Check for updates

Article

MJ

Maastricht Journal of European and Comparative Law
2018, Vol. 25(5) 551–564
© The Author(s) 2018
Article reuse guidelines:
sagepub.com/journals-permissions
DOI: 10.1177/1023263X18796978
maastrichtjournal.sagepub.com

Inconsistencies in the use of legal culture in comparative legal studies

Balázs Fekete*

Abstract

This paper is devoted to the discussion and critical analysis of the various uses of the term 'legal culture' in recent comparative legal studies. It submits that the application of the concept of legal culture has had no consensually shared approach in comparative law; instead, numerous different ways exist. The main approaches of legal culture in comparative studies have been the use of this concept as (i) background, (ii) interactions around law, and (iii) a sum of attitudes towards law. In addition, the use of this term is even more complicated as certain typical inconsistencies may also be identified. Examples show (i) the confusion of different understandings of legal culture found within the same study; and that (ii) the under-theorisation and (iii) over-theorisation of legal culture can both be regarded as such typical inconsistencies. In conclusion, the paper calls attention to a more restricted, self-reflective and critical application of this term as the prerequisite of an efficient scholarly use.

Keywords

Comparative law, legal culture, methodology, comparison of legal cultures, comparative legal studies

1. Introductory remarks

This paper is dedicated to a methodological controversy seemingly characterising recent comparative law scholarship.[1] The core of this controversy is the application of legal culture in comparative

1. Here, as a preliminary point, a methodological remark must be made. This article relies on a broad interpretation of comparative law as such. Besides primary comparative studies, in which at least two legal orders or provisions are

* Hungarian Academy of Sciences, Hungary

Corresponding author:
Balazs Fekete, Hungarian Academy of Sciences, Centre for Social Sciences Institute for Legal Studies, Tóth Kálmán utca 4 1097 Budapest, Hungary.
E-mail: Fekete.Balazs@tk.mta.hu

legal studies that has certainly been becoming a more and more fashionable way of carrying out comparative legal research projects in the last 20 years.[2] At the first glance, in many cases, the use of legal culture seems to be similar to those magical potions of fairy tales that can help solve even the greatest difficulties; it defends against the fiery breath of a dragon and recovers the forgotten memories of the princess. Reading chapters and articles that rely on the concept of legal culture when discussing a topic in a comparative way, the reader may have exactly the same impression: by invoking 'legal culture' in the discussion, seemingly complex scholarly problems are immediately solved; for instance, a reference to the cultural embeddedness of a legal rule may explain even the most complicated research question. As the main thesis, this paper submits that only a methodologically disciplined and conscious – thereby limited and restricted – application of legal culture has a high level of scholarly value in comparative law. Otherwise, legal culture may easily become nothing more than a tool of conceptual confusion. However, as a preliminary step, before going into the details, two points have to be discussed as they are both essential prerequisites for the later discussion.

A. Legal culture is not a contemporary invention

Many of today's scholars consider the use of legal culture as a contemporary conceptual innovation.[3] When describing this concept in more detail, they usually refer to the work of Lawrence M. Friedman, the author of the classic *The Legal System. A Social Science Perspective* published in 1975.[4] Indeed, this book can definitely be regarded as a symbolical starting point of the contemporary inclusion of the legal culture concept into legal scholarship. But, from the perspective of the history of ideas, it cannot be said that the use of legal culture in legal studies has begun with the oeuvre of Friedman. This has even been recognised indirectly by Friedman himself, when he mentioned the relationship between political culture and legal culture, and also referred to the anthropological understanding of law as a cultural phenomenon.[5] That is, he pointed out that culture had already been applied in some neighboring fields of study similarly to his approach. Therefore, Friedman had never claimed scholarly novelty for his concept of legal culture, but his

compared, those studies are also regarded as part of comparative law that focus only on a given legal order or a legal culture – case studies – but were prepared in a seemingly comparative context. In addition, methodological and conceptual contributions are also considered as components of comparative law. In sum, for this article, comparative law is a tradition of legal scholarship with its own broadening scope and research interests, thus it is not limited to comparative studies in legal issues in the strictest sense. For an overview of the contemporary domains and trends of comparative law, see: M. Siems, *Comparative Law* (Cambridge University Press, 2014); J. Husa, *A New Introduction to Comparative Law* (Hart Publishing, 2015).

2. For some examples of these initiatives, see: D. Nelken, *Comparing Legal Cultures* (Routledge, 1997); P. Legrand, *Comparative Law* [*Le Droit Comparé*] (PUF, 2014); M. Kurkchiyan, 'Comparing Legal Cultures: Three Models of Court for Small Civil Cases', 5 *Journal of Comparative Law* (2010), p. 169–193; C. Varga, 'Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline', 48 *Acta Juridica Hungarica* (2007), p. 95–113.
3. See, for example: J.Ø. Sunde, 'Live and Let Die. An Essay Concerning Legal-Cultural Understanding', in M. Adams and D. Heirbaut (eds.), *The Method and Culture of Comparative Law* (Hart Publishing, Oregon, 2014), p. 221–234; C. Varga, 38 *Acta Juridica Hungarica* (1997), p. 54.
4. L. Friedman, *The Legal System. A Social Science Perspective* (Russel Sage, 1975). For an authoritative reference to Friedman's role in the introduction of the concept of legal culture into socio-legal studies, see: S.S. Silbey, 'Legal Culture and Legal Consciousness', in J. Wright (ed.), *International Encyclopedia of the Social and Behavioral Sciences* (Elsevier, 2001), p. 8624–8625.
5. L. Friedman, *The Legal System. A Social Science Perspective*, p. 15, footnote 33.

readers and followers have tended to consider his conceptual innovation as a completely new development in contemporary legal scholarship.

However, without going into the very details of the history of ideas in modern legal scholarship, it is enough to recall that the application of the concept of culture in legal studies had already had a 'golden-age' in the first decades of the 20th century. In the German legal scholarship of the turn of the 19–20th century, under the influence of both Hegelian and Neo-Kantian philosophical thinking, the application of the term 'legal culture' as a key conceptual tool was coined by such important authors as Jozef Kohler or Gustav Radbruch.[6] While Kohler determined certain basic convictions on justice and fairness (*Rechtspostulate*) providing a cultural basis for law as such,[7] Radbruch came up with the concept of *Rechtstypus* ('right type'), synthetising the fundamental features of a group of legal systems belonging to a given *Kulturkreis* (culture).[8] That is, law was regarded as an essentially culturally grounded phenomenon by both of them. Needless to say, these attempts at a cultural understanding of law were deeply rooted in the previous, century-long tradition of German Romanticism that put the uniqueness of a people and the problem of difference into the focus of philosophical thinking, thereby challenging the universalism of earlier Rationalist thinking.[9] In sum, the recent flourishing of legal culture in comparative legal studies has not been without antecedents; they can mostly be found in the turn of the 19–20th century German legal scholarship.

B. The opposition between a functionalist and a cultural approach of comparative law is relative

Today's comparative law scholarly community seems to be divided along the axis of functionalism and culturalism. This opposition has been exposed by most of the latest literature; for instance, Siems[10] or Samuel[11] put a serious emphasis on this division when mapping the recent methodological landscape of comparative law. Pierre Legrand still advocates the superiority of the cultural understanding of legal comparison[12] over the previous, in his words, 'reigning orthodoxy' inspired by the functionalist tenets based on the 'desire for sameness'.[13] By and large, in the recent methodological discourse, boosted dominantly by 'culturalist' or 'post-modern', the functionalist approach of comparative law – defined by such authors as Konrad Zweigert and Hein Kötz[14] or

6. For a detailed study, see: Z. Péteri, 'A Jogi Kultúrák Összehasonlításának Előtörténetéhez', 48 *Állam- és Jogtudomány* (2007), p. 509–526.
7. See: J. Kohler, *Lehrbuch der Rechtsphilosophie* (Lothar Gruber, 1909) cited by ibid., p. 515–519.
8. See: G. Radbruch, 'Über die Methode der Rechtsvergleichung [1905–1906]', in K. Zweigert and H.J. Puttfarken (eds.), *Rechtsvergleichung* (WBG, 1978) cited by Z. Péteri, 48 *Állam- és Jogtudomány* (2007), p. 521.
9. Compare J.Q. Withman, 'The Neo-Romantic Turn', in P. Legrand and R Munday (eds.), *Comparative Legal Studies. Traditions and Transitions* (Cambridge University Press, 2003), p. 312–344.
10. M. Siems, *Comparative Law*, p. 98–118 (discussing the criticism of 'traditional comparative law' under the umbrella term of 'postmodern comparative law) and 119 (pointing out that the inclusion of the concept of legal culture into comparative legal studies may be regarded as a way to renew the earlier formal understanding).
11. G. Samuel, *An Introduction to Comparative Law Theory and Method* (Hart Publishing, 2014), p. 108–120 (presenting the approach of Pierre Legrand as a scheme of intelligibility – the hermeneutical method – trying to contrast the tenets of functionalism).
12. For a detailed summary of this approach, see: P. Legrand, 'The Same and the Different', in P. Legrand and R. Munday (eds.), *Comparative Legal Studies. Traditions and Transitions,* p. 240–311.
13. Ibid., p. 245–244.
14. See: K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Clarendon Press, 1998), p. 32–47.

Rudolf Schlesinger[15] – has been regarded as an orthodox one, a remnant of the positivist and ego-centric methodological past.[16] On the contrary, culturalism – based on the claims of grounding comparative law in post-modern philosophy, thereby including tolerance, empathy and difference in the conceptual framework – is presented as the obvious and only way of conceptual progression. These critical remarks, centred on the apparent deficiencies of the functionalist approach, all seem to be relevant indeed, but another point should also be taken into account. Cultural comparative law has emerged as the well-founded critique of 'classic' authors, but the reconciliation of these critical remarks with the 'classic' methodological toolkit also looks to be possible. It has already been proved by Jaakko Husa in his articles when arguing for a 'moderate' version of functionalism, setting aside the presumption of similarity (*praesumptio similitudinis*)[17] or defending the concept of legal families as useful 'launch vehicles' – a conceptual-theoretical tool – for future research.[18]

That said, it might be more proper to look at the various competing methods in legal comparison as a complex toolkit whose items should always be adapted to the nature of the given research question, should it be either a micro- or a macro comparison.[19] One may even argue that these two main methodological lines of thought are supplementary to each other as their 'integrated' or 'cooperative' uses may enable the researcher to get a more refined and balanced view of the problem studied as compared to the single-focussed approaches. Therefore, the harsh opposition between culturalism and functionalism, as it is emphasised by the 'cultural' scholars of comparative law, may be replaced by a holistic view that may be able to find a proper place for each different methodological approach with respect to a given research subject during the research process.

2. Three predominant understandings of legal culture in comparative law

Having presented these preliminary points, the first part of this paper will focus on the concept of legal culture as it is dominantly applied in contemporary comparative law. As legal culture is broadly used in contemporary comparative legal studies and, in many cases, in rather divergent ways, the existence of a generally shared understanding cannot be presumed. Therefore, the definition and delimitation of the main patterns of the interpretations of legal culture in comparative law is an indispensable step. In this paper, three patterns will be specified in detail; however,

15. See: R.B. Schlesinger, 'The Common Core of Legal Systems. An Emerging Subject of Comparative Study', in K. Nadelmann et al. (eds.), *Legal Essays in Honor of Hessel E. Yntema* (A.W. Sythoff, 1961), p. 65–73.
16. For a classic account of post-modern criticism of functionalist comparative law, see: the seminal article of Günther Frankenberg. G. Frankenberg, 'Critical-Comparisons: Re-Thinking Comparative Law', 26 *Harvard International Law Journal* (1985), p. 411–456.
17. Compare J. Husa, 'Farewell to Functionalism or Methodological Tolerance?', 67 *Rabel's Journal* [*Rabels Zeitschrift*] (2004), p. 419–447.
18. Compare J, Husa, 'The Future of Legal Families', *Oxford Handbooks Online* (2016), http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-26, p. 8–9.
19. For this novel approach of the methodological dilemmas inherent in comparative law, see: M. van Hoecke, 'The Methodology of Comparative Legal Research', 5 *Law and Method* (2015), p. 1–35 or G. Samuel, *An Introduction to Comparative Law Theory and Method*.

this does not at all mean that others do not exist.[20] This paper only tries to group the most typical ones that may be encountered when studying the recent scholarly discussion.

A. Legal culture as background of law

A typical reference to legal culture is aimed at pointing out a certain constellation of extra-legal factors that may have a decisive – or at least: a considerable – influence on law as such or on a given legal institution or provision. These factors may come from manifold fields of study, mostly depending on either the social science background of the scholar or the nature of the problem analysed. By these references to this set of extra-legal factors as forming the cultural background of law or a legal provision, the research strives for a comprehensive, so to say, holistic approach overstepping the pure, rule-oriented positivistic view of law. In essence, by abstracting a cultural context for a legal phenomenon and applying it in the formulation of the research insights, a legal research design can acquire a much broader scholarly scope and this choice may seriously contribute to the scholarly value of the findings. Typically, references to or mentioning of legal culture imply the inclusion of sociological, historical, political, socio-psychological or cultural studies research findings in legal research.

This approach can be illustrated properly by referring to Pierre Legrand's various articles. In essence, Legrand urges comparative legal studies to respect difference among legal orders instead of seeking the common and uniform points and, therefore, advocates the study of the so-called *mentalités juridques*, legal mentalities, backing the instrumental components of a legal order.[21] Legrand argues that these *mentalités juridiques*, having a decisive impact on the functioning of legal orders, may only be accessed through an interdisciplinary study based on findings of social psychology, linguistic and cultural studies, among others.[22] The in-depth study of European legal mentalities – those of continental and Common Law – through interdisciplinary lenses led Legrand to both insightful and provocative conclusions, such as the impossibility of a unified European civil code[23] and the denial of a real convergence between continental law and Common Law.[24]

In sum, the concept of legal culture is widely used in order to provide a context for the comparative legal research.[25] This approach has manifold ways, from in-depth case studies to broad comparisons of various legal orders, but the fact that legal culture is used to contextualise a legal research effort is a common point. Moreover, attempts for this way of contextualisation, without mentioning the term 'legal culture', have already been made by the classics works. For instance, René David argued that ideology on the social role of law had a crucial role in the

20. For a different account on the application of legal culture in comparative research, see: D. Nelken, 'Comparative Legal Research and Legal Culture: Facts, Approaches and Values', 12 *Annual Review of Social Sciences* (2016), p. 45–62. David Nelken argues that legal culture can be interpreted from the three qualitatively different perspectives. First, it may represent various mental, behavioral or factual patterns around the law (facts); second, alternatively, this term may also imply an approach looking beyond the conventional rule- and institutional focused legal inquiry (approaches) and, third, it may even become a basis for normative statements on the law (values).
21. P. Legrand, 'The European Legal Systems Are Not Converging', 45 *The International and Comparative Law Quarterly* (1996), p. 56–61.
22. For details, see: P. Legrand, 'How to Compare Now', 16 *Legal Studies* (1996), p. 232–242, 236–238.
23. P. Legrand, 'Against a European Civil Code', 60 *The Modern Law Review* (1997), p. 44–63.
24. Compare: P. Legrand, 45 *The International and Comparative Law Quarterly* (1996).
25. For further examples of this approach, see: V. Gessner, A. Hoeland, C. Varga (eds.), *European Legal Cultures* (Dartmouth, 1996).

formation of legal families,[26] while Zweigert also put much emphasis on ideological factors and the role of history when elaborating his theory of the style of legal families (*rechtkreise*).[27] That is, a broader or narrower, contextual understanding of law has always been a part of the methodology of modern comparative law; however, this approach has become rather popular in comparative legal studies during the last two decades – partly due to the proliferation of the references to legal culture.

B. Legal culture as interactions around law

Alternatively, legal culture may also be conceived of as a dynamic understanding of law in place of the static, black-letter rule or norm-focussed approach. While positivist or descriptive legal studies can only analyse legal rules and their very details, the findings of legal sociology, legal anthropology and cultural studies may help in understanding the interactions with respect to the usual functioning of legal order. Evidently, these interactions may occur either at the macro-level, where different social and political forces compete and interact to determine the actual setup of the legal order, or at the micro-level, animated by the everyday interactions of the citizens having a legal purpose.[28] The analysis of these interactions may even help in the comprehension of how the ordinary meaning of law is construed by both macro- and micro-level interactions, that is, how the normative universe around law – *nomos*[29] – evolves by the everyday practice of normative commitments. Thereby, this way of study may help to reveal how culture, as a social practice,[30] is capable of influencing the everyday perception of law.

From the various insights of legal anthropology, the concept of 'semi-autonomous social fields' offers a valuable contribution to conceptualising this complex and many times, contradictory process at the micro-level of these interactions. Some studies have already tried to use this approach in a comparative way to get a better picture of a given legal question.[31] This term, 'semi-autonomous social fields' (SASFs), was coined by Sally Falk Moore at the end of the 1970s.[32] Moore started from the conceptual framework of classical anthropological thinking and passionately argued that 'law and social context could not be separated'. As a further step, she also relied on the comparative lessons of two case studies: the dress industry in New York; and the

26. R. David, '*Traité Élémentaire de Droit Comparé*' (LGDJ, 1950), p. 223.
27. Compare: K. Zweigert and H. Kötz, *An introduction to Comparative Law*, p. 63–73.
28. M. Kurkchiyan, 5 *Journal of Comparative Law* (2010), p. 170.
29. For details, see: R. Cover, 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative', 97 *Harvard Law Review* (1983–1984), p. 4–19.
30. For the various methodological approaches of culture, see: J.W. Mohr and C.M. Rawlings, 'Formal Models of Culture', in J.R. Hall, L. Grindstaff and M-C. Lo (eds.), *Handbook of Cultural Sociology* (Routledge, 2010), p. 119–129. From the aspect of the history of ideas, see: A.L. Kroeber and C. Kluckhohn, *Culture. A Critical Review of Concepts and Definitions* (Peabody Museum of American Archeology and Ethnology, 1952).
31. For example: P.S. Berman, 'Towards a Jurisprudence of Hybridity', 11 *Utah Law Review* (2010), p. 11–29, 20–24; M. Hertogh, 'Crime and Custom in the Dutch Construction Industry', 4 *Legisprudence* (2010), p. 307–326; F. Shariff, 'Power Relations and Legal Pluralism. An Examination of "Strategies of Struggles" Amongst the Santal *Adivasi* of Indian and Bangladesh', 57 *Journal of Legal Pluralism and Unofficial Law* (2008), p. 1–43.
32. S.F. Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study', 7 *Law and Society Review* (1973), p. 719–746; and for an excellent contemporary discussion of this concept in the broader context of the social effects of legal norms, see: J. Griffiths, 'The Social Working of Legal Rules', 48 *Journal of Legal Pluralism* (2003), p. 1–84.

Chagga tribe of Mount Kilimanjaro, where she carried out the field work personally.[33] Essentially, from this anthropological perspective, modern societies are about the endless normative interactions of these semi-autonomous units of organisation. Thereby people's decisions are always influenced by the competition of divergent normative claims emanating from various SASFs. In addition, owing to this regulative potential they are also able to resist, at least partially, external pressures, that is, state law, or claims set forth by other SASFs.[34]

A well-known model of macro-level interactions around the law was already established by Lawrence M. Friedman. In his path-breaking volume that, among others, revitalised the use of legal culture in Western legal scholarship, he described the 'legal system' as the continuous interaction of structure, substance and culture.[35] In this concept, 'structure' meant the institutional setting, while 'substance' referred to the legal provisions coordinating the behavior of both citizens and institutions.[36] The third component, 'culture', was an umbrella term used by Friedman as it summarised all these non-legal effects – social forces in the broadest sense – that were able to give 'life and reality'[37] to the legal order. A special segment of these outside social influences on law was 'legal culture', as its function was to convert these external effects to relevant demands for the legal sphere being composed of structure and substance.[38] That is, macro-level interactions around law – including political, social and other forces – should always amend the formal picture of the law if one wants to get a realistic picture; and culture and legal culture may have a crucial role in their analysis and study.

If the analyzed interactions, should they be micro- or macro-level ones, are delimited precisely in a research project (as for instance based on social regulatory units or on a given legal body), they can be studied in comparative projects.[39] Obviously, these kind of comparative studies, interested in how interactions shape the perception of law in different contexts, do not necessarily refer to their precise methodological bases, but their intent to compare interactions of social, political or everyday life when construing a meaning of law and thereby creating normative commitments that

33. Based on this comparative study, as a general point, Moore argued that the SASFs are to be regarded as the fundamental units of social control instead of official state law even if the latter has the obvious monopoly of use of force. That is, society is comprised of many social fields being able to apply effective coercion or inducement that can motivate the behavior of their members. Basically, in Moore's eyes, SASFs 'bring forth and maintain behavioural rules' (J. Griffiths, 48 *Journal of Legal Pluralism* (2003), p. 23), thus they successfully exercise social control over a specific segment of society. It is also important that the boundaries of SASFs – that is, their scope of influence – are not to be defined by their organizations but by the 'fact that (they) can generate rules and coerce and induce compliance to them'. (S.F. Moore, 7 *Law and Society Review* (1973), p. 722); J. Griffiths, 48 *Journal of Legal Pluralism* (2003), p. 24) Therefore, the decisive element is the ability of exercising social control even if it is limited or solely particular; the degree of social formalization is simply irrelevant. At the same time, SASFs are only partially autonomous, because the members of a given SASF may also be members of other SASFs, so the regulatory autonomy of a given SASF always interferes with those of other SASFs. (J. Griffiths, 48 *Journal of Legal Pluralism* (2003), p. 24).
34. J. Griffiths, 48 *Journal of Legal Pluralism* (2003), p. 26.
35. L. Friedman, *The Legal System. A Social Science Perspective*, p. 16.
36. Ibid., p. 14.
37. Ibid., p. 15.
38. Ibid., p. 15–16.
39. For example, see: A. Sajó, 'Pluralism in Post-Communist Law', 44 *Acta Juridica Hungarica* (2003), p. 1–20; for the presentation of the main comparative themes of legal anthropology, see: F.G. Snyder, 'Anthropology, Dispute Processes and Law. A Critical Introduction', 8 *British Journal of Law and Society* (1981), p. 140–180, 144–151; for a recent summary of this way of studies, see: F. Pirie, 'Comparison in the Anthropology and History of Law', 9 *Journal of Comparative Law* (2014), p. 88–107.

connect them to this way of analysis.[40] In sum, these studies may reveal important insights into the socio-cultural embeddedness of law from a comparative aspect. Therefore, they also point out the cultural determination of law even without explicitly invoking 'legal culture' as a conceptual term in many cases.

C. Legal culture as a sum of attitudes towards law

The attitudinal interpretation of legal culture is also rooted in Lawrence M. Friedman's conception of legal culture. In essence – as it was already mentioned – he interpreted legal culture as medium of conversion being able to transform various interests, generated by diverse social forces, into relevant demands towards the legal system as such.[41] That is to say, the function of legal culture in Friedman's interpretation is the maintenance of the continuous conversion process between the colourful social reality composed of regulatory claims and demands and the legal system. As for the components of legal culture, Friedman points out that 'it refers to public knowledge of and attitudes and behaviour patterns towards the legal system'.[42] Thereafter, he highlights that these attitudes and patterns towards law may differ from group to group, from country to country, meaning that many different levels of abstraction of legal culture can be identified according to the intentions of the researchers.[43] For him, the most relevant one from these different layers of legal culture is the differentiation between the so-called internal one – the legal culture of the professionals – and the external one – the legal culture of the people. Further, from a historical perspective, he also convincingly argues for the uniqueness of modern legal culture as a socio-cultural entity.[44] That is, in this sense, legal culture may also be conceived of as an historical concept, in addition to its socio-legal meanings.

It is needless to explain why this understanding of legal culture stimulates comparative law scholarship. It certainly makes it possible to integrate insights of the sociology of law or the role of social and group attitudes towards law into the research design of a comparative law research project. Therefore, comparative research becomes capable of penetrating the social context of law by applying the statistical methods used by the sociology of law. This implies that by integrating these statistical methods, the rather fuzzy and blurred social context of law can be translated into the 'language of numbers' that seems to be capable of enhancing the scholarly value of these studies in the marketing of legal studies. That is, if the applied concept of legal culture is defined properly in a research, the use of these methods may be able to establish a handy framework for comparing two or more legal orders and their social context – mostly based on 'numbers' provided by the statistical analysis.

Among many excellent publications, a good example of this kind of comparative research is the well-known article of James L. Gibson and Gregory A. Caldeira that identifies various patterns of

40. To illustrate this in a post-socialist context, see, these two excellent case studies: M. Marek, 'Informal Networks and Interstitial Arenas of Power in the Making of Civil Society Law in Serbia', 57 *Sociologija* (2015), p. 571–592; D. Vuković, 'The Hollowing Out of Institutions: Law- and Policymaking in Contemporary Serbia', in B. Fekete and G.O. Fruzsina (eds.), *Central and Eastern European Socio-Political and Legal Transition Revisited* (Peter Lang, 2017), p. 155–173.
41. L. Friedman, *The Legal System. A Social Science Perspective*, p. 223.
42. Ibid., p. 194.
43. Ibid., p. 198.
44. Ibid., p. 204–207, 213–222.

European legal cultures by cross-country comparison of survey data on attitudes towards law from the 13 members of the European Union in 1993.[45] This research was based on data from a Eurobarometer omnibus survey and individual, country-specific interviews, putting into their focus three legal values – rule of law, neutrality of law, and individual liberty. It analysed the survey data by statistical methods and pointed out the existence of three different attitude sets – a rule-of-law respecting one, a more skeptical one, and a mix of these two poles – on the level of mass opinion on law in Western Europe.[46] Moreover, Gibson and Caldeira also argued that the European attitudes towards law can be described by a factor based on the three factor items being in correlation with the three legal values defined at the very beginning of the research.[47] All in all, the comparative analysis of mass attitudes towards law has already proved to be a successful and inspiring subfield of comparative law, as it enabled comparativists to integrate numerous methods of legal sociology into the tools of legal comparison or – conversely – it inspired legal sociologists to rely on a more intensive application of comparative methods.[48]

3. Three typical inconsistencies in the application of legal culture in comparative law

Thus far, three dominant uses of legal culture in comparative legal studies have been described. In the following, this paper gives an overview of certain typical scholarly mistreatments of legal culture that also characterises the contemporary use of this term in comparative law. These ways of inconsistent application will be defined in their typical forms, then examples will also be discussed in order to have a closer look at the problems implied. However, it must be stressed at this point, that this paper does never claim that a given author goes wrong in his or her article, but it only argues that the application of legal culture in his or her argumentation might be questioned or criticised from a conceptual or a methodological aspect. This capacity of methodological criticism seems to be inherent in the use of legal culture as, to my knowledge, it has never had a well-defined and consensually shared working definition, but instead, diverging approaches that have been applied since the 1970s.[49]

A. Confusion of different understandings in the same study

A typical and perhaps the most emblematic form of the inconsistent use of the concept of legal culture is grounding the scholarly argumentation in – slightly or heavily – different understandings of legal culture in the same paper. For example, an author may start with the application of the

45. J.L. Gibson and G.A. Caldeira, 'The Legal Cultures of Europe', 30 *Law and Society Review* (1996), p. 55–85.
46. Ibid., p. 70.
47. Ibid., p. 67.
48. For further examples of this thread of research, see: J.L. Gibson and R.M. Duch, 'Support for Rights in Western Europe and the Soviet Union. An Analysis of the Beliefs of Mass Publics', in F.D. Weil (ed.), *Research on Democratisation and Society. Democratisation in Eastern and Western Europe* (JAI Press, 1993), p. 241–263; E. Blankenburg, 'Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany', 46 *The American Journal of Comparative Law* (1998), p. 1–41; M. Kurkchiyan, 'Perceptions of Law and Social Order: A Cross-National Comparison of Collective Legal Consciousness', 26 *Wisconsin International Law Journal* (2012), p. 366–392.
49. For details, see: S.S. Silbey, 'Legal Culture and Cultures of Legality', in J.R. Hall, L. Grindstaff and M-C. Lo (eds.), *Handbook of Cultural Sociology*, p. 472–476. Silbey identifies four major lines within the discourse on legal culture: legal ideology; legal consciousness; legalities, cultures of legality, and counter-law; the structure of legality.

holistic approach pointing out the role of extra-legal factors in the modern development of a legal provision, and – a few pages later – he or she may try to broaden the methodological scope towards the discussion of certain attitudes, as they are expressed in statistical data, under the label of cultural factors. The main problem with this mistreatment is that it implies the parallel application of different methodological toolkits. In our hypothetical case: an interdisciplinary, multi-focussed approach of the socio-historical background, and another one from the sociology of law that relies heavily on statistical analysis. As these methods are partially incompatible or at least incommensurable by their very nature, as they are rooted in different academic traditions, the scholarly value of this mixing solution may have rather questionable results. Further, due to the incompatibility of these methods, this inconsistency often leads to conceptual and terminological confusion. That is, this kind of inconsistent application of legal culture in a research design may seriously weaken the scholarly appropriateness of an otherwise well-established research effort from a narrow, but relevant methodological aspect.

A good example of this conceptual inconsistency may be found in an otherwise very inspiring article devoted to casting light on the recent tendencies of internationalisation in Norwegian law. Although the analysis is aimed at one legal order, Norwegian law, the comparative nature of the study cannot be denied as the internationalisation of legal orders, as a general legal phenomenon, has already become a sui generis issue in comparative legal studies.[50] The discussion starts with making a distinction between legal culture as a phenomenon in its own right and as an instrument of legal analysis.[51] In general, the author broadly defines legal culture as a 'social phenomenon', and, in addition, he also argues that law is a product of legal culture.[52] Due to these general introductory remarks on the social embeddedness of law, one may suppose that the article subscribes to the holistic understanding of legal culture as a methodological starting point. That is, the appearance of certain extra-legal factors is expected that may explain, to various extents, the internationalisation of Norwegian law. However, a few pages later the article makes a turn in a methodological sense as it points out that the approach of van Hoecke and Warrington[53] is to be followed. This identifies legal culture as 'ideas and expectations of law made operational by institutional and institutional-like practices'.[54] As a closing methodological point, the author enlists six criteria that may be able to provide a basis for legal cultural analysis: '(1) conflict resolution, (2) norm production, (3) idea of justice, (4) legal method, (5) professionalisation, and (6) internationalisation'.[55]

At this point, the inconsistent application becomes apparent immediately. It can be argued that although a holistic understanding of legal culture was defined as a starting point, the author slides partially to a dynamic, interaction-oriented interpretation of legal culture since the functioning of law – conflict resolution and norm production in the list above – as such, is mentioned when defining the conceptual basis for the research as a decisive point. Needless to say, both conflict resolution and norm production are situated in the focus of either micro- or macro-level interactions. Therefore, their study needs such research tools that manifestly differ from those if legal

50. Compare, M. Siems, *Comparative Law*, p. 249–259.
51. J.Ø. Sunde, in M. Adams and D. Heirbaut (eds.), *The Method and Culture of Comparative Law*, p. 221.
52. Ibid., p. 222.
53. M. van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Culture: Towards a New Model for Comparative Law', 47 *The International and Comparative Law Quarterly* (1998), p. 495–536.
54. J.Ø. Sunde, in M. Adams and D. Heirbaut (eds.), *The Method and Culture of Comparative Law*, p. 231.
55. Ibid.

culture is applied as a background for the discussion. Unsurprisingly, the author's conclusion may be regarded as fairly narrow as he advocates a 'practical approach to legal culture' instead of becoming a real insider of a given legal culture.[56] Moreover, no explication is offered of the practical implications of this turn. In fact, by the emphasis on the 'practical approach to legal culture' the article indirectly acknowledges the problems of applying such a concept of legal culture that may embrace practically everything that is in any way relevant to a given research.

B. Under-theorisation of legal culture

A major threat for the application of legal culture is definitely the problem of oversimplification. Some of the authors are willing to apply this term without any real scholarly reflection, that is, they do not ground their arguments for the cultural embeddedness of law in a solid methodological framework. Bearing in mind the various diverging meanings of legal culture, the problems of this mistreatment become apparent at the very beginning as, without a well-founded approach, the term 'legal culture' will easily lose its explanatory value. Therefore, it can be regarded as a nice ornament in the text, but not a real scholarly concept that contributes to the understanding of a given problem. In most of these cases the authors simply mention 'legal culture' as the background of the studied question, or they solely refer to the cultural embeddedness of a legal rule, but they do so without either any serious methodological consideration or explanation. In these cases, the use of 'legal culture' as an idea serves no other purpose than to enrich the text of an article with a resonant scholarly buzzword that should connect a paper to this fashionable discourse. In sum, even simple references to the concept of legal culture may make a scholarly paper more attractive in the eyes of both readers and reviewers.

For instance, a recent paper on the cultural limits of the recent developments of European private law may illustrate well the nature of this kind of inconsistency when referring to legal culture.[57] This otherwise well-written and rather fascinating article pays noticeably small attention to the concept of 'legal culture', as such, even though this term is mentioned in its title twice. On the contrary, the concept of 'culture' is treated quite broadly by relying on the work of many relevant authors. However, neither the relationship between general culture and legal culture, nor the specificities of legal culture, are discussed. Only the threefold concept of Karlo Tuori – according to which, legal culture is composed of three layers: surface level, middle level, and deep level – is mentioned specifically in regard to legal culture, and, in addition, the author also invokes Duncan Kennedy's point putting serious emphasis on the relevance of identity discourse in the functioning of law.[58] Unfortunately, the article does not endeavour to create an applicable working concept of legal culture, although in the discussion of the recent developments of European private law under the aegis of the EU's harmonisation efforts, the variety of cultural settings and the lack of a common European culture may yet attain an important place.[59] In sum, this article

56. Ibid., p. 234.
57. S. Law, 'From Multiple Legal Cultures to One Legal Culture? Thinking About Culture, Tradition and Identity in European Private Law Development', 31 *Utrecht Journal of International and European Law* (2015), p. 68–89.
58. Ibid., p. 83–84.
59. The latest Ius Commune Casebook dedicated to the relationship between the European private laws and the European Union law offers an excellent illustration to this problem with special regard to the discussion of the various national case laws reacting to EU law instruments; see: A. Hartkamp, C. Sieburgh and W. Devroe (eds.), *Cases, Materials, and Text on European Law and Private Law* (Hart Publishing, 2017).

may illustrate well that the creation of an applicable working concept of legal culture as a first step in a research design is unavoidable, in the case that one intends to use this term as a real scholarly concept rather than simply as a textual decoration.

C. Over-theorisation of legal culture

Another danger in the application of legal culture is when scholars – keeping in mind the utmost complexity of the phenomenon – try to create such a complex working concept of legal culture that it clearly overtheorises it. This problem means that those who intend to apply 'legal culture' in their studies merge too many kinds of specific knowledge into this single term. Indeed, this inconsistency is very understandable and it also suggests that the authors have understood the conceptual weaknesses of legal culture as a term and its various methodological consequences, but, unfortunately, the answers given are inadequate to resolve these dilemmas. These dilemmas, in the application of legal culture, are illustrated well by a point of van Hoecke and Warrington in their seminal article discussing the perspectives of comparative law at the end of 20th century. As a first step, they argue that 'law is not just a set of rules or concepts, neither is it an isolated social practice. Law and legal practice are one aspect of the culture to which they belong. "Legal cultures" are part of more general cultures'.[60] Basically, they reveal that law cannot simply be studied in the conventional rule-focussed way nowadays; socio-cultural contexts should also play a considerable role. However, if an approach centred on the cultural embeddedness of law is applied, than this choice obviously gives rise to very complex methodological problems. The 'way out' from these methodological challenges may be the intensive use of various interdisciplinary approaches, as they might enable the scholar to handle this socio-cultural complexity.

As a second step, van Hoecke and Warrington, in order to establish a concept of legal culture that is capable of meeting the requirements of the above-mentioned cultural complexity behind law, list six different aspects of legal culture. This also implies that, in their eyes, legal culture should be understood as a synthesis of these six layers.

These are as follows:

(i) the concept of law;
(ii) a theory of valid legal sources including both the structural and dynamic aspects;
(iii) a methodology of law focussing on the interpretation of law and the internal relationships within adjudication;
(iv) a theory of argumentation with special regard to extra-legal components;
(v) a theory of legitimation with respect to formal, historical, axiological and sociological dimensions; and
(vi) a common basic ideology.[61]

It must also be mentioned that this approach of legal culture is specifically devoted to the lawyers' legal culture,[62] so it is focussed on such points of legal culture that appears to be relevant from the legal aspect. In sum, van Hoecke and Warrington envisage the concept of legal culture in

60. M. van Hoecke and M. Warrington, 47 *The International and Comparative Law Quarterly* (1998), p. 498.
61. For details, see: ibid., p. 514 –515.
62. Ibid., p. 513–514.

comparative law as a general, so to say umbrella, concept that is able to incorporate such 'soft' elements of the legal world that frequently remain invisible for conventional, rule-oriented legal research.

Although the comprehensive nature of this list, as prepared by these two authors, is certainly a clear advantage, it may also be argued that – from the aspect of the operationalisation of legal research – it implies some difficulties, too. These difficulties result from the overtly excessive nature of this conceptualisation of legal culture. Having analyzed these six elements, one may conclude that they bring together, among other things, approaches from the following fields of study: legal theory, theory of adjudication, rhetoric, sociology of law, general and legal history, political science, political philosophy, sociology, and cultural studies. Thus, a very – perhaps too – broad spectrum of different scholarly approaches is behind this impressive intellectual attempt to articulate a proper concept of legal culture for comparative law. However, realistically speaking, no conventional research plan can be realised with the help of this legal culture concept, as it would need the high-level application of so many fields of legal and cultural studies that would make it unsuitable for normal research activities. Alternatively, only extremely artificial and highly abstract points may be argued if starting with this legal culture concept. This danger is clearly seen by the authors, too, as they suggest using various, but not all, elements from this list for either macro- or micro-level comparison, depending on the scope of the given study.[63] Thus, as the scope of a research project requires, the framework of the comparative study can be built up with the help of some elements of this concept of legal culture.

All in all, van Hoecke and Warrington made an impressive attempt to conceptualise legal culture in a comprehensive way, but their construction in its entirety may not be well suited for conventional research due to its extremely complex interdisciplinary nature. Its real value may be that it reveals all the main components of legal culture as an ideal type – *Idealtypus* – and it facilitates the future researchers' task when selecting a given or some aspects of legal culture for a comparative study. This criticism, indeed, does not undermine the scholarly value of the fascinating study of van Hoecke and Warrington as they also realised this problem indirectly when separating the various elements for micro- or macro comparison, but it helps us understand the inherent limits of this inspiring concept.

4. Methodological lessons

The different uses and the inconsistencies uncovered as for the application of legal culture in comparative legal studies should not be surprising. On the contrary, their appearance is almost natural in the case of such a complex and blurred term. As long as a commonly shared scholarly definition of legal culture is lacking in comparative law there is no hope to develop a concise, thoughtful and standardised application. However, this does not at all mean that certain methodological considerations cannot be formulated that may be able to support and improve the use of this term in legal comparison. As, it can hardly be denied, comparative law needs those new insights and inspirations that are embedded in the term 'legal culture'. Without 'legal culture', comparative law would never address those new challenges that emanate from both the general transformation

63. Ibid., p. 515.

of legal scholarship started from the 1970s and accelerated in the last two decades[64] and the emergence of a new, globalised and interdependent legal world.

Thus, having discussed the different uses of legal culture in comparative law and some inconsistencies, three main lessons have to be specified:

1. Expecting too much from the application of legal culture in a legal research project with a comparative scope is not advisable; it is obvious that this concept is unable to back all kind of research plans. Simply, the concept of legal culture has its specific history within the broader history of legal scholarship, therefore, its scope of application is limited by the very nature of things, dominantly to sociological, anthropological and contextual problems. It has to be accepted that many research questions exist that cannot be properly explained by the use of 'legal culture' even though a reference to 'legal culture' would link the research to a rather fashionable discourse.
2. It should never have been forgotten that legal culture study (and cultural studies in comparative law in general) is just one possible method from the so-called methodological toolbox of comparative law.[65] Many other methods exist – for instance: functional, analytical or historical – that many also provide the researcher with efficient research tools for carrying out well-founded comparative law research. That is, the invocation of legal culture in a comparative project cannot be considered as a general methodological solution, but its application has to be chosen decisively with respect to the research question and the disciplinary background of the researcher or the research team.
3. Lastly, if the application of legal culture is justified in a comparative study, the researcher must always choose a proper approach of legal culture and all the potential methodological consequences of this choice must be taken into account. The differentiation among the approaches of legal culture as background, as interactions around law, or as a sum of attitudes towards law may help as it delineates three typical and frequent uses of legal culture, but other approaches may also be identified, as Nelken pointed out. If this choice has been made, the researcher should try to remain within the conceptual borders of his or her understanding as much as possible in the project.

In conclusion, a much more self-reflective methodological and critical application of 'legal culture' seems to be needed in comparative legal studies, to find the proper place for this term in the structure of the emerging post-functionalist comparative law. Obviously, this challenge cannot be met overnight, but methodological reflection may help in paving the way towards a future solution.

Funding

The preparation of this article was supported by a Bolyai János Scholarship provided by the Hungarian Academy of Sciences.

64. For critical and insightful analysis on the genesis of this qualitative transformation, see: R. Posner, 'The Decline of Law as an Autonomous Discipline: 1967–1982', 100 *Harvard Law Review* (1986–1987), p. 761–780.
65. Compare M. van Hoecke, 5 *Law and Method* (2015), p. 1–35, G. Samuel, *An Introduction to Comparative Law Theory and Method*.