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Culture, comparison, community

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Abstract

This article proposes a response to legal scholarship's recent concerns with the complexity of law's relations with culture, looked at from a sociolegal point of view. It argues that legal studies today must have a comparative dimension, and that they should contribute to an understanding of law in relation to culture, or as a cultural phenomenon. But there are problems with culture as a legal concept (or a social scientific one). Also, many long-established sociolegal ideas about 'law and society' are becoming obsolete. A way forward is to relate law to four pure types of community that interact in complex ways in social life and, together, embrace the various dimensions of culture. The article claims that a law-and-community approach to legal study clarifies law's relation to culture, and provides a framework for comparative studies of law.

1. Culture

What can an English legal scholar, with an almost entirely European social and legal experience, hope to contribute to a realistic discussion of legal studies in a country with a profoundly different culture – for example, India? The challenge is to try to find a way of bridging cultures through legal and social theory, legal and sociological scholarship. It is also to find a way of talking about culture that is neither vague and merely impressionistic (like a tourist), nor misleadingly dogmatic so that complex communal ways of life are labelled 'cultures' as if they were monolithic and uniform, and irreducibly different from other cultures. On the one hand, there is a danger in using the concept of culture in a way that assumes an inevitable similarity between people who are different in important ways. On the other, the danger is in assuming an irreducible difference between the 'other' and 'us', when in fact much may be shared and bridges of understanding can be built that make culture highly 'porous' – open to cross-influence, mutual learning, recognition of commonalities, and inter-group translation of experience, beliefs, aspirations and attachments.

This article's aim is to outline a theoretical framework that might be helpful in addressing some of the complexities of culture in social studies of law. It presents ideas about culture, comparison and community in law at a fairly high level of abstraction. But my hope is that the ideas are broad enough and sensitive enough to have some local resonance, and that they may be criticised and tested to explore their applicability for legal studies in specific contexts. Certainly, they are grounded in traditions of social theory that are almost entirely western. Although the ideas in this article reflect a strong interest in comparative legal studies and legal history, I know that they cannot entirely escape the predominantly English common law experience that has shaped their author.

All of us inhabit cultures that, in part, we are aware of. But, in part, insofar as culture forms us and makes us who we are, we are not conscious of it. To understand culture it is necessary somehow to step outside ourselves, observing ourselves participating in life, and up to a point this is possible. Observation and participation cannot ultimately be separated. We necessarily observe the situation

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in which we participate, while we participate in it (like a lawyer who, arguing a case in court, watches the judge and other participants and gains useful knowledge from observing their behaviour). And we often participate in order to observe. This may be a virtual participation (as in the empathetic understanding that a Weberian sociologist needs in studying social action) or it may be actual participant observation, which all of us do all the time if we are curious about social life.

The point is that cultural translation is very difficult, but not impossible. In getting to grips with culture (which, this article will argue, is a crucial aspect of legal studies today), there is no sharp line to be drawn between observation and participation, insiders and outsiders, internal and external viewpoints. The concept of culture becomes dangerous when it is used to draw those lines of demarcation, presenting them as fixed rather than infinitely fluid and dependent on standpoint and perspective. In other words, culture must not be treated positivistically, as a 'thing', a 'social fact' in Emile Durkheim's (1982) sense. One of the hardest challenges for legal studies today is to decide how to deal with the idea of culture, integrating it into legal thinking but avoiding the kind of reification that treats culture as monolithic, a causal factor in itself, or an explanation of legally relevant behaviour (as, for example, in the use of 'cultural defences' in criminal law and other legal fields: see Renteln, 2004). Later in this article some suggestions will be made as to how this problem can be avoided.

But is culture really important in legal studies? Legal positivists have long assumed that it is not. Law, in their view, may derive both coercive power and legitimacy from its link to the state (or, in the Austinian version, the sovereign), and the question of state authority is seen as one for political theory; otherwise law is to be understood as a system of norms of rules that regulate their own creation (Hart, Kelsen) – law is portrayed as normatively autonomous and self-standing. If culture relates to law it is, on the legal positivist view, a professional culture: the culture (in this case the values, traditions, allegiances or interests) of legal 'officials' who accept a rule of recognition, or the existence of a basic norm. But even in western countries, where an assumption of law's isolation from culture has long had currency, this assumption is becoming increasingly untenable. Law is now seen, even in lawyers' doctrinal writings (not just the writings of legal sociologists or legal anthropologists), as related to culture in many ways.

The following are a few examples. Comparative lawyers invoke the concept of legal culture in referring to the fact that it is not only rules that must be compared between legal systems but also ways of 'doing' law, practising, invoking and developing it. If law is changing more quickly than ever before in many countries, the forces behind legal change need to be understood. Culture may be a good concept to use in addressing these matters. The study of rules alone may give little real assistance in understanding law in flux.

At the same time, literature on globalisation often suggests that law moves easily from country to country, and across national boundaries. Law is seen as the 'camp follower' of transnational economic and financial development.[1] Law is often assumed to be straightforwardly instrumental in character; a mere technical device. In this context, ideas of legal culture (for example, relating to the organisation of transnational professional legal practice)[2] are sometimes convenient in referring to sociolegal conditions that facilitate globalisation. But legal culture can also refer to local ways of practising, using and thinking about law that operate as factors of resistance to globalising trends and harmonisation of law (see, e.g., Legrand, 1999).

Culture is important also, in western countries, as a legally relevant idea in considering the legal challenges and possibilities of multiculturalism, in issues such as the recognition of

1 Cf. Barber (1993, p. 119): 'Law has always been the destitute camp follower of the itinerant armies of transnationalism.'

2 See especially Dezalay and Garth (1996).

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polygamous marriages in monogamous cultures (e.g., Shah, 2005, Ch. 5); varied practices of marriage and divorce (e.g., Murphy ed., 2000, Chs. 4 and 5); the legal recognition of minority religious or traditional practices (e.g., Shadid and Van Koningsveld, 2005; Freeman, 1995); the use of 'cultural defences' against criminal and civil liability, as mentioned earlier; and the protection of 'cultural heritage'.[3]

I have not defined 'culture' here. The examples given earlier suggest many different meanings of the term – and that is this article's first major theme. *Culture does not refer to a single idea that is analytically useful in legal studies.* This does not mean that culture is unimportant – quite the opposite. It is vitally important as a matter for legal scholars to take into account. But it refers to many disparate elements – different kinds of social bonds and experiences. They need to be separated analytically. Otherwise, in talking about culture we are sometimes talking about religion or other belief systems; sometimes about traditions and customs that may be entirely secular; sometimes about material culture (levels of economic well-being and technological development); and sometimes about emotional ties (for example, to nation, to kinship group, to communal goods such as music and other arts, to shared memories, etc.) as well as emotional hostilities (to 'other' nations, races, religions, ethnic groups, etc.). It is impossible to make much progress in relating law and culture systematically without separating these different elements that may pull against, as much as reinforce, each other.

2. Comparison

Before considering how this separation of elements of culture might be achieved, it is important to say more about changes in legal studies in general that are making the relation of law and culture increasingly significant. One important consequence of these changes is, I think, that comparative legal studies are becoming much more central to legal scholarship. Comparative law as a scholarly field has served many functions,[4] but its dominant practical roles in western countries have been as a technical aid to improve national law, and as a servant of efforts to unify or harmonise law between nations, or to aid legal communication between them, especially in the interests of facilitating commerce. The dominant idea in much comparative legal scholarship seems to have been to seek similarity in law, to get rid of obstacles of legal difference that hamper legal interaction between modern nation states. Alan Watson's influential writing on legal transplants relates, in part, to this orientation. For him, comparative law is concerned with studying how particular legal systems develop by borrowing legal ideas from other systems (Watson, 1993). The focus is on integrating legal ideas in unified legal systems, not on recognising differences between laws in different systems.

Some recent writers such as Pierre Legrand (1999) and Vivian Curran (1998) have, however, advocated that comparative law should recognise, respect and even protect difference.[5] What kind of difference? There seems no obvious reason to celebrate difference in positive law as such. For the new 'comparatists of difference', the focus is on recognising, even celebrating *cultural difference*, focused on law. Thus, legal culture becomes, in this kind of comparative legal study, a central idea – referring vaguely to the entirety of ways of practising and thinking about law in a certain environment. It seems to point to the range of values, traditions, allegiances and collective interests that surround and inform law in a particular time and place. Legrand, however, talks of legal culture in terms of

3 For fuller discussion and other examples, see Cotterrell (2004).

4 For an indicative summary, see Cotterrell (2003a).

5 In Jacques Vanderlinden's (2002, p. 166) view, the task of comparatists is to 'try to "understand" the Other, in space and time, as deeply as they possibly can'.

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mentalités – outlooks, ways of thought, legal world-views – a notion that seems to retain the usual imprecision of the term culture, but may not indicate the full range of matters which, as seen earlier, this term can address.

Why is comparative law becoming central to legal scholarship? First, globalisation (if hard to define uncontroversially) is a reality affecting law in many countries. Even if law is merely a technical instrument, a camp follower of globalisation, the building of globalised technical law and the adapting of local legal variation to transnational demands for uniformity require comparative legal expertise. But the links already suggested between law and culture show that law is more than mere technology. Globalisation creates situations where law is an object of struggle, a prize to be fought for in cultural wars around globalisation. Multinational corporations, nation states and the 'itinerant armies of transnationalism' in commerce, finance, intellectual property and other fields, devote much attention to ensuring a favourable legal climate for the pursuit of their projects abroad. For the foreseeable future, that involves drawing on certain kinds of comparative legal expertise. And, as population flows make ethnic and religious diversity commonplace in nations that once thought themselves unproblematically homogeneous, the need to think of law and culture pluralistically makes comparative legal studies important (Demleitner, 1999). In legal theory, feminism, critical race theory and other developments symbolise the fact that the professional interpretive communities of lawyers are becoming much more diverse, especially in countries such as Britain and the United States.

What all of these indications add up to is the recognition that neither legal systems nor societies can be thought of as unified and integrated in the way that western legal thought has often assumed. A comparative legal perspective is no more than the systematic recognition that law is always fluid, pluralistic, contested and subject to often contradictory pressures and influences from both inside and outside its jurisdiction; that it reflects an always unstable diversity of traditions, interests, allegiances, and ultimate values and beliefs. If the comparative perspective on law was once a view of the exotic legal 'other', or of the 'external relations' of one's own law with the law of other peoples in other lands, now it is a view of transnational legal patterns and of the cultural complexities of law at home. We live in conditions where the law of the nation state must respond to a great plurality of demands from different population groups within its jurisdiction. At the same time, it must respond to powerful external pressures. Legal thought in national contexts is being fragmented *from within* in a new 'jurisprudence of difference' (Cotterrell, 2003b, Chs. 8 and 9), and globalised *from without* in demands for transnational harmonisation or uniformity.

Comparative law today is thus concerned both with seeking similarity (legal harmonisation, or unification) and appreciating difference (between legal ideas, practices, systems and experiences). Similarity is often sought on the level of positive law and with the assumption that law is an easily transferable or changeable technical instrument. The problem of adaptation is seen as essentially a technical, juristic one. But this assumption is mistaken. It applies only to those problems of regulation that are essentially instrumental in character, yet constitute only part of the responsibilities of regulation. Legal positivist or functionalist approaches, which have dominated unification or harmonisation movements among comparatists, are appropriate mainly to those kinds of law that are essentially concerned with instrumental relations (e.g., contract, commercial law). They lack the resources to address regulatory problems that bear on some other aspects of culture.

On the other hand, when comparative law seeks to appreciate legal difference – usually explicitly invoking ideas of culture or legal culture to do so – it runs up against the problem that this article has already identified: that culture is not a single thing, that it is a vague term referring to an indefinite range of aspects of the social. It lacks analytical utility and rigour. So, there is no alternative but to break culture down in some way into elements that can be treated rigorously for the purposes of legal analysis and sociolegal inquiry.

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3. Community

In December 2004, in Britain's second largest city, Birmingham, a play staged at its main theatre caused riots. The Asian playwright Ash Kotak wrote

> '*Behzti* (meaning *Dishonour* in Punjabi), the play that caused violent clashes between Sikh protesters and police in Birmingham at the weekend, was closed yesterday. With its scenes of rape and murder taking place within a Sikh gurdwara (or temple), Gurpreet Kaur Bhatti's play offended a vocal conservative group within the [Sikh] community . . . The playwright should only have to answer to his or her conscience . . . But the play comes at a particularly sensitive time when religious people from all quarters feel threatened – both by what they perceive as the moral breakdown of society and by others' accusations of religious fundamentalism.' (Kotak, 2004)

The writer of the play, a British Sikh herself, critical of aspects of life among Sikhs in the UK, especially those affecting women, was forced into hiding by death threats after the play's opening. The issue of respect for religion was prominent in public discussion of the play and its consequences. So also was freedom of speech, treated as a fundamental value of British society as a whole. Reports dwelt on the sensitivities of minority groups, and also on tensions between different generations of the British Sikh community and between conservative/traditional and progressive/modern sections of it. Meetings were organised between community leaders and concerned artists to discuss freedom of expression. Leading theatres across Britain backed proposals to host readings of the script to demonstrate support for the author's right of artistic expression (Dodd et al., 2004).

One feature of the public debates around this painful episode is particularly relevant to this article: the very weak identification of the various *constituencies* or communities involved. There was much talk of the Sikh community, but also a hazy recognition of fundamental divisions within it. There was, in the debates, the implication of a national community united in support for the value of free speech, as well as a more professionally concerned theatrical community. There was the hint of a feminist constituency, perhaps within the Sikh community but perhaps including some Sikh women along with others of different faiths or none. Ash Kotak's report, quoted above, implies the existence of a community of religious people, from all quarters, with a stake in society's moral well-being; and also the idea of society itself (unspecified in nature or scope) which may or may not be threatened with moral breakdown. Is 'community', which is invoked so often in these debates, no less opaque, vague and slippery a concept than 'culture'?

Used in this way, the answer is clearly yes. It is unsurprising that nothing conclusive arose from all the newspaper coverage and discussion between various groups after the Birmingham disturbances. Not merely did the constituencies remain undefined, but (partly as a result) the issues remained not clearly distinguished so that they could not be addressed systematically. Some issues were about values and beliefs (the integrity of the Sikh religion, the value of free speech); but there were also questions about gender relations (raised by the play) and about traditional allegiances and customary ways (the changing character of the Sikh minority; the place of minority groups generally in British society). In addition, there were economic and professional interests at stake (the concerns of theatres, actors and playwrights to be able to pursue their work profitably). No doubt other matters could easily be identified.

But, with significant adaptation, the concept of community could be used in a more rigorous way, separating the various kinds of issues and groups indicated. Just as a culture should not be thought of as a 'thing' in positivist fashion, neither should a community. Community indicates a web of understandings about the nature of social relations. It 'exists as something for people to think with' (Cohen, 1985, p. 19) in making sense of social relations and their place in them. But these

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understandings are part of social relations themselves, not separate from them. They constitute social relations in different ways. Community entails that social relations have positive meaning for the participants in them, so that people experience a sense of bonding and mutual interpersonal trust of some kind. Social relations of community have some continuity and intelligibility for those who participate in them, and this ongoing character of the relationships can be identified also by other people who are outside them.

Some sociolegal theorists, notably Georges Gurvitch, have gone to great lengths in categorising numerous kinds of social relations of community (he calls them forms of sociality) expressed through law or addressed by law (Gurvitch, 1947, Ch. 2). But legal theory needs to classify only a *minimal* number of types of community. These can then be considered practically in the contingent ways they combine in actual social life. Isolating this small number of irreducible types of community enables us to ask whether each of them has some special features that law necessarily addresses differently. Do different types of community entail different types of legal regulation, or different challenges for law? In general, I think the answer is yes.

Following this approach, it is possible to distinguish just four abstract types of community: instrumental community, community of belief or values, traditional community and affective community (Cotterrell, 1997). The Birmingham Sikh protests case revealed a *community of belief* among the religious believers involved, as well as among others united by their common commitment to ultimate, overriding values of free speech. It also showed the power of *tradition* which, in some respects, united the Sikh minority, but in other respects divided it generationally. Traditional community refers to social relations based on common experience, environment, history, language or customs. *Instrumental* community is the community formed by people engaged in common or convergent projects or purposes, often economic but not necessarily so. In the Sikh case it is represented in part by the common concerns of those engaged in theatrical work to be able to present plays and perform them. *Affective* community is community based on purely emotional ties (or, sometimes, hostilities). Negatively, it may be a type of community based on dislike or hatred of others. Positively, it is based on affection for those with whom one identifies.

A warrant for separating these four types of community lies in a direct adaptation of Max Weber's sociology. Weber (1978, pp. 24–26) identifies four basic types of social action,[6] irreducibly distinct from each other and comprehensive; he claims that they underlie all social patterns, structures and institutions. The four types of community directly reflect Weber's types of action. Like them, they are ideal types. That is, the types of community are not found in pure form in reality, but are combined in many ways in the patterns of social association in which people live. These combinations can be called networks of community.

How can this idea of community help practical legal inquiry? First, a law-and-community approach frees sociolegal inquiries from the old paradigms of 'law and society' or 'law in society'. Unfortunately, for lawyers and most sociologists, 'society' has come to mean mainly the politically organised society of the nation state. But transnational law, now developing in many forms, must relate to social environments (networks of community) that extend beyond or across nation state boundaries. Equally, pluralistic views of law and culture, discussed earlier, suggest that law needs to be related systematically to diverse social groups and networks in national societies. These groups and networks are linked by aspects of common culture, but by using the typology of community it becomes possible to break down the elements of culture into bonds of shared beliefs or values, bonds formed around common projects, bonds of shared history, customs or experience, and bonds of emotional allegiance. The webs of culture are woven from these distinct and sometimes conflicting elements.

6 Weber's types of social action are 'instrumentally rational', 'value-rational', 'affectual' and 'traditional'.

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Thinking in terms of law and community is not inevitably conservative or reactionary. Instrumental community almost always looks towards change, achievement and development. It aims at building something new. Traditional community, by contrast, looks towards roots, stability, the familiar, the tried and tested, the customary or the habitual. Affective community, based on pure feelings of attraction or repulsion, is often volatile (Weber thought purely affectual social action was not susceptible to rational interpretation). Community of belief or values can be revolutionary or reactionary, evangelical or fundamentalist, open or dogmatic, tolerant or censorious, stable or unstable. This variety combined in different ways in the types of community also suggests that regulatory problems of community are likely to vary considerably from one type to another. It also suggests that networks of community (combining these types) will often show contradictory regulatory requirements or demands.

Much more work would be needed to identify in a theoretically adequate way the different regulatory challenges posed by these different abstract types of community.[7] Nevertheless, it is possible to make tentative suggestions – exploratory or indicative rather than comprehensive – about relations between modern state law and the four types of community.

There seem good grounds for suggesting that, of these four types, *instrumental community* is usually the easiest to regulate legally. Law regulating common or convergent projects – for example, business enterprises and transactions, trade and financial institutions and other economic networks is usually itself instrumental in character. It often addresses narrowly defined social relations, limited in scope (focused only on the project, deal or enterprise). Sometimes these relations are strictly limited in duration too, lasting only until the project is completed or the deal is fulfilled. Law in this setting may well be the 'camp follower' of globalisation: seen as relatively unproblematic and effective because strictly limited in social aim and scope. Comparatists usually see commercial or contract laws as the types of law easiest to harmonise or unify (Bonell, 1995) or transplant (e.g., Levy, 1950).

On the other hand, systems of values or beliefs are notoriously difficult to define conclusively and so to make the object of direct legal regulation. Thus, *community of belief* is legally problematic. The integrity of religious doctrine is, for example, always at risk from diverse interpretations, schisms or heresies. It can be conclusively defined only when it has authority structures at least as strong, and probably stronger than those of state law (for example, expressed in terms of the 'infallibility' of certain religious leaders in making rulings or issuing interpretations or edicts). State law, as such, can only make rules that *imply* ultimate values; that is, it can create structures of rules that can be plausibly interpreted as collectively expressing these values. But there will usually be room for debate and, because the debates focus on beliefs or values that are objects of commitment, disagreements may become bitter or violent. Even if almost everyone, for example, supports the sanctity of human life as an ultimate value, people may disagree as to whether an unborn foetus is such a life, or whether there is a point at which this value no longer holds when quality of life has deteriorated beyond a certain point (as in cases of patients in a permanent vegetative condition).

This does not mean that state law can or should have no concern with supporting certain values or beliefs. The problem is to recognise the limits in which it can do this and the wisdom of avoiding legal pronouncements on some value controversies. At the same time, it is necessary that, in complex, pluralistic modern societies, law should, on the one hand, firmly defend the right of communities of belief to exist and flourish and, on the other, no less firmly defend as 'universal' the values of personal dignity and autonomy that are essential for all individuals of whatever creed (or none) to co-exist peacefully and with mutual respect.[8] Human rights law is especially relevant,

7 For some exploratory studies see Cotterrell (forthcoming, 2006).

8 On this theme, see Selznick (1992, Ch. 4).

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today, to these kinds of legal tasks. But the types of community do not correlate neatly with juristic classifications of law.

Traditional community was associated above with a focus on roots, custom, and familiar ways. Boaventura De Sousa Santos (2002, pp. 177, 296) speaks of 'rights to roots' as well as 'rights to options' as being demanded in the contemporary world. Globalisation makes some people and organisations more mobile than ever; they may be established in one country or several, invest in other countries, and own property or trade in yet others. For these actors, rights to options (unfettered movement) are a priority. But many people – the majority of the world's population – are not easily mobile in this way. Law is faced with demands to protect conditions of co-existence in which people find themselves living, whether by choice or not: traditional locales, practices, languages, physical and social environments. Law's most basic task in this context (performed usually mainly by criminal and tort law) is to prevent the frictions that arise as a result of mere proximity to others.

In some respects this is relatively simple law. Like law protecting and promoting instrumental community, law protecting basic conditions of co-existence has a limited, narrowly defined, even straightforward social task. It is surely no surprise that the most basic aims of criminal and tort (delict) law are not strange to most citizens in many countries. On the other hand, legal conditions of basic co-existence are becoming increasingly complex and contested: local communities seek to defend their local environment against the ravages of commercial exploitation or pollution from outside. Conversely, global environmental concerns (for example, about rain forests or endangered animal species) are pitted against local needs to exploit natural resources in order to provide a means of livelihood or to increase local prosperity. The specific dilemma for law in relation to traditional community is not so much how to devise means to protect rights in this community as how to define the *arenas* of co-existence. In one sense, these arenas are enlarging with globalisation – people are increasingly aware of world-wide common concerns with physical security and with the ecological health of the planet. At the same time, distinctive local environments seem more precious as global forces foster a bland uniformity in the conditions in which people live.

Of all the types of community, *affective community* may be hardest to regulate by state law. Social relations based purely on emotional attachment (or rejection) are very difficult to analyse in legal terms, since law requires precise rules and binding definitions of the meanings of actions and situations. For example, lines between consensual sexual intercourse and rape, between invited intimacy and assault, between attraction and repulsion, are clear in theory, but in practice may be established and moved in ways that law is powerless to rationalise. Law directed against racism or religious intolerance may be faced with levels of bigotry that it simply cannot counter with reason or with normal sanctions. In regulating social relations powerfully shaped by emotion, law seems often to work by indirection, addressing not the unfathomable relationship itself but action resulting from it or demonstrable conditions of domination or vulnerability created through it.

4. Conclusion

A law-and-community approach gives basic theoretical resources for analysing law in social context today. The social universe to which law relates cannot be thought of simply as 'society', a unified, monolithic, politically organised society whose boundaries are those of the nation state. Law now is called on to express the aspirations and provide the security of nation states; of nations within states; of states and nations within larger unions (for example, the European Union); of transnational networks of business and finance; of ethnic groups, adherents of particular religions, carriers of endangered traditions and ways of life, populations in threatened environments, globally mobile entrepreneurs, social movements of many kinds; and of slowly emerging global communities united in concern for the future of the world. Such demands, in total, are beyond the capacity of any

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currently existing legal order to bear. Nevertheless, they form what will be an agenda for legal studies on a global scale in future.

This article has tried to suggest that culture is fundamentally important to law. In large part this is because invoking the idea of culture hints at many of these agenda items. Comparative study of law is the means by which legal scholarship must gradually expand its horizons to come closer to accepting this agenda. But, despite the legal significance of culture, culture cannot become a legal concept adequate to the theoretical tasks involved. A law-and-community approach, as sketched here, may be a necessary means of working towards theory that can help in distinguishing the regulatory tasks that the future agenda of legal studies will have to address.

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