures change over time? Osvaldo Saldias introduces the new concept of 'legal culture light' to account for the fact that legal institutions can be modified by ideas coming from elsewhere. In the final paper Yuksel Sezgin offers an insightful discussion of battles to change provisions governing women's rights in Muslim religious legal systems in Egypt, Palestine and Nigeria.

Is the same concept of legal culture being used in all these papers? Is it being used for the same purposes? In calling this workshop 'using legal culture' we certainly did not assume that we could avoid all discussion about how best to define the term. But the starting point of this collection is that the meaning of concepts depends in large part on the way that they are used.³ Hence the aim was less to revisit these definitional debates and more to see what could be learnt from examining how scholars currently use this term in their research. As Kurkchiyan writes, in her contribution, 'Although the potential of the concept to bring together the 'legal' and 'social' has been recognised at the theoretical level by specialists in comparative studies, its practical use in empirical research remains very poor'. Even the Benda- Beckmanns, who are most critical of the term, argue that 'the main drawback of current discussion seems to be the lack of such a clearly defined set of problems for which the existing set of terms and

³ Some of those authors who use the term mean nothing in particular with it, and some who do not use the term are essentially talking about the same issues.

concepts offer insufficient explanation and for which the term 'legal culture' might be a solution.'

Legal culture remains a highly controversial term. Even Lawrence Friedman is now unsure if he should have invented it. He describes it as 'an abstraction and a slippery one' and admits that legal culture is 'a troublesome concept', that 'there is a serious problem of definition', and that if he were to start over he might not use it again.⁴ Unfortunately he does not tell us how he would deal with the criticisms to which it has been exposed. It will be for the reader to decide how much progress has been made here in responding to the objections made by critics of the concept. The object of this introductory essay is to provide a background for and overview of the presentations given at the workshop. I shall first discuss the ways the concept of legal culture is defined and the purposes for which it may be employed. I then go on to reflect, in the light of these contributions, on some of the (interrelated) theoretical problems that are posed in the course of actually using the concept.

What is legal culture?

Studies of law in relation to culture cover a large range of topics including the role of culture- in -law (and the challenges of legal pluralism and multiculturalism) to the part played by law –as- culture seen as a way of making meaning. Those interested in the relationship between law and culture may wish to study law as a cultural artefact, examine the way it becomes present in everyday life and experience, or through the media, or consider the role of law in accommodating cultural defences or protecting cultural treasures⁵. But in the broadest sense, the gain in thinking about law in the same breath as culture is that it alerts us to cultural variation in how law is thought about and its ascribed and actual role in social life. The focus of the papers in this special issue is on the value of using legal culture as a 'term of art' for the purposes of comparative law. Amidst all the effort to reform the efficiency of legal institutions in developing countries, for example, few have stopped to consider that in many societies (and in all societies in at least some contexts) official law is mainly experienced as a source of unpredictability that threatens to disrupt everyday normative patterns and agreements. It is no wonder then that well meaning legal reforms often meet indifference or hostility.

⁴ Friedman, L. (2006) 'The Place of Legal Culture in the Sociology of Law' in Freeman, M. (ed) *Law and Sociology* (Oxford University Press), 185-199.

⁵ For examples see Cotterrell, R. (2004) 'Law in Culture' 17 *Ratio Juris* 1–14.; Kuhn, P. (1999) *The Cultural Study of Law: Reconstructing legal scholarship* (Chicago University Press); Mautner, M. (2011) 'Three Approaches to Law and Culture' 96 *Cornell Law Review*, 839; Sarat, A. and Kearns T.R (eds), *Law in Everyday Life* (Ann Arbor, 1993) and Sarat A and Kearns, T.R (eds), *Law in the Domains of Culture* (Ann Arbor, 1998)."

But it is no small challenge to give this term of art a workable meaning. The word culture has been said to be the most complex in the English language⁶, and many law professors earn a living discussing the meaning of 'legal'. Most often legal culture is simply taken to be the rough equivalent of 'legal system'⁷ or a way of pointing to the specific techniques of exposition and interpretation employed by jurists and other legal actors⁸. As such it creates few problems of misunderstanding but also adds little to our conceptual armoury. It is also vital to distinguish amongst the different kinds of disagreements amongst those arguing about what legal culture means (or should be made to mean)⁹. There is for example the question whether or not legal culture is a useful term as compared to alternative concepts. Then there is discussion about what the term refers to – for example, to attitudes and /or behaviour, or whether legal culture should be sought more at the popular or at the institutional level. Confusion can easily arise where what appears to be a debate about the correct interpretations of a given legal culture – say, the best explanation for why the Japanese make relatively little use of the courts, in fact trespasses into these other areas. Blankenburg, for example, takes Friedman to be arguing that 'folk' culture shapes differences in legal behaviour. He offers, by contrast, a comparison of the very different use of courts in Germany and the Netherlands, countries which, he argues, have similar folk cultures. For him, institutional and infrastructural arrangements represent the key to differences in legal culture. In his view 'there

⁶ Williams, R. (1976/1983) *Keywords*, (Fontana/ Oxford University Press.) According to *Wikipedia* (last checked nov. 6 2011) the most common uses of the term culture (apart from referring to matters of taste) are to refer to 'An integrated pattern of human knowledge, belief, and behaviour that depends upon the capacity for symbolic thought and social learning', or 'The set of shared attitudes, values, goals, and practices that characterizes an institution.'

⁷ See e.g. Gessner, V. Hoeland, A. and Varga, C. (eds.), (1996) *European Legal Cultures* (Dartmouth); and Varga, C. (1992) *Comparative Legal Cultures* (Dartmouth).

⁸ Blankenburg, E. and Rebuffa, G. (1993) 'Culture Juridique' in Arnaud, A. (ed.), *Dictionnaire encyclopédique de théorie et de sociologie du droit* (LGDJ) 139–42.

⁹ Cotterrell, R. (1997) 'The concept of Legal Culture', in Nelken, D. *Comparing Legal Cultures* (Dartmouth). See generally Nelken, D. (1995) 'Disclosing/ Invoking Legal Culture' in Nelken, D. ed. *Legal Culture, Diversity and Globalisation: special issue of Social and Legal Studies* 4:4 pp. 435-453; Nelken, D. 'Using the concept of legal culture' in 29 *Australian Journal of Legal Philosophy* 1-28; Nelken, D. (2006) 'Rethinking Legal Culture' in Freeman, M. ed. *Law and Sociology*, (Oxford University Press) 200-224. Nelken, D. (2007) 'Defining and using the concept of legal culture', in Orucu, E. and Nelken, D. (eds.) *Comparative Law: A Handbook* (Hart): 109-132.

is no legal culture outside of institutions'.¹⁰ But, in the debate over whether the low level of use of law in Japan is to be attributed to deliberate cultural avoidance of litigation, or is rather a result of structural arrangements that block access to the courts, Blankenburg's approach would line him up with those arguing that is structures and 'institutions' rather than legal culture that matters¹¹.

It is also not always easy to see where definitional disagreements end and empirical enquiries begin. Can we distinguish legal culture from political, economic or religious culture?¹² How do they interrelate? Opinions may differ and in part at least this can (has to be?) formulated as an empirical question rather than as a matter of definition. Take Friedman's distinction between 'internal' and 'external' legal culture. Do lawyers belong to 'internal legal culture' (as servants of the courts) or 'external legal culture' as agents of social groups and of individual litigants. What about the relationship between external legal culture and culture in general?¹³ Is external legal culture itself a distinctive aspect of wider culture? Is even internal legal culture distinguishable? What about the way judges incorporate lay definitions of appropriate behaviour into their activities?¹⁴ Or the examples offered by Silbey of laymen and women drawing on legal ideas in ordinary social life?

There is also an important overlap between legal culture and what is called 'the culture of legality' (stressing the 'legal' before the word culture). This term- which corresponds very roughly to what in English is called 'the rule of law' is particularly common in those jurisdictions, or parts of jurisdictions e.g. in the former Soviet union, Latin America, or the south of Italy, where state rules are systematically avoided or evaded. These are places where there is -as seen from a state perspective -a culture of illegality. The point of talking of 'legal culture' in such cases is to point to the normative goal of getting 'legality' into the culture of everyday social and political life and so reorienting the behaviour of such

¹⁰ Blankenburg, E. (1997) 'Civil Litigation Rates as Indicators for Legal Culture', in Nelken, D. (ed.) *Comparing Legal Cultures* (Dartmouth): 41–68.

¹¹ See Nelken, D. (1997) 'Puzzling out Legal Culture: A comment on Blankenburg' in Nelken, D. ed. *Comparing Legal Cultures* op.cit. : 58–88.

¹² Brants, C and Field, S (2000) 'Legal Culture, Political Cultures and Procedural Traditions: Towards a Comparative Interpretation of Covert and Proactive Policing in England and Wales and the Netherlands', in Nelken, D. ed. *Contrasting Criminal Justice* (Aldershot): 77–116.

¹³ Banakar, R. and Fard, S.N. (2011) *Driving Dangerously: Law, Culture and Driving Habits in Iran* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871029. 201

¹⁴ see e.g. Edelman, L.B, Uggens, C. and Erlanger, H. S. (1999) 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth', *American Journal of Sociology*. 105: . 406–54

populations towards (state) law and /or encouraging state law to respect certain limits of action. Whereas legal culture is a descriptive/ explanatory term, the 'culture of legality' is a normative and evaluative one. Keeping apart descriptive and normative meanings is important, if only so as to be able to examine what sorts of legal culture are more or less conducive to creating 'the culture of legality'.

On the other hand, it is moot whether actual attempts to study legal culture can be (or should be) free of particular cultural or value -shaped ideas of what legal order requires. 'Law' and 'culture' are also words whose interpretation and definition have illocutionary effects ('this is the law', 'that behaviour is inconsistent with our culture'). The term 'legal culture' may itself be used by judges, politicians or others, in the course of making claims about what is or is not consonant with a given body of law, practices or ideals. This use, as much prescriptive as descriptive, or prescriptive through being descriptive, can 'make' the facts it purports to describe or explain. Some scholars therefore think the term must be crafted so as to capture what these legal actors are trying to do¹⁵. And the broader question arises whether any talk about culture can be merely descriptive rather than itself an interested intervention in debates.

Culture as a term easily lends itself to misuse both by social actors and scholars¹⁶. It can be interpreted in a way that is 'essentialist', over- determined, over-bounded, and xenophobic. It can provide a reason to reject proposed reforms and an alibi for resistance to change. Many critics of the idea of legal culture see that term as sharing in such problems. For Glenn, the idea of culture is suspect both because of its origins and its consequences. It came in, he claims, to replace the dirty work done by the idea of 'race' and the results of using such a term can be negative because it implies that patterns of behaviour and attitudes are static and necessarily doomed to conflict. He reminds us that cultures should not be treated as 'super organic', or 'substantive, bounded entities', but rather seen as 'shreds and patches remaking themselves'.¹⁷ For Glenn, cultural analyses both unify and essentialise the notion of culture, so that scholars are tempted to orientalise behaviour as foreign and irrational and ignore or

¹⁵ Webber, J. (2004) 'Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken', in *Australian Journal of Legal Philosophy*: 25–3.

¹⁶ See Kuper, A. (1999) *Culture: The Anthropologist's Account* (Harvard University Press). But this can be taken too far, see Merry, S. E. 'Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)' in (2003) 26 (1) *Polar: Political and Legal Anthropology Review* 55–77. See also Goodale, M. (2009) *Surrendering to Utopia*, (Stanford University Press) for an anthropologist's attempt to revive the use of the term culture in writing about human rights.

¹⁷ Glenn, H. Patrick 'Legal Cultures and Legal Traditions', in: Van Hoeck. M. (ed.), (2004) *Epistemology and Methodology of Comparative Law* (Oxford University Press) 32.

downplay the importance of economic and related political drivers of change. The German word *kultur* indeed emerged as a defensive term to be used in romantic opposition to the French universalizing idea of civilisation (for which today's discourses of democracy and human rights could be considered equivalents)¹⁸. Glenn insists further that the term culture implies consensus.

On the other hand, critiques such as Glenn's seem to miss the point, at least as far as Friedman's way of talking about culture is concerned. Friedman argues specifically that every group has its own legal culture, even going so far as to say that this is so for every individual. And his analytical distinction between 'external' and 'internal' legal culture deliberately invites us to investigate the possibility of large differences between legal professionals and others. Curiously, Friedman's use of the word culture in legal culture is in fact much closer to the non-essentialising French idea, as can be seen from his claim that we are moving to a global legal culture, based round individualism, equality, and human rights. Friedman stresses convergence and the role of modernity. As Ginsburg puts it, 'Japan is frequently deployed in Friedman's favourite trope much law is the same in (for example) Tokyo as in Toledo or Turin. The statement has intuitive appeal because everyone 'knows' that Japanese culture is different and so assumes that legal culture must be as well. Yet scholars within Japanese studies are constantly fighting simplistic efforts to attribute differences in outcomes to cultural factors.'

Legal actors do (perhaps must?) work with some consensual idea of culture as a normative presupposition. But at this time of export and import of legal institutions and ideas it would be implausible indeed to see cultures as closed, uncontested and self-referential. The contributors to this special issue show themselves well aware of the dangers Glenn points to. Merry warns us that 'Cultural ideas are contested and connected to relations of power. Cultural repertoires include both values and practices, ideas and habits, and innovations along with commonsensical ways of doing things. Culture is the product of historical influences rather than evolutionary change. It is marked by hybridity and creolization rather than uniformity or consistency. Local systems are embedded in national and transnational processes and particular historical trajectories.' The Benda- Beckmanns agree and go further: '...we would have to ask what other factors would be highlighted and what might be displaced or silenced when we use the term 'culture' ... the term 'culture', like 'custom', threatens to silence, to make to make invisible, the categories of the legal and the political, the power differences and economic inequalities.'

Nonetheless, there are many other challenges which face those wishing to make use of the notion of legal culture. How is to be related to and contrasted with other aspects of society, for example institutional behaviour or social structure? If culture is defined too broadly nothing is left to be explained, if too narrowly it takes on a residual quality resorted to when other explanations run out. Should the term culture be reserved for irrational, or at least value-based action, rather than purely instrumental social action? If not, how else can we draw a line between culturally shaped behaviour and all other behaviour? Is legal culture a

¹⁸ Kuper op. cit.

matter of attitudes and behaviour that is assumed or explicit, inarticulate or articulated?

There are of course alternatives that avoid the difficult word culture. These include ideology¹⁹, community,²⁰ mentalities²¹, the legal complex²² traditions²³, epistemes, ²⁴ formants²⁵, path-dependency²⁶, or even autopoiesis²⁷. But it is less clear that these other terms avoid the problems any better than legal culture when it comes to identifying what exactly they refer to, what makes them coherent objects of analysis and whether they end up as tautologies. They are also often used in ways that overlap with legal culture. In

¹⁹ Cotterrell, 1997 op. cit. The Benda-Beckmanns agree with Cotterrell that ideology is a better term: 'An approach that locates the cultural as a dimension of social organisation escapes this danger. Thus we would study the empirical manifestations of this dimension as they are expressed at different layers of social organization. At the layer of ideals and ideologies, we find generalized cultural understandings of why social life and organisation are as they are and how they should be and schemes have a strong justificatory and apologetic character.

²⁰ Cotterrell, R. (2006) *Law, Culture and society: Legal Ideas in the mirror of Social Theory* (Ashgate).

²¹ Merryman J.H. and Perez -Perdomo, R., (2007) 3rd ed. *The civil law tradition: Europe, Latin America, and East Asia* (Stanford University Press).

²² Karpik, L. and Halliday T, (2011) 'The Legal Complex', to be published in *Annual Review of Law and Social Science*, Center on Law and Globalization Research no 11-05, September, 15 2011.

²³ Glenn, H. (2007) 3rd ed. *Legal traditions of world* (Oxford University Press).

²⁴ Legrand, P. (1997) *Fragments on law as culture* (Deventer).

²⁵ Sacco R. (1991) 'Legal Formants: A dynamic approach to comparative law' *Am. J. Comp. L.*, 1-34.

²⁶ See e.g. Pierson, P. (2000) 'Increasing returns, path dependence and the study of politics', *Am. Pol. Sc. Review* 94: 251-267.; Mahoney J. (2000) 'Path dependence in Historical Sociology', *Theory and Society* 29, 507-548.

²⁷ Gunther Teubner uses this theory to explain what can be said about the likely effects of trying to apply legal ideas across legal cultures see Teubner, G. (1998) 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences', 61 *Modern Law Review*, 11-32. And cf. 'Beyond the Metaphor of Legal Transplants?: Consequences of Autopoietic Theory for the Study of Cross - Cultural Legal Adaptation', in Priban, J. and Nelken, D. eds. *Law's New Boundaries: The Consequences of Legal Autopoiesis*, Dartmouth, 2001: 265-302.

their contributions to this special issue Silbey shows that she is interested in ideological effects of doctrine even under the rubrics of legal culture and legal consciousness. Field tells us that 'the term culture brings it with certain useful resonant connotations that other terms like legal ideology or legal order or legal system do not: it 'puts a great emphasis...on the lived texture of the social order'. But he also writes: 'Ultimately it is the tradition of the constitutionally independent and paternalist youth justice magistrate that provides the symbolic legal capital that lends coherence and stability to Italian youth justice cultures' (my underlining). He adds that 'if the concept of legal culture can help us to relate particular practices to the intellectual formations, institutions, traditions and structures of feeling that give them meaning we can make a significant step towards understanding the legal 'other' (my italics).

Undoubtedly, some of the claims made for the superiority of other concepts also suffer from special pleading. Glenn argues that tradition is a widely used folk concept, whereas culture is used only in the West. But this begs the question of whether and when the terms of our explanations need always to be linked to those used by social actors. In general, many would argue that tradition also carries many of the troubling implications that Glenn attributes to culture. As Twining points out, it can be difficult to separate legal from other traditions.²⁸ The term has also been severely criticized for its neglect of socio-economic and political influences, as well as for committing the so called 'intentionalist' fallacy²⁹. The concept of living law, for its part, only gets at part of what Friedman and others seek to explain with legal culture, nor does it lend itself easily for use in comparing legal systems. The concept of ideology is itself difficult to handle, not least because it requires us to justify our privileged position in describing other people's ideas. The term is also not necessarily suitable for all the purposes of those who use legal culture; adopting this concept if anything would change the nature of the inquiry. As far as autopoiesis is concerned, whereas one of the purposes of using the term legal culture is to examine the how and the extent of internal legal culture's autonomy, Luhmann's theory resolves this by theoretical fiat.

Working with the idea (s) of legal culture

How we use legal culture will depend on the disciplinary framework in which it is developed- and disputes between (as well as within) disciplines will shape what is made of it.³⁰ In line with competing approaches to social theory, legal culture

²⁸ After summarising Glenn's criticisms of the term culture Twining comments that for some purposes it may be useful nonetheless, see Twining, W. 'Glenn on Tradition: An Overview', *Jcl I*. 1 107.

²⁹ Whitman, J. 'A simple story'; Review of P.Glenn's *Legal Traditions of the World*, in *Rechtsgeschichte*, 2004.

³⁰ Disciplinary allegiances also affect the answer to definitional issues about the boundaries of legal culture. In (USA- shaped) political science considerable energy has been expended in trying to establish how far judges are influenced by their political preferences.

can be seen as manifested through institutional behaviour, or as a factor shaping and shaped by divergences in individual legal consciousness, as a pattern of ideas which lie behind behaviour, or as another name for politico-legal discourse itself. Should we model legal culture on the idea of political culture with its focus on inquiries into voting patterns and types of political system, drawing a parallel between asking whether people go to vote and why do or do not use law? Or should we rather follow 'rational choice' theory, as developed in some political science or economists approaches, where 'culture' often disappears in favour of other motivations. Whatever choice we make buys in to a larger set of theoretical ideas about law and society and related methodological protocols. Friedman has always employed the concept in the context of a wider theoretical approach based on an input-output model of social systems and a pluralist view of power. But the sense of the term will change if attempts are made to use it in the context of approaches such as those of Marx, Foucault, Bourdieu or Luhmann.

Merry (in this volume) tells us that the meaning of legal culture varies in terms of at least three different academic traditions.³¹ And Saldias tells us that 'there are as many possible components or elements of the concept "legal culture" as there are fields of research.' Insofar as culture is shaped by the past historical approaches to legal culture must be important.³² But, according to Ginsburg (in this volume), Friedman developed his ideas in opposition to the mistaken ideas of 'doctrinal lawyers and legal historians. The simple observation that legal culture reflects underlying social forces allows Friedman to emphasize surprising similarities that cut across the traditional 'families' of comparative law and this convincingly lays to rest the traditional comparativists' idea that legal families provide much analytic bite in understanding contemporary societies... The term formed part of his battle to show that law was not insulated from and independent of social forces. So as to show that law is part of the totality of culture; that the part is not master of the whole; that interests and values, pressing in from outside or internalized by those inside the system, make up the law'.

³¹ For her 'One comes from the field of comparative law, which in the past studied legal families and traditions, examining how they develop and how they cluster together. A second is an anthropological focus on the way law expresses ideas and values that are shared within the larger society, both reflecting and creating these larger systems of thought and action. The third is a socio-legal perspective on the way legal institutions operate in practice. Clearly, these are quite different approaches to the concept, each with value in its own terms and yet suggesting different perspectives on legal change and comparison'.

³² For valuable and theoretically sophisticated examples of socio-historical approaches see e.g. Channock, M. (2001) *The making of South African legal culture, 1902-1936 : Fear, favour, and prejudice* (Cambridge UP) and Smail, D.L (2003) *Emotions, Publicity, and Legal Culture in Marseille, 1264-1423*, (Cornell University Press).

Marina Kurkchiyan sees the special value of the concept of legal culture in the way it can facilitate communication between the very different disciplines of law and social sciences. 'At the 'law' end', she tells us 'are those who view the legal realm as a self-contained entity. Their work has produced a rich body of literature on courts, litigations and settlements, legal professionals, regulations, constitutions and human rights. At the other end are the 'social' scholars: people who try to go beyond the traditional, 'jurisprudential' concept of law and instead explore wider questions about the rules that people follow in their everyday life, the non-legal methods that they use to solve their disputes, their attitudes towards law, and their expectations of it.' On the other hand, it is debatable how far law and social science can find a common language if their purposes differ. 33

What is taken to be legal culture also varies with the methods used to grasp and/or measure it (and each method may miss something caught by the other). Friedman tells us that legal culture can be (indirectly) measured by asking people questions about how they think about the law or by watching what they do. 34 Comparative claims about legal culture may in fact need to rely on data and findings about patterns of which the participants themselves are unaware. For example, even well-informed people living in India mistakenly think that the reason courts are slow because the country has such a (relatively) high rate of litigation. 35 Americans are convinced that their Tort system regularly produces excessive and undeserved awards. But it turns out that in large part this impression is manufactured by the media.³⁶ More generally, those societies where legal professionals express least concern for what Anglo-American writers since Roscoe Pound have called the 'gap' or gulf between the 'law in books' and 'law in action'³⁷, may not be those where the gap is least problematic but those where the gap is overwhelming.

A wide variety of methods is represented in this collection. Merry argues that 'some aspects of the concept are more empirically accessible than others and warrant special attention', and that each of the dimensions she identifies needs a

³³ See the exchange between Cotterrell, R. (1998) 'Why must legal ideas be interpreted sociologically' 25 *Journal of Law and Society*, 179-192 and Nelken, D. (1998) 'Blinding Insights: The limits of a reflexive sociology of law' 25 *Journal of Law and Society*, 407-426.

³⁴ Friedman, L. (1997) 'The Concept of Legal Culture: A Reply' in: Nelken, D. (ed.) (1997) *Comparing Legal Cultures* op.cit. 33-40.

³⁵ Galanter, M. and Krishnan, J.K. (2003) 'Debased Informalism: *Lok adalats* and legal rights in modern India' in Jensen EG and Heller, TC (eds) (2003) *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, 96-141.

³⁶ Haltom, W and McCaan, M (2004) *Distorting the Law*, (Chicago University Press).

³⁷ Pound, R. (1910) 44 *Law in Books and Law in Action*, *Am. L. Rev.*, 12.

particular type of method. 38 For her 'Legal consciousness and the practices and ideologies of legal institutions can be studied (both) with ethnographic and survey approaches'. The Benda-Beckmanns recommend in-depth ethnographic study of different sites, and De Gerolamo in fact provides an account based on direct observation. On the other hand, Saldias explains that the method of 'thick description is unnecessary and inappropriate when studying 'light' legal culture, whilst Field tries to understand different 'cultural logics' even without undergoing full anthropological immersion. Hertogh relies mainly on opinion surveys (though he is critical of how they have been previously worded); both Engel and Field favour interviews whilst Kurkchian also makes use of focus groups. Palmer, Hotz and Sezgin, for their part, rely mainly on interpretations and readings of legal materials. Silbey, in her effort to get at laymen's ideas of law relies largely on qualitative analysis of media sources. But she also suggests that 'the law operates, perhaps most powerfully, by rendering the world unproblematic. Indeed, in organizing and giving meaning to the most routine, everyday events -- such as buying groceries or driving down the street -- the law may be most present in its conspicuous absence.' Hence, she argues, 'we are more likely to observe it at those moments when the routine seems to break down. At moments when expectations are thwarted and tacit assumptions negated, people's actions often reveal what is usually their unarticulated understandings of the mundane; in short, that the taken-for-granted reveals itself in its breach'. 39

All methods have their limits. Silbey admits that her reliance on the media makes it difficult to make quantitative claims and Hertogh admits that his findings need checking with more qualitative methods. Merry and the Benda-Beckmanns would perhaps want to know more about the social movements whose activities on behalf of the rights of women and children help explain what has and has not been achieved in those countries.) The prior choice of how we go about defining legal culture (for example treating culture as either as the conscious pursuit of given values or else as buried assumptions) should dictate the method chosen. But in practice- in these papers too- it may often happen the other way round. The use, say, of opinion surveys or analysis of legal texts implicitly determines the working definition of legal culture.

Most important, however, different ways of using the term legal culture have to be understood against the background of well-established theoretical

³⁸ She tells us that 'the first dimension requires organizational analysis and ethnographic study of legal institutions, the second a survey of public attitudes and perspectives, the third the analysis of recourse to legal remedies, and the fourth a study of how people conceive of problems and the relevance of the law to these conceptions.'

³⁹ Silbey writes, 'the shoveler performs historic legal concepts of work and property and assumes that others organize their activities, in part, with these same notions. None of this need be articulated, either the legal concepts or the snow-shoveler's assumptions that others think the same way that he does.'

developments that distinguish two contrasting uses of the term culture⁴⁰. In line with this contrast, one approach to legal culture would take it to refer to patterns of law-related behaviour in given places or contexts (as contrasted with other time or places). Its aim would be to make comparisons of legal systems more sociologically meaningful and explain and understand other (legal) cultures⁴¹. The second approach would see legal culture as an ongoing process of meaning-making playing a part in the shaping and reshaping of law. Work using this approach interrogates what is meant by culture as part of developing sociology and social theory of law more generally. This second definition thus overlaps with an interest in studying legal consciousness (as well as how to get 'beyond legal consciousness')⁴². The definitions of legal culture for each purpose are correspondingly different. An interest in comparing law-in-context-in different places for example would suggest including more in what is taken to be legal culture⁴³ than a domestic enquiry concerned to delineate the specific role of culture.

Over the years Friedman has followed both tracks simultaneously. Some of his investigations have been geared to what he himself terms the first, 'anthropological', definition of culture concerned with characterising 'aggregates' of larger culture. Thus he has sought to characterise, for example, American legal culture – and the move there to what he describes as 'total justice'⁴⁴ or the 'republic of choice'⁴⁵ as well as, more recently, Latin American legal culture.⁴⁶

⁴⁰ See Swidler, A. 1986 *Culture and Action: Symbols and Strategies*. *American Sociological Review* 51:273-286, Sewell, WH Jr (1999) 'The Concept(s) of Culture,' in *Beyond the Cultural Turn: New Directions in the Study of Society and Culture*, eds. Bonnell, V.E and Hunt, L (University of California Press): 35-61. As Silbey has recently put it, 'On the one hand we can speak of culture as a world of belief and practices associated to a specific group. On the other we can use the term analytically as a category distinguishing the cultural – 'seen as a collection of semiotic resources deployed in interactions'- from other aspects of social life, Silbey, S. (2005) 'Legal Culture and Cultures of Legality' in Hall, J.Grindstaff,L and Ming-cheng Lo eds. *Handbook of Cultural Sociology*, Routledge.

⁴¹ Nelken 2004 op.cit

⁴² Silbey, S (2001) 'Legal culture and legal consciousness,' in *Encyclopaedia of the Social and Behavioural Sciences*, Elsevier; Silbey,S. (2005) op.cit. 'After Legal Consciousness' *Annu.Rev. Law.Soc.Sci* : 323-368.

⁴³ Nelken, 2004 op.cit.

⁴⁴ Friedman, LM (1985) *Total Justice* (Russell Sage).

⁴⁵ Friedman, LM (1990) *The Republic of Choice: Law, Society and Culture* (Harvard University Press).

But his own definition of legal culture, and his general use of the term to understand the demands people bring to law, clearly forms part of his attempt to show the influence of culture on law. In this volume some of the authors seem more interested in an overall characterisation of legal culture, for example, Palmer on Chinese legal culture in relation to the family, whilst others are more interested in the way culture is used and changed, for instance, Silbey in the creation of citizen-made law and De Gerolomo on the intersection between law and mediation 47.

But can we draw on both these senses of culture in the same enquiry? 48Some critics argue that it would be safer to treat only the second type of enquiry as productive of knowledge and consider the first concern as merely indicating (one of) the objects about which such enquiry can be pursued.⁴⁹ Taking the first concept seriously reproduces ‘essentialising’ assumptions about how law and culture related, reifying culture as determinant and constraining of individual choices. In this collection Merry warns against the first (holistic) use and argues that considering the constituent dimensions of legal culture separately provides far better insight into the law/society relationship, greater scope for agency, and a more nuanced analysis of processes of legal transfer, translation, and hybridity’. Others take the opposite view and insist that the first type of enquiry should have priority. Thus Legrand tells us ‘I understand the notion of "culture" to mean the framework of intangibles within which a community operates, which has normative force for this community (even though not completely and

⁴⁶Friedman, LM and Pérez-Perdomo, R (2003) *Legal culture in the age of globalization: Latin America and Latin Europe* (Stanford University Press)

⁴⁷ De Gerolomo claims that ‘Mediation is hermaphroditic: the exploration of the term legal culture shows that mediation is outside the law as a social process, and at the same time, it is within the law through the influences of legal structures, rules and norms’.

⁴⁸ As will be seen, the answer to this question depends on the position taken on a series of other theoretical choices, such as seeing culture as shaping or being shaped, pursuing or rejecting causal explanations in social science, and treating culture as found or made.

⁴⁹ Nicholson, P. ‘Legal culture repacked: Drug trials in Vietnam’, in Nicholson, P. and Biddulph, S. eds. *Examining Practice, Interrogating Theory: Comparative Studies in Asia:*

Martinus Nijhoff : 71.

coherently instantiated), and which determines the identity of a community as community.’⁵⁰

The Benda -Beckmanns are those most opposed to continuing with the first use: ‘Calling the values and beliefs embedded into legal repertoires and procedures ‘legal culture’ comes close to capturing what comparative lawyers seek to compare ... (b)ut this is rather different from what socio-legal scholars have been seeking to study under this heading, namely ‘the cluster of attitudes, ideas, expectations and values which people hold with regard to their legal system, legal institutions and legal rules’.⁵¹ Obviously, both people’s attitudes and values and the values inscribed into ideologies and legal frameworks are important, empirically and theoretically, but they are two different sets of social phenomena that have to be set apart and not be identified – people use culture depending on different contexts with each other. Only on this basis can possible interdependencies between them be analyzed.’ For them ‘It would be quite counterproductive to lump these factors into one concept of legal culture, as Friedman and others have proposed to do.’

As I have argued elsewhere, however, there is a strong case for saying that the two enquiries are necessarily intertwined. Only in this way ‘research into legal culture (can) help alert us to the way aspects of law are themselves embedded in larger frameworks of social structure and culture that constitute and reveal the place of law in society’.⁵² Seen broadly, using legal culture can involve investigations that concern the extent to which law is party or state-directed (bottom up or top down), the role and importance of the judiciary, or the nature of legal education and legal training. It may concern ideas of what is meant by ‘law’ (and what law is ‘for’), of where and how it is to be found (types of legal reasoning, the role of case law and precedent, of general clauses as compared to detailed drafting, of the place of law and fact). Legal culture can be discerned in different approaches to regulation, administration and dispute resolution. There may be important contrasts in the degree to which given controversies are subject to law, the role of other expertises, the part played by ‘alternatives’ to law, including not only arbitration and mediation but also the many ‘infrastructural’ ways of discouraging or resolving disputes.

It can often be helpful to start from what appear to be puzzling features of the role and the rule of law within a given society. Why do the UK and Denmark complain most about the imposition of EU law but then turn out to be the

⁵⁰ Legrand 1997 (review of Nelken’s *Comparing legal cultures* in the *Cambridge Law Journal* 56 : 646-649. The lack of a contribution in this volume from Legrand is indeed the ‘elephant in the room’. Unfortunately his paper at the workshop was not suitable both because of its length and its somewhat different (but very interesting) focus .It will be published separately in the next issue of the journal .

⁵¹ See Friedman, L (1997) op.cit.

⁵² Nelken 2004 op.cit.

countries which have the best records of obedience? Conversely, why does Italy, whose public opinion is most in favour of Europe, have such a high rate of non compliance? Why does Holland, otherwise so similar, have such a low litigation rate compared to neighbouring Germany? Why in the United States and the UK does it often take a sex scandal to create official interest in doing something about corruption, whereas in Latin countries it takes a major corruption scandal to excite interest in marital unfaithfulness!? Such contrasts can lead us to reconsider broader theoretical issues in the study of law and society. How does the importance of 'enforcement' as an aspect of law vary in different societies? What can be learned, and what is likely to be obscured, by defining 'law' in terms of litigation rates? How do shame and guilt cultures condition the boundaries of law and in what ways does law help shape those self -same boundaries?

For sociology of law to make progress in making claims about legal culture it can only do this if it gives careful consideration to its instantiation in both local national and international contexts. Silbey advocates 'situated contextualised analyses of culture in given 'sites of action'. But this cannot be abstracted from suppositions about the larger context. How far are Silbey's findings applicable beyond the specific context of the three USA cities she examines?⁵³ To what extent is the process De Gerolomo describes shaped by its setting in the UK- and specifically in London. Vice- versa, for the contributions that seek to generalise about national cultures such as Hertogh's study of the Netherlands, Marina Kurkchian's comparison of UK, Poland and Bulgaria, the discussions by Palmer and Hotz of the rules of family law in Japan or in China, and Field's analysis of the response to juvenile crime in Italy or Wales.

At the same time we must also bear in mind that possible uses of the term legal culture will change as ideas of culture itself come to be reformulated in anthropological or other work. Indeed part of the difficulty here arises from the fact that so -called 'cultural turn' (and an attendant stress on the creation of meaning) in the social sciences coincided with increasing reluctance to use the term 'culture' on the part of many anthropologists. It could be a fair criticism of Friedman's pioneering approach to legal culture to say that it does not seem to have been influenced by the 'interpretive turn' in the social sciences. He seems unconcerned, as Glenn puts it, that 'culture may be an effect of our descriptions, not its precondition'.⁵⁴ As Jonathan Friedman has written, culture is now viewed as an endless interpretation of interpretations, part of an 'enormous interplay of interpretations in and about a culture' to which the scholar herself also contributes.⁵⁵

The unit of legal culture

⁵³ Merry tells us in her piece that there are some places and groups which take a quite 'un-American' attitude to resort to law. Of course they may see themselves as the 'true Americans.'

⁵⁴ Glenn 2004 op.cit

⁵⁵ Friedman, J. (1994), *Cultural Identity and Global Process*. London: Sage.

What are we referring to when we speak of legal culture (or cultures)?⁵⁶ high and low culture, ideal-types of community with different needs and uses of law, etc? Are national jurisdictions still the appropriate unit on which to focus? Above all there is the radical question that results from the fundamental debate over the meaning of culture. Is it a mistake to talk about legal cultures as objective units rather than as constructions of participants and observers? Another type of criticism has to do with identifying the boundaries of legal culture with those of national jurisdictions. The search to understand and explain legal culture at the level of the nation -state continues to be an important ambition of comparative law and comparative sociology of law, as seen in titles such as the 'Japanese approach to law', 'Dutch legal culture', 'French criminal justice' etc. Here too our contributors make reference to Chinese, Japanese, Bulgarian, Welsh and English legal culture. And the papers by Hertogh, Kurkchiyan, Field Palmer, and Holtz are concerned with explicating national units. But the student of legal culture will often want to focus at levels below and above that of the nation state. On the one hand, the culture of the local courthouse, the working norms of different social and interest groups and professional associations, the networks of individuals involved in pursuing, avoiding or mediating disputes. On the other, international institutions and regulators and the so-called 'third cultures' of inter-national trade, communication networks and other transnational processes⁵⁷.

In advance of empirical investigation it can be rash to assume any necessary 'fit' between law and its environing national society or culture. Legal systems have always been affected by a variety of processes of borrowing, imitation and imposition. But increasingly nation states are (again) no longer the exclusive or even predominant source of norms. Their insertion in larger bilateral or multilateral structures and networks means that there is an increasingly wide gap between the (global) sites where issues arise and the places where they are managed (the nation-state). Different kinds of units emerge as objects and as

⁵⁶ Nelken, D, (2009) 'Law, Liability and Culture' in Engel, D. and McCann, M. eds. *Fault Lines: Tort Law as Cultural Practice*, (Stanford University Press): 10-24; Cotterrell, R. (2010) 'Objectionable work: conscientious objection to Assigned work tasks: a comment on relations of law and culture' 31 *Comp. Lab. L. & Pol'y J.* 511.

⁵⁷ Dezalay, Y and Garth, B (1996) *Dealing in Virtue* (Oxford, Oxford University Press).; Snyder, F (1999) 'Governing Economic Globalisation: Global Legal Pluralism and European Law' 5 *European Law Journal*, 334-374; Teubner, G (1997) 'Global Bukowina: Legal Pluralism in the World Society', in Teubner, G. (ed) *Global Law without a State* (Dartmouth, Aldershot), 3-38; Teubner, G. (1998) 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences', 61 *Modern Law Review*, 11-32.

agents of control. 58. Instead of governments, the talk now is increasingly of 'governance' of how power is exercised at a series of other levels and by other institutions, in collaboration or otherwise with state bodies. The "denationalization" of rule making means that transnational public and semi-public networks substitute, to an increasing extent, for national governments. Rule-formulation and settlement increasingly takes place within new agencies of transnational governance, such as NAFTA, the OECD, and the WTO, but also in many lesser-known public-private forums.

Naturally, this process varies by different areas of legal and social regulation. A contrast is often made between, on the one hand, those areas of law that are relatively internationalized, such as international business contracts, antitrust and competition policy, internet and new technology, labour law, social law, and environment law, and, on the other hand, family law and property law. But experts even in these latter fields frequently report evidence of international trends and cross-cultural influences. As the world is increasingly tied together by trade and communication many people increasingly have the sense of living in an interdependent global system marked by borrowing and lending across porous cultural boundaries which are saturated with inequality, power and domination. All this means that the purported uniformity, coherence or stability of given national cultures will often be no more than an ideological projection or rhetorical device used by some of those within or outside a given society or other context 59. So we need to avoid reifying national or other stereotypes and recognize that much that goes under the name of culture is no more than 'imagined communities' or 'invented traditions'. We may also need to be cautious about using terms that suggest boundaries at a time when many argue that it would be more appropriate to speak of 'flows'.60

On the other hand, claims about the decline of the nation state can be taken too far. Differences between legal cultures may mobilize or reflect wider social and cultural patterns that roughly coincide with national political boundaries. Such

⁵⁸ Much of what is represented by the 'rule of law' itself, as a way of providing certainty and keeping the state within bounds, seems increasingly outdated for the regulation of international commercial exchange by computer between multinationals more powerful than many of the governments of the countries in which they trade, see Scheuerman, W.E. (1999), 'Globalization and the Fate of Law ', in Dyzenhaus, D. (ed), *Recrafting the Rule of Law: The Limits of Legal Order*, (John Hopkins Press), 243-266.

⁵⁹ Coombe, RJ (2000) 'Contingent Articulations: a Critical Studies of Law', in Sarat, A. and Kearns, T. (eds), *Law in the Domains of Culture*, op.cit. : 21-40.

⁶⁰ Appudurai, A. (1995) *Modernity at Large: Cultural Dimensions of Globalization* (University of Minnesota Press). Glenn 2004 op.cit. argues that, unlike culture, the concept of 'tradition' is less linked to the idea of spatial boundaries.

boundaries often coincide with language and cultural differences and represent the source of common statistics. The imposition of a common legal code and the common training of legal officials form part of attempts to achieve and consolidate national identity. 'Borders' continue to play important instrumental and symbolic roles, not least in responding to immigration. It is therefore premature to say that the nation state has had its day as a source of ordering. The recent rise of punitiveness in many Western countries for example has been seen as an attempt by the state to reassert its sovereignty- either as a form of symbolical 'acting-out' or, alternatively, as an essential and successful aspect of restructuring the regulation of poverty by the neo- liberal penal state. There is even some empirical basis for psychological differences in national traits in the way people relate to each other.⁶¹ Such different, historically conditioned sensibilities may persist over quite long periods (But careful research is needed to avoid confusing short-term and long- term trends.)

The current so-called 'globalisation' of law is a complex process which is likely to produce increasing social and economic differentiation as much as harmony⁶². And 'increasing homogenisation of social and cultural forms seems to be accompanied by a proliferation of claims to specific authenticities and identities'⁶³. Hence assumptions of necessary convergence probably underestimate the continuing importance of culture and resistance. One of the most important tasks of the student of legal culture at the present time is in fact to try and capture how far globalization represents the attempted imposition of one particular legal culture on other societies. Importing countries are offered both the Anglo-American model whose prestige is spread by trade and the media, and national versions of the more intellectually impressive continental legal systems embodied in ready-packaged codes. This model is said to be characterized by its emphasis on the link between law and the economy (rather than law and the state), by its reliance on legal procedures that prioritise orality, party initiative, and negotiation inside law. ⁶⁴ More than any particular feature of legal procedure, what does seem to be spreading is the common law ideology of 'pragmatic legal instrumentalism', the very idea that law is something which does or should 'work', together with the claim that this is something which can or should be assessed in ways which are separable from wider political considerations.

⁶¹ Hofstede, G (1980) *Culture's Consequences: International Differences in Work Related Values*, (Sage).

⁶² For examples from criminal law and criminal justice see Nelken, D (2011) *Comparative Criminal Justice and Globalisation* (Ashgate), especially the chapters by Muncie, Savelsberg and Von Swaningen.

⁶³ Strathern, M (1995) *Shifting Contexts: Transformations in Anthropological Knowledge*, (Routledge) : 3.

⁶⁴ Only some of these elements are actually on offer in legal transfers and the model does not accurately describe how the law operates at home (much of the American legal and, even more, the regulatory system, in practice relies on inquisitorial type procedures).

What is clear, however, at a minimum is that we now have to apply the term legal culture to a variety of different units, each of which is changing and in a relationship of mutual interaction with the others. But the problem with the term having a such a wide range of referents has been famously underlined by Roger Cotterrell in his critique of Lawrence Friedman's use of the concept (a debate that also connects to the previous discussion of the two meanings of culture) .⁶⁵The variety of ways that Friedman has used it - as a term describing group or individual attitudes towards using law but also to 'American legal culture' and 'modern legal culture' has serious consequences for the value of the concept. It means that legal culture becomes, in his words, 'An immense, multi-textured overlay of levels and regions of culture, varying in content, scope, and influence and in their relation to the institutions, practices and knowledge's of state legal systems'. Although, he says, such a variety of level of super and sub national units could in theory provide a rich terrain for inquiry we must nonetheless reject the idea that legal culture can be reflected in 'diversity and levels' whilst also having a 'unity'. For him, 'if legal culture refers to so many levels and regions of culture (with the scope of each of these ultimately indeterminate because of the indeterminacy of the scope of the idea of legal culture itself) the problem of specifying how to use the concept as a theoretical component in comparative sociology for law remains'.⁶⁶

Cotterrell is right to argue that these units may often not add up to a 'unity'-- except from the point of view of those whose job it is to try to show them to be coherent. Merry too writes that 'it is not clear how such a concept can deal with the extensive borrowing, transfer, and imposition of legal ideas and forms which takes place across the borders of legal fields.' Rather than serving to show the concept to be otiose, however, this may be taken to testify to the intricacies of lived legal culture with its mix of overlapping and potentially competing elements (a complexity also encountered by those comparative lawyers who focus on societies with plural legal orders.) ⁶⁷ Saldias, in this special issue, argues that his notion of 'light' legal culture allows us to embrace this variety, so as to ask for example 'if the World Trade Organization has created a particular kind of legal culture that is different from a sheer notion of *Lex Mercatoria*; or whether the EU's administrative legal composite can be considered a type of administrative legal culture.' But even the papers on China and Japan take their

⁶⁵ Cotterrell, 1997 op.cit.

⁶⁶ Cotterrell, 1997 id. The Benda -Beckmann's agree 'Once we acknowledge the 'variety and interdependence at the levels of generalised cultural understandings in ideologies, legal institutions and procedures and in people's minds and actions' the most difficult problem lies in the interrelations and interdependences among the elements terms lumped together as legal culture.' (And see discussion in the next section).

⁶⁷ See the work of Merry herself in Merry, S (2005) *Human Rights and Gender Violence: Translating International Law into local Justice*, (Chicago University Press) or Nelken, D.(2011)' Human Trafficking and Legal Culture', 43 *Israel Law Review* : 479-513.

sense from the need to explain how these jurisdictions hold out against wider trends in family law (even when they have formally signed on to following them).

Thus the extent to which cultural units maintain their (changing) boundaries largely reflects choices made by social actors. As Jonathan Webber argues 'The concept of culture is not so much a way of identifying highly specified and tightly bounded units of analysis, then, as a heuristic device for suggesting how individual decision-making is conditioned by the language of normative discussion, the set of historical reference points, the range of solutions proposed in the past, the institutional norms taken for granted, given a particular context of repeated social interaction. The integrity of cultural explanations does not depend upon the "units" being exclusive, fully autonomous, or strictly bounded. Rather, it depends upon there being sufficient density of interaction to generate distinctive terms of evaluation and debate. When there is that density, any examination of decision-making in that context will want to take account of those terms'.⁶⁸

In his contribution here Sezgin extends this analysis.' In each society' he argues,' there is a dominant legality (i.e. Legalist) drawn from the hegemonic legal culture that presupposes the supremacy and centrality of a single legal system and its ideology in the most positivist sense of the term (i.e., the state law). Dominant legality not only promotes a particular image and narrative of the law through channels of hegemonic legal culture, but also as a constitutive power it permeates into socio-legal space and colonizes bodies and minds of the subject of the law. However, the dominant legality is always challenged by alternative legalities that draw upon either deviant interpretations of the hegemonic legal culture itself or legal cultures of non-hegemonic subaltern groups.' 'One may observe,' he argues, 'competing legalities within the same socio-legal space each drawn from a different strain of legal culture. Individuals and groups can invoke legality in ways neither approved nor acknowledged by the "law". In fact, as repeatedly shown in social movements and legal mobilization literature, it is possible for groups to invoke legalities that are in stark contradiction to the essence and spirit of the law.' (and see also Silbey's chapter)

Elements and Aggregates

A problem closely linked to the task of identifying the unit(s) of legal culture is that of distinguishing the elements of (legal) culture as opposed to treating it as an aggregate. Glenn tells us that what he finds particularly problematical is the employment of culture as a 'holistic signifier' and also as a 'variable' (a confusion

⁶⁸ Webber J. op. cit . For an interesting study of how judges appointed to the European Court of Human rights from very different jurisdictions succeed in creating a shared legal culture see Arold, N.L. (2007) *The legal culture of the European Court of Human rights*, (Martinus Nijhoff). Cf. Nelken, D. (2009) 'The Temple of Rights': Review essay of Nina - Louisa Arold's *The legal culture of the European Court of Human rights*', *European Journal of Public Law* ,15, : 447.

of the two main uses of the term culture) .⁶⁹ As Ginsburg reminds us, in fact Friedman regularly treats legal culture as an aggregate characterised by a variety of elements or traits, ⁷⁰ but also uses legal culture as an analytic device, distinguishing 'internal' legal culture, which refers to the role in the law of legal professionals, from 'external' legal culture which he uses to refer especially to those individuals or groups who bring pressure to bear on the law to produce social change. But the distinction between aggregates and elements is not a hard and fast one. All wholes can be incorporated into yet larger ones, just as all elements can be broken into yet smaller ones.⁷¹ Whether it is appropriate to go down or up in levels of abstraction will depend on the purpose of an enquiry, for example whether we are comparing whole societies or elements within them (see also the paper by Saldias). The group 'attitudes' towards the use of law that are at the centre of Friedman's use of legal culture can also be broken down into smaller elements. Indeed Friedman thinks it is plausible to speak of each individual's legal culture. And these individual attitudes or opinions are in turn themselves composed of measurable responses to a range of particular questions.

Merry's address is centrally concerned with this issue. She argues that we need to break up the idea of legal culture into what she calls four 'social dimensions'. The first is the practices and ideologies within the legal system, everyday way of getting things done, shared assumptions about good and bad clients, and other internal rules and practices, some of which are based on legal doctrine and others on categorizations shared by the wider society, such as ideas of race and gender. (As she says, this corresponds to Friedman term 'internal legal culture'). Then there is the public's attitude toward the law. Whether the legal system is seen as a source of corruption and ethnic preference, for example, or it may be viewed as an institution that offers the rule of law for all people equally, regardless of their background. This, she suggests, is somewhat similar to what Friedman calls external legal culture. Thirdly, there is the question of legal mobilisation, which refers to how readily people define their problems in legal

⁶⁹ Glenn, P. e-mail to me 24 June 2004.

⁷⁰ According to Ginsburg, for Friedman modern legal culture shows '1) rapid legal change, in line with rapid social change; 2) density and ubiquity of law, leading to a juridification of social life; 3) instrumental legitimacy of law as a tool of social engineering; 4) a somewhat paradoxical emphasis on rights and entitlements; 5) a culture of individualism, which explains the shift toward rights; and 6) Globalization and convergence of legal cultures.'

⁷¹ As the Benda – Beckmans argue, 'We do not think that calling these factors of individual legal culture 'legal consciousness'..., would improve the situation. It would simply shift the problem of the complexity of these factors and possible interrelations from the term 'legal culture held by individuals' to the term 'legal consciousness'. But this applies to elements such as 'attitudes values and ideologies' that the seem to see as bedrock as compared to legal culture.

terms, when they turn to the law for help⁷². A fourth dimension is legal consciousness, the extent to which an individual sees him or herself as embedded in the law and entitled to its protections. Experience with the law, both good and bad, can change legal consciousness. It may encourage further use or may drive the litigant to avoid the law next time. Merry argues that these last two aspects offer the best way to understand the cultural dimensions of law and its relationship to a social context as well as providing a more satisfactory analysis of the processes of translation across legal fields and the hybridity of these fields. She emphasises that these are dimensions rather than distinct forms of social behaviour.⁷³

Merry sees this programme as the best way of facilitating empirical research into legal culture. By contrast, the Benda-Beckmanns see the need to distinguish legal culture into its elements as a reason to jettison the larger term altogether. For them 'there can be no doubt that the concept summarizes important social phenomena. The question is whether it makes sense to capture them in one analytical concept and treat them as one unit for purposes of description, comparison and social theory'. They admit that most authors are well aware of the fact that there is no homogeneity in what they call 'legal culture' and tend to be careful enough to differentiate among the components of the whole. However, for them 'such differentiation is marred by the original conception of what they make distinctions in, namely 'legal culture'. 'Once legal culture is disassembled,' they claim 'it becomes difficult to reconstruct it as an analytical category. The study of 'empirical complexity and the interdependencies of its components will not become easier if captured as 'legal culture'. 'If the term refers to attitudes, knowledge, expectations and values,' they ask 'why not talk about attitudes, knowledge, expectations and values? If it refers to ideologies or to the values embedded in law, why not call them thus? These concepts are general enough. Lumping too many things together into 'legal culture' or into 'units' of legal culture easily obscures interrelations between the elements that are lumped together.

⁷² Though Merry does not say so, this too is central to Friedman's approach.

⁷³ Merry explains: that 'in practice each of these categories overlaps and influences the others, it is important to see that they are not distinct forms of social behaviour but dimensions of social life always reshaping each other in some ways. For example, the claim that a society is litigious relies on all four aspects of legal culture. It says that legal mobilization is excessive. The overuse of the law is the product of a legal consciousness of entitlement and an institutional framework that makes the legal system relatively accessible. The public perception that a society is litigious implies that the public sees the legal system as too available, and is too ready to see its problems in legal terms. Further, it implies that the practitioners within the system feel overburdened by the amount of work they are doing. '

Interestingly, however, they acknowledge that their way of talking about legal culture sometimes comes close to Friedman's analytical distinction between the elements of internal and external legal culture. Thus they tell us 'Individual persons have their own knowledge, values, and attitudes towards law and its operation (in the sense of Friedman's 'legal culture'). These are usually a combination of knowledge, stereotypes and ideas shared with many others with highly idiosyncratic values and attitudes based on a person's socialization and experience. These may be similar or different from those values inscribed into ideologies and the legal-institutional framework.' They then insist (in words from which Friedman would probably not dissent) that 'the extent to which interactions, including the ways the institutions of a legal organisation function and the ways in which persons or organisations use the legal system, are influenced by such personal cultural understandings is a theoretically important issue, but the personal understandings should not be identified with those inscribed into ideologies and legal frameworks.'

In any case, most people who participated at this workshop were not so ready to jettison the idea of legal culture, even as they wrestled with the challenge posed by the Benda-Beckmanns. Stewart Field, for example, asks, 'what is the advantage of labelling that general representation as one of legal cultures rather than (say) legal orders, systems or processes?' His answer is 'the apparently paradoxical notion that one differentiates formations, institutions, structures of feeling and traditions to enable the making of necessary connections between them.' As he puts it 'actors do not live in a world of differentiated elements of institutions, formations, structures of feeling and traditions, however useful the distinctions may be as a heuristic device. The ultimate and impossible challenge that legal anthropologists and comparative lawyers must set themselves is to try to get something of the subjective feel of the normative pressures operating on the legal 'other' while making those pressures explicit in a way that native legal actors would not and perhaps could not do.'

Field tells us, more generally, that he was unhappy with breaking legal culture up into its constituent elements because '(T)hey seemed to hold separate what I wanted to bring together: the active relationships between legal (and other) frames of interpretation on the one hand, and institutional and doctrinal practices around the law on the other.' He favours instead an approach in which culture is treated as 'the process of interaction between patterns learned and created in the mind and patterns communicated and made active in relationships, conventions and institutions.' He seeks to show 'that the interpretation of a wide range of operative legal concepts is shaped by distinct social connotations, that these practices only 'make sense' within particular sets of legal and broader social contexts and relationships. No doubt these meanings are fragile and contested and subject to change. But the argument is that there are distinctive cultural 'logics' at work, distinct ways of seeing into which the researcher must struggle to enter.'

Marina Kurkchyan, likewise, is reluctant to abandon the whole for its parts. 'The concept of legal culture,' she says, 'becomes a useful orientating notion if the task is to identify a pattern of constructing a meaning of law and behaviour towards it

throughout the society, a pattern that emerges as a result of interplay of the legal and political traditions with the contemporary institutional configuration, as well as impact of external influences. It provides the broad vision that permits an assessment of what law is in that particular setting, how it works, and how it relates to other social constructs such as trust, justice, power, and group socio-legal identity.’ Referring to the first use of the term, she admits, however, that ‘difficulties emerge when a researcher uses the holistic method to compare different societies.’ ‘In that task,’ she argues, ‘a new set of questions has to be addressed.’

In explaining the sense of her own enquiry she tells us that ‘In different societies, each with its local peculiarities, law and legal institutions are likely to have evolved in contrasting directions. The inevitable sequence of historical serendipities is likely to amplify the differences. Logically one would expect law and legal institutions to convey different messages to the people in each of them. Would not each set of people, as users of legal institutions, define and re-define the substance of those institutions through their distinctive beliefs, experiences and practices? And would not the particular configuration and performance of other institutions in the society (economic, social, and political) influence the role and interpretation of what law is perceived to be in that particular social setting? She concludes recommending ‘the potential of the idea of a single “legal culture” to explore the way in which law is constructed in a particular social space through the interaction of all the relevant social forces, internal as well as external, so that together they constitute a complete map of what is traditionally called the legal sphere.’

As these interventions suggest, the question of when to disassemble the idea of legal culture will again depend largely on the purpose of our research. In his paper Saldias sets out to study how legal culture actually breaks down as it ‘travels’ from one society to another. This offers a new way of examining the relationship between the whole and its parts. ‘Certainly’, he tells, ‘the “thick description” project is a very fruitful one: it prevents the analysis of legal systems from getting oversimplified. It has however severe limitations. First, since it pursues a comprehensive account of legal culture, it gives up stringency in its assertions. As it aims at incorporating every relevant element of legal culture, it loses the systematic overview of its different elements. At this point, we hardly know how and to what extent the many components of legal culture have intertwined’. So he recommends that we ‘deliberately exclude some elements of legal culture – insofar as this helps explain why modified versions of legal culture are able to ‘travel’. This so called ‘light’ version of legal culture is seen as ‘a process that encompasses only attitudes, beliefs and a common language, deliberately leaving behind others like history and values.’

Circular Explanations?

What role can legal culture play in ‘explaining’ patterns of legally related attitudes and behaviour? And how does this relate to the difficulties we have already noted with respect to identifying the units or needing to distinguish the

elements from the whole of which they form part? For many critics this is the central problem with the term because confusion of cause and consequence is intrinsic to all explanations using the idea of culture. It is too easy to fall into the trap of 'essentialism' or 'culturalism' which involve circular arguments in showing how cultural values cause a given response to events. Question: Why do they use law that way in Japan? Answer: Because that is their (legal) culture. Or to put the point another way; when we talk about American or Japanese legal culture are we already offering some sort of explanation of behaviour or only indicating that which needs to be explained? Is legal culture the name of the question or the answer?

As we have seen, Cotterrell sees this problem as one posed especially acutely by the range of referents for legal culture in the work of Friedman. He complains that 'Friedman sees legal culture as a cause of 'legal dynamics', though, somewhat confusingly, he also uses it to describe the results of such causes, writing for example, about the traits of a variety of large aggregates such as American culture, Latin American legal culture, modern legal culture and even global legal culture⁷⁴. In his reply to these criticisms Friedman seems to miss this point and takes him to be complaining mainly about the difficulty of measuring the concept. To this Friedman replies that many other concepts are similarly 'abstract'; differences and changes in culture can be measured through indirect indicators such as crime and litigation rates.⁷⁵

But even if Friedman does indeed use the term to denote aggregates as well as elements this does not mean that his own use of legal culture in his explanatory enquiries are tautologous, Typically, he wants to show how social, political and technological developments produces change in what people expect of the law. As Ginsburg reminds us, the argument goes, the rise, for example, of a society based on the automobile produces new demands (legal culture). This then creates the need for new rules, changes which rules are important and the problems to which legal institutions seek to offer responses. Certainly, as Ginsburg goes on to concede, this raises the question 'whether modern law is 'the cause' or 'product' of other social developments'. But Friedman's answer is that it is social forces or social structures – as set into motion by social groups and individuals (i.e. 'external legal culture')- that are the actual agents of change. This said, it is also entirely plausible to argue that what is a cause can also be the result of other causes. Recently, Friedman has described how modern social and economic developments have led to the growth of a culture of 'expressive individualism' that has helped spread the idea of universal human rights. This has weakened the pretensions of national sovereignty which in turn helps the spread of transnational prescriptions. ⁷⁶

⁷⁴ Cotterrell 1997 op.cit

⁷⁵ Friedman 1997 op.cit.. Blankenburg (1997 op.cit.) agrees with Friedman that litigation rates can be taken as 'indicators' in this sense, even if he disagrees with Friedman about what the evidence shows in terms of the causal importance of 'external legal culture'.

⁷⁶ Friedman, L. (2011) *The Human Rights Culture* (Quid Pro Books)

But it is not only Friedman's work that has come in for this type of criticism. Sally Kenny has made the same kind of objection when reviewing the second edition of Blankenburg and Bruinsma's book *Dutch Legal Culture*⁷⁷. She first summarizes what they have to say about legal culture as an aggregate: 'The Dutch legal culture is pragmatic and flexible, rather than rigid and formalistic. It favours consensus, inclusion, discussion, and negotiation (if only among all relevant elites) rather than conflict and dichotomous, legally-enforceable outcomes. The absence of judicial review of legislation coexists with wide judicial, administrative, and prosecutorial discretion. The Europeanization of legal practices, greater public concern about crime, and a reduced willingness to fund a generous welfare state, however, are eroding the distinctive aspects of Dutch legal culture.'

But she then goes on to voice her misgivings about asking an aggregate to play the role of a variable. 'I agree that legal culture is not reducible merely to public opinion or attitudes of legal professionals. Institutions both reflect the broader culture and shape it. Institutions and legal culture are, as we say, mutually constitutive. But, she complains, this way of using the term means that 'legal culture has that slippery "residual variable" quality about it—shared by the concept political culture. It is everything and nothing simultaneously. It is the totality of laws, practices, and opinions. And it somehow simultaneously stands apart from these things and effects how they work. It is both cause and effect'.⁷⁸

It is easy to find other examples of the same criticism. Glenn argues that legal culture's 'shortcomings come into evidence when it shifts from something to be described, interpreted, even perhaps explained, and is treated instead as a source of explanation in itself'.⁷⁹ Jeremy Webber agrees, 'Until a solution is found to this problem, legal culture 'risks being a superficially attractive but ultimately obfuscating concept, insisting upon interdependency but then cloaking that interdependency under the rubric of a single concept, doing nothing to tease out the specific relations of cause and effect within any social field'. Consequently, alternative terms to legal culture will be that much more

⁷⁷ Significantly, Bruinsma changed the title in a later edition to 'Dutch law in action' because of such objections.

⁷⁸ Kenny, S.J. (1996) 'Review of Blankenburg and Bruinsma, *Dutch Legal Culture*' in *Law and Politics Book Review*: 122-123. But she does go on immediately to add 'Yet the strongest evidence of the importance of legal culture is the different outcomes produced by similar structures in two different countries. For example, the Dutch and the British may both have informal tribunals for legal conflicts over social security, mental health, and labor, yet in Britain, the tribunals will operate formally and legalistically and in the Netherlands, informally and flexibly.'

⁷⁹ Glenn, 2004 op.cit.

attractive to the degree that they can be shown to be less likely to lead to circular arguments in which the explanation is also that which needs to be explained.’⁸⁰

But Webber also implies that, in theory, it would be worthwhile to tease out ‘specific relations of cause and effect’. And there are many possible causal hypotheses that could be productively explored. Most obviously, when social actors take ‘culture’ to represent or require certain behaviour or values they make orient themselves to it as a reason for acting. As Palmer points out in the citation which serves as the head note to his paper “Anyone who has ever asked ... Chinese informants why they follow such and such a custom knows the maddingly reiterated answer: ‘Because we are Chinese’ ”. This can also affect the operations of larger units. In the 1980’s the appearance of league tables of relative levels of incarceration induced Finland (interested in being seen as similar to other Scandinavian countries) to move towards the average imprisonment rate by reducing its prison population; Holland for its part felt enabled to do the opposite. Likewise, how far East European cultures come to resemble western legal cultures, assuming this to be desirable, in part depends on how far politicians, policy makers and legal actors there believe they can escape the patterns inherited from the past. 81

Interestingly, the Benda- Beckmanns, despite their generally critical approach to the term, do not see tautology as the real problem here. The important thing for them is to dissolve culture into the stream of social interaction. ‘The threat of ‘tautology’’, they tell us, ‘only arises out of a static understanding of ‘legal culture’ ... the question of whether ‘legal culture’ is something that explains or that has to be explained, now does not present a problem. ...whatever is summarised as culture or legal culture will be the context, medium and outcome of social interactions. Disaggregated and set into a structuration perspective, the various elements captured under ‘legal culture’ may be used to explain other elements. Different elements of ‘legal culture’ may figure as objects and description or figure as factors in explanation. One can only speak of ‘tautology’ if one treated these different social phenomena as ‘the same’ phenomena and disregarded the chronology and logic of processes of structuration.’

Another way of avoiding tautology is to see legal culture as something that needs to be explained rather than as an explanation.⁸² This may be what Friedman is doing when he argues that ‘social forces’ cause legal change – calling those forces external legal culture is just an unfortunate turn of phrase. Repeatedly he has

⁸⁰ Webber op.cit.

⁸¹ Krygier, M. (1996-1997) ‘Is There Constitutionalism After Communism? Institutional Optimism, Cultural Pessimism, and the Rule of Law’ 26 *J International Journal Sociology*: 17–47; Polak, P. and Nelken, D. ‘Polish Prosecutors, Corruption and Legal Culture’ in Febbrajo, A. and Sadurski, W. eds. *East-Central Europe After Transition: Towards a New Socio-Legal Semantics*, (Ashgate) :219-254.

⁸² For Silbey 2005 *Legal Culture and Cultures of Legality* op.cit culture is ‘the outcome of social analysis’.

sought to prove that it is social conditions that make legal interventions effective not vice versa. In this collection too we also find attention given to explaining (changes in) legal consciousness rather than using it as itself an explanation of socio-legal change. Thus Hertogh tries to chart the declining legitimacy of law in the Netherlands by showing the need to examine how people support legal institutions, not just how much. But at the level of an entire society almost anything may turn out to be relevant to explaining why its legal culture, or even just one aspect of it, differs from another's.

Take, for example, the question why Italy suffers such long court delays. To answer that this is because of its legal culture is tautologous if delay is itself included as one of the ingredients of its legal culture. But if we seek to explain such delays- as a feature of legal culture we can certainly find a long list of potential factors. In the first place there are the relevant laws, especially those to do with civil and criminal procedure. There is also the management and organisation (or lack of organisation) of the courts and legal profession, claims about the supply of law not keeping pace with the demand, economic interests, political priorities etc. On the other hand there is the effort of the European Court of human rights to create pressure for the Italian legal system to come into line and the way this is frustrated. 83

The problem of course is that it can then prove surprisingly difficult to decide which of these factors are the crucial ones, especially as the relevant facts can often be elusive (e.g. comparative statistics suggest that Italy has a comparatively low rate of litigation despite the continual complaint about court overload)84. Interpretations of these facts can be even more controversial. Large companies can make use of judges as (paid) arbitrators outside the normal trial system. But small businessmen (the backbone of economic life in Italy) would seem to gain little from the current situation. If so why do they not put more pressure on the politicians to do something? Are lawyers and banks the only ones that profit from this situation? 85 Here rather than culture providing pat solutions to our enquiry it leads (as perhaps is appropriate?) rather to an infinite regress of causal puzzles regarding what shapes it.

Using the idea of legal culture when studying the relationship between law and different social contexts is less likely to produce results that are tautological if we are open to new evidence that can lead to revising our understanding of the culture in question. Take for example the problem of explaining why Italy has –

⁸³ Nelken, 2004. op.cit.

⁸⁴ Blankenburg, E. (2003) 'Judicial systems in western europe : Comparative indicators of legal professionals. Court litigation and budgets in the 1990's', in Jensen and Heller eds. op.cit. : 63-95.

⁸⁵ Nelken, D. 2004 op.cit.; Nelken, D. (2008) 'Normalising Time: European integration and Court delays in Italy' in Petersen, H. Krunke, H, Kjær A.L. and Madsen, M.R. eds., *Paradoxes of European Integration* (Ashgate): 299-323.

allegedly- a good record in applying the recent international agreements aimed at fighting human trafficking and helping those who are victims of it.⁸⁶ At a conference held in Palermo to celebrate the signing of the so-called Palermo Protocol some years earlier a number of speakers argued that Italy was one of the countries that was most advanced in interpreting and applying it. By contrast, they claimed, places with the reputation of being progressive in matters such as women's rights, such as Sweden or Netherlands, had a much poorer record.

Such claims are surprising given that other aspects of what we know about Italian legal culture might have predicted a quite different outcome. Not only because Italy is often slow in complying with other international directives, but also because Italy's criminal justice system is not very victim - oriented, and its victim- support movement is not anything like as well- developed as in many other advanced western countries. In Italy, partly as a result of the influence of Catholic culture, victims are often expected 'to forgive' rather than ask for revenge. As a 'state society', punishing is considered something to be carried out for the 'general interest' not on behalf of victims. In many Protestant countries, with a 'liberal' idea of the state, by contrast, victims are often put on a pedestal as representatives of the 'community' for whose defence - as potential or actual victims- the state/ government justifies its existence.

Of course it could simply be untrue that Italy is really more active in applying the Protocol than other countries. Because of the lack of comparable cross- national data on the number of cases dealt with in relation to the number of potential cases of trafficking, we cannot be sure how Italy's figures compare with those elsewhere. Or we may not be comparing like with like in terms of the potential number of victims that could be helped. There are a number of reasons why the number of people trafficked to Italy -itself a function of the number of illegal migrants- could be much larger than in many comparable countries. First of all there is the power exercised by four major entrenched organised crime groups. Then there is its geographical position, with an exposed coastline and proximity to Africa, and the large poorly regulated black economy and demand for illegal workers - in the agricultural, industrial sectors and sex trades.

If these factors mean that Italy has a relatively high number of cases of trafficked victims then it would be no surprise (and not a mark of merit) if Italy has more opportunity to apply the Protocol. Conversely, if what we are measuring is activity more broadly geared to prevention and protection of immigrants or of those in the sex trade the relatively small number of cases of trafficking victims protected in Sweden and the Netherlands is open to a different interpretation. Sweden deals with few cases because it relies instead on prosecuting prostitutes' clients. The Netherlands, by contrast, seeks to legalise and regulating the trade in sex so as to curb the demand for trafficked victims. By contrast, the Italian response to trafficked victims has done little to help introduce more 'rational' ways of regulating immigration or sex work generally.

⁸⁶ Nelken, D.(2011) op.cit.

It would be wrong, however, just to 'explain away' claims that Italy is especially effective in dealing with trafficking cases. After all, the fact that the protocol was signed in Palermo (as well as the presence of a number of relevant intergovernmental and NGO groups on its territory) may have given Italy some sense of 'ownership' of this struggle. Because there is more organised crime in Italy than in many other European countries this means that the criminal justice system has had more experience in dealing with it. Concern for victims may have increasingly become the justification for the application of the criminal law in countries whose legal cultures are more influenced by liberal individualism, Protestantism and the common law. But this may work differently when it comes to foreign victims of trafficking who are not members of the local 'community' and may be considered to some extent authors of their own plight. Italy, by contrast, is a country with a relatively higher tolerance for ambiguity when deciding who is a victim (as with the so called organised crime pentiti.) It may be precisely because the justification for punishment does not flow from the 'ideal' victim that there may be more willingness to protect flawed victims.

Other more general, debatable and debated features of Italian legal culture could also be relevant here. The degree of independence from government enjoyed by judges and prosecutors in Italy can cause problems in coordinating crime policy- and, according to their opponents, contributes to political instability. But because judges often find that they have to substitute for politicians in dealing with endemic social problems such as corruption (their so-called role of *supplenza* or supplement) this gives them more of a free hand than in some other jurisdictions. Thus judges and prosecutors can extend protection to these particular victims even if this may not be very popular with governments or public opinion- who are usually keener on cracking down on anything connected to illegal immigration. What is a disadvantage in one setting can be a plus in another. For example, if, as we have noted, Italian legal procedures are particularly afflicted by delays this may make it all the easier to allow for decent 'cooling off periods' so that victims of trafficking can overcome their trauma and decide what they want to do next. In sum, the main reason to speak about culture - and not just economics and politics - is to see how legal ways of dealing with problems tend to 'come as a package'.

Explanation or Interpretation?

The danger of tautology is most worrying to those with an interest in prediction who hope to develop policy relevant social science explanations showing how variables produce outcomes. What legal factors correlate with economic growth? Which conditions are likely to determine whether this transplant takes or not?⁸⁷ But comparativists may want to use the idea of legal culture for a variety

⁸⁷ For an ingenious attempt to use evidence of the success or failure of transplants as a way to reveal the legal culture that 'explains' such outcomes see Kurchiyan, M. (2009) 'Russian Legal Culture: An Analysis of Adaptive Response to an Institutional Transplant' *Law and Social Inquiry* 34, 337-364.; Nelken, D. and Feest, J. (2001) *Adapting Legal*

of other purposes including classification, description and evaluation. And it is important not to identify explanation merely with the use of causal analysis.⁸⁸ For Pierre Legrand 'the comparatist is attracted to the explicatory power which an appreciation of the legal as culturally constituted may yield. The indeterminacy of "culture" or, if you will, the impossibility of distinguishing between "culture" and "non-culture" in a way that would allow the identification of empirically verifiable causal relationships through which control over social life could be effectively attained ought to be a handicap only for the positivist. But, comparative legal studies subscribes to a very different cognitive project. The comparative enterprise does not purport to be serviceable in the sense of providing an instrumental programme oriented toward technical ends.... comparative analysis of law is best apprehended as a hermeneutic investigation aiming to achieve understanding about the life of the law and life in the law through the invention of meaning.'⁸⁹

In line with the different methodologies that compete in the social sciences there is an important divide between those scholars who look for 'indicators' of legal culture in the activity of courts and other legal institutions, and those who insist instead on the need to interpret cultural meaning.⁹⁰ The first approach uses culture (or deliberately simplified aspects of it) to explain variation in matters such as levels and types of litigation or social control. In order to test its hypotheses the positivist approach is obliged to develop a socio-legal Esperanto which abstracts from the language used by members of different cultures, preferring for example to talk of 'decision- making' rather than 'discretion'. The rival strategy, concerned precisely with grasping linguistic subtleties and cultural packaging, would ask whether and when the term 'discretion' is used in different legal cultures and what implications the word carries⁹¹. For the interpretative approach, concepts both reflect and constitute culture; as in the changes undergone by the meaning of 'contract' in a society where the individual is seen as necessarily embodied in wider relationships ⁹², or the way that the Japanese ideogram for the new concept of 'rights' came to settle on a sign associated with 'self-interest'. rather than morality.⁹³ Whereas the positivist

Cultures (Hart).

⁸⁸ See also Saguy, A. C. and Stuart, F. (2008) 'Culture and Law: Beyond a Paradigm of Cause and Effect' in *The ANNALS of the American Academy of Political and Social Science* 619:

⁸⁹ Legrand 1997, review of Nelken op.cit.

⁹⁰ See, for a good recent example of the interpretative approach, Tanase, T (2010) *Community and the Law: A Critical reassessment of American Liberalism and Japanese Modernity* (Edward Elgar).

⁹¹ Nelken, 2004 op.cit.

⁹² Winn, J. (1994) 'Relational Practices and the Marginalization of Law: Informal Practices of Small Businesses in Taiwan ' *28 Law and Society Review*, 193- 232.

⁹³ Feldman, E. (1997), 'Patients' Rights, Citizen Movements and Japanese Legal Culture', in Nelken, D. ed. 1997 op.cit. : 215-236 .

approach would seek to throw light on legal culture by seeking to assign causal priority between competing hypothetical variables so as to explain variation in levels and types of legally related behaviour, the interpretative approach, on the other hand, would be more interested in providing 'thick descriptions' of law as 'local knowledge'⁹⁴. It would see its task as doing its best to faithfully translate another system's ideas of justice and fairness so as to make proper sense of its web of significance. It asks about the different nuances as between the terms 'Rule of law', 'Rechtsstaat', or 'Stato di diritto' or the meanings of 'community' in different societies.⁹⁵

For many comparativists therefore, understanding is something that can only be reached through careful interpretation⁹⁶. What does this legal institution, procedure or idea mean? What, if anything, is it trying to achieve? It could even be argued that by formulating their questions in this way scholars are more likely to be in tune with the many post-positivist schools of social science and cultural theorizing that have endorsed the so-called 'interpretative turn' away from earlier mainstream ways of pursuing behavioural science. Merry argues for an approach to culture that treats it as a way of seeing at least as much as an object of enquiry. She argues that 'notions of culture as residual cause or as holistic system have long since been rejected as inadequate. 'Cultures' she tells us, are not bounded entities but porous, sets of ideas and practices that are not fixed but constantly shifting. They provide the lens through which new institutions and practices are adopted and transformed. ...This is a more dynamic, agentic, and historicized way of understanding culture. It emphasizes the active making of culture, society, and institutions and the grounding of this action in specific places and moments'. For her, what is essential is a framework that sees the cultural domain as a resource, a practice, and a dimension of institutions but not a residual cause. Such a dynamic mode of analysis is a far more promising way to incorporate the dimensions of the cultural into the analysis of law/society relations than the holistic idea of legal culture.' ⁹⁷

⁹⁴ Geertz, C (1973) 'Thick Description: Towards an Interpretive Theory of Culture,' in Geertz, C. *The Interpretation of Culture*, (Basic Books); Geertz, C. (1983) *Local Knowledge: Further Essays in Interpretive Anthropology*, (Basic Books).

⁹⁵ Zedner, L. (1995) 'In Pursuit of the Vernacular: Comparing Law and Order Discourse in Britain and Germany', in Nelken (ed), 1995 op.cit :517-534.

⁹⁶ See e.g. Legrand 1997, *Fragments on Law as Culture*, op. cit.

⁹⁷ In their illustrative case study of the Minangkabau the Benda-Beckmanns ask ' (D)o the Minangkabau have a culture, or a legal culture, or legal cultures - beliefs embodied in legal repertoires, institutions and procedures as well as the knowledge, attitudes, values, ideas and expectations that different categories of persons have with respect to law and its social function. An essential issue is to what extent these latter factors, among others, can play a role in shaping human conduct.'

For the Benda Beckmanns it is impossible to know how and when culture will be drawn on situationally. 'Expectations, attitudes, knowledge and evaluation' they say' may be mutually interdependent. The knowledge or expectation of corrupt judges may be a reason to avoid state courts for certain persons while they at the same time cherish the idea of having a good law and legal procedure; for others it may be a reason to go there because they hope (or believe they know) that they may get away with things that would be impossible in village institutions of dispute settlement though that does not mean that they have a high opinion of the law of the state.' They are especially concerned about the consistency of attitudes and behaviour across different contexts:

'we would have to distinguish between legal culture in the mind, in words, or in [concrete inter]action such as the making and justification of claims or judgments, where individual values and attitudes may be displayed quite differently. The statement made for public consumption, the declaration of a judgment according to the law in the name of the people, may express the judge's values and attitudes towards law and legal procedure and may be manifest in a detailed rationalisation and justification. The same judge may have a cynical attitude towards the law when he has been bribed to let one party win and nevertheless writes a learned and sophisticated judgment, simply having shifted the onus of proof.'

The papers here that might seem to come nearest to offering tautologous explanations are those that make reference to national legal cultures as having the power to (re)shape the reception of legal reforms. But these authors are not offering the idea of Chinese or Japanese legal culture as causal mechanisms but rather are trying to provide a hermeneutic interpretation of one part of a (changing) legal whole in relation to the rest. Palmer and Hotz seek to understand how (and how far) the cultures they are studying reconcile widely held ideals regarding the protection of women and children with their own well entrenched long standing patriarchal legal cultures or ones which places the rights of the elderly before those of children.

It would be wrong in any case to draw too sharp a line between explanation and interpretative understanding⁹⁸. Even if she is cautious about positivist methodologies Merry still wants to know why the people she studied did or did not make use of the new legal institutions at their disposition. And Engel points to the need for comparative data. 'If 'hybridization' in the nari adalat brought a greater promise of justice to village women in India, it seemed on the contrary to bring a diminished sense of access to fair treatment in northern Thailand.' Kurkchian, too, though careful to define what she means by explanation does not abandon it. She argues that legal culture 'is the product of a convoluted interplay between historical legacy, institutional performance and popular attitudes. 'Such a broad picture', she says, ' does not allow causal analysis, but it does have the potential to explain how law is embedded in the social texture and how it relates to other concepts such as justice, trust and the rule of law.' Sezgin

⁹⁸ Nelken, D. (2010) *Comparative Criminal Justice: Making sense of Difference* (Sage).

offers us an account of the wider conditions that explained the different outcomes of efforts to change Nigerian, Palestinian and Egyptian family law. But he is eager to generalise his findings, 'The socio-legal change may then take place if the dominant legality is successfully replaced by an alternative image of legality, provided that, as three case studies have shown, a confluence of favourable political and institutional opportunity structures, support networks, and a repertoire of hermeneutic resources and interpretive schemas exist and are accessible to subaltern groups.'

Of Coherence and Change

Another way of talking about the issues we have discussed so far, but also of taking them further, is to think about the alleged coherence of legal cultures and the way this relates to the possibilities of change. If aspects of law-in-society do come in 'packages' we need to ask what makes for the coherence (or 'unity') of such 'units'? (How do elements turn into a whole? What gives a unit its 'unity'?) The answer will also again depend on whether we treat coherence as an explanation or what needs to be explained,⁹⁹ as part of positivist explanation or as a hermeneutic alternative to it. Getting into detail a further set of questions concerns what it is that is being held together— individual opinions and attitudes, behaviours, texts, institutions, working groups, ideas and ideals? And by what? Psychological pressures to consistency, pressures for group conformity, institutional and organisational controls or routines, legal or religious texts?

For many writers the idea of coherence provides the key to the point of talking about legal culture. It is this that 'explains' continuities in its patterns of ideas and practices over time, or that predicts how it is likely to respond to attempts at legal transfers. But for those critical of the concept of culture or legal culture the presumption of coherence is the problem not the solution. Comparative lawyers and philosophers of law have often defined the term so as to capture the activities of the various legal professionals and jurists who bear the responsibility of (re)producing purported coherence in legal materials.¹⁰⁰ But these writers say little about what type or degree of coherence is required in actual practice and their way of using the term can be somewhat narrow for many of the purposes of socio-legal inquiry.¹⁰¹

While, for some scholars, there is an intrinsic link between the elements that make up a given unit, others think that the connection exists (only) insofar as participants talk about it 'as if' it is real. For yet others the supposed coherence is one imposed on units by observers and commentators. On the one hand, it is argued that culture shapes action and ideas. On the other, if culture is, to a large extent, a matter of struggle and disagreement, the purported uniformity,

⁹⁹ Nelken, D. (2007) 'Three Problems in Employing the Concept of Legal Culture', in Bruinsma, F. and Nelken, D (eds) (2007) *Explorations in Legal Culture*, Elsevier: 11-28.

¹⁰⁰ See eg Webber op.cit.

¹⁰¹ Blankenburg and Rebuffa op . cit.

coherence or stability of given national or other cultures will often be no more than a rhetorical claim manipulated by members of the culture concerned or projected by outside observers.¹⁰² At the heart of this debate lies the question of whether coherence is an intrinsic or constructed feature of legal culture (and the process(es) by which one becomes the other). It is not only lawyers and judges, as Cotterrell tells us, who attempt to sell the ideology of law as a 'gapless system', whatever they may know from their everyday practice in their offices or in the courts. ¹⁰³ As made clear in Silbey's paper, lay actors also help to reproduce the idea that law must have an answer to all occasions of potential conflict. And even the Benda Beckmanns recognise that coherence does function as an ideal (or ideology) for those acting within these culture. As they put it ' at the same time that which has been hybridized is also upheld practically in its idealized and allegedly original and uncontaminated form.'

The range of possible positions is reflected also by the contributors to this special issue. Some authors assume that the task of showing that national legal cultures are in some ways coherent is just a matter of empirical demonstration, butt Field offers a theoretical justification of this claim. Merry, by contrast, sees legal culture as no more than a framework with different overlapping elements with no necessary overall coherence- little more than a series of topics to investigate concerning institutions, attitudes, mobilisation and consciousness. For her, 'Legal practices tend to be hybrid and creolized, formed of borrowings, transplants and translations of other legal practices in other places and times. Hence it is unlikely that will be coherent. Indeed as with culture more generally lack of coherence is what gives actors room for manoeuvre and innovation'. For Saldias too, the only plausible coherence is one that allows for pluralism 'Just as it is possible to have more than one identity, it is possible to be immersed in more than one legal culture simultaneously.'

The Benda-Beckmanns take a similarly sceptical view, telling us that : 'Minangkabau legal pluralism would consist of three legal orders, each with its own cultural dimension incorporating quite different and contradictory values and beliefs.' For them this takes away the need to use the term at all. Silbey, who prefers the term legal consciousness (though is wary of reifying that too) follows Swidler in seeing culture as 'not a coherent, logical and autonomous system of symbols.¹⁰⁴ Variation and conflict concerning the meaning and use of these symbols and resources is likely and expected because at its core, culture "is an intricate system of claims about how to understand the world and act on it".

¹⁰² It is interesting to ask how Silbey's account here of contestation over street property 'rights' relates to the categories of different responses to law discussed in Silbey, S. and Ewick, P. (1998) *The Common Place of the Law: Stories from Everyday Life* (Chicago).

¹⁰³ Cotterrell 1997, op.cit. It should be said that Friedman would be the first to agree with this, having always fought in his scholarship against accepting law's self conceptions at face value.

¹⁰⁴ See Sewell, Swidler op.cit.

Under close scrutiny, doctrinally defined areas of law for example that governing family relations, seem to be far from coherent.¹⁰⁵ On the other hand, it is important to distinguish speaking of coherence seen from within the culture and when offering external comparisons with other cultures. In these terms, the work of family lawyers may have more in common with family lawyers in other jurisdictions and cultures than say copyright lawyers in the same country.¹⁰⁶ And, seen cross- nationally, even apparently unconnected branches of law may in fact manifest remarkable levels of cultural similarity within a given society. As Whitman has claimed recently, in replying to criticisms of his 'culturalist' approach to penal law, 'the pattern that we see in comparative punishment is also the pattern we see in many other areas of the law. Indeed, I would claim it as a virtue of my book that it shows that punishment law cannot be understood in isolation from the rest of the legal culture. For example, American workplace harassment law differs from German and French workplace harassment law in very much the same way.. The same is true of comparative privacy law ...just as it is true of the law of hate speech and everyday civility ...I think these studies carry cumulative weight'.¹⁰⁷

The question of what is meant by speaking of coherence gets even more complex if we examine the assumptions or claims that are made about 'the fit' between legal culture and other aspects of the same society.¹⁰⁸ It is often assumed that the direction of influence is mainly from culture in general to legal culture in particular. Indeed this is the crux of Friedman's argument. For him, sooner or later, larger culture (re) shapes internal legal culture. Those who argue for so called constitutive theories of 'law in society' would see things also working the other way round¹⁰⁹. But the existence of definite relationships between legal practices and ideas and those in the wider society does not mean that the one always and necessarily mimic the other. ¹¹⁰

In characterizing 'the American way of law' Kagan argues that this is the consequence of a 'fundamental mismatch' between, on the one hand, the demand

¹⁰⁵ Dewar J. (1998) 'The normal chaos of family law', *Modern Law Review*, 61,: 467–485. See also Bell, J. (2001) *French Legal Cultures*, (Cambridge).

¹⁰⁶ Though such external comparisons increasingly fold back into internal debates and action. See the example of European prison rates mentioned earlier.

¹⁰⁷ Whitman J.Q. (2005) 'Response to Garland', 7 *Punishment and Society* : 389-396.

¹⁰⁸ Nelken, D. (1986) ' Beyond the Study of "Law and Society"? Henry's Private Justice and O'Hagan's The End of Law? *Law & Social Inquiry*, 11 :323–338.

¹⁰⁹ E.g. Calavita, K. (2001.) 'Blue Jeans, Rape, and the De-Constitutive Power of Law ' 35 *Law and Society Review*. 89;

¹¹⁰ For example 'legal' and 'scientific' forms of truth telling may be symbiotic because they use somewhat different approaches to truth finding.

for social and political justice through law together with the expectations of equal opportunities demanded by interest groups and individuals, and, on the other hand, where the role of central and local government is deliberately hamstrung, the difficulty of meeting these demands except piecemeal through the courts. 111. Moreover, places also differ in the extent to which similarities in legal and wider culture are valued. Thus, in places like Italy, an insistence on greater 'formalism' in legal matters may be understood as seeking to differentiate itself from the lack of such formalism in the 'life world' of ordinary social interaction.

If legal culture does possess coherence how then does it also change? Ideas of continuity and change are inevitably reciprocally intertwined in debates about (legal) culture. 112 The strain towards supposed coherence is alleged to explain relative lack of change, the difficulty of change and even the direction of change¹¹³. Conversely, claims that long-standing historical patterns cannot be altered can be 'dystopic' and block possible reforms¹¹⁴. Glenn claims that those who use culture as an explanation put too much stress on the past governing the present. 115 It can be salutary to recall the transformations in attitudes towards 'law and order' in the short period that elapsed from Weimar to Hitlerian Germany (and in an interconnected world even resistance to outside influence is an active process). But usually change is circumscribed. Consider again one of the examples mentioned earlier, that concerning scandals and legal culture. It is true that recently there have in fact been expense scandals concerning members of parliament in England and Wales that have not been based round sexual improprieties. Equally there were attempts to bring down prime minister Berlusconi for alleged sexual misbehaviour. At the same time however it is interesting to note that the UK scandals concerned private misbehaviour by members of parliament rather than suspicion of business corruption of politics. Conversely, Berlusconi's sexual mis(s) behaviour became a serious issue when it was seen to have involved the alleged facilitation of public works contracts to those who supplied him with women. And in the end it was not these scandals that brought him down but unsustainable levels of public borrowing.

¹¹¹ Kagan R. (2001) *Adversarial Legalism: The American Way of Law* (Harvard U. Press.) and see Nelken, D. (2003) 'Beyond Compare? Criticising the American Way of Law', *Law and Social Inquiry*, 28 : 181-213.

¹¹² As Ginsburg argues 'The very notion of culture sounds like it emphasizes the particular and the permanent.'

¹¹³ For the Japanese case see e.g. Feldman, E. (2006) 'The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First Century Japan', Nellco Legal Scholarship Repository Scholarship at Penn Law University of Pennsylvania Law School.

¹¹⁴ Krygier, 1997. op cit.

¹¹⁵ But, as Ginsburg explains here, Friedman's use of the term is all about change; if anything he goes to the other extreme saying that his use of legal culture does not presuppose anything 'enduring.'

How far legal cultures can be deliberately transformed remains intensely controversial.¹¹⁶ Many of the contributors to this issue do underline continuity rather than or despite change. For Field 'Italian reforms seem to innovate within established traditions rather than to challenge them'. Kurkchiyan tell us how much people's expectations of legal institutions in Poland and Bulgaria remain similar to what they were before despite those countries joining the European Union. Palmer and Hotz find that law makers and law finders in China and Japan offer resistance to moving any faster to provide greater rights for women and children. As we have seen, difficulties in knowing when such resistance will crumble puts in question the value of the term as a predictive device. For Ginsburg (explaining Friedman's views) 'Culture thus represents a kind of lag, though it is hardly predictable in the ways it changes. It is partly a constraint, but also partly a wild card, not capable of mechanistic analysis'. Field tells us that 'the 'fit' between Italian youth justice practices and Italian legal and general culture.. exactly implies the difficulty of making predictions about the consequences of applying similar practices in other social and legal contexts. Could or should some version of the Italian youth justice magistrate be introduced into England and Wales? It is conceivable that it might 'work', in the sense of producing outcomes judged positive for society or individuals within it, but it is very unlikely to work in the same way'.

Saldias is much more confident about the possibility of engineered change and traces the stages by which legal change ends up producing a new coherence (at least at the level of rules). In the process of importing new ideas 'members learn from each other how to behave in such networks, and they finally impose their behaviour and convictions to the newcomers, who usually reproduce the patterns primarily because they face "liability for their newness". A consciousness develops in the sense that the laws that this networks advocate for, are a distinctive order, and they begin behaving accordingly'. Thus 'law transfer can originate all the necessary components of a slimmed-down legal culture,' and goes on, 'With the engagement of legal academia, the legal culture "light" is complete. It has become a community based on causal-beliefs about the role of the law, it has produced the necessary change, and it has crystallized them in binding case law.'

Sezgin too (speaking about different types of change and different kinds of beneficiaries) offers us his roadmap of what must happen for successful change

¹¹⁶ For Ginsburg the 'answers range from the technocratic view that law can move easily and intentionally, to the radical culturalist position that legal transfers are a contradiction in terms, and that cultural specificity of the recipient system inexorably transforms the borrowed institution.' See also Nelken and Feest 2001 op. cit. ; Harding A and Nicholson P. (2010) 'New courts in Asia: Law, development and judicialization' in Harding, A and Nicholson, P. eds *New Courts in Asia* (Routledge) :1-28 at p21 quote a participant at their conference saying that this is a 'debate done to death'. One can understand the sentiment.

to take place, 'The constant struggle between the dominant and subaltern legalities is the driving engine of socio-legal change in the society. The change—radical or incremental—can only be achieved when the dominant legality is successfully replaced by an alternative legality in the society. In this process of reproduction of legality subaltern groups will challenge the legitimacy of existing power relations and constantly offer new images and narratives of legality, through which they will redefine their rights and entitlements under the law. Oftentimes they will do that without necessarily altering the “law” or the “text” in question, but the legality built around it. '

On the other hand if culture is a toolkit (that social actors can choose when and how to draw on) how does it maintain its coherence? Silbey implies that, as in the classical sociological debates, we do not have to come down on the side of either action or structure. She tells us here that '...the system has no existence apart from the succession of practices that instantiate, reproduce, or - most interestingly - transform it. .. (S)ystem and practice constitute an indissoluble duality or dialectic.' In her account even lay people -by constructing intelligible and plausible claims to legal right out of discursive resources concerning ideas of labour, property, notice, and community consent- add new elements to law. Sezgin, writing about religious legal cultures, also takes the same approach. 'Individuals and groups' he tells us 'engage in construction of legality by drawing upon a particular strain of legal culture in the society. In other words, people can arrive at alternative versions of legality by invoking divergent strains of legal culture that consists of established ideas, religious precepts and teachings, social, cultural and moral postulates which both psychologically and axiologically influence the way people relate and react to the normative universe that surrounds them. Legal culture embodies various images and narratives of justice as well as interpretative schemas and resources (both allocative and authoritative) that not only give meaning to thought and action but also enable individuals to construct a self-sustaining holistic view of the legal and moral world by reimagining their own rights, entitlements, protections, obligations, restrictions, liabilities and disabilities under the law. Individuals participate in construction of legality through expression of their legal consciousness.'

Whatever culture represents at any given point can therefore change as a result of the ongoing actions (or inactions) of social actors. Saldias extends to this to the deliberate effort to reshape whole systems. Paradoxically their chance to transform other cultures reflects the strength of what unites their own professional cultures. As compared to the 'thick culture that Geertz seeks to fathom, 'he argues 'what holds together ('light') legal culture of legal actors 'can consist of policies and normative cores, an episteme, or a common academic or professional socialization. The actors involved 'are interested in the outcome of legal transfers, and they share a belief about what particular laws are most beneficial for their communities, and how they should be implemented.'

Can there be a universal concept of legal culture ?

The ability to change other places does not prove that we have understood them (it may often be a result of failing to do so). Assuming that we want to can we stand outside our own (legal) culture(s) in studying other (legal) cultures? How far is the idea of legal culture (or at least any given conception of it) itself a 'folk concept' rather than an 'observers' concept? If there are obviously many legal cultures are her also multiple concepts of legal culture? Once again these questions are inseparable from the others we have been discussing. For example, they link to the question of what we take to be the 'unit' of legal culture (and who decides this) . Thus Glenn, for example, sees the idea of legal culture as linked to the Western idea of the state¹¹⁷. On one view of the aims of social science, propositions are strengthened the more they are shown to be valid across different cultures. It would count as an interesting finding about legal culture if we could show that courts are given the opportunity to assert themselves mainly when political parties are unsure whether they or their rivals will dominate.¹¹⁸ The long standing rival conception of the 'cultural sciences', on the other hand, is cautious about such hypothesis testing. It insists that our understanding of other places will inevitably be coloured by our cultural starting point- and that our task is to revise this in the course of learning about how things work elsewhere.

Amongst our contributors, the Benda – Benda-Beckmanns stress the difficulty of applying the Western scholarly concept of legal culture for the purpose of explaining behaviour in plural legal systems where people can and do draw on different normative repertoires for different purposes. But they also argue that the problems they raise are not limited to such places– and that in many ways all jurisdictions are normatively plural. Merry's case- study is also of a plural and hybrid jurisdiction. But she takes this as an opportunity to test the limits of the concept and suggest ways to reformulate it to make it more broadly applicable. The most extended reference to the problem of universality, however, is found in Engel's discussion of the ideas about 'law' and society' that lie behind Friedman's

¹¹⁷ Glenn, HP (2003) 'The Nationalist Heritage' in Legrand, P and Munday, R (eds.) *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press): 4.

¹¹⁸ see e.g. Nelken's explanation for the autonomy of Italian Prosecutors and judges in combating corruption in Nelken, D (1996) 'Judicial Politics and Corruption in Italy' in Nelken, D. and Levi.M (eds.) 'The corruption of Politics and the Politics of Corruption ' in 23 *Journal of Law and Society*: 95-113, and Ginsburg's analysis of the conditions of independence of constitutional courts in Ginsburg T. (2003) *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge University Press. On the other hand, Harding in 'The constitutional court of Thailand 1998-2006: A turbulent innovation' in Harding and Nicholson, eds. *New courts in Asia*, op. cit. 121 -144 at I36-137, shows that such generalisations can be difficult to apply to specific case studies– except retrospectively.

categories of internal and external legal culture (ideas that are widely shared in mainstream work on social science and law). 119

There are problems, Engel tells us, in using this distinction even in western societies. Socio-legal scholars know very well that this sort of spatialization of law is a metaphor that may bear little relationship to law as it actually behaves and is experienced in everyday life. As he argues, 'It is often difficult to say that any given person, event, or activity is inside or outside the law. Even within the solid walls of a courthouse, much activity takes place that could be considered 'outside' the legal system'.¹²⁰ But for him, Friedman's idea of legal culture is especially unhelpful when dealing with countries with strong religious cultures such as Thailand.¹²¹

Instead of accepting Friedman's own view of internal and external legal culture as neutral analytical categories Engel instead offers a cultural reading of them.' Two aspects of Friedman's imagery' he tells us, are particularly noteworthy. First, law is spatialized. It has an inside and an outside, and legal culture forms a kind of membrane between the two spaces. Second, the internal space is dead, desiccated, and inert. It is a place of bones without flesh and words without life. By contrast, the external space is alive, vital, and active. Outside the law, one

¹¹⁹ Questions about the wider applicability of the distinction between internal and external legal culture have also been raised in the past. Erhard Blankenburg, for example, implied that Lawrence Friedman's ideas about legal culture is modelled on ideas about what is supposed to happen in the common law world with respect to public community influence over law/ state in as opposed to the continental European world. And, of course, arguably, the same applies in reverse to Blankenburg's effort to show that legal culture depends on institutional supply, something which makes more sense against the background of continental European approaches to the law and the state. Engel's critique is more radical than Blankenburg's. The problem discussed by Blankenburg had to do with the causal priority to be given to the internal or the external. For Engel, it is the distinction itself which is a product of a local legal culture.

¹²⁰ Silbey likewise points out, 'Non-professionals acquire training to enter the law, while untrained people participate in the legal system as litigants, witnesses, juries, audiences for court TV, and citizens voting for legislators, as well as compliant or criminal members of a society. Social movements such as the battered women's movement or the pay equity movement call on the symbolic resources of the law (even when they do not actually use legal strategies).

¹²¹ See Engel, D (2005) 'Injury Narratives: Globalization, Ghosts, Religion, and Tort Law in Thailand' 30: 3 *Law & Social Inquiry*: 469-514, and Engel, D. and Engel J.S. (2010) *Tort, Custom and Karma: Globalization and Legal Consciousness* (Stanford University Press).

finds life forces that act like water in the desert and bring to life the otherwise barren world of law.' Referring by contrast to the approach taken by the noted anthropologist Clifford Geertz, Engel points to 'Friedman's circumscribed view of law as a dusty, entombed skeleton versus Geertz's broad and unbounded view of classical Indian law as sun and cattle! 'Friedman's colourful imagery of law and legal culture', he argues, 'presupposes a pluralism of legal and normative spaces, whereas Geertz's description of Indian law presupposes the opposite – a unity of law, government, culture, and belief.'

Whereas Friedman is seen as offering a value-free 'scientific' approach to legal culture,¹²² for Engel his concern with law having an 'inside' and an 'outside' is itself a reflection of the 'project' of modernity, aimed inter alia at securing liberal legalism and secularism. Friedman's conception of legal culture is itself linked to the aspiration to keep politics and economics subservient to law as well as the value of civil society playing its proper role as the source of the legal. Maintaining the metaphorical separation of inside and outside, and thereby affirming the 'relative autonomy' of law, is central to the project of modernity'. As compared to theocratic societies, this is crucial because the theory of modern law 'presupposes that no one group in the society has a privileged access to religion and moral truth,' and therefore the proper role of law is to establish a secular and neutral 'process for conflict resolution' rather than to endorse one set of cultural practices or religious beliefs over another. 'Engel thus accuses Friedman of being ethnocentric, parleying a local concept as if it was a general one.

According to Ginsburg, on the other hand, Friedman is only speaking about the effects of 'modernity' on law and intends his ideas about legal culture to be applicable only to modern societies. As he puts it 'Friedman argued that access to justice only becomes an issue when one accepts the peculiarly modern notion 'that there is, or ought to be, a single, uniform, universal body of norms; that every citizen—every man, woman, and child—regardless of rank, social status or income must be able to enjoy the protection and the privileges of that body of norms. Most law, in most times and places, has been hierarchical, and thus there is little demand for 'access' until a liberal regime starts to take hold.' Likewise, his argument about the spread of a global legal culture is again an empirical claim (one subject to testing), a description of a trend towards convergence, not a normative ideal. His most recent book on the sociology of human rights stresses the role of modernity as the vector of social change. Even if there may be 'multiple modernities' for Friedman the similarities seen in developments in the economy and infrastructure are more important than the differences. ¹²³

It is thus debatable how far Friedman's distinction carries all the 'liberal legalist' implications that Engel attributes to it, especially given Friedman's abiding concern precisely to deny law's autonomy so to show that it is what lies outside the law that actually animates and shapes it (as Engel himself concedes). What

¹²² Though Friedman has always been aware that socio-legal studies lies on the border between the sciences and the humanities, see Friedman, L (1985-1986) 'The Law and Society Movement', 38 *Stan. L. Rev.* 763

¹²³ Friedman, 2011 id..

Friedman does claim is the spread of common cultural ideas about individual rights – which law increasingly embodies in cross-national legal prescriptions. A sense of this process can also be gained when reading the papers on China and Japan here which criticise the degree of protection of women and children currently offered in these jurisdictions. In part the authors tie their analyses to an ‘internal critique’ of what these legal systems claim to stand for. But they also hold them to ‘universal’ standards enshrined in international documents.

The methods that these authors use are perhaps more legal than social scientific. But, for the student of legal culture, there may also be reasons to be cautious about apparently more ‘scientific’ forms of measuring progress towards compliance with human rights standards. Certainly, these enterprises (seek to) create as much as index common legal culture. As Sally Merry has written elsewhere, ‘Recent efforts to measure law and the rule of law by international financial institutions and NGOs such as the World Justice Project are currently grappling with ...problems.. of incommensurability and a lack of data. They are also struggling with how to develop universal categories for comparison while recognizing the importance of local knowledge. ‘124

So, as this suggests, we may also need to be cautious about the supposed universality of social science methods for studying legal culture when applied across different cultures. If we do not make allowance for cultural differences – for example with respect to expectations about saying and doing or the making and enforcing of laws -we can easily misinterpret our findings. In the case of the contributions to this volume we can ask what it means to say (as Hertogh does) that almost as many people in Italy as in the UK (86.9 %to 92.7%) endorse the view that it is ‘not alright to break the law if you do not agree with it provided you are careful not to get caught’. Is this really a measure of legitimacy or an indication of what respondents thought they were supposed to say? Does it tell us what people believe should be the case or what they think is actually the case? Much turns on what the statement and the reply mean in different cultural contexts. Hertogh is careful to say that qualitative methods would be needed to supplement his survey research. But how the two types of approaches should be put together in such enquiries is another matter.

Like other key sociological terms any characterization of culture can either attempt to keep analytical distance from or to grasp folk concepts. Susan Silbey and Patricia Ewick on the basis of their research in the USA have argued that legal consciousness refers to a limited set of narratives that ordinary Americans have about the law, which they characterize as “before the law”, “with the law”, and “against the law”.¹²⁵ These represent three distinct schemas, or cognitive maps, through which individuals see themselves in the world. They are ways of understanding how the law works with relationship to the self. Any person may have more than one schema, deployed at different times depending on the situation. Whilst such an approach excites interest amongst scholars in

¹²⁴ Merry, S. (2011) ‘Measuring the World: Indicators, Human Rights, and Global Governance’, *Current Anthropology* 52: 583-595.

¹²⁵ Silbey, S. and Ewick, P. op cit.

continental jurisdictions a focus on studying legal consciousness bottom -up is currently less common there.¹²⁶ Does this mean that looking for legal culture in public surveys itself presupposes a common law, bottom- up, approach to legal institutions?

To this it could be replied that it can be illuminating to try out such an approach even where it is less familiar. Blankenburg, as we have mentioned, in his well known comparison of Germany and the Netherlands downplayed the importance of 'folk' legal consciousness assuming that popular culture and demands on law in both places would be similar¹²⁷. Hertogh's survey data reported here puts this assumption to the test and shows that there are real differences between public attitudes in the two countries so that folk consciousness would seem to matter more than Blankenburg assumed. On the other hand, in her comparative study of a number of jurisdictions, Kurkchian's research (in both common law and continental jurisdictions) provides evidence that different public expectations of the courts are themselves tied to what official ideologies tell them to expect. All this is proof, if any were needed, that we still have much to learn about what shapes and is shaped by legal culture.

¹²⁶ Translating Silbey and Ewick's work in other legal cultures is no easy matter. I have been told recently that some French scholars have been working for a year trying to make a satisfactory translation of one chapter

¹²⁷ Blankenburg, 1997 op.cit.