Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken

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David Nelken's paper is a rich and subtle meditation on the concept of legal culture. It sets out two concepts of culture, which I will call (following Nelken) the 'explanatory' and the 'interpretive' approaches. It then takes a particular case, exploring the contribution of culture to understanding delay in Italian legal administration. Nelken refuses to engage in a reductive or simplistic account of the problem of delay but instead immerses us in the range of factors that contribute to it, allowing us to experience its complexity and its relationship to other dimensions of Italian society.

My comment cannot hope to match the richness of the original. In particular, I cannot match Nelken's intricate and sympathetic knowledge of Italian society (I wish I were sufficiently familiar with Italy to do so!). Instead, I take up the more general theoretical issue. How should we conceive of legal culture? Is the concept useful? Does it assist our understanding of legal phenomena?

Two Concepts of Culture

Nelken's two concepts of culture are roughly as follows. The first — the explanatory concept — treats culture as a discrete explanatory variable alongside such other causal factors as institutional structure or the funding of the courts. The question then becomes: What contribution does culture make to a particular outcome? One assesses the impact of legal culture by controlling for the effects of other factors, so that one isolates the causal contribution of culture.

The second — the interpretive concept — treats culture as an aggregating concept, capturing everything relevant to the operation of law in a specific social field (especially a national field). It does not denote any

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particular aspect of that field, at least not necessarily. Rather, its distinctive contribution is to focus on how diverse phenomena are interrelated, how they form an integrated whole, interdependent and mutually reinforcing. Thus, factors which under the first conception are treated as separate from culture — levels of funding; institutional structure; number of judges — are under the second treated as components of culture. Culture becomes the vision of the whole, which includes all these elements as parts.

Nelken is drawn to the second conception. He invokes Geertzian thick description as a way of capturing the legal culture of a particular society. His account of delay in the Italian legal system is generous in the array of factors it cites as contributing to Italian legal culture. But he also wants to use that concept as an explanatory factor. He wants to suggest what special impact Italian legal culture has on delay. He wants to explore the extent to which differences in time-to-decision in various European countries can be attributed to culture.

He therefore runs headlong into the conceptual problems associated with cultural explanations. He is drawn to use culture both as a comprehensive picture of the Italian legal field — including all of that field's distinctive values, concerns, interdependencies — and, at the same time, as an identifiable explanatory factor in its own right. But if the notion of culture already incorporates all the other influences that shape a legal system, doesn't it already contain the variables against which it is, ostensibly, being compared? This is the basis for the objection, cited by Nelken, that cultural explanations are fundamentally tautological: they incorporate everything about the society — all its distinctive characteristics — and then use that to explain the way things are. Isn't it better to treat an interpretive approach to culture as simply a picture, a vision of the whole, a portrayal of how the social order fits together in a reasonably coherent, interdependent, and mutually reinforcing whole — and leave it at that, without trying to extract a causal relationship between 'culture' and the phenomena it purports to portray? Otherwise it 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.[1]

These are forceful criticisms, very much the criticisms that Nelken has in mind in the theoretical introduction to his paper. He does not so much answer them as introduce them and then provide a rich and complex account of the elements of the Italian legal order that bear upon delay in the courts, suggesting how a characteristic set of attitudes and values (which he

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[1]   See Roger Cotterrell, 'The Concept of Legal Culture' in David Nelken (ed), *Comparing Legal Cultures* (1997) 13.

derives from a deep interpretive engagement with Italian society) contributes to the problem. His account is compelling — compelling in a manner that does seem, in some sense, to explain. How can we make sense of that explanation without falling into the tautological reasoning decried by culture's critics?

I think there is a way of maintaining the interpretive approach to legal culture and using it as an explanatory factor without simply hiding other factors in its capacious cloak. The interpretive approach to culture identifies a distinctive dimension of social interaction rooted in the way people reflect upon their societies, consider their institutions, and seek to change them or manoeuvre within them. It captures an important determinant of their actions, but one that focuses not so much on a new and separate variable as upon the way in which participants draw lessons from the contexts in which they act and shape their conduct accordingly. It seeks to characterize the process of institutional feedback — of normative reflection and re-incorporation — in which all social actors engage, and it is especially alive to the distinctive sets of normative considerations that emerge in different social contexts. It has particular force when applied to law, providing a means of capturing dimensions of legal reasoning that are generally ignored in sociological explanation, despite the fact that those dimensions often seem, to participants, to be the most salient reasons for their actions.

This, in condensed form, is the concept of culture that I think is implicit in Nelken's discussion. In the balance of this comment I seek to give that concept more definition.

Culture, Meaning and Deliberate Action

In his remarkable article, 'Interpretation and the Sciences of Man' (first published in 1971 but republished many times since),[2] Charles Taylor responds to criticisms of interpretive social science that parallel the criticisms levelled at the interpretive approach to legal culture. Taylor's response is founded on the premise that human beings are self-interpreting animals, continually striving for meaning, seeking always to interpret their interactions with others and adjusting their conduct accordingly. Humans seek to understand how their lives are ordered; they strive to determine what is significant and what not. Their efforts are inherently evaluative, as they try to separate the salient, the meaningful, from the transitory and worthless. Furthermore, their conclusions have an important bearing on how they act. Humans don't just respond like automatons to stimuli.

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[2]   Charles Taylor, 'Interpretation and the Sciences of Man' in Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (1985) 15. The argument that follows draws heavily on Taylor.

Rather, when confronted with a new situation, they try to understand how it fits with the balance of their experience, they evaluate its import, and they tailor their actions accordingly. It is this process of constructing meaning — and the influence that these interpretations exert on action — that is the distinctive province of the concept of culture.

These interpretations are, in important respects, shared among individuals in a social field. Some of their content is inherited or learned from others. Individuals adopt a language; they inherit beliefs from their parents; they are schooled; they read; they borrow phrases and concepts. These influences provide much of the language of social understanding — the preliminary concepts that individuals use to make sense of their world. But even as individuals assume responsibility for their own interpretations, their reflections have an indispensable intersubjective dimension. Their interpretations seek, in very large measure, to make sense of social interaction. They are necessarily shaped, then, by processes of mutual adjustment, accommodation, and coordination. Moreover, that interaction occurs within established contexts, which have their own institutional forms, economic structures, and social practices. The interpretations may not be generated in any simple manner by these contexts, but they will be shaped by the effort to make sense of those contexts and by the individual's need to function within them, and that effort will be common to all who participate in the particular context.[3]

To the extent that individuals participate in the same contexts, to the extent that their interaction is intensive, they come to share a great deal. They may not share fully elaborated interpretations. They may not share the same conclusions. But they will share many of the terms of debate: the formulation of the important questions; a set of historical reference points; accepted styles of evidence and argumentation; an array of interpretations

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[3]   The intersubjective dimension of human understanding therefore derives not just from the body of articulated concepts and beliefs that one inherits, but also from the patterns of interaction existing in any society, even when these have not been articulated in conceptual terms or when they remain the subject of only partial and pragmatic articulation. Wittgenstein's grounding of meaning in 'forms of life', the American pragmatists' emphasis on the role of 'habit' and Pierre Bourdieu's concept of 'habitus' might all be seen as ways of comprehending this broader intersubjective domain. See Ludwig Wittgenstein, *Philosophical Investigations*, (G E M Anscombe, trans, 1958, 2nd ed) paras 19 and 23; George Herbert Mead, 'The Problem of Society — How We Become Selves' in Anselm Strauss (ed), *The Social Psychology of George Herbert Mead* (1956) 17; Charles Taylor, 'To Follow a Rule' in Charles Taylor, *Philosophical Arguments* (1995) 165; Shannon Sullivan, 'Reconfiguring Gender with John Dewey: Habit, Bodies and Cultural Change' (2000) 15 *Hypatia* 23.

provided by past participants; and an understanding of the vocabulary and norms implicit in particular institutional structures. There will still be room for debate — various ways in which these and other factors can be marshalled. As Nelken says, cultures are often a matter of struggle and disagreement. But this should not hide the extent of the sharing. Indeed, even to have a clearly defined disagreement, one needs to have a common vocabulary. Otherwise the parties simply speak past each other.[4]

It is this language of reflection and evaluation, together with the field of present interpretations, which the notion of culture tries to capture. Culture provides the lens through which stimuli are recognized, formulated, reflected upon, incorporated, and translated into action.[5]

Note that in this conception a culture is not defined by a single, constant, and bounded content — by, for example, a specific set of beliefs that all members of that culture hold in common. The concept focuses, above all, on the processes by which individuals draw on what has gone before, confront new experience, revise their preconceptions, and fashion (often through collective discussion and debate) how to proceed. The more intense the interaction, the more extensive the commonality of experience and the richer the set of intersubjective meanings are likely to be. But that set is in continual evolution in response to further reflection and new experience. It can incorporate plurality and disagreement; indeed societies are frequently defined by the terms of their disagreements as much as by their agreements. And, as Nelken shows, its adaptation may well reach beyond the boundaries of a particular region to incorporate fresh considerations emanating from outside or to establish working understandings with those outsiders.

This view is, then, perfectly consistent with the existence of a multiplicity of overlapping, concentric and interacting cultures, some richer, some thinner, in which individuals participate simultaneously. One can, for example, simultaneously participate in the culture of the Milanese legal community, in the broader Italian legal culture, in the institutions of the new Europe, and in the global legal order. Each will have its own distinctive characteristics, shaped by its history and terms of discussion. It may well be that local communities involve more extensive sharing of vocabulary and norms. The degree of commonality — the depth and richness of the particular culture — will be shaped by the intensity of interaction over time.

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[4]   See Jeffrey Stout, *Ethics After Babel: The Languages of Morals and Their Discontents* (1988) 61 and 69ff, drawing on Donald Davidson, 'On the Very Idea of a Conceptual Scheme' (1973–4) 47 *Proceedings and Addresses of the American Philosophical Association* 7.

[5]   Compare Jeffrey Stout, *The Flight from Authority: Religion, Morality, and the Quest for Autonomy* (1981) 258ff.

But any pattern of sustained interaction will produce its own distinctive vernaculars.[6]

This means that the cultural 'unit' is susceptible to different definition, depending on the level and purpose of the analysis. We all participate in different cultures for different purposes: the culture of our workplace, the culture of our neighbourhoods, of our cities, of our families, of our in-laws, of our religions, of our states. Any context that involves repeated social interaction over time is likely to throw up its own standards of evaluation, resources for further reflection, and sometimes the formalized structures and relations we call institutions. Because we all participate in multiple webs of interaction, the boundaries of our 'cultures' are going to be indistinct and porous — precisely the kind of porosity to which Nelken draws our attention in his discussion of the Italian case. The concept of culture is not so much a way of identifying highly specified and tightly bounded units of analysis, then, as a heuristic device for suggesting how individual decision-making is conditioned by the language of normative discussion, the set of historical reference points, the range of solutions proposed in the past, the institutional norms taken for granted, given a particular context of repeated social interaction. The integrity of cultural explanations does not depend upon the 'units' being exclusive, fully autonomous, or strictly bounded. Rather, it depends upon there being sufficient density of interaction to generate distinctive terms of evaluation and debate. When there is that density, any examination of decision-making in that context will want to take account of those terms.

One thing formal institutions certainly do is to focus interaction, on a repeated basis, within a particular framework. They generate — to some extent they assist in defining — webs of interaction with a certain density.[7] Institutional boundaries are therefore often used as rough approximations for cultural boundaries. Institutions, by structuring interaction, tend to generate cultures moulded to their contours. It is no accident, then, that

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[6]   I explore this dialogic conception of culture (sometimes under the rubric of 'community') in more depth in Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (1994) 183–228; Jeremy Webber, 'Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice' in Ottawa, Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (1993) 133; and Jeremy Webber, 'Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples' (1995) 33 *Osgoode Hall Law Journal* 623.

[7]   Compare Webber, *Reimagining Canada*, ibid 194–7, regarding the impact of provincial boundaries on political community.

Nelken ultimately fastens on the level of the state as his primary (though far from exclusive) level of analysis.

How do researchers' interpretations relate to the cultures of the participants? When a researcher uses a notion of culture he or she is not merely reflecting the set of meanings present within that context. Not only does the researcher suffer from his or her own limitations of access and imagination, but different participants in the culture may well have different interpretations of the culture's characteristics. Every context holds resources for varying characterisations, indeed for growth in the participants' own understanding of the whole. Participants' understandings are therefore partial in two senses of that word (both related to the provisional and limited nature of our interpretations of the world): 1) they are marked by limitations in the participants' own experience and imagination; and 2) they are contested. In fact one suspects that intimations of significance and meaning, of norms and appropriate conduct, often shape individuals' actions without being wholly articulate. Participants respond to cues as to what is appropriate, what not, what is valued, what not, without always being able to say what they are doing and why.

The researcher attempts to fashion his or her best reading of that context, seeking to understand the explanations offered by participants for their conduct, looking for congruencies and incongruencies in participants' justifications and actions, identifying presuppositions, exploring the relationship between justifications advanced and the institutional structure, historical experience, and salient debates within that society, and attempting finally to present a portrait of the distinctive patterns of meaning and argument within that society. This will be the researcher's best understanding, which may depart from those of the participants themselves, although it should be able to explain and justify its departures from the participants' self-knowledge. If done well, such an interpretation will give some idea of the range and grounds of disagreement within the society, and will convey some impression of that society's historical trajectory. If successful, it should help members to recognize significant aspects of their own practices; it should assist non-members in understanding, acting within, or interacting with, the social context; and it should carry predictive power with respect to that context's capacity for self-maintenance and change, mechanisms of change, and the way in which specific developments are likely to be incorporated or rebuffed. Such a portrait provides real explanatory power. All those features are present in Nelken's treatment of the problem of delay in the Italian legal order.

Legal Culture and Legal Reasoning

This method of analysis has special relevance for the examination of law. Many examinations of law from the 'outside' — comparative law; the sociology of law — either ignore legal reasoning altogether (attributing legal phenomena to the power possessed by particular segments of society, to institutional characteristics taken to be exogenously determined, or to such social factors as poverty, illiteracy, family breakdown, ethnic diversity, religious belief — the list goes on) or they rely upon naively positivistic conceptions of law (taking the interpretation and effect of legal rules to be given). Both alternatives are unsatisfactory. The first may catch something of the truth. Social factors do have a significant impact on the content and administration of the law, an impact all too often occluded in lawyerly analysis. But neither approach incorporates a model of legal reasoning adequate to the practice of lawyers and judges. Neither captures the seriousness with which legal actors — and indeed members of society generally — grapple with legal concepts in fashioning their claims of right. In particular, neither captures the scope of legal argument — the full range of considerations marshalled — in any attempt to argue how the law should be interpreted to apply to any specific set of facts.

The notion of legal culture helps fill this lacuna. It pays attention to the texts of the law and to the distinctive ordering of priority, in different legal traditions, among these texts. But it also incorporates the broader range of considerations that actors routinely rely upon, sometimes implicitly, sometimes expressly, in their interpretation and application of the law: presumptions as to the underlying principles of justice; expectations as to institutional role (the role of courts vis-à-vis legislatures, the role of provincial versus central governments, the role of state regulation in relation to private ordering); general norms of social interaction and fair dealing emergent in particular social practices; and a sense of law's historical evolution and future potential.[8] The law is

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[8] Gerald Postema has developed a compelling description of the structure of reasoning in the common law across a series of works that focus particularly on the 17th century common lawyers' conception of their craft (especially on the works of Selden and Hale). This description captures the process of collective normative deliberation, drawing on the kinds of considerations mentioned in the text, which constituted, in Postema's view, the 'artificial reason' of the common law. His description of this process of collective normative reflection parallels very closely the interpretive search for meaning in societies generally, described above. See, in particular, Gerald Postema, 'Classical Common Law Jurisprudence' (2002) 2 *Oxford University Commonwealth Law Journal* 155 (Pt 1) and (2003) 3 *Oxford University Commonwealth Law Journal* 1 (Pt 2). It might be argued that

continually being fashioned and refashioned as rules are applied to new circumstances, as new enactments require that one rethink established areas of the law, as theories of law evolve, and as broader social attitudes and practices change. The concept of legal culture, if deployed well, can help reveal the broader historical and societal context that shapes the interpretation and development of law.

In fact, the integrating mission of the notion of culture — the presumption, inherent in the interpretive approach to culture, that members of society seek to make sense of their world as a whole, that they attempt to understand it as having a reasonably comprehensive and coherent meaning, and that they seek to derive principles of value, principles of appropriate conduct, from that vision — has very close parallels to an important feature of legal method: its attempt to fashion interpretations of the law that are consistent and normatively coherent, both across distinctively legal sources and in relation to broader conceptions of justice and fair dealing current in the society — its attempt to fashion interpretations, in other words, that are consistent with a continually revised comprehensive vision of the law in that society.[9] The interpretive approach to legal culture shadows this integrative aspiration in legal reasoning, playing close attention to the interrelationships, the patterns existing among different aspects of the legal order. It can therefore offer a richer and ultimately more accurate account of the content and force of legal principle than a simple catalogue of legislative provisions and judicial decisions could provide.

The notion of legal culture doesn't (or rather it shouldn't) specify a single correct interpretation of the law. Rather, it stands at one step removed from debate over the interpretation of the law. It stands in the position of observer, not participant, describing the range of factors (some mutually reinforcing, some in tension) that are likely to condition the array of participants' interpretations. It speaks the language of tendency, of probability, not of right and wrong. Nevertheless, its interpretations do seek

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this understanding of legal reasoning is distinctive to the common law and cannot be generalised. It may indeed be the case that the common law was unusual in its tendency to conceive of legal reasoning expressly in this fashion, but there is good reason to hold that the same kinds of processes are typical of law more generally, including the civil law. That full argument cannot be made here, but for arguments that tend to that more general case see Lon Fuller, 'Human Interaction and the Law' (1969) 14 *American Journal of Jurisprudence* 1; Gérard Timsit, 'Sur l'engendrement du droit' [1988] *Revue du droit public et de la science politique en France et à l'étranger* 39; Martin Krygier, 'The Traditionality of Statutes' (1988) 1 *Ratio Juris* 20; Martin Krygier, 'Thinking Like a Lawyer' (1991) 23 *Poznan Studies in the Philosophy of the Sciences and the Humanities* 67.

[9]   Gerald Postema, 'Integrity: Justice in Workclothes' (1997) 82 *Iowa Law Review* 821.

to capture the substance and trajectory of argument over law in the society. It represents a point of contact between sociological description and normative assessment, ideally providing a foundation both for a full account of social causation and, ultimately, for consideration of the normative adequacy of a particular society's legal order. This latter characteristic may be one reason why the notion of legal culture makes some uncomfortable, for, in attempting to make normative sense of the society, legal culture blends evaluation and description. But when one is dealing with a phenomenon that operates, at least in part, through normative argument, surely this is precisely what one wants to do.

Conclusion

The notion of legal culture therefore serves as a second-order concept. While it may incorporate such features as institutional structure, volume and content of legal enactments, numbers of judges, and levels of disputation existing within a society, its special mission is to explain how those factors are understood within the order as a whole, how they are assimilated and interpreted, and how, as a function of that interpretation, they shape human action. Legal culture is concerned with capturing the distinctive quality of the social discourse through which issues are conceived and responses formulated. It takes normative argument seriously and seeks to reveal the nature of that argument in a given context, all as a way of understanding how the society is likely to respond to further problems and challenges.

It is not, then, merely tautological. The patterns of considerations it describes are, it is true, drawn from past interaction within the society. Those patterns reflect continual attempts to normalize phenomena within society, to make them all fit together. But those attempts at normalization are active processes, always partial, always provisional, always involving reinterpretation and reinstitution. It is that continual struggle for normative meaning, and its impact on human action, that is the subject of legal culture.