Between Functionalism and Essentialism: Culture as Historically Contextualized Social Practice

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To attempt to address the place of culture in comparative law is, to say the least, a daunting task. I am all too well aware of the many brilliant people who have had a great deal to say about this perennial question, many of them attending this conference. So I take much comfort in the personal nature of this panel’s assignment, which is to reflect on “how the notion of culture has informed [our own] particular research projects.” My own view is that, when properly deployed, culture can prove a useful and important—indeed crucial—category for comparative legal research. Its great value is in helping us to steer between two significant dangers that confront anyone doing comparative research: namely, functionalism and essentialism.

Functionalism is a term used in many different ways, not all of which I find troubling. The functionalism that concerns me is the kind that treats the function of a social institution or practice as somehow separable from culture. Functionalists of this ilk tend to assume that social institutions and practices serve some necessary, rational, and universal purpose—a purpose inherent in the nature of social coexistence and thus capable of being analyzed apart from culture. The notion that complex social institutions and practices can be thus reduced to a set of necessary, rational, and universal purposes, in turn, lends itself to the belief that these institutions and practices are directly responsive to human intervention in neat and predictable ways. There may well be certain elements of the social experience that fit (or at least closely approximate) this model. But as the literature on legal transplants has repeatedly demonstrated, and as we can see from any number of recent events—such as Western efforts to liberalize eastern European
economies—societies often respond to institutional intervention in ways that we do not expect and that seem to defy functionalist rationality. The human actions that engender and sustain social institutions and practices, in short, are constrained by something deeper and more elusive than that for which the kind of functionalism I am describing can account. That “something” is, of course, culture—namely, the values and beliefs of a particular community, as inherited across time and expressed in its constitutive discourses and institutions.

This concept of culture is, in my view, a vital antidote to the kind of hubris that can so easily follow from an overly simplistic and reductionist functionalism. But at the same time, an overreliance on culture, and in particular, on a broad, ill-defined notion of culture, entails dangers of its own—most notably, that of essentialism. Essentialist accounts avoid the pitfalls of functionalism, but only at the high price of suggesting that a society’s core features are a necessary and inherent part of its culture. Such accounts thus foster an unfortunate belief that the status quo is somehow inevitable, eschewing the arrogant exuberance of functionalism only to embrace a kind of meek resignation. Perhaps even more troubling, essentialism lends itself to a retified view of cultural difference that threatens to undermine meaningful cross-cultural communication and exchange. While talk of national volksgeist is, it would seem, happily long past, a tendency to essentialize culture difference remains. This tendency informs a wide range of comparative analysis (including, as I will soon describe, discussions of legal procedure and practice) and leads some to conclude that the comparative endeavor itself is fatally flawed, at least in so far as it seeks to identify cross-cultural similarities, and not just differences.

How then should we deploy the concept of culture? For me, a key part of the answer is to remember that, while we speak of culture as something that has a kind of physical existence with characteristics that we can detail and discuss, there is in fact no such thing as culture in this
sense. Culture is, instead, an analytical construct—a kind of shorthand that we use to describe and analyze a particular set of social practices and the values that these practices serve both to express and construct. The social practices that constitute a given community’s culture encompass the totality of its many institutions and discourses, including but in no way limited to, those concerning law and legality. To talk of culture is thus necessarily, in my view, to talk about a particular set of social institutions and discourses, and not about some free-floating spirit inherent in the very nature of the community being studied. Put differently, the institutions and discourses that are constitutive of culture necessarily operate in a particular historical context, and by studying them in this context, we avoid the risk of essentializing culture, while at the same time sharpening culture’s explanatory potential.

Let me give an example from my own work. I have been troubled for some time now by the pervasive tendency to characterize present-day American legal culture as distinctively adversarial, as compared with that of other developed nations. It is not that I disagree with this characterization. In fact, I think it largely true. But with few exceptions, comparative accounts of the adversarial nature of American legal culture tend to be removed from any historical context, thus implying that the United States is necessarily or inherently adversarial. Such essentialist accounts of American legal culture are both descriptively and normatively problematic. As a descriptive matter, to posit some kind of free-floating culture of adversarialism as the explanation for why American practice differs so much from that of much of the rest of the world is simply not informative. As a normative matter, the failure to historicize our standard comparative account of American legal culture results in a disturbing tendency to assume that change is impossible—that Americans have always been and must necessarily remain committed to an extreme form of adversarialism of whose many social costs we are all too well aware.
As you have no doubt gathered, I am now working on the project of trying to historicize our comparative account of American adversarial culture—to study it, in other words, as a set of particular social practices that arose at particular moments in time for particular historical reasons. The story here, as it turns out, is quite complex, touching on, among other things, failed nineteenth-century attempts to establish court-mandated conciliation and, in particular, Reconstruction-era efforts to highlight the status distinction between former slaves and white men. But there is at least one key insight that bears mention in this forum—namely, that Americans were not always so distinctively adversarial. In particular, if we distinguish between the separate traditions of law and equity, as nineteenth-century lawyers themselves typically did, it becomes readily apparent that equity procedure prior to the mid-nineteenth century bore a striking resemblance to contemporary continental European modes of procedure. For example, in sharp contrast to the common law’s oral, adversarial method of taking witness testimony, with which we are now familiar, American equity, like Roman-canon based, European procedure, provided for testimony to be taken in writing, before judicial officers sworn to secrecy, outside the presence not only of other witnesses but also of the parties themselves. The culture of American equity was thus oriented towards truth-seeking and expertise, rather than towards adversarial party participation. This, in turn, suggests that, contrary to the standard essentialist account, at least certain features of American adversarial culture are of relatively recent origin, and therefore neither necessary nor inevitable.

As this example from my own work hopefully indicates, I am decidedly not of the view that a cultural approach to the study of society necessarily renders comparative work impossible. In fact, as I have argued here, by grounding our analyses of comparative legal culture in a historical context, we can thwart the essentialism that suggests that different cultures are so
radically and necessarily distinct that there is nothing to compare and everything to contrast. Of course, culture—because it consists of a set of specific social practices—is by its very nature the embodiment of particularity. For this reason, comparatists who seek to emphasize the incommensurability of different legal cultures will always have the wherewithal to do so. But this is in no small part a matter of choice. We choose the nature of the categories that we compare, and in so doing, whether to assume a bird’s eye view, or instead, one more closely approaching that of the worm. Both perspectives of course generate equally “true” accounts of the world, but they are not equally satisfying and useful—at least not to birds and worms alike. As for we humans, I take comfort in the fact that we have acquired the capacity both to fly and to crawl and, it is my hope, to recognize which situations call for which. The great contribution of comparative research is, I believe, to inquire into the validity of our easy assumptions of similarity and difference alike, and, if necessary, to challenge these, adopting as appropriate the perspective of bird or worm, and sometimes even both.