

Legal Culture and Judicial Reform

Introduction

While reformers have often turned to foreign models when thinking about how to improve the operation of a legal system, it is widely acknowledged that simply grafting borrowed laws or legal institutions into a new context frequently does not have the desired effects. Thus, there is an increasing sense that reform projects must be more sensitive to local context. One aspect of local context that is frequently cited as important by scholars and practitioners is the “legal culture” of various countries.

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. This topic brief will address the importance of legal culture for legal reform and development work, focusing on the difficult problems of defining, measuring, and making causal arguments with “legal culture”.

What is legal culture?

What, exactly, is “culture” – legal or otherwise? “Culture” is often a broad, catch-all term for an array of complex beliefs, symbols, and patterns of behavior. Attempting to define it in a way that permits measurement will inevitably invite the objection that the definition is faulty, that it doesn’t really capture “culture”, but only public opinion, religion, language, or whatever other element is used. And, this objection is basically correct. The problem is, without trying to narrow culture down to more manageable, observable components, the concept is too broad and multifaceted to be useful.

Tellingly, there is no consensus definition among social anthropologists, despite the fact that their well-established field takes “culture” as one of its primary objects of study. The problem is further illustrated by other branches of the social sciences that have tried to use “culture” as an explanatory variable. These fields, like anthropology, have not succeeded in developing a generally accepted, operationalizable definition of culture, and this has hindered research on the impact of culture on other important social phenomena. In the field of political science, to take one example, the use of “political culture” as an explanatory variable has gone through cycles of ascendance and decline. When it is neglected, scholars sense that they are omitting something important, but attempts to introduce cultural variables into the analysis of politics have not succeeded in generating a sustained, systematic research program, largely because scholars have trouble coming up with a definition that is comprehensive and useful. The study of political culture then drops away until a new wave of scholars “discovers” the omission of cultural variables, and the cycle begins again.

How can legal culture be measured?

A closely related issue is the problem of measurement. Different scholars have tried different approaches to the difficult problem of measuring legal culture, but none are entirely satisfactory. One approach is to use very general categorical variables, such as religion, language, or ethnic background, as a proxy for culture (La Porta et al 1999). This approach has the advantage of being relatively clear and straightforward, but is vulnerable to the charge of being crude and inaccurate. Another approach is to use survey data on attitudes and beliefs (Bierbrauer 1994, Gibson and Caldeira 1996). While a valuable source of information, these survey-based studies are time consuming and hard to carry out, and their results are often quite difficult to interpret. And, though more refined than the first approach, they are also subject to the criticism that they miss important nuances of legal culture, making inferences from aggregate opinion data without regard to other factors.

A third research technique is the ethnographic approach, where scholars immerse themselves in a particular community and attempt to sort out its particular signs, symbols, rituals, and practices. This approach captures more cultural detail, but runs into several problems. First, this type of data gathering is especially time-consuming, expensive, and difficult. Second, the place of ethnographic description in social science research is problematic, because the ethnographer produces findings that are often hard to verify or reproduce, even by another well-trained ethnographer. Third, even if a particular ethnographic account could be considered a valid and reliable source of cultural data, cross-country (or even intertemporal) comparisons may be difficult or impossible, precisely because sophisticated ethnographies can be so case-specific.

What effect does culture have on law?

Beyond the problems of definition and measurement, cultural analysis is difficult because it is virtually impossible to sort out the causal relationships between “culture” and behavior, even when the former isn’t defined tautologically as the latter. How much do people’s attitudes, beliefs, and assumptions determine their social environment, and how much does the social environment determine their attitudes, beliefs, and assumptions? 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.

What effect does law have on culture?

The causality problem is related also to the question of cultural change. There is often an implicit presumption, in both policy discussions and scholarly literature, that culture is slow to change. This may often be the case. In some countries there is evidence that

legal modernization is of marginal importance relative to traditional patterns of business behavior (Winn 1994), and there is also evidence that the transplant of a “foreign” legal system tends to be less successful than practices that are developed indigenously, suggesting that existing legal culture is resistant to simple reform (Mattei 1995, Berkowitz et al. 2000). But there are also numerous examples of quite rapid change – sometimes within a generation, and sometimes even faster – in what were thought to be enduring patterns of legal culture. For example, though Western-style civil courts were (and are) considered by many to be incompatible with the cultural traditions of much of the non-Western world, in many places the introduction of such courts led to rapid changes in attitudes and practices of dispute settlement (Lee 1993, Kranton and Swamy 1999).

There does not now exist any good theory to explain cultural changes, and why they happen in some situations but not in other, seemingly similar situations. Thus, we should be wary both of assertions that cultural inertia will always inhibit rapid change, and of contrary assertions that culture is quite malleable. This simple fact is, there is evidence to support both of these contradictory assertions, and at this point, there’s no way to know when one or the other is more likely to hold true in a given situation.

What significance does legal culture have for reformers?

“Legal culture” as an analytic category has numerous problems. The concept is difficult to define without slipping into vagueness and tautology. All attempts to measure culture are problematic, and involve trading off parsimony and generalizability with detail and descriptive accuracy. Sorting out the direction of causality between “culture” and various other aspects of social, political, and economic life is extremely difficult, even if culture is defined precisely. And the problem of cultural change, and our relative lack of systematic knowledge as to why and how such change takes place, further complicates the picture. All these considerations should make us cautious about turning too quickly to “culture” as an explanation for the complex problems legal reformers face.

And yet, as proponents of cultural explanations are quick to point out, just because a factor and its effects are hard to measure, that doesn’t mean that it’s not both real and important. The basic point – that beliefs, assumptions, and practices understood as “cultural” affect the operation of the legal system – is essentially true. The task, then, is to find a way to incorporate these considerations more systematically, avoiding the facile, deterministic, and tautological explanations that have caused some analysts to eschew cultural explanations entirely.

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