

Encyclopedia of Law & Society: American and Global Perspectives

Culture, Legal

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Book Title: Encyclopedia of Law & Society: American and Global Perspectives

Chapter Title: "Culture, Legal"

Pub. Date: 2007

Access Date: December 08, 2014

Publishing Company: Sage Publications, Inc.

City: Thousand Oaks

Print ISBN: 9780761923879

Online ISBN: 9781412952637

DOI: <http://dx.doi.org/10.4135/9781412952637.n160>

Print pages: 370-376

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<http://dx.doi.org/10.4135/9781412952637.n160>

The term *legal culture* is a relatively new one, although it traces to terms like *legal tradition* or *legal style*, which have a much longer history in comparative law or in early political science. It presupposes and invites us to explore the existence of systematic variation in patterns in “law in the books,” in “law in action,” and, above all, in the relation between them. Nevertheless, even this apparently simple premise is far from uncontroversial. This entry focuses on the problem of definition, the relationship between legal cultures and legal transfers, and the strategies that one may use for studying this topic.

The Meaning of Legal Culture

Lawrence Friedman introduced the term *legal culture* into the sociology of law. He distinguished between [p. 370 ↓] “internal legal culture,” which refers to the ideas and practices of legal professionals, and “external legal culture,” which is the name he gave to the opinions, interests, and pressures brought to bear on law by wider social groups. Friedman increasingly argued that the importance of “internal legal culture” tends to be exaggerated, usually by legal scholars who have an investment in doing so. He prefers to concentrate on the part played in producing legal and social change by the increasing public demand for legal remedies, which he calls the drive to “total justice.” Legal culture, he says, determines when, why, and where people turn for help to law or to other institutions, or just decide to “lump it.” Legal culture tells us, for instance, if French but not Italian women are reluctant to call the police to complain about sexual harassment.

When used in comparative research, the term *legal culture* may prove helpful in looking for differences in the degree to which given controversies are subject to law, the role allocated to other expertise, and the part played by “alternatives” to law. It also directs attention to the role of religious or ethical norms and the ambit of other forms of social control and social ordering. Accompanying and concretizing such differences, explaining and attempting to justify them, there are likely to be contrasting attitudes to the tasks law should be asked to play, to the distinctive approaches to formal and substantive ideas of legality and legitimacy, or concerning the appropriateness of public participation.

In most of his work as a leading American legal historian, Friedman has been concerned with describing changes in law-related behavior in American society. Some stimulating if controversial work in this field, however, has been designed to show, *pace* Friedman, that once we take a comparative perspective, we may view patterns of legally related behavior differently. Patterns are often less the result of the way folk culture shapes the demand for legal relief, and more the result of supply, a predictable outcome of the type and range of institutional possibilities provided for redress. For instance, Erhard Blankenburg's important study of litigation rates in Europe seeks to explain why the Netherlands has one of the lowest, and Germany one of the highest, litigation rates, despite being so similar culturally and even interdependent economically. He answers that these rates depend less on what people want from law than on the availability of other institutional possibilities for dealing with their disputes and claims. The Netherlands, compared with Germany, possesses a much wider range of "infrastructural" avenues for disposing of cases in ways that do not require court litigation. As an illustration of the need for further conceptual clarification in this field, however, we may note that Blankenburg calls these infrastructural alternatives "legal culture," while those engaged in the debate over Japanese legal culture would describe them as "structural" factors in opposition to cultural ones.

Lee Hamilton and Joseph Sanders, in their study of Japanese and American attitudes to litigation, show how both structural and cultural factors reinforce each other. The broad concept of "culture" is one that is difficult to pin down. It is colored by its history, as part of the Romantic reaction to the Enlightenment, and it is an idea, as Adam Kuper shows, that is much abused outside the academy, as scholars talk of "culture wars" or the concern for "Asian values" that some politicians allege to be at risk from the spread of Western practices. Likewise, the meaning and boundaries of what people consider "law" are highly variable outside of a given culture. Thus, it is doubly problematic to talk of the relationship between "law" and "culture."

Legal Culture, Legal Transfers, and Globalization

The nation-state is a convenient starting point for much writing about legal culture, as for most work in comparative sociology of law. Such books as Blankenburg and Freek Bruinsma's *Dutch Legal Culture*, John Bell's *French Legal Culture*, and the books on Japan by John Haley and David Johnson illustrate this. The same holds for the edited book by Volkmar Gessner and colleagues, *European Legal Cultures*, in which the individual state is still the focus of attention. However, whether one employs the term in domestic contexts or in comparative analyses, it is important to consider how far one should treat the nation-state as the only or best level of analysis.

With the advent of globalization, it is no longer (if it ever was) sufficient to describe legal doctrine, [p. 371 ↓] procedure, and institutions as if given settings each had their own characteristic ways of doing law that could be collected and classified. As Rosemary Coombe demonstrates, we now inhabit a deterritorialized world. With modern media, we participate in other communities with which we have no geographical proximity or common history. All “totalizing” accounts of society are exclusionary and enact a social violence by suppressing contingent and continually emergent differences. Instead, we must face the challenges of transnational developments, the politics of global capitalism, and multiple overlapping and conflicting “juridiscapes.”

Rather than limiting ourselves to the nation-state level, patterns of legal culture must often be sought at other levels. For many purposes, the appropriate unit of legal culture may be the local court, the prosecutor's office, or the lawyer's consulting room. Differences between places in the same society may often be considerable. Legal culture is not necessarily uniform (in organizations or meaning) across different branches of law. At the macro level, historical membership of the civil or common law world transcends the frontiers of the nation-state. In addition, increasingly globalizing networks of trading and other interchanges are challenging and reworking the implications of these memberships. Lawyers specializing in some subjects may have less in common with other lawyers outside their field than they have with those abroad. Attention must be given to what have been described as the “third cultures”

of international trade, communication networks, and other transnational processes. The boundaries between units of legal cultures are fluid, and they intersect at the macro and micro levels in ways that are often far from harmonious. Nevertheless, this untidiness, as well as the not infrequent attempts to conceal or resolve it, are all part of the phenomenon of living legal cultures.

Legal culture has always had a dynamic aspect, being both a result of the past and projected toward an uncertain future. However, the influence of globalization certainly seems to be increasing the pace of legal transfers. Of special interest for wider theorizing in law and society is the way such transfers are sometimes geared to the difficult process of attempting to bring about an imagined future. Where this is the case, the transplant metaphor favored by many comparative law scholars becomes particularly misleading. Officials use foreign law to change, not to preserve, existing society and culture. They hope that law may be a means of resolving current problems by transforming society into one that is more like the source of such borrowed law; legal transfer becomes part of the effort to become more democratic, more economically successful, more secular (or more religious). By what is almost a species of sympathetic magic, imitated law is deemed capable of bringing about the same conditions of a flourishing economy or a healthy civil society that are found in the social context from which the borrowed law has been taken. Hence, ex-communist countries try to become more like selected examples of the more successful market societies, or South Africa models its new constitution on the best that Western regimes have to offer rather than on constitutional arrangements found in its nearer neighbors in Africa.

In the past, the reception of dissimilar legal models was perhaps most likely when third parties imposed legal transfers as part of a colonial project. Many non-European countries have mixed or pluralistic legal systems that testify to waves of colonial invasions or imitations of other systems. Even in Europe, some of the legal institutions that people most typically think of as their own are the result of borrowing or imposition. Some Dutch disputing mechanisms are, in fact, a result of German occupation during World War II, mechanisms that Germany itself has abandoned. Likewise, some American authors have tried to explain, as examples of “Japanese” legal culture, standard features of continental European systems that date back only to their borrowing after World War II.

Nowadays, international organizations, such as the International Monetary Fund (IMF), seek to reshape societies according to a supposedly universal pattern of political and financial integrity. The IMF may request or insist on specific changes as a condition of trade, aid, alliance, or diplomatic recognition. Countries may accept changes strategically as a symbolic way of marking willingness to play by the “rules of the game” of the wider global economy. This explains the adherence to intellectual property or [p. 372 ↓] antitrust provisions of the World Trade Organization by countries with few ways of enforcing such rules—or little need to do so.

Given the extent of past and present transfer of legal institutions and ideas, there are therefore good reasons to doubt whether one can relate all aspects of a given legal culture to other features of its current national context. It is arguable that the nation-state is the only appropriate reference point for some of the last two hundred years of positivist law. Much domestic law in the nineteenth century, for example, the law of copyright, was invented only as a response to its existence elsewhere. In advance of empirical investigation, it would be wrong to assume any particular “fit” between law and its surrounding society or culture. As global flows and trends influence national cultures, their purported uniformity, coherence, or stability will often be no more than an ideological projection or rhetorical device, manipulated by elements within the culture or by outside observers. Much that goes under the name of culture is no more (but also no less) than “imagined communities” or “invented traditions” (though these may of course be real in their effects).

The nation-state has to come to terms with the impact of globalization, as Antoine Garapon argues for France. Nevertheless, given the continuing national boundaries of jurisdiction, politics, and language, it would be wrong to deny their continuing importance. Contrary to the claims put forward by Friedman, there is also no necessary connection between globalization and the assumption of inevitable convergence. Common influences, cultural interchange, and increasing economic interdependence (or in many cases, just dependence) can all produce similarities. Conversely, there is a proliferation of claims to specific authenticity and identity.

Only patient research into ever-changing “jurisclapes” will allow us to assess claims that we are now seeing convergence toward a modern (AngloAmerican?) legal culture, as Friedman suggests. The same applies to more limited claims, such as Garland's

argument that current American legal responses in the field of criminal justice epitomize those required by “late modern society,” and so are bound to arrive in other advanced democracies, if they have not already done so. Interestingly, other authors insist that the legal cultures of nation-states remain recognizably distinctive and, in particular, that the extremes of “adversarial legalism” are found only in the United States.

Wolf Heyderbrand argues that a pressing current task for the comparative sociologist of law is to try to capture how far in actual practice what one describes as globalization in fact represents the attempted imposition of one particular legal culture on other societies. What is clear is that legal culture is ever more what we could call “relational”; increasing contact between societies means that there are ever more opportunities to define one's own legal culture in terms of relationships of attraction to but also repulsion from others. For example, when comparative European prison rates first appeared in the 1980s, Finland, which came high in the list, decided to cut back on prison building to move nearer to the “norm,” while Holland felt entitled to build more.

Studying Legal Culture

How can one operationalize the concept of legal culture? Roger Cotterrell criticized Friedman's broadbrush use of this idea, claiming that it is too vague and impressionistic. He argues instead for the study of the way professionally managed legal ideology shapes wider consciousness. Friedman replied that like all overarching social science concepts, even if legal culture may not be in itself measurable, it covers a wide range of phenomena that one can measure. For example, the term points to an essential intervening variable in explaining the pace and type of legal changes that follow large social transformations such as technological breakthroughs.

For David Nelken and others, *legal culture*, like terms such as *legal system* or *legal process*, serves mainly as scholarly shorthand for pointing to a set of ideas and activities. One can identify legal culture and, to some extent, even explain it. Nevertheless, once we try to use it as itself an explanation, we risk falling into the circular argument of many cultural explanations. Nelken has recently attempted to avoid this circularity.

A not unrelated problem is deciding whether an explanation in terms of culture is necessarily posed in [p. 373 ↓] opposition to other types of explanation, for example one making reference to social structure. For some, culture serves as a residual explanation when more social-structural explanations seem unsatisfactory or insufficient. In general, explanatory approaches seek to sharpen distinctions between external and internal culture, for example, between legal and political culture, to assign causal priority. In posing general explanations of legal life, they try to measure differences in legal culture using evidence of the behavior of legal institutions and the law in action such as litigation or crime rates. Sometimes one develops this approach at the expense of attention to the meaning of law for those who operate or use it. For example, some Japanese authors, such as Takao Tanase, question how far the idea of Japanese nonlitigiousness was the power elite's invention, meant to lead people to believe in their own nonlitigiousness.

Interpretative approaches, on the other hand, are more concerned about understanding how aspects of legal culture resonate and fit together. Clifford Geertz shows how they seek to use evidence of legally relevant behavior and attitudes as an “index” of culture or a “thick” description of law as “local knowledge.” He is concerned precisely with grasping linguistic nuance and cultural packaging.

In carrying out research, the first approach seeks a sort of sociolegal Esperanto, which abstracts from the language used by members of different cultures, preferring, for example, to talk of “decision making” rather than “discretion.” The rival strategy would ask whether and when the term *discretion* is used and what different nuances it carries. Its task is faithfully translating another system's ideas of fairness and justice and making proper sense of its web of meanings. Thus, scholars who adopt interpretative approaches contrast the different meanings of “rule of law,” *Rechtsstaat*, or *stato di diritto*. They compare the Italian term *garantismo* with “due process” or “law and order,” compared with the German *innere Sicherheit*. They unpack the meaning of *lokale Justiz* compared with “community crime control.” By examining the idea of the “state” in common law and continental countries, one may answer the question of why litigation is seen as essentially democratic in the United States, but as antidemocratic in France.

In trying to grasp the secrets of culture, the interpretative approach faces the problem that key “local” terms are, by definition, almost untranslatable. Blankenburg explored

the meaning of the term *beleid*, in Holland, which refers to the often-explicit policy guidelines followed by trusted government criminal justice personnel and complex public organizations in general. For this approach, concepts not only reflect but also constitute culture. Examples include the changes undergone by the meaning of “contract” in a society in which an individual is seen as necessarily embodied in wider relationships, or the way that the Japanese ideogram for the new concept of “rights” came to settle on a sign associated with “self-interest,” rather than morality.

Legal culture itself is not an indigenous term in any legal system. But in Italy, it is very common (especially when referring to the South) to speak of the “culture of legality,” by which people mean the project of extending “jurisdiction” and the difficulty of gaining social acceptance of the need to live life within the constraints of legal rules.

Finding an appropriate methodology for revealing patterns of legal culture is also complicated. Within anthropology, James Clifford and George Marcus show that the process of producing accounts of other cultures is highly contested. One increasingly places emphasis on the situation and assumptions of the “teller” and the process of “telling” as much as what is being told. An interpretative stance, more than the explanatory approach, is ready to object that culture is in many respects a specious “invented tradition” or “imagined community.” Lawrence Friedman argues one is not forced to treat culture as “Culture,” but rather invites us to see it as an endless interpretation of interpretations, part of the flow of meaning, the enormous interplay of interpretations in and about a culture to which the scholar also contributes.

This approach is also less interested in drawing a line between legal culture and the rest of society, because it sees this as less a problem for the observer to solve than an aspect of the way legal culture works. Legal culture for this approach is not just a set of behaviors and ideas but also a feature of the way the boundaries between law and everything else are [p. 374 ↓] reflexively constructed. For instance, Maria Ferrarese argues that common law systems tend to look for their rationale in terms of the link between law, economics, and society. Continental systems, alternatively, look for the connections among law, politics, and society.

For this reason, it is difficult to accept Niklas Luhmann's (1927–1998) systems theory of law, which tries to posit a constant relationship between the legal and other social

subsystems in all modern societies. Empirical investigation suggests rather important differences in the way one conceives and lives law, even within Europe. In many continental countries, in deference to the state project of representing the collective will or under the influence of religious traditions and philosophical idealism, one may deliberately treat law as more of an aspiration than a blueprint for guiding behavior. The very lack of correspondence between legal and other norms can be part of a model of law as a counterfactual ideal, an expectation that both legal officials and the wider society share.

In common law nations, on the other hand, the law of society may be modeled more closely after that which is already considered reasonable behavior by powerful interests in the wider culture. As this suggests, there is a pressing need to give more attention to the way past and present theorizing in the sociology of law, from Max Weber (1864–1920) to Luhmann, assumes and mobilizes a (local) vision of legal culture, even where they leave the problem of legal culture unexplained rather than being squarely addressed.

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<http://dx.doi.org/10.4135/9781412952637.n160>

See also

- [Comparative Law](#)
- [Culture, Global Legal](#)
- [Globalization, Resistance to Economic](#)
- [Globalization and Law in Everyday Life](#)
- [Luhmann, Niklas](#)
- [Popular Culture, Law and](#)
- [Sociological Theories of Law](#)
- [Sociology of Law](#)
- [Symbols in Law](#)
- [Transplants, Legal Exports as](#)
- [Weber, Max](#)

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