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Thinking About Legal Culture

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Abstract
This paper addresses the controversial concept of legal culture. It first considers the different meanings of the term and the variety of debates in which it figures. It then goes on to consider difficulties in deciding the units to which the term "legal culture" is applied, and the problems in using the term in explanations. It concludes by examining the way assumptions about what gives legal culture its coherence have implications for explaining how and when it changes. In each section of the argument an attempt is also made to show the relevance of these questions for the *Asian Journal of Law and Society* as seen in the papers published in its first issue.

Keywords: legal culture, comparative law, sociology of law, coherence, social change

1. INTRODUCTION

The term "legal culture" is employed by lawyers, politicians, and, sometimes, (even) ordinary citizens, as well as by scholars belonging to different scientific disciplines.[1] But it is also a highly controversial one. Lawrence Friedman, who introduced the concept into the sociology of law, now describes legal culture as "a troublesome concept." He admits that it is "an abstraction and a slippery one" and that "there is a serious problem of definition." If he were to start over again, he says, he might not use it again.[2] Yet, as seen in the first issue of this important new journal, he continues to use the term, in this case so as to argue that we are now witnessing the spread of a "global legal culture"[3] that is widely accepted and is bound to spread further. Any such claim about global legal culture not only presupposes that the term has sense but that we can also point to changes in individual legal cultures resulting from its encroachment on them. Friedman's paper in fact takes as its target a recent book by David

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1. There are Chairs in Legal Culture and Centres dedicated to it in places such as the University of Girona (Spain), the University of Copenhagen (Denmark), the University of Lapland (Finland), and the University of Wuhan (China). The term is widely employed in studies of legal and social change. A recent special issue of the journal *Retfaerd* edited by Hanne Petersen was entitled "Legal Cultures on the Move" (see Petersen 2008). Likewise, a recent 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.

2. See Friedman (2006).

3. Or, more exactly, a "modern legal culture."

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and Jaruwan Engel[4] that challenged this claim by showing how legal consciousness in Thailand's second largest city did not seem to be following such a trend.

But even if the trajectory of global legal culture is controversial, the emergence of this journal is itself symptomatic of the way many countries in Asia are undergoing important processes of socio-legal transformation. What is interesting is the fact that talking about "culture" is often seen as unhelpful in studying these developments. Increasingly, both locally based socio-legal scholars and foreign commentators are unhappy with any type of explanation that relies on the alleged Asian reluctance to use law. This is now seen as representing a lazy short cut that obviates the need for genuine investigation or, at worst, a thinly disguised effort at preserving the status quo.[5] For many years, for example, scholars tried to explain why Japan was a society where lawyers, judges, and litigation were relatively marginal. For some writers the best explanation of this was a "culturalist" one that referred to specific features of how law and formal dispute processing were perceived and lived in Japan (and Asia more generally).[6] Other writers strongly disagreed, arguing that the explanation depended more on politically shaped institutional impediments to relying on the courts or other economic disincentives.[7] It seems as if the latter writers have prevailed. The interest of younger scholars now increasingly lies in describing and explaining "law and society" institutional aspects of legal change rather than arguing about cultural specificity.[8] They seek to examine empirical variables in the light of general approaches in socio-legal studies, economics, or political science taken from the wider literature.[9] Why have certain institutional changes been introduced? Where have the ideas behind them come from? Where are they intended to take the legal system and what effects have they had so far? How far do they reflect or help create social change? Claims about differences within Asia as compared to other places have to be illustrated through careful documentation of the same kinds of variation that are examined by socio-legal scholars everywhere else, and by using the same methods.

But banishing all talk of legal culture may not be an unmixed blessing. To judge by the sample of papers published in the first issue of this journal a clearer focus on the relationship between law and culture could represent a valuable route to finding a common language to understanding and evaluating differences in patterns of legally oriented behaviour. In this paper,[10] I shall first consider the different meanings of the term and the variety of debates in which it figures. I then go on to consider difficulties in deciding the units to which the term legal culture is applied, and the problems in using the term in explanations. I conclude by examining the way assumptions about what gives legal culture its coherence have implications for explaining how and when it changes. If, as Weidong Ji writes in his Foreword, "the relationship between law and society has never been more important

4. Engel & Engel (2010).

5. Miyazawa (1995) describes how the legal departments of Japanese corporations claimed that litigation would be un-Japanese.

6. See Kawashima (1963); for more nuanced approaches, see the later work of Tanase (2010) or Feldman (2006b), arguing here, as in other work, that Japanese cultural specificity can sometimes lead to more use of law!

7. Haley (1978); Ramseyer & Nakazato (1989, 1999).

8. See also Ginsburg & Hoetker (2004), who discuss the interplay between Japan's economic downturn and the increased turn to law.

9. See the chapters in Vanoverbeke et al. (2014).

10. I draw also on previous work; see especially Nelken (2012a, 2014).

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and more elusive,"[11] it can be important to clarify to what use a term like legal culture is being and may be put.

2. THE MEANINGS OF LEGAL CULTURE

When Lawrence Friedman introduced the idea of legal culture into sociology of law and legal history it was intended to serve as a "term of art," part of his effort to show that social pressures and needs shape legal change more than autonomous developments within legal tradition itself. But others do not always limit themselves to this task. Both "law" and "culture" are polysemic terms, and studies of law in relation to culture can cover a large range of topics. As Sally Merry has recently put it, "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."[12] The word "culture" has been said to be the most complex in the English language. Anthropologists have become leery about using the term because of the dangers of "essentialism" or "culturalism." Much the same applies to the term "legal." Indeed, many law professors earn a good living by discussing its highly contested meanings. Some scholars take the easy way out and use legal culture simply as a rough equivalent of legal system or to point to the specific techniques of exposition and interpretation employed by jurists and other legal actors. But whilst these ways of understanding the term are relatively straightforward, they offer little to our conceptual armoury when it comes to seeking explanations of legal change.

If this was not enough, there is also significant overlap between the idea of legal culture and what, in some places, is called the "culture of legality" (stressing the "legal" before the word "culture"). The latter 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, where state rules are systematically avoided or evaded, such as the former Soviet Union, Latin America, or the south of Italy. The point of talking of "legal culture" in these places is less to conduct an explanatory exercise and more to point to the normative goal of getting "legality" into the culture of everyday social and political life and so re-orienting the behaviour of such populations towards (state) law and/or encouraging state law to respect certain limits of action. "Law" and "culture" are words whose interpretation and definition have illocutionary effects ("this is the law," "that behaviour is inconsistent with our culture"). The term "legal culture," too, is used by judges, politicians, or others (including academics) in the course of making claims about what is or is not consonant with a given body of law, practices, or ideals, and can be as much prescriptive as descriptive. It helps constitute the facts it purports to describe or explain.

Legal actors such as judges need to work with some supposedly consensual idea of culture as a regulative ideal, even as they argue what the law requires. As Jeremy Webber puts it:

> 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

11. Ji (2014), p. 3.
12. Merry (2012).

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> 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.[13]

Because of this prescriptive quality, however, culture—and legal culture—are terms that can easily lend themselves to misuse. For Patrick Glenn, a leading comparative law scholar, 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 it necessarily implies that patterns of behaviour and attitudes are static and necessarily doomed to conflict.[14] Cultural analyses also both unify and essentialize the notion of culture, so that scholars are tempted to orientalize behaviour as foreign and irrational and ignore or downplay the importance of economic and political drivers of change. The German word *Kultur*, for instance, emerged as a defensive term used in Romantic opposition to the French universalizing idea of civilization (for which today's discourses of democracy and human rights could be considered equivalents?). For Glenn, by contrast, cultures should not be treated as "super organic," or "substantive, bounded entities," but rather seen as "shreds and patches remaking themselves."

On the other hand, critiques such as Glenn's fail to do justice to current socio-legal ways of talking about legal culture. At this time of increased export and import of legal institutions and ideas few if any scholars talk of cultures as closed, uncontested, and self-referential in the way Glenn imagines. Merry, for example, insists 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."[15] Far from assuming consensus, Friedman's well-known distinction between "external" and "internal" legal culture deliberately invites us to investigate the possibility of large differences between legal professionals and other members of a given society and emphasizes the extent to which legal change depends on larger social pressures. Friedman's use of the word culture is in fact closer to the French idea of civilization than it is to the German idea of *Kultur*. If anything, rather than the "essentialism" that so worries Glenn, the problem here is the over-ready assumption that the spread of American "horizontal" relationships and consumerism signifies that we are all moving towards a global legal culture that is based around individualism, equality, and human rights.

All of the papers in the first issue of this journal have something to tell us about the connections between law and culture (some even put this in their title). Masahiko Aoki speaks of the importance of the common knowledge that others can and do assume at ruler, organization, and individual levels. Weidong Ji tells us that it is consensus that allows markets to exist. And he looks forward to the day when the distinctive cultural systems of Asia combine Confucian philosophy with the Habermasian theory of communicative action

13. Webber (2004), p. 32.
14. Glenn (2004).
15. Merry, *supra* note 12, p. 55

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and build a new Asian order with a fundamental consensus on social values as its foundation.[16] We learn how culture helps shape the choices of Chinese businessmen,[17] the ways that cultural differences can frustrate transplants,[18] and the battles over changing legal culture that play out in China[19] and Singapore.[20] But the meanings given to culture and legal culture can be quite different. One author looks for what explains conceptions of good and bad judging in China and "the West."[21] At the other extreme, a paper seeking to explain judicial decision-making in the Philippines treats the institution of the judiciary as sufficiently similar cross-culturally so as to be able to test out (confirm) established political science findings about the determinants of judicial decisions in the US.[22]

But it is a moot point whether actual attempts to study legal culture can ever be entirely free of particular cultural or value-shaped ideas of what legal order requires. As in comparative law enquiries, a good dose of reflexivity is advisable if we are to begin to grasp how other legal cultures are different from our own. Friedman is adamant that his approach is one that advances general sociological insights, and that what he is describing is not the result of an "American" culturally shaped view of law.[23] The global legal culture he sees as emerging has to do with modernity rather than "the West" (except inasmuch as the West modernized first). But, as I am sure he would agree, even academic cultures are also shaped by local culture.[24] Friedman's distinction between internal and external legal culture has been seen as itself the product of a cultural history that values law's independence from politics.[25] The priority he gives to showing that it is external legal culture that is responsible for legal change may also sit better in common law than continental legal cultures. It seems plausible to speak of people in Thailand as relying on religion rather than law. But we may fail to appreciate how far religion has shaped and continues to shape our own institutions.[26] Do we risk imposing ethnocentric meanings when we say that the victim of an accident in Thailand feels that the "accident, in short, 'was his own fault'."[27] When we use American political science methods to understand the judiciary in the Philippines is it self-evidently correct to equate Democratic versus Republican judicial appointments with the difference between judges who have government or opposition sympathies?[28]

Should we even attempt value neutrality in using the term legal culture? Arguably, it is important to try to keep descriptive and normative meanings apart if we want to be able to examine which sorts of legal culture are conducive to creating "the culture of legality." But the exact content of the rule of law remains controversial. Sida Liu, Lily Liang, and Terence

16. Ji, *supra* note 11.
17. Chan et al. (2014).
18. Trzcinski & Upham (2014).
19. Liu et al. (2014).
20. Chua (2014).
21. Jacob (2014).
22. Dalla Pellegrina et al. (2014).
23. Personal communication by email from Lawrence Friedman (28 December 2012), commenting on Nelken (2012b).
24. Interestingly, Weidong Ji, in his Foreword to the first issue of this journal, tells us that, for him, "socio-legal studies are based on collectivism (*guanxi*)."
25. See Engel (2012).
26. Jacob, *supra* note 21, explains that Western ideas of the judge are profoundly influenced by Christianity.
27. Friedman (2014).
28. Dalla Pellegrina et al., *supra* note 22.

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Halliday's absorbing paper about the trials of Li Zhuang uses the terms "professionalism" versus "populism" to refer to the contending principles at stake (which they link to the antinomies of procedure and substance and law and politics).[29] They leave us in little doubt that liberal legalism and the rule of law requires the triumph of professionalism. But it is far from clear that these universal-sounding dilemmas mean the same thing in China as they do in the US.[30] Of course there is nothing wrong with scholars wanting to be part of the struggle for the rule of law, as well as seeking to explain them. But in that case it can be difficult to describe events without assuming that "power" and "interest" play a greater role on the side to which you are less sympathetic.[31]

3. DEBATING LEGAL CULTURE

Problems of definition lie at root of a number of different kinds of debate over legal culture. It may be helpful to distinguish these. The first concerns whether we really need the term. Given the uncertainties about its meanings, why not choose alternatives advocated by other scholars, such as "ideology," "community," "mentalities," "the legal complex," "traditions," "epistemes," "formants," "path-dependency," or even "legal autopoiesis"?[32] Certainly, legal culture needs to compete with these other possible terms. On the other hand, each of these terms has its own drawbacks. The concept of "living law," for example, only gets at part of what Friedman and others seek to explain with the term legal culture. Nor does it lend itself easily for use in comparing legal systems. Much the same is true of the concept of ideology,[33] which has the further problem that it requires us to justify giving ourselves a privileged position in describing other people's ideas. Legal tradition carries more promise. But it would be an awkward way of describing differences between societies such as the length of court delays. As far as autopoiesis is concerned, one of the purposes of using the term legal culture is to problematize the extent of legal culture's autonomy under different circumstances. But, on at least some readings, Luhmann's theory resolves this issue by theoretical fiat.

Second, there is the debate about how to make the term serviceable given its various meanings. As many authors have pointed out, if we are to make use of a term for the purpose of carrying out empirical investigations, it is important to be able to operationalize it. Can an idea that covers everything from professing culture to the culture of the professions do anything but sow confusion? Merry has recently proposed breaking up the idea of legal culture into what she calls four "social dimensions":[34]

> The first is the practices and ideologies within the legal system, the everyday way of getting things done, shared assumptions about good and bad clients, and other internal rules and

29. Liu et al., *supra* note 19.

30. The paper by Jacob in the same issue of the journal provides some clues as to why there is support in China for a different approach to judicial autonomy, and it is easy to see that "popular justice" in recent Chinese history has meant both more and less than "public participation."

31. See also Stanton's account of the consequences in Burma when religious precepts, custom, and equity were made irrelevant by legal formalism (Stanton 2014).

32. Nelken (2006).

33. Cotterrell (1997).

34. Merry, *supra* note 12.

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> 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.[35] Then there is the public's attitude towards the law—whether the legal system is seen as a source of corruption and ethnic preference, for example, or is instead viewed as an institution that offers the rule of law for all people equally, regardless of their background.[36]

"Beyond this," Merry argues, "there is the question of legal mobilization, which refers to how readily people define their problems in legal terms when they turn to the law for help. A fourth dimension is legal consciousness, the extent to which an individual sees themselves as embedded in the law and entitled to its protections. Experience with the law, both good and bad," she argues, "can change legal consciousness. It may encourage further use or may drive the litigant to avoid the law next time."[37]

For those critical of the term, however, it is this very multiplicity of meanings that makes it inadvisable to use the term.[38] The von Benda-Beckmann's, for instance, see the call to distinguish legal culture into its constituent 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 … Once legal culture is disassembled, 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, 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.[39]

A third matter of debate is where (and how) we should look for legal culture. Is it mainly a matter of attitudes and/or behaviour—or is it their relationship that matters? How far can we distinguish legal culture from political, economic, or religious culture? In what ways do these spheres interrelate? How is what is demarcated as legal culture to be related to and contrasted with other aspects of society, for example institutional behaviour or social structure? Much the same applies to drawing the line between culturally shaped behaviour and all other behaviour. Should the term be confined to irrational or, at least, value-based, action rather than purely instrumental social action? Put differently, is legal culture a matter of taken-for-granted attitudes and behaviour or also deliberate choice? If culture is defined too broadly, so as to include everything else, then it is left with nothing to explain. But if it is operationalized too narrowly, it takes on a residual quality, only to be resorted to if and when other explanations run out. For Silbey, for example, "the law operates, perhaps most powerfully, by rendering the world unproblematic. Indeed, in organizing and giving meaning

35. Merry says that this corresponds to Friedman's term "internal legal culture."

36. This can be related to what Friedman describes as "external legal culture."

37. Merry, *supra note* 12. 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 emphasizes that these are dimensions rather than distinct forms of social behaviour.

38. von Benda-Beckmann & von Benda-Beckmann (2012).

39. *Ibid*., p. 102.

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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 explains: "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."[40]

Friedman's now classical distinction between "internal" legal culture (that of legal actors and "taught tradition") and "external" legal culture (the pressures brought by social groups and social and technological change) can also be tricky to work with. How much is internal legal culture distinguishable from wider culture? What should we make of the way judges sometimes seek to incorporate lay definitions of appropriate behaviour into their reasoning? 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? The answer of course is both.

When reading discussions of whether an interpretation of a given legal culture is convincing, or not, it can often be difficult to see where definitional disagreements end and empirical objections begin. Erhard Blankenburg, for example, takes Friedman to be arguing that it is "folk" culture—in the sense of public demand—that shapes differences in legal behaviour. He tells us, by contrast, that a comparison of courts in Germany and the Netherlands shows that they have very different litigation rates even though, he argues, they have similar folk cultures. For him, therefore it is institutional and infrastructural arrangements that represent the key to differences in legal culture. In his view, "there is no legal culture outside of institutions."[41] But the opposite terms are used 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. There, those arguing for the importance of "institutions" treat this as an alternative to culture rather than as just an alternative site of culture.

More awareness of these debates could be relevant to the papers published in the first issue of the journal. For many agencies and actors, understanding the differences between legal cultures provides the key to the possibilities of success of legal transplants from one culture to another. As a recent World Bank study reported:

> Legal culture is often considered as a given feature of the local environment to which proposed legal reform projects must adapt; many argue that legal and judicial reform programs must be tailored to fit local legal culture or they will fail. Other times, the prevailing legal culture itself may be the object of reform, rather than merely a constraint. Thus, understanding the arguments related to the concept of legal culture will become increasingly important for aspiring legal reformers. Does the legal system not work well because people distrust the courts, or do people distrust the courts because the legal system doesn't work well? Is the introduction of a new contract law unlikely to have an effect because the business culture prefers informal deals with family and friends, or does the preference for informal dealing exist only because no one has yet passed an efficient contract law? These sorts of problems are not easy to resolve, especially because the causality clearly runs in both directions, and the interactions between beliefs and actions are extraordinarily complex.[42]

40. Silbey (2012), p. 137.

41. Blankenberg (1997); but see also Nelken (1997a).

42. Worldbank.org (2001), see also the commentary by Barron (2005).

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On the other hand, it has been strongly argued that the term is not helpful for trying to predict the effects of legal transplants.[43] Pragmatically, it would be fair to say that the two papers in the journal about unsuccessful efforts at transplanting in Burma and Cambodia each point to the variables that affect the capacity of resistance of local (legal) culture. The paper by Leah Trzcinski and Frank Upham, for example, offers a fascinating account of the difficulties of transplanting the idea of a land registry to Cambodia. They show that this transplant presupposed unrealistic levels of technical proficiency, social sophistication, and economic resources. But they add that it is neither possible nor necessary to answer the question of whether top-down reforms conducted by foreign technocrats are always doomed to fail.

4. THE UNITS OF LEGAL CULTURE

What unit(s) are being referred to when we speak about legal cultures—and how does legal culture help reproduce them? Evidence of legal culture can be found in different approaches to regulation, administration, and dispute resolution. It may concern variations in 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 with detailed drafting, of the place of law and fact), 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. There may be important contrasts in the degree to which given controversies are subject to law, the role of other forms of expertise, the part played by "alternatives" to law, including not only arbitration and mediation but also the many "infrastructural" ways of discouraging or resolving disputes.

Most often, research starts from what appear to be puzzling features of the role and the rule of law within a given jurisdiction. Why do the UK and Denmark complain most about the imposition of EU law but then turn out to be the countries that 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? How is it that Holland, otherwise so similar, has such a low litigation rate compared with neighbouring Germany? In the US and the UK it often takes 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 necessarily 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?

But we need to be cautious about assuming that the boundaries of legal culture will always correspond with those of a unified nation-state. This would be especially misleading where we are dealing with behaviour in plural legal systems where people can and do draw on different normative repertoires for different purposes. In addition (as Friedman's paper in the first issue makes clear), it is increasingly important to ask how global culture is shaping local

43. Gillespie (2008).

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legal culture. Legal systems have always been affected by a variety of processes of borrowing, imitation, and imposition, and nation-states have never been the exclusive or even predominant source of norms. But the insertion of nation-states into larger bilateral or multilateral structures and networks means that there is an increasingly widening gap between the (global) sites where issues arise and the places where they are managed (the nation-state). It is more and more misleading to use terms that suggest boundaries at a time when it would be more appropriate to speak of "flows."

Different kinds of unit emerge as objects and as agents of control. Instead of governments, the talk 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 rule-formulation and settlement takes place within new transnational agencies, and that these transnational public and semi-public networks substitute, to an increasing extent, for national governments. All this 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, anti-trust 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 in these latter fields are amongst those most likely to be engaged in efforts to bring about legal harmonization.

As the world is increasingly being 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. 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." On the other hand, claims about the decline of the nation-state can be taken too far. Differences between legal cultures still often track wider social and cultural patterns that roughly coincide with national political boundaries. The imposition of a common legal code and the common training of legal officials form part of deliberate attempts to achieve and consolidate national identity. Borders continue to play important instrumental and symbolic roles, not least in responding to immigration.

The recent rise of punitiveness in many Western countries, for example, has been seen as an attempt by the nation-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 neoliberal penal state. There is even some empirical basis for pointing to psychological differences in national traits in the way people relate to each other.[44] Such different, historically conditioned, sensibilities may persist over quite long periods. Even if globalization produces social and economic differentiation,[45] "increasing homogenization of social and cultural forms seems to be accompanied by a proliferation of claims to specific authenticities and identities."[46] Assumptions of necessary convergence underestimate the continuing importance of difference and resistance.

44. Hofstede (1980/2001).
45. Nelken (1997b).
46. Strathern (1995).

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In advance of empirical investigation, it can be rash to assume any necessary "fit" between law and its environing national society or culture. In seeking to chart the relationship between the global and the local, we need to focus attention on levels below and above that of the nation-state. On the one hand, there is 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 international trade, communication networks, and other transnational processes. One of the most important challenges for the student of legal culture is to try to 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. The Anglo-American model is characterized as laying more emphasis on the link between law and the economy (rather than law and the state), and its reliance on legal procedures that prioritize orality, party initiative, and negotiation inside law. But, as much as any particular feature of its legal procedure, what certainly does seem to be spreading is the common-law ideology of "pragmatic legal instrumentalism," the very idea that law is something that does or should "work," together with the claim that this is something that can or should be assessed in ways which are separable from wider political considerations.

The large variety of units of legal culture discussed by the papers in the first issue confirms many of the points that we have noted in this section. Some authors focus on large national units such as Burma or Japan. Weidong Ji points to the way that globalization can increase pluralization within the nation-state and a stress on localism. Friedman rather stresses the spread of global culture as a vector for legal homogenization. But even he admits that China may represent something of an exception. There are also discussions of legal actors and institutions such as judges in the Philippines and the US, prosecutors, defence lawyers, and the Bar Association in China. Some consideration is also given to the way law is used by actors outside the legal system such as businessmen and politicians in China, or management consultants in Cambodia.

Significantly, we learn that what goes on in given contexts often depends on the efforts by outsiders to change local culture, whether this be the direct intervention of British colonial power, in the Burma study, or, in the case of Cambodia, the more indirect, but no less telling, pressure of international Japanese, Australian, German, and Finnish experts and donors, in addition to that of the ubiquitous World Bank and the US. Interestingly, however, Trzcinski and Upham also tell us that politicians in countries like Cambodia appreciate that outsiders are reluctant to actually withdraw once they have invested in a country, however unsuccessful their reform efforts. Less is said in these studies about the way processes of comparison and standardization themselves constitute and transform units.[47] Robert Jacob speaks of China as counterposed to the (Christian) West as a product of historical processes. These have led to what he characterizes as "irreconcilable logics of Justice in action."[48] But Weidong Ji sees Asia as a

47. Nelken (2015).

48. Jacob, *supra* note 21, p. 29. His paper is also particularly valuable by showing that "we," rather than the "other," have (religious) culture. By comparison, the book by the Engels (*supra* note 4) speaks in more familiar terms of the continuing or revived influence of religion over culture beyond the "West."

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socially constructed geographical and political concept, and suggests that Europe, America, and Asia have a need to contrast themselves with this "other."

5. EXPLAINING LEGAL CULTURE

Probably the most vexing issue of all is whether legal culture can be used to provide explanations or, instead, at best, is something that needs to be explained.[49] Is legal culture the name of the question or the answer? If it is both will it not inevitably lead to circular arguments of the kind: Question: "Why do they use law that way in Japan?" Answer: "Because that is their (legal) culture!" Whilst there should be no difficulty in seeking to explain the social economic and political antecedents of given patterns of legal cultures when we seek to use legal culture itself as the explanation of such patterns, there is a serious risk of falling into tautology.

This question is often linked to the problem of what we should count as an appropriate unit of legal culture. Roger Cotterrell famously criticized Lawrence Friedman for applying 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.[50] He points out that Friedman regularly treats legal culture as an aggregate characterized by a variety of elements or traits, but he also uses legal culture to refer to one element of the whole, as when speaking of the individuals or groups who bring pressure to bear on the law to produce social change. He complained that this meant that legal culture becomes "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 knowledges of state legal systems." In consequence, 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."[51]

Sally Kenny made a similar kind of objection to the term when reviewing the second edition of Blankenburg and Bruinsma's book, *Dutch Legal Culture*.[52] 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 that this way of using

49. Nelken (2004).
50. Cotterrell (1997); see also Friedman (1997).
51. Cotterrell, *supra* note 50, p. 17.
52. Blankenburg & Bruinsma (1991).

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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."[53] Indeed, in response to this objection, Bruinsma changed the title in the next edition of the book to *Dutch Law in Action*.[54]

Patrick Glenn, likewise, tells us that what he finds particularly problematic is the employment of culture as a "holistic signifier" and also as a "variable." He 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.[55] Jeremy Webber agrees, saying: "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."[56]

But, despite the force of these claims, it is important to note that the existence of different referents for the term does not necessarily have to lead to tautology. Whilst Cotterrell is correct to argue that the units of legal culture may often not add up to a "unity," this fact may itself provide a good key to the intricacies of lived legal cultures with their mix of overlapping and potentially competing elements. Nor is the distinction between aggregates and elements 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. Whether it is appropriate to go down or up in levels of abstraction will then depend on the purpose of an enquiry, for example whether we are comparing whole societies or elements within them. 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.

The different ways of using the term, as cause or result, have also to be understood against the background of theoretical developments that have produced two rather different uses of the term culture. One, the so-called anthropological approach to legal culture, takes it to refer to patterns of law-related behaviour in given places or contexts as contrasted with other times or places. Here, the main task is explaining legal culture. The second approach is more interested in uncovering the ongoing process of meaning-making within a given society, as a way of studying legal consciousness (as well as getting "beyond legal consciousness").[57] For these investigations, legal culture comes to be seen as a source of social action.

53. Kenny (1996), p. 122. On the other hand, hers is by no means a blanket dismissal of the term. She goes 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 labour, yet in Britain, the tribunals will operate formally and legalistically and in the Netherlands, informally and flexibly."

54. Bruinsma & Blankenburg (2000).

55. Glenn, *supra* note 14.

56. Webber, *supra* note 13. But he does concede that it would in principle be worthwhile to try to establish "specific relations of cause and effect" (p. 28).

57. Silbey (2005).

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How legal culture is used in constructing explanations will also depend on the disciplinary framework in which the concept is developed and will therefore buy into a larger set of theoretical ideas about law and society and related methodological protocols. We could model our notion of 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 they do or do not use law. Or we could follow "rational choice" theory, as developed in some political science or economics approaches, although "culture" here often disappears in favour of other motivations. In line with competing approaches to social theory, legal culture can be seen as manifested through institutional behaviour, as a factor shaping and shaped by divergences in individual legal consciousness, as a pattern of ideas that lie behind behaviour, or as another name for politico-legal discourse itself. 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.

In practice, what is taken to be legal culture will vary with the empirical 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. But we should not forget that participants themselves are not always aware of crucial features of their own legal cultures. Many Americans are convinced that their system of negligence law regularly produces excessive and undeserved awards, though it turns out that, in large part, this impression is one that is manufactured by the media.[58] Those societies where legal professionals express least concern for what Anglo-American writers call the "gap" between the "law in books" and the "law in action,"[59] may not be those where the gap is least problematic but those where the gap is overwhelming. In such cultures it may just be taken for granted that law is more of an aspiration than a guide to what is actually likely to happen.

The papers in the first issue of this journal show the range of possible uses of the term in explaining socio-legal behaviour and social and legal change. Some are more interested in "internal legal culture," others in "external legal culture." Whereas some papers identify culture and legal culture as something to be explained, others treat them as tools for explanation. On the one hand, the paper by Jacob seeks to explain differences in what is expected of judges in China and "the West."[60] On the other, we learn how the choices of Chinese businessmen are shaped by their culture,[61] and hear about the conditions that affect the extent to which formal legal rules do and do not create institutions.[62] The papers draw on a range of different disciplines including political science, sociology, and legal history. There is a particularly clear contrast in part between those who use legal or legal historical analysis, and those who use social scientific tools to examine institutional behaviour or the causes of social change. The study of gender structure and lawyer stratification in Japan by Mayumi

58. Haltom & McCaan (2004).
59. Pound (1910).
60. Jacob, *supra* note 21.
61. Chan et al., *supra* note 17.
62. Aoki (2014).

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Nakamura applies the normal socio-legal paradigm that would be used in the US or elsewhere,[63] and it is this strategy that allows it to show the specificities in the Japanese situation. The same applies to the paper by Lucia Dalla Pellegrina, Laarni Escresa, and Nuno Garoupa that seeks to understand the determinants of the decisions of Supreme Court judges in the Philippines, where the authors find that outcomes are not really different from those found in the US.

6. COHERENCE AND CHANGE

We come, finally, to the most ambitious claim made for the term legal culture. Whatever virtue there may be in recognizing cultural variation in how law is thought about, and its ascribed and actual role in social life, the real goal for many writers is to understand social change and ensure that reforms are successful. Amidst all the effort to improve the efficiency of legal institutions in developing countries, for example, it can be very relevant to stop and consider that, in legal culture terms, 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 with indifference or hostility.

For those working with the idea of legal culture it is the strain to coherence—the idea that aspects of law-in-society come in "packages"—that "explains" or helps makes sense of continuities in patterns of ideas and practices over time. By implication, therefore, it also provides the clue to the possibilities of change. But this raises a number of further questions. What is it that is being held together—individual opinions and attitudes, behaviours, texts, institutions, working groups, ideas and ideals—or all of these? And what is doing this? Are we speaking of psychological pressures to attitudinal consistency or group conformity, institutional and organizational controls and routines, or the constraints and opportunities contingent on applying legal or religious texts under changing social circumstances? Most important, should we assume that there is always an intrinsic link between the elements that make up a given unit, or does the connection exist (only) insofar as participants talk about it "as if" it is real? Given that, to a large extent, culture is always a matter of struggle and disagreement, the purported uniformity, 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.

Is law coherent? Under close scrutiny, any given doctrinally defined area of law, such as that governing family relations, can in fact be shown to be "chaotic."[64] The same applies to the relationship between different branches of law within a jurisdiction.[65] Arguably, the work of family lawyers will have more in common with family lawyers working in other places than it will with, say, copyright lawyers practising in the same jurisdiction.[66] On the other hand, using a comparative perspective, some scholars argue that even apparently unconnected branches of law may in fact manifest remarkable levels of cultural similarity within a

63. Nakamura (2014).
64. Dewar (1998).
65. Bell (2001).
66. See also *ibid*.

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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.[67]

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.[68] 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. But we should not assume that the relationship between legal practices and ideas and those in the wider society necessarily are homologous. Take, for example, Kagan's characterization of what he calls "the American way of law."[69] His claim is that this is a consequence of what he calls a "fundamental mismatch" between, on the one hand, the demand 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, because the role of central and local government is deliberately hamstrung, the difficulty of meeting these demands, except piecemeal through the courts. There are also important differences in the extent to which any given culture gives value to similarities in its legal and wider culture spheres. In places such as Italy an insistence on great "formalism" in legal matters is intended to differentiate the legal world from the lack of such formalism in the "life world" of ordinary social interaction.

The alleged strain towards coherence can be used to explain the relative lack of change, a difficulty of change, and even the direction of change.[70] But we should never rule out the possibility of even rapid change. It is relevant—if also worrying—to recall the transformations in attitudes towards "law and order" in the short period that elapsed from Weimar to Hitlerian Germany. And, in an ever more interconnected world, considerable effort is required just to resist outside influence. Arguments about the possibility of change can themselves play a role in social developments. The claim, for example, that long-standing historical patterns cannot be altered can easily be "dystopic" in its effects by blocking possible reforms. After the collapse of the Soviet Union there were those who used past culture as an alibi for why things could not change in countries that had been part of the Soviet bloc.[71] On the other hand, arguments about culture can also be used to show that change is possible. Most obviously, many of those who write about global culture do so in ways that make its spread appear more or less inevitable, and even more problematically, they assume that it brings about homogenization.

In any research into legal culture it is important to be attentive to both coherence and change. Consider again the example earlier concerning differences in the pattern of scandals

67. Whitman (2005), p. 396.
68. See Nelken (1986, 2009).
69. Kagan (2001); see also Nelken (2003).
70. For a good Japanese example, see Feldman (2006a).
71. See Krygier (1996–97).

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in the UK and Italy. Recent expense scandals concerning Members of Parliament in England and Wales were not in fact based around sexual improprieties. Conversely, there were attempts to bring down Prime Minister Berlusconi in Italy for alleged sexual improprieties. Yet we can still see the continuity underneath the apparent change. It is surely worthy of note that the UK scandals concerned private misbehaviour by Members of Parliament, rather than corrupt agreements between politicians and businessmen. Conversely, Italian former Prime Minister Berlusconi's sexual misbehaviour became a more serious issue with voters when it was alleged to have involved the facilitation of public works contracts to those who supplied him with women. And his official exclusion from the right to stand as a political candidate was a result not of these scandals but the consequence of his receiving a definitive conviction for fiscal crimes.

Many of the papers in the founding issue of the journal also discuss the role of culture and of legal culture in social change. Some imply that cultural coherence can be undone by change, others stress how it can constrain change, and yet others reveal the ways that change can appeal to coherence in order to be accepted. Friedman repeats his thesis that social and technological change is the moving force of law. And he is undoubtedly right when he tells us that places in the same historical periods tend to have much more in common in their legal arrangements than the same place in different historical periods. He admits that China may constitute an exception. But he sees Thailand (the object of the Engels's study) as a country undergoing a process of transition. He expects it be transformed as people move to the towns,[72] industrialization rises (imposing "the rhythms of factory life"), and ideas about human rights advance. He points out that even the Engels's interviews show that some of the victims they describe in their book no longer completely believe their local discourses as their perceptions edge closer to the global norm.[73] Arguably, however, Friedman's preference for emphasizing similarities runs the risk of minimizing differences between places at the same level of technological and economic development. Aoki, for his part, offers a sophisticated analysis of the structural factors that shaped contrasting transitions in China and Japan.

Many authors also want to evaluate the effects of the attempts at change they describe. Thomas Stanton shows us that change, even where achieved, is not always to the good. According to him, English colonial innovations in Burma, such as the introduction of Western standards of enforcement of contracts, successfully marginalized existing customs, and undermined traditional legal system. But by so doing they also unleashed destructive forces in the society. For him, the British courts offered only "order without meaning." The resistance in Thailand to the transformation of Tort law in the direction that Friedman expects seems also connected to the contestation over the meanings of accidents. By contrast, both the paper by Liu, Liang, and Halliday and that authored by Lynette Chua, focus on the role played by social actors within the society. Their interest lies in the way their actions carried the potential to change their legal cultures in a positive direction. Their analyses suggest that a crucial part of the (limited) success achieved by lawyers in China or gay activists in Singapore derives precisely from their knowing the limits of what can be done—the ability to appeal to coherence so as to justify change. But it can of course be difficult to know in

72. Stanton admits that even without colonial intervention Burmese customary law might not have withstood the move away from village life; see Stanton, *supra* note 31, p. 178.

73. Friedman does not deal with the Engels's question of why the rise in motor car use in the 30 years since their previous study in Changmai had not (yet) led to a rise in Tort law there.

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advance the line between what is acceptable and what is still beyond the boundaries of change, as seen in the official response to the adoption of allegedly "aggressive tactics" by defence lawyers in present-day China. The fate of Li Zhuang demonstrates that a high price may be paid for crossing the line.

The study by Trzcinski and Upham of the effort to introduce a land registry in Cambodia offers the best example of the complexities to be considered in tracing the encounter between global and local legal culture. They describe the effort to change local patterns of land usage into something akin to the concept of ownership imagined by Western legal systems[74] and show how it soon became clear that the goals of strengthening security of land tenure pointed in a different direction from that of integrating Cambodia into the international economic order. In practice, even the (many) sponsors of change were divided about how to proceed, as seen by the move from the 2001 land law to the civil code reform of 2007. The effort to create a land registry created too much uncertainty, and so the courts were given the final say. But this allowed bureaucrats and judges to charge bribes for their services. One way or another the most vulnerable members of the population lost out.[75] Their account certainly demonstrates that legal culture matters, and the dangers of "undertaking grand schemes without a clear understanding of local context"[76] when adopting models that reflect political preferences from other times and places. Their conclusion is that "the political and social realities of Cambodia will overwhelm any legal framework" and that the alternative was "deference to whatever social and normative systems were (and probably still are) maintaining whatever degree of order and stability exists in Cambodia land practice."[77] But it is important not to conclude too much on the basis of this case-study; we should be careful in generalizing from the limited success of introducing new legal architecture in a society where genocide had wiped out the professional classes.

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74. This was purportedly to help create the rule of law as well as to increase food production via facilitating foreign direct investment.

75. They tell us that many Cambodians wanted to hold on to their land rather than receive monetary compensation for mistakes of registration.

76. Trzcinski & Upham, *supra* note 18, p. 67.

77. *Ibid.*, p. 71.

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