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How Does Culture Count in Legal Change?: A Review with a Proposal from a Social Movement Perspective

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COMMENT

HOW DOES CULTURE COUNT IN LEGAL CHANGE?: A REVIEW WITH A PROPOSAL FROM A SOCIAL MOVEMENT PERSPECTIVE

*Setsuo Miyazawa**

I. CULTURE IN TANASE'S ARTICLE.....	917
II. CULTURE IN FELDMAN'S ARTICLE.....	920
III. CULTURE IN PEERENBOOM'S ARTICLE.....	923
IV. CULTURE IN WHITEHEAD'S ARTICLE	926
V. CULTURE IN LEGAL CHANGE FROM A SOCIAL MOVEMENT PERSPECTIVE	928

We have in this volume four articles on legal change in China and Japan written by four distinguished authors. These articles vary with regard to subject state, specificity of issues, and breadth of analytical scope. They commonly discuss one factor, however: *culture*. The purpose of this Comment is to examine the way each article uses culture in its explanations of legal change. The Comment concludes with a brief suggestion, from a social movement perspective, on employing culture as an explanatory tool in a non-essentialist way.

I. CULTURE IN TANASE'S ARTICLE

Culture is most prominent in the two articles written by the sociolegal scholars Takao Tanase and Eric A. Feldman. I will examine Tanase's article first, as it has a broader analytical scope that encompasses both Japan and China and often refers to Western states.¹

Part I of Tanase's article presents a cultural view of law. He writes, "When [non-Western states] enact laws and reform their legal institutions, they look to Europe and the United States." He then asks, "[I]s this the only way for non-Western societies like Japan or China to develop law? Even as foreign laws are assimilated, can there not be an evolutionary pattern in which they are absorbed and then manifested into laws

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1. Tanase cites and refers to a large number of Japanese-language materials. Readers outside Japan can learn the breadth and depth of Japanese scholarship from his footnotes.

with a distinct identity?"² He further states, "This Article tries to answer this question, finding clues in the parallel processes of Chinese legal development and Japanese legal reform."³ His answer comes soon after these statements: while "stateless circulation of legal norms is [a] feature of globalism" that now pushes legal change in non-Western states like Japan and China, "states will not attain this 'culture-free law' in perfect form" and "[c]ulture will continue to affect the evolution of law"⁴ Culture is thus posited as the key factor that gives distinct identity to a national legal system, even when law reformers borrow "fragments of legal norms, procedures, and institutions of different systems"⁵

Tanase identifies three models for how culture affects the evolution of law.⁶ First, culture could work as a negative factor to deter the reception of law, as "a society's particular culture is an initial condition for system evolution and is therefore expected to regulate subsequent development."⁷ Second, culture could work as a positive value to construct a distinctive legal system, as can be typically seen in the arguments for "relational rules," "common Asian law," "Asian values," and the like.⁸ Tanase rejects these two models, however, for they are based on an essentialist notion of culture that does not recognize the fluidity and negotiability of culture. He argues that "[c]ulture is . . . incessantly reimagined and recreated by the people within a changing society."⁹

Tanase then presents the third model, to which he subscribes. His arguments may be paraphrased and summarized as follows: all laws are culture-laden, and even ostensibly universal law is actually based on unique and local Western/American culture; people evaluate imported laws and indigenous laws on their relative performance in facilitating efficient market transactions, as well as on their relative success in enabling good society, and they rely on their own culture to discern the good from bad; and through a global transmission of ideas and institutional information, a combination of cultural law and universal law will emerge.

Parts II and III of Tanase's article are elaborations of the third model and are devoted to his claim of the rationality of the diffusiveness of rights and the functionality of extralegal norms that seem to prevail in Japan and China. His argument in Part II may be paraphrased and sum-

2. Takao Tanase, *Global Markets and the Evolution of Law in China and Japan*, 27 MICH. J. INT'L L. 873, 875 (2006).

3. *Id.*

4. *Id.* at 876.

5. *Id.*

6. *Id.* at 876-79.

7. *Id.* at 877.

8. *Id.*

9. *Id.* at 878.

marized as follows: while the stereotypical view on the West assumes exclusive rights exercised by autonomous subjects, even the West considers restrictions necessary for the sake of public welfare, and Japan has been functioning well with non-exclusive rights and interconnected subjects; thus, legal evolution with a diffusive conception of rights may be taking place in China.¹⁰ His arguments in Part III are largely based on his reflection on business relationships in Japan that depend on extralegal norms: "it is rational, even in the economic sense, to create extralegal norms sustained by culture, to construct bonds of reputation, and to suppress opportunistic behavior in the performance and renegotiation of contractual obligations."¹¹ He argues that the passivity of the Japanese judiciary may actually manifest in its honoring of society's autonomous ordering; while traditional Japanese trade practices are now being revised, this is not because these practices are inherently irrational but because cultural elements that once supported them have disappeared. He appears to think China can have legal evolution with a similar combination of a less-developed formal legal system and a highly-developed system of extralegal norms.

Tanase concludes his article with Part IV, which expresses his reservations to the pursuit in China of what he calls the Trinitarian development model of attaining the rule of law, democracy, and economic growth.¹² He expresses, in his last sentence, the hope that "we [might] learn from [China] a possible alternative development of law within contemporary global society."¹³

One may raise a variety of questions concerning Tanase's argument. Has Tanase, in the main body of his article, maintained his conception of culture as fluid, negotiable, and incessantly reimagined and recreated and avoided the pitfall of the essentialist conception of culture? How does he explain who will prevail in the process and outcome of negotiation? To which culture among those competing in Japan and China is he referring? Cannot those who have succeeded in establishing their own values as the dominant culture use his argument to maintain the status quo? How does he incorporate the role of indigenous promoters of reform, either inside or outside the government, who examine internal problems and external conditions of their state, study examples of legal solutions in other states that have experienced similar problems and conditions, envision their solutions inspired by such comparative study, and try to mobilize various resources to realize the desired change, even

10. *Id.* at 880–84.

11. *Id.* at 889.

12. *Id.* at 890.

13. *Id.* at 893.

against the hostile dominant culture? Should we dismiss these reformers as misguided local agents of globalism or the West? Notwithstanding these questions, however, culture clearly occupies a central place in Tanase's discussion.

II. CULTURE IN FELDMAN'S ARTICLE

Feldman presents an extremely rich description and analysis of what he calls "[t]he rapid and seismic shift in Japan's legal control of tobacco, a legal change unanticipated and so far unexplained."¹⁴ Although his study is very detailed and highly complex, the gist of his analysis is well summarized at the very end of the article:

In sum, a normative change toward smoking in the West has gradually affected every aspect of smoking in Japan. Japanese lawmakers changed the legal apparatus of smoking as a reaction to the new Western no-smoking norms, and social approval of smoking vanished, replaced by intolerance and the expulsion of smokers from public spaces. Culture has led to changes in law, just as the law has influenced the transformation of culture.¹⁵

Feldman presents a comprehensive model of legal change in Japan that consists of four major variables: (1) a normative change in the West; (2) the norm of conformity with the West in Japan; (3) domestic agents who promote the Western norms; and (4) local conditions receptive to the influence of Western norms. Since he treats a normative change in the West as synonymous with a cultural change in the West, and because he considers the norm of conformity a pervasive element of Japanese culture, culture occupies a truly central place in Feldman's analytical framework.

The most important point in his framework is that a normative or cultural change in the West does not automatically lead to a legal change in Japan; legal change requires active participation of local reformers who perceive the given normative change under the influence of the norm of conformity and attempt to devise a legal change that is feasible under local conditions. On this point, Feldman states, "Japan does not blindly emulate the West, but instead takes account of Western forms and selectively adopts and adapts those that fit. Inevitably, therefore, when Japan borrows from a foreign model, the indigenized version operates

14. Eric A. Feldman, *The Culture of Legal Change: A Case Study of Tobacco Control in Twenty-First Century Japan*, 27 MICH. J. INT'L L. 743, 747 (2006).

15. *Id.* at 820.

differently than it would in its original environment.”¹⁶ In this sense, his argument resembles Tanase’s assertion that imported laws may be given distinctive identity through modification by local reformers under local culture.

Feldman clearly differs from Tanase, however, when he argues that the norm of conformity with the West is pervasive in Japan. He, of course, notes the early influence of China and Korea and explains that Western influence has become dominant only since the mid-nineteenth century, when Japan fully opened itself to the West.¹⁷ He also provides an explanation of how the norm of conformity has developed in Japan: Japanese leaders in the early Meiji period had a clear and rational incentive to emulate Western institutions, including law, post offices, the police, newspapers, prisons, and schools, in order to eliminate unequal treaties (with extraterritoriality) signed by the Tokugawa government and more generally engage on equal footing with Western powers. “What may have started as a rational effort to equalize political and economic relations with the West increasingly became a more general cultural pattern of behavior that led both the elite and the populace to look West”—and a new culture (and social norms) was thus created.¹⁸ Therefore, emulation of Western norms is not a passive reaction to *gaiatsu* or outside pressure; it can be a result of Japan’s “internalized impulse to conform, even in the absence of external Western pressure.”¹⁹

One may raise at least two questions in response to this argument. The first question concerns the generality of Feldman’s analytical framework. Since he claims the existence of the norm of conformity with the West only for Japan, his analytical framework may not be appropriate for legal change in general. While such a limitation would not be a serious problem as long as one stays within studies on modern Japan, others might wish to use his article as a stepping board in building a more general analytical framework applicable to other states.

Furthermore, the applicability of Feldman’s framework may be limited even with regard to Japan: it appears to be applicable only during periods when the norm of conformity to the West exists. As he states, “the variability in how and whether [a social behavior] manifests itself—the blossoming of pre-WWII nationalism, the return to materials like wood and paper in contemporary architecture, the current fashion of wearing traditional Japanese yukata robes on the streets of Tokyo—exemplifies how culture is contested, politicized, manipulated, and

16. *Id.* at 763.

17. *Id.* at 759–60.

18. *Id.* at 760.

19. *Id.* at 767.

transformed.”²⁰ Feldman thus seemingly requires an additional theory that explains when one norm (conformity with the West) appears and when it is replaced with another (say, conformity with traditional Japan). His present analytical framework appears somewhat tautological, as it essentially argues that Japanese legal reformers conformed to Western values because they operated under the influence of a norm of conformity with the West.

The second question involves the theoretical nature of the norm of conformity with the West. Like Tanase, Feldman writes that it is correct to dismiss “an essentialized notion of culture.”²¹ The typical essentialist notion of culture is a commonsensical version of the concept of Japanese legal consciousness originally presented by Takeyoshi Kawashima.²² Kawashima argued that Japanese people are less likely to employ litigation to solve disputes among them because “harmony” commonly characterizes their social roles and because “[t]here is a strong expectation that a dispute should not and will not arise [in a harmonious society]; even when a dispute does occur, it is solved by mutual understanding.”²³ Kawashima clearly identified a substantive norm that governed the disputing behavior of Japanese people and argued that such a norm was widely shared in Japan, including among both elites and non-elites. Kawashima himself, however, hoped and predicted that such a norm would decline and people would more frequently use litigation and other parts of the formal legal system to order their lives.²⁴ “But scholars without much expertise in the Japanese legal system often subscribed to an exaggerated and unidimensional version of Kawashima’s relatively limited claims, asserting the overwhelming influence of Japanese culture on law without defining culture or specifying the mechanism of its influence.”²⁵ Kawashima’s view became a cliché, and an essentialist notion of Japanese legal consciousness was formed. Feldman’s concept of the norm of conformity with the West does not include any substantive content concerning the legal or disputing behavior of Japanese people; it simply asserts that legal reformers in Japan naturally look to the West when they must design a new law, whatever its

20. *Id.* at 761.

21. *Id.* at 813 n.266.

22. *Id.* at 810–11. See also Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41 (Arthur von Mehren ed., 1963). For my own comments and elaborations of Kawashima’s concept of legal consciousness, see Setsuo Miyazawa, *Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior*, 21 *LAW & SOC’Y REV.* 219 (1987).

23. Kawashima, *supra* note 22, at 44.

24. *Id.* at 57–59.

25. Feldman, *supra* note 14, at 811.

substantive content. Since conformity with the West is itself a behavior, however, and because the norm of conformity with the West is given such a prominent position in Feldman's analytical framework, one may ask whether it is similar to an essentialist conception of culture. Thus, it may be productive to derive a modified analytical framework from Feldman's article that will treat the norm of conformity with the West simply as one of many local conditions that affect the reception of reform proposals inspired by normative change in foreign states.

III. CULTURE IN PEERENBOOM'S ARTICLE

Peerenboom's article on China clearly has the broadest analytical scope: as its title indicates, Peerenboom intends to review scholarship (Part I of the article) and to present his own case studies (Part II) on: (1) description; (2) prediction; and (3) evaluation ("assessment" in his own terminology) of legal reforms in China. Furthermore, "[w]hile drawing on China for concrete examples, the discussion involves issues that are generally applicable to comparative law and the new law and development movement, and thus it addresses the broader issue of what we know and do not know about legal reforms."²⁶ Therefore, it may be helpful to use his discussion to develop a general analytical framework, consisting of a set of hypotheses or propositions that may be tested through a wide variety of empirical studies—not only on China, but also on other states.

For those who are interested in developing a general framework for explaining legal change that is applicable to a wide range of states, Peerenboom's review of literature in Part I.C appears a useful place to start. In that section, he reviews empirical studies that attempt to identify "the factors that lead to successful transplants or to convergence rather than divergence" or "the factors that might favor deductive approaches rather than inductive approaches (or vice versa)."²⁷ Although "descriptive metaphors continue to proliferate, there has been less progress in identifying" those factors. Peerenboom nonetheless recognizes that "empirical studies in other areas have made some progress in sorting out key components behind social, legal, and political change" and lists "several important elements" of those key components.²⁸ While I am tempted to try to sketch such a set of hypotheses, this would become a diversion from the

26. Randall Peerenboom, *What Have We Learned About Law and Development? Describing, Predicting and Assessing Legal Reforms in China*, 27 MICH. J. INT'L L. 823, 824 (2006).

27. *Id.* at 830.

28. *Id.* at 830-34.

main purpose of this Comment.²⁹ I shall therefore move to the more pertinent question of how culture counts in Peerenboom's case studies.

Firstly, in his case study on the development of rule of law in China, Peerenboom appears to reject a version of the essentialist conception of culture when he writes that "[c]ommentators have also cited *cultural factors* to explain many of China's problems, with some arguing that the state's Confucian heritage, authoritarian past, and reliance on social networks may prevent, or at least complicate, the implementation of rule of law. When starkly stated, this view verges on Orientalism."³⁰ While he argues that "[c]ultural factors may . . . play a role in implementation of rule of law," and explains that "Chinese citizens infrequently invoke administrative litigation in part because they are still adjusting to the idea of suing state officials,"³¹ his conclusion is that "[c]ulture . . . is not the main obstacle to the realization of rule of law in China. Many of the most serious impediments are *institutional*."³² His point is that "the courts, procuracy, police, legal profession, administrative law, and legislative systems" are still too weak to sustain a higher degree of rule of law, as "[i]t takes decades to create efficient, professional, and clean institutions."³³

Secondly, on criminal law, Peerenboom states that "[o]ne of the most significant reforms . . . was the transition from an inquisitorial system to

29. Peerenboom's following statement is indicative of his opposition to efforts to develop such a general explanatory framework:

We should avoid the Arthurian quest for the holy grail: a single, comprehensive, unified theory able to predict both macro and micro legal system reforms in all states. There may be more than one model of development. A model of development that works in one region may not work in another.

Id. at 868. I do not, however, take this statement to imply his opposition to the kind of general explanatory framework I would construct, as an independent variable in such a framework may naturally vary from case to case, and its impact on the dependent variable (legal change) may also deviate from case to case along a range that includes zero effect (totally insignificant) and strongly negative effect. As long as such a framework encompasses a wide range of hypotheses about the relationships between an array of independent variables and legal change, as long as no specific combination of variable values are assumed to have the same impact on legal change in all areas of law in every state, and as long as different levels of analysis (micro or macro) are not confused, he would likely not object. Of course, quantitative measurement of such independent and dependent variables might be hopelessly difficult, and it might be virtually impossible to measure the relative impact of a specific independent variable under the usual *ceteris paribus* (other conditions being equal) assumption. Yet such a general framework might help to guide our search for relevant variables and relationships, even in in-depth case studies, which Peerenboom advocates. *Id.* at 864. Such in-depth case studies might in turn lead us to finding new variables that have not been included in the original framework.

30. *Id.* at 840.

31. *Id.*

32. *Id.* at 841.

33. *Id.*

a more adversarial system in the mid-1990s” and asserts that “the move to an adversarial system in China radically altered the role of procuratorates, judges, and lawyers.”³⁴ Yet, “implementation has proven exceedingly disappointing.”³⁵ Among other factors, he argues that “[t]he harsh treatment of criminals is . . . the result of *cultural factors*, including majoritarian preferences for social stability, a tendency to favor the interest of the group over the individual, and the lack of a strong tradition of individual rights. The traditional Chinese emphasis on substantive justice also makes it harder to take the procedural rights of criminals seriously.”³⁶ Peerenboom thus appears to come very close to an essentialist notion of legal culture here.

Thirdly, regarding China’s new summary and simplified procedures, the concept that is closest to a dominant legal culture may be what Peerenboom calls “a longstanding tradition in China.” He writes that “the new rules are . . . consistent with the longstanding tradition in China of emphasizing rehabilitation and confessions in exchange for leniency, which may explain their quick adoption.”³⁷ This concept, however, can also reflect the institutional culture of the actors in the present system, and I will refrain from judgment about its theoretical character.

Regarding administrative detention, adjudicative committees, and individual case supervision, Peerenboom provides little or no cultural explanation. He is mostly interested in assessment or value judgment about these institutions and the desirable forms and directions of further reforms. On administrative detention, for instance, he only states that “summary procedures were in response to an increase in caseloads; the number of criminal cases in China has risen rapidly to over 500,000 today. . . . [with] more than three million minor cases handled by the police every year.”³⁸ He does not mention culture at all. Peerenboom discusses the adjudicative committee system in relation to the issue of judicial independence and characterizes its introduction as an “inherently domestic political process.”³⁹ This characterization suggests he does not consider the dominant culture in China as a major explanatory factor here. On individual case supervision, he again focuses on assessment and concludes that while “ICS [Individual Case Supervision] is necessary at present. . . . all will agree that significant reforms are necessary to make the process more transparent, fair, and efficient.”⁴⁰ These

34. *Id.* at 844.

35. *Id.* at 845.

36. *Id.* at 846.

37. *Id.* at 851.

38. *Id.* at 857–58.

39. *Id.* at 859.

40. *Id.* at 862.

“[r]eforms, however, must be sequenced to avoid overtaxing the existing institutions.”⁴¹ Peerenboom’s emphasis on the sequencing of reform stages does not appear to imply that reforms must be limited within a boundary acceptable to the currently dominant culture.

Finally, it should be noted that Peerenboom pays much attention to culture at another, lower level, namely the “institutional culture” of the actors in the present legal system.⁴² Peerenboom discusses this factor mainly as a negative element that inhibits reform or change. If a proposed change or reform is compatible with the “institutional culture,” however, current legal actors may function as “domestic agents” of reform.⁴³

All in all, Peerenboom does not give culture a prominent place in his explanation of legal reforms in China. He occasionally comes very close to an essentialist conception of culture, but his emphasis is clearly on the role of indigenous reformers, institutional capacity, vested interests, and other noncultural factors. He argues in Part III of his article, for instance, that “the reform process has been primarily a technocratic one driven by experts and elites inside and outside the government,” “the biggest obstacles at present are systemic in nature and involve the lack of institutional capacity,” and “the government has been able to push through welfare-enhancing legal reforms despite opposition from certain sectors.”⁴⁴ When he concludes his article by arguing that “[o]pen-minded reformers cannot afford to look only West or only East, only up or only down, only to culture, politics, or economics. A more context-sensitive approach is necessary,”⁴⁵ he does not seem to mean that Chinese reformers should seek purely Chinese reforms that follow only the presently dominant culture in China.

IV. CULTURE IN WHITEHEAD’S ARTICLE

Using the case of Japan’s compliance with the Basel Accord of 1988, Charles K. Whitehead proposes “a new approach to understanding state compliance with international obligations, positing that increased interaction among the world’s regulators has reinforced network norms, as evidenced in part by a greater reliance on nonbinding instruments.”⁴⁶ He argues that those “[network] norms influence senior regulators and

41. *Id.* at 865.

42. *Id.* at 833.

43. *See generally* Feldman, *supra* note 14.

44. Peerenboom, *supra* note 26, at 865.

45. *Id.* at 871.

46. Charles K. Whitehead, *What’s Your Sign—International Norms, Signals, and Compliance*, 27 MICH. J. INT’L L. 695, 697–98 (2006).

. . . affect both state decisions to comply as well as levels of compliance.”⁴⁷

Whitehead considers “the potentially coercive effect of norms—their ability to compel” states to formally adopt global standards, even in the face of competing domestic interests, without fully enforcing them.⁴⁸ He also writes:

Resulting levels of state compliance may reflect a balance between these two forces, with lower levels still sending the “right” signal if a network norm excuses defection. The relational nature of instruments that evidence a norm may permit states to vary levels of compliance yet still be understood among network members to signal support for that norm.⁴⁹

The rest of Whitehead’s article illustrates such a process through a detailed analysis of Japan’s compliance with the Basel Accord. The study shows that the Basel network norms are simultaneously very powerful and highly flexible: on the one hand, they compel financial regulators to make their respective states comply with the Accord despite domestic opposition, and, on the other hand, they give leeway and discretion to those regulators to comply with the Accord at a very low level—so long as they send signals that can be interpreted to imply their intention to comply.

One may wonder whether Whitehead’s article shares qualities with the other articles on legal change and legal reform. I believe it does, as state compliance with an international accord and the corresponding change in domestic policies, regulations, and laws can be considered a special case of legal reform on a micro level.

One may also wonder whether Whitehead’s article involves culture. I think it does; “network norm” in this case means a perspective widely shared by members of an international network, composed of financial regulators from a large number of states, that has evolved through personal interactions. Since regulators are involved in policymaking and governance in their respective states, the network norm can be considered a set of values shared by “domestic agents” of legal change (as in Feldman’s terminology) or the “institutional culture” of actors in the legal system (as in Peerenboom’s article). Thus, the network norm, in general, and Whitehead’s article, in particular, have a place in the broader literature on legal change. Furthermore, Whitehead’s approach avoids the problems associated with the essentialist conception of

47. *Id.* at 698.

48. *Id.* at 703.

49. *Id.*

culture, as the substance of network norms varies from network to network and the norms themselves are formed at a transnational level.

V. CULTURE IN LEGAL CHANGE FROM A SOCIAL MOVEMENT PERSPECTIVE

People understand a problem they face according to their own cognitive and evaluative view. They give specific meaning to the problem and choose a specific solution according to their own perspective. When this perspective belongs to an individual, it is an attitude. When a group of people share the same attitude, it is a culture. Such a group can range from a small gathering of people working, studying, or living together to a large number of people living in a state, a region, or even the world.

An essentialist concept of culture assumes nearly all members of a given group, most typically a state, share a specific, substantive type of cognition and evaluation. This approach also assumes culture is a highly stable and powerful determinant of cognition, evaluation, and action.

All four authors in this symposium appear to reject such a position as a matter of theoretical principle. Tanase considers culture fluid, negotiable, and incessantly reimagined and recreated. Feldman believes culture is contested, politicized, manipulated, and transformed. Peerenboom's article suggests prominent elites in the state structure support legal change even when actors in the present Chinese legal system may oppose reform for cultural reasons. We may infer from Whitehead's article that internationally-connected financial regulators might develop their own culture, which could differ from the one dominant among other domestic elites and could actually produce changes in state policies.

In short, we cannot discuss culture as a monolithic, unchanging entity. We should recognize, instead, that different cultures are competing in any given group, particularly a large group like a state, even when one of them occupies a dominant position at the moment. Which culture will prevail depends on various contingencies.

Tanase, Feldman, and Peerenboom, however, seem to come very close to an essentialist concept of culture in parts of their discussion. They do so particularly when they discuss cultural factors supposedly pervasive in their subject state. How can we construct an analytical framework that treats culture from a non-essentialist perspective? The sociology of social movement provides a template for this perspective.

A social movement is defined as "a set of opinions and beliefs in a population representing preferences for changing some elements of the

social structure or reward distribution, or both, of a society”;⁵⁰ “the mobilization of sentiments in which people take actions to achieve change in the social structure and the allocation of value”;⁵¹ or “any sentiment and activity shared by two or more people oriented toward changes in social relations or the social system.”⁵² Law is an element of the social structure, and a set of opinions, beliefs, sentiments, and actions supporting legal change is, thus, a form of social movement. Insights of the sociology of social movement can therefore apply to the success or failure of legal reform efforts.⁵³

Social movements do not merely encompass those outside the elite. Just as “Ronald Reagan and Margaret Thatcher [were] connected to conservative social movements,”⁵⁴ those at the top may promote social change as well. In extreme cases, such as in the case of Japan in the early Meiji period or seemingly in the case of contemporary China, those in the most powerful positions can even be the sole promoters of social change. The focus should thus be on the distinctions between the social changes sought by members of civil society and those mainly initiated by elite state officials. This also applies to legal change.

What, then, are the most important dynamics in social movements? The contemporary sociology of social movement does not assume social movement will naturally flow from “grievance” or the perception of a problem that appears to require a solution involving changes in an element of the social structure (e.g., the legal system). The rise and success of social movements depend on the triplet of “political opportunities,”⁵⁵ “resource mobilization,”⁵⁶ and “framing.”⁵⁷ Originally, these three dynamics were divided among three separate social movement approaches, but present studies of social movement usually consider them all. Simply

50. John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, in SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY: COLLECTED ESSAYS 20 (John D. McCarthy & Mayer N. Zald eds., 1987) [hereinafter SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY].

51. Mayer N. Zald & Bert Useem, *Movement and Countermovement Interaction: Mobilization, Tactics, and State Involvement*, in SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY, *supra* note 50, at 249.

52. Roberta Ash Garner & Mayer N. Zald, *The Political Economy of Social Movement Sectors*, in SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY, *supra* note 50, at 293.

53. I wrote an introductory textbook on the legal process in Japan from such a perspective. See SETSUO MIYAZAWA, HO-KATEI NO RIARITI: HO-SHAKAIGAKU FIRUDO-NOTO [THE REALITY OF THE LEGAL PROCESS: FIELD NOTES ON THE SOCIOLOGY OF LAW] (1994).

54. Garner & Zald, *supra* note 52, at 294.

55. See generally SYDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* (1998).

56. See generally SOCIAL MOVEMENTS IN AN ORGANIZATIONAL SOCIETY, *supra* note 50.

57. See generally Robert D. Benford & David S. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611 (2000).

stated, those who wish to change an element of a social structure must: (1) find and seize a political opportunity that gives them access to the policy-making process (political opportunities); (2) mobilize members, money, facilities, labor, expertise, media, and other resources in order to form, sustain, and grow movement organizations (resource mobilization); and (3) frame their proposals in ways that effectively mobilize potential adherents and constituents, garner bystanders, and demobilize antagonists (framing).

Culture functions most prominently in "framing." Social movement scholars have found that culture can impose constraints on social movement framing activity,⁵⁸ and they assert that "one of the key factors affecting whether or not a proffered frame resonates with potential constituents has to do with the extent to which the frame taps into existing cultural values"⁵⁹ One may wonder whether this is just another essentialist conception of culture. It is not: social movements utilize culture strategically, selectively and instrumentally. "Strategic selection encompasses situations in which there is intentional cross-cultural borrowing, with the adopter or importer assuming the role of an active agent in the process"⁶⁰ Furthermore, "[t]he cultural material most relevant to movement framing processes include the extant stock of meanings, beliefs, ideologies, practices, values, myths, narratives, and the like, all of which can be construed as part of . . . [a] 'tool kit'"⁶¹ In order to increase the acceptability of their ideas, leaders of social movements frame the particular problem and the presentation of their solution so as to fit the local culture. If they find the local culture unfavorable, however, they may try to mobilize other cultural materials, including those imported from other states, particularly when the exporter state or organization commands a high normative status in the host state. Moreover, such framing is always contested: movement opponents, bystanders, and the media may present counterframing⁶² and mobilize different cultural materials. The final reform (or failure of reform) emerges from such contestation. The point is that local reformers are active agents of this process: even when they borrow materials from outside their state, they do so on the basis of their own perception and evaluation of the particular problem, and they either utilize or challenge local culture depending on the need of their movement.

Culture is also relevant to "resource mobilization": the legitimating impact of cultural materials can play a positive role in starting, sustain-

58. *Id.* at 622.

59. *Id.* at 624.

60. *Id.* at 627.

61. *Id.* at 629.

62. *Id.* at 625.

ing, and growing movements. Movements that do not fit the dominant culture can find validation through the use of different normative viewpoints. The point, again, is that local reformers may strategically select cultural or normative materials on the basis of their own needs. Furthermore, if a movement grows through successful “resource mobilization” and frames problems and their solutions in a way that divides elites and enlists influential allies,⁶³ it can change “political opportunities” and increase the accessibility of the policy-making process.

It is my contention that the concept of social movement can include movement for legal change, either by the state elite or members of civil society—allowing insights from the sociology of social movement, including the concept of culture as a strategically-utilized material, to apply to the reform process. I should admit that the preliminary sketch above included culture at a pervasive level and did not discuss the cultures of specific groups. Because the problem of the essentialist conception of culture is most apparent at the level of pervasive culture, such a limited discussion may yet prove useful. The elaboration of this perspective, however, is left for the future.

63. See Tarrow, *supra* note 55, at 79–80.

