

# Using The Concept of Legal Culture

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## I. The Meaning of Legal Culture

Legal culture, in its most general sense, is one way of describing relatively stable patterns of legally oriented social behaviour and attitudes. The identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are not just what we do.

Enquiries into legal culture try to understand puzzling features of the role and the rule of law within given societies. Why do the United Kingdom and Denmark complain most about the imposition of European Union ('EU') law but then turn out to be the countries which 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? Why does Holland, otherwise so similar, have such a low litigation rate compared to neighbouring Germany? Why in the United States and the United Kingdom does 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 can 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?

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These few examples are enough to suggest that findings about legal culture can have both theoretical and policy implications. But there may even be more straightforwardly practical advantages. Knowing more about differences in legal culture can actually save your life! One well-travelled colleague who teaches legal theory likes to tell a story of the way crossing the road when abroad requires good knowledge of the local customs. In England, he claims, you are relatively safe on pedestrian crossings, but rather less secure if you try to cross elsewhere. In Italy, he argues, you need to show about the same caution in both places; but at least motorists will do their best to avoid actually hitting you. In Germany, on the other hand, or so he alleges, you are totally safe on the zebra crossing. You don't even need to look out for traffic. But, if you dare to cross elsewhere, you risk simply not being 'seen'.

The sort of investigations in which the idea of legal culture finds its place are those which set out to explore empirical variations in the way law is conceived and lived rather than to establish universal truths about the nature of law; to map the existence of different *concepts* of law rather than establish *the* concept of law.<sup>1</sup> In employing the idea of legal culture in comparative exercises geared to exploring the similarities and differences amongst legal practices and legal worlds the aim is to go beyond the tired categories so often relied on in comparative law such as 'families of law' and incorporate that attention to the 'law in action' and 'living law' which is usually missing from comparative lawyers' classifications and descriptions.<sup>2</sup>

But the concept of legal culture is certainly not a simple one. Not only is it used in a variety of ways, some authors have even suggested that it is so misleading that it should be abandoned. In this paper I shall first address two of the key issues surrounding the use of this term. Firstly, what should we consider to be the unit of legal culture? In a period of increasing globalisation is it still appropriate that it be the nation state? Secondly, how should the term legal culture figure in our explanations? Is it a separable variable to be set against other causal factors, or is it a rather an invitation to interpret what is distinctive about the way law works and is experienced in different places? After summarising some of the general literature on these issues I shall then re-examine them with reference to empirical research I

<sup>1</sup> See Brian Tamanaha, *A General Jurisprudence of Law and Society* (2001).

<sup>2</sup> See, eg, David Nelken, 'Understanding/ Invoking Legal Culture' in David Nelken (ed), Special Issue on *Legal Culture, Diversity and Globalization* (1995) 4 *Social and Legal Studies* 435–52; David Nelken (ed), *Comparing Legal Cultures* (1997) 58–88; and David Nelken, 'Comparative Sociology of Law' in Reza Benakar and Max Travers (eds), *Introduction to Law and Social Theory* (2002) 329–44.

am engaged in which concerns court delays<sup>3</sup> in Italy. Italian drivers may indeed be relatively quick witted in avoiding accidents, but if we should ever be so unfortunate as to be caught up in one it is important to know that we may have to wait as much as 14 years for a verdict. In many other European countries waiting time tends to be measured in months rather than years; yet despite this apparently creaking court system Italy is a leading economic power. How far can using the concept of legal culture explain or make sense of such differences in the heart of Europe? I shall conclude by saying something about what legal delay can tell us about the relationship between legal culture and general culture in Italy. Any study of this sort can at best provide only part of the picture. But hopefully even this will be sufficient to remind us of the ethnocentricity of many of our ideas regarding the role and the rule of law.

### (a) The Unit of Legal Culture

Articles,<sup>4</sup> and books,<sup>5</sup> very interesting ones, continue to identify legal culture within the nation state, and collections of studies of legal culture likewise use this as their organising theme.<sup>6</sup> But rather than limit ourselves to the state level, patterns of legal culture can and must also be sought both at a more micro as well as at a more macro level. At the sub-national level 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 (organisationally and meaningfully) across different branches of law.<sup>7</sup> Lawyers specialising in some subjects may have less in common with other lawyers outside their field than they have with those abroad. At the macro level, historical membership of the continental or common law world transcends the frontiers of the nation state. And, increasingly, the implications of these memberships are being challenged and reworked by globalising networks of trading and other interchanges. We also need to

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<sup>3</sup> I shall have to leave to another occasion the problems in using the term delay as if it were a self-evident fact, rather than a contested and contestable label implying that someone finds a length of waiting time unacceptable. Likewise, I shall not discuss here the harm caused — *even in Italy* — by legal procedures that are over *too* quickly.

<sup>4</sup> Eric Feldman, 'Patients' Rights, Citizen Movements and Japanese Legal Culture' in David Nelken (ed), *Comparing Legal Cultures* (1997) 215; and Eric Feldman, 'Blood Justice, Courts, Conflict and Compensation in Japan, France and the United States' (2001) 34 *Law and Society Review* 651.

<sup>5</sup> See, eg, John Bell, *French Legal Culture* (2002); Ehrhard Blankenburg and Freek Bruinsma, *Dutch Legal Culture* (2<sup>nd</sup> ed, 1994); David Johnson, *The Japanese Way of Justice* (2002).

<sup>6</sup> See Volkmar Gessner, Armin Hoeland and Casba Varga (eds), *European Legal Cultures* (1996).

<sup>7</sup> Bell, above n 5.

explore what have been described as the ‘third cultures’ of international trade, communication networks and other trans-national processes.<sup>8</sup>

Given the extent of past and present transfer of legal institutions and ideas, it is often misleading to try and relate legal culture only to its current national context.<sup>9</sup> For example, some American authors have mistakenly tried to explain, as examples of ‘Japanese’ legal culture, standard features of Continental European systems which date back in Japan only to their borrowing of these legal institutions in the last century. Many aspects of law are the result of colonialism, immigration and conquest. Non-European countries frequently have mixed or pluralistic legal systems which testify to waves of colonial invasions or imitations of other systems.<sup>10</sup> Deliberate attempts at the socio-legal engineering of so called ‘legal transplants’ can range from single laws and legal institutions to entire codes or borrowed systems of law.<sup>11</sup> Law may be remade by wider national culture; but it can also itself help mould that culture. Many current legal transfers can be seen as attempts to bring about imagined and different *futures*, rather than to conserve the present (as the transplant metaphor might suggest). 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 neighbours in Africa. The hope is that law may be a means of resolving current problems by transforming their society into one 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. In what is almost a species of sympathetic magic borrowed 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.

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<sup>8</sup> See, eg, Francis Snyder, ‘Governing Economic Globalisation: Global Legal Pluralism and European Law’ (1999) 5 *European Law Journal* 334; Guenther Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’ in Guenther Teubner (ed), *Global Law Without a State* (1997) 3; Guenther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences’ (1998) 61 *Modern Law Review* 11; Yves Dezalay and Bryan Garth, *Dealing in Virtue* (1996).

<sup>9</sup> David Nelken, ‘Comparativists and Transferability’ in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transition* (2003) 437.

<sup>10</sup> Andrew Harding, ‘Comparative Law and Legal Transplantation in South East Asia’ in David Nelken and Johannes Feest (eds) *Adapting Legal Cultures* (2001) 199.

<sup>11</sup> David Nelken, ‘Towards a Sociology of Legal Adaptation’ in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (2001) 4.

The adoption of dissimilar legal models is perhaps most likely where the legal transfer is imposed by third parties as part of a colonial project and/or insisted on as a condition of trade, aid, alliance or diplomatic recognition. But it has also often been sought by elites concerned to 'modernise' their society or otherwise bring it into the wider family of 'civilised' nations. Japan and Turkey are the most obvious examples.<sup>12</sup> Even in Europe some of the laws and legal institutions that people think of as most typically their own are the result of imitation, imposition or borrowing.<sup>13</sup> Much domestic law in the 19<sup>th</sup> century, such as the law of copyright, was mainly invented as a response to its existence elsewhere. There are Dutch disputing mechanisms which are in fact a result of German imposition during the occupation, and which have been abandoned in Germany itself.<sup>14</sup> Hence, in advance of empirical investigation it would be wrong to assume any particular 'fit' between law and its enviroing national society or culture. In addition, the nation state has now to come to terms with the impact of globalisation.<sup>15</sup> For some writers, we inhabit a 'deterritorialised world'; we can participate via the media in other communities of others with whom we have no geographical proximity or common history.<sup>16</sup> Hence, 'all totalising accounts of (a) society, (a) tradition, or (a) culture are exclusionary and enact a social violence by suppressing continuing and continually emergent differences'.<sup>17</sup> Instead we must face the 'challenges of transnationalism and the politics of global capitalism or multiple overlapping and conflicting jurisdictions'.<sup>18</sup>

Claims about the decline of the nation state can no doubt be taken too far. Given the boundaries of jurisdiction, politics, and language, the nation state does make a convenient starting point for comparing legal culture. It is an empirical question how far legal culture at the national level is modified by what happens at other levels. Common influences, cultural interchange

<sup>12</sup> See the contributions to Andrew Harding and Elsin Orucu (eds), *Comparative Law for the 21st Century* (2002) and Michael B Likosky (ed), *Transnational Legal Processes* (2002).

<sup>13</sup> See Brad Sherman, 'Remembering and Forgetting: The Birth of Modern Copyright Law' in David Nelken (ed), *Comparing Legal Cultures* (1997) 2, 237.

<sup>14</sup> Alex Jettinghoff, 'State Formation and Legal Change: On the Impact of International Politics' in David Nelken and Johannes Feest (eds), *Adapting Legal Cultures* (2001) 99.

<sup>15</sup> Antoine Garapon, 'French Legal Culture and the Shock of "Globalization"' in David Nelken (ed), Special Issue on *Legal Culture, Diversity and Globalization* (1995) 4 *Social and Legal Studies* 493.

<sup>16</sup> Rosemary J Coombe, 'Contingent Articulations: A Critical Cultural Studies of Law', in Austin Sarat and Thomas Kearns (eds), *Law in the Domains of Culture* (1998) 21.

<sup>17</sup> Ibid 31.

<sup>18</sup> Ibid 43.

and increasing economic interdependence (or in many cases just dependence) can all produce similarities. But, simultaneously, 'increasing homogenisation of social and cultural forms seems to be accompanied by a proliferation of claims to specific authenticities and identities'.<sup>19</sup> We also need to take care that our comparisons do not fall into the vices of Occidentalism or Orientalism, of making other cultures seem either necessarily similar or intrinsically 'other'.<sup>20</sup> Given that culture is, to a large extent, a matter of struggle and disagreement, the purported uniformity, coherence or stability of given national cultures will often be no more than a rhetorical claim projected by outside observers or manipulated by elements within the culture concerned. 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. There is therefore some danger of reifying national stereotypes, (as in the earlier examples of driving practices in different societies?) as there is of failing to recognise that legal culture, like all culture, is a product of the contingencies of history and is always undergoing change.<sup>21</sup> It is enough to think of the transformations in attitudes towards 'law and order' from Weimar to Hitlerian Germany. In terms of the case study that follows it is worth remembering that Italian judges in the 1920s and 30s had virtually no backlog of cases.

One of the most pressing tasks of the comparative sociologist of law is to try and capture how far in actual practice what is described as globalisation in fact represents the attempted imposition of a one *particular* legal culture on other societies. Some leading authors argue that we are now seeing convergence towards a modern type of legal culture,<sup>22</sup> and in particular the recent growth of prestige of the Anglo-American model which is spread by trade and the media. The Anglo-American model is seen to be characterised by its emphasis on the care taken to link law and economics (rather than law and the state), procedures which rely on orality, party initiative, negotiation inside law, as well as more broad cultural features such as individualism and the search for security through legal

<sup>19</sup> Marian Strathern, *Shifting Contexts: Transformations in Anthropological Knowledge* (1995) 3.

<sup>20</sup> Maureen Cain, 'Orientalism, Occidentalism and the Sociology of Crime' (2000) 40 *British Journal of Criminology* 239.

<sup>21</sup> See Nelken, 'Understanding/ Invoking Legal Culture', above n 2.

<sup>22</sup> Lawrence Friedman, 'Is there a Modern Legal Culture?' (1994) 7 *Ratio Juris*, 117. See also David Garland, *The Culture of Control* (2000), who, in the admittedly restricted area of criminal justice, argues that American legal responses epitomise those required by 'late modern society', and are bound to arrive to other advanced democracies if they have not already done so.

remedies.<sup>23</sup> Others insist that nation states remain recognisably distinctive, with the extreme of ‘adversarial legalism’ located only in the United States.<sup>24</sup> It has been observed that much of the ‘ideal’ model does not accurately describe how the law operates at home, for example the American legal and regulatory system in practice often relies on inquisitorial methods. National versions of the Continental legal system embodied in ready packaged Codes are also being exported, especially to the ex-communist world. In addition, the ideals represented by the ‘rule of law’ itself, as a way of providing certainty and keeping the state within bounds, seem increasingly outdated for the regulation of international commercial exchange by computer between multinationals which are more powerful than many of the governments of the countries in which they trade.<sup>25</sup>

What does seem undeniable is the extent to which legal culture is becoming ever more what we could call ‘relational’. With increasing contact between societies there are ever more opportunities to define one’s own legal culture in terms of relationships of attraction to or repulsion from what goes on in other societies. For example, when comparative European prison rates first began to be published in the 1980s, Finland, which came high in the list, decided to cut back on prison building, whereas Holland felt entitled to build more. What mattered was to stay within the norm. Likewise, for many European countries the continued use of the death penalty in the United States serves as a significant marker of the superiority of their own legal culture.

### **(b) What is the Concept of Legal Culture good for?**

Let us assume that we can identify which unit — or, better, units — of legal culture we want to study. Our second set of questions concern how we should employ the concept in the context of our investigations. What is the point in calling a particular pattern of behaviour or ideas legal culture, and what follows from this? We could use this term, like others such as ‘legal system’ or ‘legal process’, as no more than scholarly shorthand for pointing to a set of activities or problems. But if we want to utilise legal culture in explanatory enquiries we shall have to go further than this. The question is

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<sup>23</sup> See Wolf Heyderbrand, ‘Globalization and the Rule of Law at the End of the 20<sup>th</sup> Century’ in Alberto Febbrajo, David Nelken and Vittorio Olgiati (eds), *Social Processes and Patterns of Legal Control: European Yearbook of Sociology of Law*, 2000 (2001) 25.

<sup>24</sup> Robert Kagan, *Adversarial Legalism: The American Way of Law* (2001); David Nelken, ‘Beyond Compare? Criticising the American Way of Law’ (2003) 28 *Law and Social Inquiry* 181.

<sup>25</sup> See William Scheuerman, ‘Globalization and the Fate of Law’ in David Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (1999) 243–66

how much further? Culture is one of those words which it is particularly difficult to define and easy to abuse.<sup>26</sup> Within anthropology the process of producing accounts of other cultures is increasingly contested.<sup>27</sup> How can we avoid the ever-present danger of circular argument? (eg they do it that way because that is how they do it in Japan, in Holland or wherever). Is it best to use the term legal culture only as a residual explanation when other explanations run out?<sup>28</sup>

Roger Cotterrell has argued that the term legal culture is too vague and impressionistic a concept to be useful in constructing explanations.<sup>29</sup> Lawrence Friedman, the acknowledged father of the term, replies that it is no worse than other overarching social science concepts. Even if the concept as such is not measurable it covers a wide range of phenomena that can be measured.<sup>30</sup> In its role in explanations, legal culture can serve to capture an essential intervening variable in influencing the type of legal changes which follow on large social transformations such as those following technological breakthroughs.<sup>31</sup> More generally, legal culture determines when, why and where people turn for help to law, or to other institutions, or just decide to 'lump it'.<sup>32</sup> It would be a finding about legal culture, he says, if French but not Italian women were reluctant to call the police to complain about sexual harassment.<sup>33</sup> The issue of legal delay, as we shall see also lends itself to analysis for this purpose.

Friedman is also the author of the classic distinction between 'internal' and 'external' legal culture. On the one hand, 'internal legal culture' refers to the ideas and practices of legal professionals; 'external legal culture', on the other hand, is the name given to the opinions, interests, and pressures brought to bear on law by wider social groups. Friedman has increasingly argued that the importance of 'internal legal culture' as a factor in explaining socio-legal change tends to be exaggerated, usually by legal scholars who have an investment in doing so.

<sup>26</sup> Adam Kuper, *Culture: The Anthropologists Account* (1999).

<sup>27</sup> James Clifford and George Marcus, *Writing Culture: The Poetics and Politics of Ethnography* (1986).

<sup>28</sup> Tony Prosser 'The State, Constitutions and Implementing Economic Policy: Privatisation and Regulation in the UK, France and the USA' in David Nelken (ed), Special Issue on *Legal Culture, Diversity and Globalization* (1995) 4 *Social and Legal Studies* 507–516.

<sup>29</sup> Roger Cotterrell, 'The Concept of Legal Culture' in David Nelken (ed), *Comparing Legal Cultures* (1997) 13.

<sup>30</sup> Lawrence Friedman, 'The Concept of Legal Culture: A Reply' in David Nelken (ed), *Comparing Legal Cultures* (1997) 33.

<sup>31</sup> Friedman, *Law and Society: An Introduction* (1977).

<sup>32</sup> *Ibid.*

<sup>33</sup> Friedman, 'The Concept of Legal Culture', above n 30, 35.



He has preferred to concentrate on the importance of external legal culture and has given especial attention to the increasing public demand for legal remedies — what he calls the drive to ‘Total Justice’<sup>34</sup> — producing legal and social change. Some of the most stimulating if controversial work in this field, however, has been designed to show, *pace* Friedman, that patterns of legally related behaviour are less the result of the way ‘folk culture’ shapes the demand for legal relief and more the consequence of the institutional possibilities provided. There has been considerable debate for example about how far the comparatively low use of courts in Japan should be explained in terms of a specifically widely felt Japanese (and, more generally Asian) religious based, cultural reluctance about going to law, or whether it is more a result of a deliberate set of government created disincentives to litigation.<sup>35</sup> An 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.<sup>36</sup> The answer given is 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, it is argued, as compared to Germany, possesses a much wider range of ‘infrastructural’ avenues for disposing of cases in ways that do not require court litigation.<sup>37</sup>

The mainstream social science explanatory approach to legal culture typically seeks to assign causal priority between competing hypothetical variables. The interpretative approach, on the other hand, is more concerned to understand how aspects of legal culture resonate and fit together. It sees its task as faithfully translating another system’s ideas of fairness and justice and making proper sense of its web of meanings. In the search for holistic meaning the insistence on distinguishing internal from external legal culture, or the ‘demand’ for law from the ‘supply’ of law, is likely to obscure more than it reveals.<sup>38</sup> Whereas the first approach uses various aspects of legal culture to explain variation in levels and types of legally related behaviour such as litigation or crime control, the second approach

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<sup>34</sup> Lawrence Friedman, *Total Justice* (1985), and see also Lawrence Friedman, *The Republic of Choice: Law, Society and Culture* (1990).

<sup>35</sup> See, eg, Valerie Hamilton and Joe Sanders, *Everyday Justice: Responsibility and the Individual in Japan and the United States* (1992).

<sup>36</sup> Ehrhard Blankenburg, ‘Civil Litigation Rates as Indicators for Legal Culture’ in David Nelken (ed), *Comparing Legal Cultures* (1997) 41.

<sup>37</sup> As an illustration of the lack of conceptual clarification in this field we may note that the infrastructural alternatives that Blankenburg, *ibid*, calls ‘legal culture’ others would describe as ‘structural factors’, precisely in contrast to cultural ones.

<sup>38</sup> David Nelken, ‘Puzzling out Legal Culture: A Comment on Blankenburg’ in David Nelken (ed) *Comparing Legal Cultures* (1997) 69.

seeks to use evidence of legally relevant behaviour and attitudes as an 'index' of legal culture. It aims at providing 'thick descriptions'<sup>39</sup> of law as 'local knowledge'.<sup>40</sup> In testing its hypotheses the mainstream approach seeks a sort of socio-legal 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, concerned precisely with grasping linguistic nuance and cultural packaging, would ask whether and when the term discretion is used and what different nuances it carries.<sup>41</sup>

Scholars who adopt the interpretative approach contrast the different meanings of the 'Rule of Law', the '*Rechtstaat*', or the '*Stato di diritto*', the Italian term '*garantismo*' versus 'due process', or 'law and order' as compared to the German '*innere sicherheit*'; they unpack the meaning of '*lokale justiz*' as compared to 'community crime-control'.<sup>42</sup> They try to grasp the secrets of culture by focusing on key local terms, which are almost, but not quite, untranslatable. Blankenburg himself explores the meaning of the term '*beleid*' in Holland that refers to the more or less explicit policy guidelines followed by trusted government, criminal justice personnel and public organisations in general.<sup>43</sup> They examine the idea of the state in common law and continental countries so as to understand, for example, why litigation is seen as essentially democratic in the United States and as anti-democratic in France. For this approach, concepts both reflect and constitute culture; as in the changes undergone by the meaning of 'contract' in a society where the individual is seen as necessarily embodied in wider relationships,<sup>44</sup> or the way that the Japanese ideogram

<sup>39</sup> Clifford Geertz, 'Thick Description: Towards an Interpretive Theory of Culture' in Clifford Geertz, *The Interpretation of Culture* (1973).

<sup>40</sup> Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (1983).

<sup>41</sup> 'Legal culture' is not itself an indigenous term. But in Italy it is very common (especially when referring to the South) to speak of the 'culture of legality', by which is meant the project of extending 'jurisdiction' and the difficulty of gaining social acceptance of the need to live life within the constraints of legal rules.

<sup>42</sup> Lucia Zedner, 'In Pursuit of the Vernacular: Comparing Law and Order Discourse in Britain and Germany' in David Nelken (ed), Special Issue on *Legal Culture, Diversity and Globalization* (1995) 4 *Social and Legal Studies* 517.

<sup>43</sup> See Blankenburg and Bruinsma, above n 5.

<sup>44</sup> Jane K Winn, 'Relational Practices and the Marginalization of Law: Informal Practices of Small Businesses in Taiwan' (1994) 28 *Law and Society Review* 193.

for the new concept of 'rights' came to settle on a sign associated with 'self interest' rather than morality.<sup>45</sup>

An interpretative stance is more ready than the mainstream explanatory approach to treat culture as part of a flow of meaning, 'the enormous interplay of interpretations in and about a culture'<sup>46</sup> to which the scholar herself also contributes. It is also less interested in drawing a definitional line between legal culture and the rest of social life because it sees this less as a problem for the observer to solve than an aspect of the way legal culture actually works as it reflexively constructs the boundaries of law-in-society. Common law systems, for example, tend to focus more on the link between law, economics and society; civil law systems principally on that between law, politics and society.<sup>47</sup> In some civil law legal regimes, as compared to the Anglo-American pragmatic-instrumental view of law, law may be deliberately treated as more of an ideal aspiration than as a blueprint for guiding behaviour, either because of deference to the state project of representing the collective will, or under the influence of religious traditions and philosophical idealism. This may partly explain the successful spread of Anglo-American lawyering.<sup>48</sup>

## II. Legal Delay in Italy: A Case Study

Civil cases in 1999 took *on average* five years to go through the first trial stage, and over nine years for both the first and appeal stages (which is essentially a retrial of the facts).<sup>49</sup> There is also a further and regularly used

<sup>45</sup> Eric Feldman, 'Patients' Rights, Citizen Movements and Japanese Legal Culture', above n 4.

<sup>46</sup> Jonathan Friedman, *Cultural Identity and Global Process* (1994).

<sup>47</sup> This is one reason why it is difficult to accept the Luhmann-Teubner systems theory of law which tries to posit a constant relationship between the legal and other social sub-systems in all modern societies, see David Nelken, 'Beyond the Metaphor of Legal Transplants? Consequences of Autopoietic Theory for the study of Cross-Cultural Legal Adaptation' in Jiri Priban and David Nelken (eds), *Law's New Boundaries: The Consequences of Legal Autopoiesis* (2001) 265.

<sup>48</sup> See Maria-Rosaria Ferrarese, *Le Istituzioni della Globalizzazione* (2000).

<sup>49</sup> It is difficult to find an Archimedean lever for studying legal culture. Explanations of legal culture cannot just be based on explaining 'rates' of legal activity since knowledge of how culture works is required to make sense of these 'rates' and decide their significance for comparative purposes. See David Nelken, 'Puzzling out Legal Culture', above n 38, and David Nelken, 'Comparing Criminal Justice' in Mike Maguire et al, *The Oxford Handbook of Criminology* (3rd ed, 2002) 175. These official figures therefore obviously need considerable interpretation. For some purposes they overestimate the time required, whereas for others they may even underestimate it! The figures report the *average* time taken by all cases in

final appeal stage on legal points that can be taken to the numerous sections of the Supreme Court. Penal cases can take only a little less time. At the start of 2000 as many as 3 500 000 civil cases and 5 400 000 penal cases were awaiting trial. Can the idea of legal culture help us make sense of all this? What can this case study show us about the value of the concept? As promised, I shall be concentrating in particular on the intersections amongst different units — or levels — of legal culture, as well as on the role of the concept as an explanatory tool and an invitation to explore meaning. I shall take these two issues in turn.

### (a) The Need for a Multi-level Analysis

The problem of legal delay in Italy is largely perceived and presented as a national problem. But there is certainly also considerable variation at the local court level around the country. The time courts took to dispose of civil cases from their case loads ranged from around six to eleven years, and the courts in the South were almost always consistently longer. For example, according to the Ministry of Justice statistics for the civil courts in 1999, the shortest period was found in the small town of Bolzano in the (Austrian influenced) far North of the country, where first stage trials took on average around four and half years and the process of appeal court hearings took around a further year and half (making a total 6.20 years). The court with the record for the longest trials was Caltanissetta, a small town in Sicily where, on average, cases took seven and half years for the first trial stage, and a further five and a half for the appeal stage (total time 13.15 years). In some, mainly southern, courts bankruptcy or inheritance disputes can still involve more than one generation of lawyers. In others, legal culture may be 'behind' the level of efficiency reached in those parts of the country. The small university town where I work is situated in a wealthy and peaceful part of Central Italy. But the head of the local lawyers association was reported in June 2003 as protesting about the fact that after initial hearings the following hearing date for civil trials can only be fixed for dates

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each tribunal. They also include those that finish before a sentence is delivered (either by agreement between the parties or for other reasons). Yet further time is required for 'depositing' the sentence of the judge, and even more for actually carrying out the court's judgment and getting your money and property back. For a series of reasons, that have to do with the lack of court bailiff resources and the competition from private and even illegal actors, the actual 'recovery' of the debt is the most problematic stage of the legal process. After the 1995 civil justice reform designed to shorten waiting time hundreds of thousands of cases, some of which are quite legally complex ones, awaiting trial at the time of the reform, were assigned to a sort of legal bureaucratic limbo (the so called '*sezione stralcio*') where they are still slowly being disposed of by poorly paid lawyers deputising as honorary judges.

between 2007 and 2011(!) (And in most normal cases six hearings are required.)

Nonetheless, these national differences do not negate the existence of a relatively high level of court delay in Italy, as compared to other European countries. And, if anything, there is *more* in common in legal culture across the country than in many other aspects of national culture. As a relatively young state there are significant differences in many other aspects of national culture between the North, the Centre and the South. The similarities in legal culture, on the other hand, derive from the sharing of common rules, procedures and nationally appointed judges as well as aspects of institutional practice and law in action, such as the way lawyers are paid. Indeed, law is often deliberately used as a nationalising and centralising force to correct for the 'backwardness' of outlying areas.

On the other hand, it is impossible to understand the factors that shape court delays in Italy without looking beyond national boundaries. The current working of Italian criminal justice is moulded by doctrinal scholarship which reflects, on the one hand, the long standing hegemony of German penal law, which is still unchallenged amongst the law professors of substantive criminal law, and, on the other hand, the more recent influence of Anglo-American ideas which have come in as a result of the introduction of a large number of accusatorial elements in the penal process. This certainly complicates any effort to characterise Italian criminal justice merely in terms of other aspects of the same culture. Proposed remedies for court delays are more likely to come from abroad than from within Italy. This is true, for example, for the introduction of so called 'Justices of the Peace' as a more rapid jurisdiction for first level civil cases, which again drew on the Anglo-American tradition.

Sometimes such 'borrowing' may even exacerbate delay. For example, this was true of the effects of the 1989 new code of criminal procedure on delays on the penal side. This famous reform was the first to introduce a fully-fledged accusatorial system into a continental legal system. But it came up against the reluctance of the judges and prosecutors working in the system to lose control of the trial. It was modified early on by a restrictive decision handed down by the constitutional court, which feared that organised crime would otherwise be able to exploit the considerable new procedural advantages it gave to the accused.<sup>50</sup> Part of the justification for the reform was the stimulus it would give to speeding up trials by allowing a variety of quicker alternatives including plea bargaining. But alternatives to full trial are adopted in less than a third of cases. The main problem is that the new protections for the accused that

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<sup>50</sup> Elisabetta Grande, 'Italian Criminal Justice: Borrowing and Resistance' (2000) 48 *American Journal of Comparative Law* 227.

characterise the adversarial system were simply added to the previous ones characteristic of the older inquisitorial type of system. The system now seeks to incorporate protections designed to foreground the forensic heat of the adversarial trial *together* with reliance on double checking by different judges in the three stages of trial that include the right to a full rehearing of the facts on appeal. Even relatively trivial criminal cases can need to be viewed by as many thirty people with legal training. Bureaucratic procedural requirements include complex notification rules for all parties to the trial that can be easily manipulated if the accused changes his address or lawyer regularly. What this means is that there is little incentive for lawyers to use any of the alternatives to trial. By holding out and exploiting all procedural rights there is a good chance that the case will be time-blocked before it runs its full course of all three trial stages.

At the macro level, however, it is the role played by the supernational Strasbourg Court of Human Rights that is of particular interest for our purposes. The right to a trial within a reasonable period is one of the fundamental rights of the Convention of Human Rights (Art 6) that this Court seeks to protect. In 1999, when there were over forty signatories to this convention, there were no less than 6885 appeals from Italy awaiting decision, almost all of which concerned legal delay. This represented over 20% of the total from all countries for breaches of all the various provisions of the Convention. Italian representation at later stages was even higher. Thirty six per cent of all sentences handed down were findings of guilt against Italy for cases involving unreasonable delay in its trial processes. The Italian state was condemned to pay so called moral damages to almost all the successful applicants. The Strasbourg Court itself got into difficulty in handling all these appeals within a reasonable period and set up committees to overhaul its machinery in an attempt to catch up with its backlog!

The cases that reach Strasbourg are not necessarily representative of Italian court cases in general, but it is by no means only the extreme cases that arrive there. To provide some empirical evidence on these matters I carried out an analysis of a sample of 50 court cases handed down by the court in the late 1990s. This revealed that delays ranged from four to 18 years. Most cases were on the civil side. Penal cases tend to end by the case becoming time bound ('prescription') and the accused person often tends to leave it there. But interestingly, no more than a seventh of the sample involved anything like commercial disputes. Most cases involved individuals in dispute with large organisations. The Italian state usually tried to defend the cases at Strasbourg on the grounds of court overload, but this defence was always rejected. At a conservative estimate as many as a fifth of court cases in Italy take longer than the time Strasbourg considers reasonable. Absent particular reasons of legal complexity a good part of the

Italian system could in theory automatically just be transferred to Strasbourg after a certain period of normal waiting time! The Court has responded to the annual assault of cases by treating the Italian state as a 'persistent offender', placing it under surveillance and threatening to exclude it from the Council of Europe. The only other signatory treated in this way is Turkey, for its continuing maltreatment of the Kurds. Justice delayed is often justice denied, but it is questionable whether excessive court delay is the same sort of breach of human rights as torture.

The role of the Strasbourg Court well illustrates the complexities of charting the relationship between the local and the global in studying legal culture. Because 'law' is at the same time both agent and object of globalisation it becomes difficult even for participants in legal systems to know where the boundaries of the jurisdiction stop. On the one hand the Strasbourg Court is an institution whose jurisdiction allows it override local legal regimes. In the Italian case the court even seems to be engaged in something like an attempt to standardise modern court systems and 'normalise' Italy's deviant approach to legal procedure and court practice. On the other hand, because Italy was a willing signatory to the Convention we could consider the European Court as no more than a higher level court of appeal of the *same* legal culture. Importantly, even if not as such an element of the *legal system*, this idea of resorting to law as the antidote to abuse of power is also a central part of the belief system of many judges, lawyers and jurists within the Italian legal culture itself. But Strasbourg is still a rather special court. According to one Italian 'human rights' lawyer who specialises in taking cases to Strasbourg who was interviewed in 2000

the European Court, the Court is almost a 'Court of Miracles' because it seems to be an organisation which is outside time and space. You can go there to punish the powerful. Because that is what it is all about we could say that what it offers is revolutionary, even anarchic justice.

The lawyer went on to add that the actual damages that the Strasbourg Court awards to someone 'crushed by the national legal system' were far too low to compensate for what can have been lost.

It would be premature to conclude that European harmonisation of court delay is round the corner or that Italy is about to get its house in order.<sup>51</sup> Some home-grown remedies have been introduced. There have been significant 'managerial' type reforms aimed at combining different levels of the criminal court and reducing the number of hearings in civil cases. Gains in speed in new civil cases did result from the re-routing of

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<sup>51</sup> Other case studies, for example of the implementation of International Monetary Fund standards or international conventions etc, would likely turn up similar dialectics of change and resistance.

pre-1995 cases to be dealt with by honorary judges. Judges who are found responsible for breaching bureaucratic time limits in writing their judgments now risk having to pay damages and not, as previously, only criticism, as a result of internal disciplinary hearings by the Supreme Judicial Council. But the basic weaknesses of the system have not been touched. In addition, however, Italy has also taken more questionable measures to stave off criticism from Strasbourg. In 1999 the so-called Pinto Law (*Legge Pinto*) was passed. As a result cases of alleged delay now have first to be submitted to the court of appeal of the nearest district, where decisions are then supposed to be provided within four months. This holds back recourse to Strasbourg and aims to prevent parties from seeking remedies that place Italy in a bad light internationally and cost the government money in moral damages. But this new trial stage of course itself adds to delay, and there are additional limits to the remedies provided. At a conference on legal delay in the criminal courts held at Padua that I attended recently, the way the courts are applying the *Legge Pinto* was described as 'diabolical'.<sup>52</sup> For example, unlike actions before the Strasbourg Court it is necessary within Italy to prove that delay has led to material damage and the expenses of bringing the action are not reimbursed. So cases are still going to go to Strasbourg.

More recently, a new constitutional right to reasonable length trials was included in the framework of the so-called 'just trials' revision of the *Constitution*. Significantly, however, this does not give rise to private actions against the state as with the Strasbourg Court.<sup>53</sup> No thought was given to how to make this right effective, nor how to ensure its priority in relation to the other rights and procedural protections being introduced simultaneously whose tendency was actually to lengthen court processes. Judges have told me that they have begun to use this new principle as a means of 'closing' stale cases where, from a strictly formal point of view this would have been problematic. Lawyers defending politicians and organised criminals also try to invoke this as a right when their clients have been waiting a long time (often because of their own delaying tactics) for their trials to end. But any real commitment to the aim of 'speedy trials' must be suspect in the light of the continuing and even increasing emphasis on multiplying points and methods of procedural rights and controls. For most of the trial lawyers I have been interviewing in the course of my

<sup>52</sup> The Padua Conference on Reasonableness in the Length of Trials, 30–31 May 2003.

<sup>53</sup> Italian legal (and political) culture is one where rights are often not related to effective resources. For example female judges (an ever increasing proportion of the magistracy) are guaranteed excellent paid maternity leave but no substitute is supplied for them at this time and the cases they are responsible for are usually just put on hold.



research on this topic the average time taken for court cases in Italy is something they have adapted to and take for granted. The exceptional cases for them are the ones that overrun the Italian norm, because of more than normal problems in the availability of judges, administrative errors by the *cancelleria*, the number of parties involved, the need for complicated expert evidence, difficulties in obtaining the collaboration of parties or witnesses, unfair tactics used by the other side, legal complexities and so on.

### **(b) Explaining and Interpreting Legal Delay in Italy**

What happens in Italy is not merely a result of Italian culture and legal culture. But it is certainly also very much connected to other aspects of the Italian context. What (other) aspects of culture and society explain court delay in Italy? What can an interpretative approach tell us about the attitudes and behaviour which help produce such delays? As we shall see, one strategy of explanation concentrates on identifying the possible causes of delay and giving each the weight it deserves. The second seeks more to understand different ways of thinking about law.

To a degree the length of legal processes is the result of purely legal factors. The requirement of three court stages (two of these on 'the facts'), the number of supreme courts (which often in practice re-try cases), the length of judge's verdicts ('motivations' as they are called on the continent), and the prestige of jurists' commentary as a potential source of law, all encourage legal uncertainty. The judge's role in civil trials is central, as it is in France, but in Italy they are expected to write much longer 'motivations' of their decisions. Judges explain that they can only get around to thinking about the case and writing their sentences once all the facts have come in. Lawyers who used to write brief requests now use their computers to state their claims at great length. Moreover, once it has accumulated, delay itself produces more delay and uncertainty.

Media discussions attribute the 'blame' to the way people abuse the system. Either the problem is the laziness, arrogance or managerial ineptitude of judges, or it is the avidity of lawyers, the litigiousness of disputants or the disinterest or self interest of politicians. In academic discussions the most cited cause is undoubtedly the fact that the number of judges has nowhere near kept pace with the increasing rate of litigation in the post war period. In terms of what Friedman calls 'external legal culture', the argument is that the 'supply' of law has simply not kept up with public demand. Since the last world war there has been a seven fold increase in the number of civil cases filed whereas the number of judges has less than doubled.<sup>54</sup> Many more cases arrive at the courts than can possibly be dealt

<sup>54</sup> Sabino Cassese, 'L'esplosione del Diritto: Il Sistema Giuridico Italiano dal 1975 al 2000', in (2001) 28 *Sociologia Del Diritto* 55. Cassese, a leading authority on public law, links this to both economic change and the

with by the number of judges available, and court hearings are for this reason scheduled well into the future for the earliest court calendar date available. Crucially, then, delay is not a result of the time actually spent on dealing with the cases, but is instead the accumulated product of all the 'dead' periods (calculated in months or even years) that are allowed to pass between the relevant court sessions.

A second important cause of delay is said to be the large increase in the number of lawyers which has grown up to satisfy, but which may also stimulate, this public demand. According to some statistics there are now as many as 150 000 lawyers though not all of them are in practice. Entrance examinations for becoming lawyers, in contrast to those for judges, are extremely easy. The way that lawyers are paid, on the basis of each legal act they perform, is also said to encourage drawing out cases.<sup>55</sup> On the one hand, there is no state financed legal aid, and hence no possibility for limiting cases litigated with public subsidy to those considered meritorious. On the other, the costs for litigation, especially in a comparative context, can be considered relatively low and do not serve as much of a deterrent to litigation. Once cases are under way lawyers rarely aim at settlements before the case reaches court, in part because delay comes to represent a goal in itself. On the civil side, delay for one person is stay of execution for another, and, in both the civil and penal process, postponement of the day of reckoning is exactly what at least one party is seeking to obtain. The relatively low proportion of cases which lawyers settle before trial is also said to be explained by the fact that in Italy there is 'no culture of compromise'. The last chapter of a recent review of alternative dispute arrangements in Italy has the title (in Italian) 'Conciliation as set out by the Code — a ruined past, a bankrupt present and a highly uncertain future'.<sup>56</sup>

Other background institutional factors are also worth noting. In terms of government spending the Italian court system is starved of resources and those that are available are sometimes skewed by political considerations and by the difficulty in rationalising the distribution of tribunals across the country in terms of effective demand. The court administration struggles to cope with its workload often relying on antiquated information technology, and at least some of the generally poorly paid employees are affected by the formalistic ethos which characterises much public employment in Italy. The self governing judicial parliament has its work cut out to defend judicial

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'explosion' of law. An earlier empirical study argued that patterns of economic growth and court overload in Italy were not well correlated and that aspects of internal legal culture seemed to be better predictors, see Stefania Pellegrini, *La Litigiosità in Italia, un'Analisi Sociologica-Giuridica* (1997) 24.

<sup>55</sup> Daniele Marchesi, *Avvocati, Magistrati, Litiganti* (2002).

<sup>56</sup> Stefania Pellegrini, *La Giustizia Civile Dentro e Fuori dal Tribunale* (2000).

autonomy from political attack and has neither the resources nor the know how to run the courts as a public service. There is little support amongst judges for a managerial approach to running Italian courts. The heads of courts are never chosen for managerial ability and often lack it, and for those who are, formally speaking, their subordinates have a high level of constitutionally guaranteed independence. There is no small claims court, though recently Justices of the Peace have been recruited and given a role in dealing with low value cases. But they too are now accumulating a backlog. These weaknesses at the formal level are made up for by the existence of what Blankenburg called 'infrastructural alternatives'.<sup>57</sup> Only the very rich can afford judicial arbitration and there are still only relatively few mediation schemes set up by local chambers of commerce.

In addition, however there are also what we could call structural factors. Here the major argument would be that legal delays are in the interest of the powerful. But the evidence for this is equivocal. Take first the politicians. Governments save money by not spending on the courts, and, indirectly, the voters benefit in lower taxes — assuming they pay them. Delay, and its consequence, queuing, is then one way to ration a scarce resource. Some of the cases of worst delay actually involve government trying to avoid cashing pension or other promises. In general, Italian governments tend to govern through leniency rather than efficiency and order.<sup>58</sup> Yet, on the other hand, governments pay a high price in legitimacy for the poor functioning of the courts, especially after the procession of cases going to Strasbourg. And the court system has a high degree of political, though not financial, autonomy from the executive. Even the Ministry for Justice relies on judges seconded to the Ministry for drafting and supervising legal reforms.

Working out the relationship between delay and economic interests is similarly complicated. For Weber (and his modern followers) a predictable and well functioning legal system is an essential part of the infrastructure of capitalism. Yet economic interests in Italy put up with a high level of disorganisation and delay. The largest businesses, it is true, can and do have recourse to arbitration, using judges and/or distinguished jurists, as a way of resolving their disputes. But this is a costly solution as a percentage of the value of the case has to be paid in return for quick justice. The large majority of Italy's economy, however, relies on small business, and they would surely benefit from a more expeditious and responsive court system. Delay mainly helps those in the wrong who can use court delay as means to postpone payment (or prison), especially, as has happened, when the

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<sup>57</sup> Blankenburg, above n 36.

<sup>58</sup> Dario Melossi, 'The Economy of Illegalities: Normal Crimes, Elites and Social Control in Comparative Analysis' in David Nelken (ed), *The Futures of Criminology* (1994) 202.

interest on funds that can be obtained in the market place is higher than the legal interest which has to be paid when the case is eventually settled.

Of course, once this type of system exists, those working within or alongside it, and those caught up as parties, may all sometimes have vested interests in delay. Having found ways to benefit from it they may also willingly perpetuate the current situation. Judges and lawyers, sometimes in implicit collusion, may gain advantages by taking things slowly; the judge can postpone the moment of writing the sentence, the lawyer can keep more cases on the go than could possibly be handled in a system with more stringent temporal requirements. What is more, the consequent unpredictability of legal remedies provides a niche for intermediaries or mediators, such as politicians and professionals, debt collection agencies, accident specialists, in the North, and, in addition, organised criminals the South. These play a vital role in bringing parties together, acting as guarantors,<sup>59</sup> and resolving at least some cases of non-compliance for example by taking over or recovering debts. Banks gain from acting as depositors in long drawn out bankruptcy cases. For their part large corporations get around court inefficiencies by taking independent action to disconnect supply or reclaim debts owed. Those who are 'repeat players'<sup>60</sup> in the legal system can choose when it suits them to engage in litigation and can opt for delaying tactics or early settlement as it suits them. They have the power to make others wait and have time on their side. It is often said, though usually without any direct evidence to back it up, that economic actors also tolerate the current inefficient system because they feel it could be to their advantage if they were ever to find themselves on the side with the weaker case. Certainly, there is ample proof that some powerful actors, including leading politicians and businessmen, do fear that they might one day come within the reach of the criminal courts and so have an interest in a trial system which offers room for manoeuvre and delay. It is hard (if not impossible) to envisage a legal system that on the one hand had long drawn out criminal trials but rapid civil ones. Nonetheless to argue that the present delays are more in the interests of economic actors than otherwise still seems to be going too far. The widely read and authoritative financial daily, *Il Sole 24 Ore*, which is owned by the *Confindustria* employers' association, certainly treats delay as a serious problem and it regularly denounces the inefficiency of Italy's courts. Indeed this newspaper is the main public source of information about court delay.

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<sup>59</sup> In continental systems the profession of notaries plays a vital institutionalised role in guaranteeing the validity of documents and transactions such as those involved in the sale or purchase of property and the construction of companies.

<sup>60</sup> Marc Galanter, 'Why the Haves Come out Ahead' (1974) 8 *Law and Society Review* 95.

In Friedman's terms, the question remains, why does the pressure of 'external legal culture' not produce a more responsive and efficient system? To explain this we must focus more carefully on the 'internal legal culture' of jurists and practitioners and try to make sense of their attitudes and actions. From the President of the Republic down, public discourse is uniformly and repetitively critical of legal delay. At each ceremonial opening of the legal year the head judge of the legal system and the heads of individual court districts ritually deplore delay. Indeed they use the level of backlog as a measure of the progress they have (or have not) achieved in the running of their courts. Ministers of Justice likewise underline this problem as their priority. But most of the jurists who construct and debate procedural reforms are opposed, as a matter of principle, to treating law as only or mainly a matter of good management. Many such jurists see it as a pre-eminent task for law not to compromise its ideals and procedures. For example, The Padua Conference on Reasonable Trial Lengths, was punctuated by unflattering references to Bentham, utilitarianism, managerialism, and pragmatism. And mention of some trials in Denmark taking no more than twenty three days were greeted with laughter!

Legal processes are seen to need lawyer's expertise. By comparison with Anglo-American legal cultures lay participation in judicial matters is highly restricted and even Justices of the Peace are required to have law degrees. Sometimes delay is admitted to be just an unfortunate side-effect of what fair procedure requires. But, more often, 'Law' and 'administration' are presented as potentially competing discourses, and the transformation of law into administration a danger to be exorcised. A distinction is sometimes made between 'effectiveness' (which is relative to aim) and acceptable, and 'efficiency' which is assumed to sideline questions of ideal aims into sordid questions of costs and benefits. Because the law must be equal for all, there is resistance to introducing special procedures for different types of cases at either a formal or informal level. Greater effort is dedicated to maintaining the greatest possible right to trial before a professional judge than in any other comparable common law or civil law systems. Interestingly, delay itself may even be seen as valuable. One experienced family lawyer whom I interviewed said it was right for family separation cases to take the time they did because of all the emotions involved.<sup>61</sup> And a speaker at the Padua conference on legal delay offered a variety of reasons why delay could be considered valuable in criminal cases.<sup>62</sup>

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<sup>61</sup> By contrast the Strasbourg Court of Human Rights sees delay in cases involving personal status as particularly heinous.

<sup>62</sup> He argued that delay could help the victim get over the effect of the crime; that the trial is (and should be) the punishment for the offender; and that the passage of time allows the judge to see the effects of the crime on the victim and society. In general, delay creates a necessary distance to both the victim

Jurists become highly learned in the arts of procedure. Some even snub their colleagues who deal with mere substantive law! When practising in the courts as lawyers they are skilled in using the time factor as one of the key pragmatic and practical considerations which facilitates the exchange and compromise needed to gain advantage in the cases they defend. But they almost never discuss these practicalities when engaged in politico-legal debate. By contrast, on the criminal side especially, at the level of actual practice many judges and prosecutors do try to indicate priorities and introduce 'virtuous' organisational practices so as to prevent what they see as distortions of legal procedure from leading to paralysis of the system. These include the use of 'do it yourself' techniques that hide behind the 'myth of obligatory prosecution' of all reported crimes, in an effort to avoid falling foul of time-limitation rules.<sup>63</sup> Rather than being credited with keeping the system going, however, resort to these practices is seen as bordering on the employment of legally improper and discreditable discretion.

As this suggests, it would be a mistake to draw too sharp a contrast between 'external legal culture' with its demand for accessible and speedy justice, and a unified 'internal legal culture' with its disdain for other than self regarding legal values. Apart from the interests in greater through-put of some of those in the system (especially those in directive roles), accessible and speedy justice are also legal values in themselves which can and do find some way of being recognised by the system. The question is rather *how* the Italian legal system defines acceptable and unacceptable delay through its rules, jurisprudence and everyday practice. At the level of legal doctrine, for example, there are different time limits for penal and civil cases, special rules for urgent civil cases, and special procedures for certain types of cases. In Italy the legislator has given priority to cases where workers risk losing their jobs. By contrast, in the New York courts, which were the first to be studied socio-legally, priority was given to business cases, and it was this which allegedly led to increasing delay in other kinds of cases.<sup>64</sup> If any remedies for delay are to take effect they will have to engage with the autopoietic definitions of the system, both in doctrine and the 'law in action', for it is these that determine how it allocates its scarce resources.<sup>65</sup>

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and the offender and may make conciliation and mediation possible. Where appropriate it allows the victim and society to see that they were 'co-responsible' for the crime.

<sup>63</sup> David Nelken and Letizia Zanier, 'Tra norme e prassi: durata del processo penale e strategie degli operatori del diritto' forthcoming in *Sociologia del Diritto*.

<sup>64</sup> Harry Kalven and Harry Zeisel, *Delay in the Courts* (1959).

<sup>65</sup> Reducing legal delay requires an understanding of how to co-ordinate the

Equally, the legal procedural values which help produce delay are shared by political elites and many others in the wider society. This is particularly clear on the penal side. In fact, no analysis of legal culture in Italy would do more than scrape the surface if it did not reckon with the historically shaped mutually interlocking distrust of the state found both on the right and the left. After the war there was an understandable reaction against the role of state-run courts during the excesses of Fascism. In addition it was unclear whether it would be the Communists or the Christian Democrats who would prevail electorally, and hence which of these would be obliged to endure the hegemony of their ideological enemies. The post war *Constitution* granted judges and prosecutors a high degree of constitutionally entrenched autonomy and self-government and over the next thirty years an ambitious scheme of self-governing autonomy of the judges was put into place. Increasingly this autonomy from the state came to favour the Communist party that was permanently excluded from the changing government coalitions put together by the Christian Democrats. And eventually it allowed prosecutors and judges to bring down all the parties of government simply by applying established criminal law.<sup>66</sup>

The fear of placing discretion in the hands of political opponents continues to justify the maintenance of unrealistic, redundant and mutually controlling institutions with high procedural safeguards. At the Padua conference a leading law professor sympathetic to the Berlusconi government and active in politics said in his presentation that he would not feel 'protected' if Italy was to remove the appeal stage in criminal cases, even though it is functionally redundant under the newly introduced accusatorial system. 'In this culture and at this time', he said, 'we do not benefit from the settled political consensus characteristic of Anglo-Saxon polities'. A law professor on the left, on the other hand, argued that, in order to avoid the power to prosecute coming under the control of (corrupt) governments it was necessary to maintain the rule of obligatory

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times of all the actors involved, legal and otherwise. The process cannot move faster than that of its slowest component. But there is no reason why the courts have to be the slowest of these. See Thomas Durkin, Robert Dingwall and William L F Felstiner, *Plaited Cunning: Manipulating Time in Asbestos Litigation* (1990).

<sup>66</sup> See, eg, David Nelken, 'A Legal Revolution? The Judges and Tangentopoly' in Stephen Gundle and Simon Parker (eds), *The New Italian Republic: From the Fall of the Berlin Wall to Berlusconi* (1995) 191; David Nelken, 'Judicial Politics and Corruption in Italy' in David Nelken and Mike Levi (eds), *The Corruption of Politics and the Politics of Corruption*, (1996) Special Issue of 23 *Journal of Law and Society* 95, and David Nelken, 'Il Significato di Tangentopoli: La Risposta Giudiziaria alla Corruzione e i Suoi Limiti' in Luciano Violante (ed), *Storia d'Italia 14: Legge, Diritto e Giustizia* (1997) 597.

prosecution, despite the fact that this is either a fig leaf for discretionary decision-making or the cause of unmanageable delay. Better that delay serve as the 'functional equivalent' of discretion than allow one's political rivals the choice of who to prosecute, or let off. In this as in so many other ways structure and culture are symbiotic.

It could be objected that delays in the civil courts have less to do with the degree of autonomy possessed by prosecutors and more to do with the general weaknesses of the public administration. But it is what happens in the criminal courts that sets the agenda for court reform. Moreover, criminal courts handle a far wider range of issues than is true in Anglo-American polities. As just one example, lawyers in tort claims in road accident cases regularly rely almost entirely on the evidence collected by the public prosecutor in connected criminal proceedings. And criminal courts have regularly drained resources from the civil courts as they responded to the emergencies of terrorism, organised crime, and, more recently political corruption.

## II. Legal Delay, Legal Culture and General Culture in Italy

What else can legal delay tell us about the connection between legal culture and other aspects of daily life in Italy as compared to elsewhere? Certainly, the rhythms of law and life are in some ways similar. From a comparative perspective, many aspects of social life also move more slowly in Italian culture than in Northern Europe or the United States. Relationships typically depend on family or family-like group allegiances that take a long time to build up. People are slow to leave home, they like to live near where they grew up and to keep very close contact with their families. Ties that are slow to build are also difficult to end. For the groups that occupy key roles in social, economic and political life, co-option is the norm, seniority is of considerable importance, and merit is gained to a large extent simply by *waiting* one's turn. In matters which involve government or public agencies queuing is inevitable, the case file must be followed through all its stages, and it may sometimes be necessary to intervene, personally or preferably through an important intermediary, to secure a successful outcome. There is much in common between the inefficient and over-bureaucratized justice system and the cumbersome and deliberately unresponsive bureaucratic machine that takes refuge in legal formalities and is uninterested in outcomes. Many of the delays attributed to inefficient courts, so called '*malgiustizia*', in fact represent efforts by the courts to deal with the results of poor administration or so-called '*malamministrazione*'.



On the other hand, we should be wary of treating the slowness of court processes in Italy as just an extension of patterns in the wider culture. In its private sector, Italian firms provide fierce international competition on delivery dates and service; the delay of the courts therefore seems rather to be indicative of the much complained of differences between the 'public' sector and the 'private' sector, another aspect of the poor infrastructure that Italian business has to tolerate. Even more than is the case in many other modern societies everyday social and economic life follows its own patron-client logics behind a veneer of state legal norms. Social actors may resort to law as a weapon so as to challenge or at least delay decisions that would otherwise take place according to these other norms. For the weak — as well as for the powerful — delay may sometimes be a solution and not always a problem.

But those who have only legal remedies to rely on can in some senses be held 'to blame' for not being in sufficiently good standing in wider social hierarchies or groupings as to be able to use more privileged routes or alternatives to vindicate their claims. It is appropriate that those using legal remedies put up with the considerable time these take to bear fruit. An important consequence, even if not necessarily the cause, of court delay is thus the way it reinforces such dependence on social hierarchy,<sup>67</sup> and maintains the importance of group allegiances as compared to the individualistic assertion of rights. Whatever other benefits they might bring, more effective court dispute mechanisms might replace or attenuate such bonds. Delay may also be integrative in other, yet stranger, ways. In the Italian context for example it allows everyone, including politicians and state employees, to blame 'the state' and feel united against it!

Legal delay in Italy should therefore be treated not just as an indicator of waiting times but also as a measure of the distance between legal culture and general culture. This 'gap' is in part deliberate, as in the way the criminal law tries to maintain principles of impersonal equality before the law at all stages of the penal process precisely because elsewhere clientilistic and other particularistic practices are so widespread. But it means more generally that the courts are often quite out of touch with widely accepted practices. Thus in Italy a central issue of late has been the

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<sup>67</sup> Douglas Hay, in *Albion's Fatal Tree* (1976), provides a brilliant interpretation of the reason why the increasing passage of legislation carrying the death penalty in 18th century England was accompanied by relatively low implementation of this penalty (especially after the possibility of transportation). He explains that, because avoidance of the death penalty required the obtaining of a 'pardon', its 'latent function' was to reinforce the systems of hierarchical dependence by which those of lower status were reminded that they might one day need to turn for help to their social superiors.

question of where the role of the judges does (and should) stop and that of other authorities begin. This has led to a running battle between the judiciary and the politicians. Every day the newspapers carry stories about allegedly improper interference by one side with the prerogatives of the other. On the one hand the judges see themselves as preventing the powerful escaping the exercise of 'jurisdiction', as they term the boundaries of law's empire; on the other hand, some politicians complain of the exercise of political biased interventions by the judges.<sup>68</sup>

In the end, the lengthy court delays of the Italian legal system may be one price to be paid for what is an extreme form of legal independence from political control. Courts in this type of polity (and the legal culture which goes with it) can, if needs be, take action against the most powerful in the land. But, clearly, this level of activism cannot be sustained on an everyday basis without upsetting those social norms that are geared to the reproduction of social hierarchies. The *Tangentopoli* anti-corruption investigations themselves demonstrate both the exception and the rule as far as the place of legal delay within legal culture is concerned. In the special political circumstances of the early 1990s (in particular the collapse of the Iron curtain), ruling politicians lost legitimacy as soon as the newspapers released the information that they had been sent 'advice' that legal proceedings were being taken against them for corruption. But most of these cases then took a large number of years to actually run their course and virtually no one went to jail. The cycle of corruption scandals has now come to an end. The current Berlusconi government has found that there is much to gain from exploiting and increasing the possibilities of postponing cases where its own legitimacy and interests are at stake. At the same time, however, it regularly accuses the judges of being the major cause of disgraceful delays.<sup>69</sup>

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<sup>68</sup> David Nelken, 'Legitimate Suspicion? Berlusconi and the Judges' in Paulo Segatti and J Blondel (eds), *The Second Berlusconi Government* (2003) 112.

<sup>69</sup> Ibid.