The Dual Spectrum of Law

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Nordic Sketches on European Legal Culture

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In memory of Neil MacCormick

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INTRODUCTION

NORDIC SKETCHES ON EUROPEAN LEGAL CULTURE: LAW 1 / LAW 2

Is there anything between *law* and *non law*? Is this an inescapable dichotomy excluding a middle? During his academic life Patrick Glenn, author of the pathbreaking *Legal Traditions of the World,* constantly sought to overcome binary legal thinking and warned about the "western bias against conceiving of law as anything other than that which is positively enacted by the state"[1]. The rest would not be considered *real* law. But can we transgress this strict *Western* dichotomy? This book assumes we can, and explores the terrain between *law* and *non-law* in Europe by distinguishing two dimensions of legal discourse and legal thinking, one based on instruments and sources and the other based on ideas. The book explores practical reason, norms and institutions, within and outwith the state, that we can agree to call *law*, or law-like, from the perspective of comparative legal cultures. It follows Glenn's approach in recasting comparative law and engages with problems of degree, going beyond binary dichotomies law/non-law. The discourse skims through several dualities that characterize legal culture, to introduce and explain the relevance of distinguishing two dimensions of law: Law 1 and Law 2, each with its own spectrum and range.

The book eschews strict, jointly-exhaustive dichotomies and favors looking for a *tertium datur*, a middle or third way. And yet, the theory builds on a "dual" dimension. In my defense I would rejoin that dualities are not dichotomies[2]. Whilst I do adopt dual distinctions, they tend to be more like

[1] Glenn, 2005: 863.

[2] By no means do I deny the interest of dichotomies like Hume's Is / Ought or Searle's brute/institutional facts, or like those of *Recht / Unrecht* (lawful/unlawful) or System / Environment that Luhmann captured so convincingly to describe the code of the law in his Sociology of Law (1980). Other dualities of interest to our

poles or ideal types in a scale or a spectrum, not like mutually exclusive categories or binary codes excluding middles. I will be drawing from dualities like MacCormick's norm giver / norm user distinction, Hart's distinction between primary and secondary rules, Reichenbach's context of discovery / context of justification, Dworkin's policies / principles, Robert's order / dispute or Alexy's dual nature of law. The theory also draws from the distinction between provisions and norms elaborated by the Genoa school (Crisafulli, Guastini), and from Daniel Kahneman's distinction between System 1 (spontaneous) and System 2 (rational). These are the types of duality that have inspired me.

As scholars of law and participants in it, we tend to intersect perspectives and adopt a hermeneutic understanding of law, following methods such as rational reconstruction and regulative ideals to build models of laws interacting in complex, poly-centric systems, and of the special type of institutional reasoning used in the application of the law to address conflict and disputes in settings that go above and beyond the state. Europe is one such setting.

Institutional Reason

In his influential book *The Morality of Law* Lon Fuller poses the question "When it is said that the law represents the rule of reason, it is appropriate to ask what kind of reason is meant" (Fuller 1964:5). Fuller did not ask what kind of law it is that can represent the rule of reason because he assumed law embodies the rule of reason. My reply in this book will be, the kind of reason that a given kind of law can represent is 'institutional reason', but it takes a type of law to represent this reason, institutional law. Law is, first and foremost, institutional, as Neil MacCormick argued throughout his work. Law is composed of institutions, it regulates institutions and is itself an institutional practice, the product of institutions. Law is the set of norms (contained in provisions) recognized as valid and binding within social, economic and political institutions and by society at large. But law is also the reflexive discourse within and about such norms and such institutions and the reconstruction of such norms into a system, into an ideally coherent system. Law and institutions aim to secure an orderly society, and to channel and organize conflict in order to restore order and social peace. In this sense, law is a reflexive institution. Each of us, as members of society and active citizens, are participants of the practices of institutional reason. Legal

work are Durkheim's organic / mechanic solidarity, Sumner Maine's status / contract, Tönnies' *Gemeinschaft / Gesselschaft*.

scholars, sociologists and social philosophers are no exception and this makes our role particularly challenging. We are analyzing-describing-theorizing such practices, but we are ourselves part of them, we strive to improve them, or criticize them, we engage in the dialogical practices of the law.

There are, roughly speaking, three different categories of academic or scientific discourse about the law and, correspondingly, three types of legal scholars or academic jurists. Some jurists from the dogmatic disciplines of both private and public law are closer to the law-makers, the performing actors, legislators, treaty-makers, lawyers, counsel, administrators, judges, and they engage in a functional, instrumental relationship with such actors, contributing to an improvement of the norms they create and recreate. They follow a practical, normative interest. Other jurists, from interpretative, analytical disciplines, are more interested in the discourse and speech acts and communicative contexts, or in the deep presuppositions that institutional reason relates to, in the meaning of social and institutional practices of the law. They seek a hermeneutic understanding of such communicative practices. Yet, a third group of jurists, socio-legal scholars, focus specifically on the societal effects and impacts, on the claims, on the perceptions of the norms of law, of its authoritative creators and of the addressees involved in the practices, or engaged in the conflicts, and study these aspects empirically. But scholars are only part of the law. Legal discourse displays the interaction of legislator(s), the judiciary, and legal scholars, and, pragmatically, law is improved and reformed through communication between these three types of actors.

As a scholarly work, this book is an exercise in the second category, while trying to keep an alert eye on the teachings and insights of the other two. It adopts a theoretical, interpretive and critical perspective on European law, its reason, its authority, its system of decision-making, and its institutional practices. The book compiles and edits ten selected lectures I have delivered in different Nordic universities[3] on the subject of European law and legal

[3] The Universities of Lund, Bergen and Helsinki have been the main venues for my lectures. My first seminar was in Lund in April, 1998, on the subject of soft law, and my last contribution was also in Lund in April, 2024, in a seminar dedicated to a normative appraisal of the legal reasoning of the Court of Justice of the EU. In between, there are contributions presented in Reykjavik, Gothenburg, Stockholm, Malmo and Turku (Åbo) and more frequently in Bergen, Oslo and Copenhagen, and in the Nordic University where I have spent most time, and keep most links, Helsinki. I have revised and updated all the lectures under a coherent thread based on the Law 1 / Law 2 distinction, which I explain below.

culture, the theory of the European legal orders, and on institutional reason and on the legal reasoning of the European courts. Hence the subtitle, *Nordic* sketches on European legal culture.

A certain fascination for the North: Nordic Legal Culture

But why Nordic? What sort of attraction is there, in the field of Jurisprudence and European law, between a Basque socio-legal scholar of European legal culture educated in Edinburgh and the Nordic departments in those disciplines? Why should Nordic universities take an interest in the research I have been conducting on the legal theory of European law and in *The Legal Reasoning of the European Court of Justice*? (Bengoetxea, 1993) I would venture to say it was my approach to the distinction between clear cases and hard cases, my first intuitive attempt to explain away the dichotomy through pragmatism and legal realism[4]. It was futile, I argued, to try to predict when a case would be clear by looking at the legal provisions that would apply in a pre-interpretive way or form the standpoint of legal dogmatics. When will the case be clear? We cannot know beforehand. Any norm could be problematized, any case could become hard. It is through pragmatism and realism that we conjecture, once we analyze the actual litigation at hand, that we are before a clear case. This is because no interpretative doubt has been raised by the parties or interveners concerning the application of the selected legal norms to the facts of the case and therefore the type of justification the court will use in the instant case will tend to be deductive, and the argumentation will not be controversial. But it may also be because the judge applying the law tends to see the problem situation as routine, raising no new issues, or no hard questions[5]. When doubts are raised and when the court takes these doubts seriously, then we have a hard(er) case and the syllogistic application of the norm to the facts of the case, qualified accordingly, will not count as a sufficient justification, and a higher level of argumentation, including practical reason, will be necessary to justify each of the premises. Intuitively, I was anticipating the Law 1 / Law 2 distinction of the present book.

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[4] My book *The Legal Reasoning of the European Court of Justice*, Bengoetxea 1993, deals with these questions in pages 168-72, and chapters 6 and 7. It is one of the first attempts to explore a European Jurisprudence.

[5] Using the fast/slow thinking typology, we could say, with Kahneman (2011: 114), that "System 1 is not prone to doubt. It suppresses ambiguity and spontaneously constructs stories that are as coherent as possible. … doubt is harder work than sliding into certainty".

But, more personally, what it is then that attracts and fascinates me from Nordic (legal) culture? Is it Scandinavian legal realism? Probably not. The dominating legal theoretical tradition in the Nordic countries is not Scandinavian legal realism, but legal pragmatism, and this is probably due to a weak position of legal science, a large participation of laypersons in all sorts of legal procedures, the high level of mutual trust, and informality in Nordic culture, the predominance of orality in court procedure, the late emergence of professional lawyers and legal dogmatics, the predominance of the legislator and statutory law, the absence of constitutional courts, and a very restrained use of judicial review.

The type of legal philosophy produced in the Nordic academic circles I have frequented[6] blend legal realism with analytical Jurisprudence and practical reason, with legal pragmatism and reasonableness, with critical legal positivism and the deep layers of legal culture and with sociology of law. But I am particularly fond of the Nordic progressive and liberal outlook on the Criminal Justice System and social private law, as an expression of the welfare state, the Nordic idea of a 'good' state, a facilitator of alternative dispute resolution (ADR) as complementary to a court system with high lay participation, a provider of legal advisory services and *Ombudsmand*, actively involved in areas like the protection of consumers and of the weaker party in contract or property law. In a way, it is all of that.

I can certainly explain my own familiarity with Nordic legal culture, and the Nordic way of life. Nordic countries are small in population (Sweden is larger), low density (Denmark less low), relatively homogenous and ideally egalitarian (Letto-Vanamo, 2011[7]). These characteristics presumably have

[6] It is difficult for me to list all the authors that have exerted an influence on my work, but some important names are Alf Ross, the Uppsala school, Hjalte Rasmussen, G.H. von Wright, Jaako Hintikka, Aulis Aarnio, Alelsander Pezcenik, Nils Jareborg, Anne Lise Kjaer, Kaarlo Tuori, Pia Letto-Vanamo, Ditlev Tamn, Martti Koskeniemi, Jan Klabbers, Reza Banakar, Håkan Hydén, Anna Lundberg, Hans Peter Graver, Jon Elster, Nils Christie, Johan Galtung, Peter Asp, Kimmo Nuotio, Jørn Jacobsen, Linda Gröning, Thomas Wilhelmsson, Suvi Sankari, Samuli Hurri, Susanna Lindross-Hovinheimo, Panu Minkinen, Ari Hirvonen …

[7] Letto-Vanamo speaks of small quite homogenous, even egalitarian societies, modernized with the first wave of industrialization, where big cities (and the bourgeoisie) are lacking, and where (legal) culture has been - and can even today be - characterized as rural, as distinct from urban, metropolitan culture. Modern civil law codifications (like the French code civil or the German BGB) are missing in all the Nordic countries, while legal science (jurisprudence) emerged much later there than in other Western European countries.

an impact on the Nordic legal culture and Nordic courts. The countries of my national identities – Basque mostly, and a wee bit Scottish – relate to these features. Indeed, Scotland does have its own law, a mixed Common Law/Code Law legal system, including its own criminal law and its own judiciary and system of courts and may share certain legal cultural traits with the Nordic region (not only the historic Nordic ascent of the Shetlands and Hebrides). Further away geographically, the Basque Country could share some cultural traits (at the level of social norms, perhaps even a brief episode of Protestant influence) but not at the level of legal culture. Basque law lost its own judicial system many centuries ago, and only retains a leftover of its historic system of private law to protect the sustainability of the farmhouse and of public law, the local *foral* expression of democratic self-government, and these historical rights account for a *sui generis* system of self-government under the Spanish Constitution. The Basque Country and the Nordic states share European EU law now (EU law with Finland, Sweden and Denmark, and EEA law with Norway and Iceland), but, alas, no longer with Scotland, for only the law of the Council of Europe and the ECHR is common ground now, pending a new relationship of post-Brexit UK with the EU. European law is, by any standard, an important element of convergence.

On top of those features of the Nordic societies mentioned above, Nylund (2021: 8) considers that "late modernisation, urbanisation and professionalisation are still reflected in many legal institutions, *inter alia* in low specialisation among judges and the relatively high use of lay judges. The state is considered 'good', and the boundary between civil society and the state is blurred compared to many other countries. This is reflected *inter alia* in private organs, such as dispute resolution boards, having an important role in resolving disputes and in flexible rules giving the decision-maker discretion to find the most practicable solution". A fine balance between formalism and pragmatism results, relying on high social trust in institutions[8].

But perhaps assuming the existence of some Nordic culture is already a *partie prise;* for, can we be certain we are not constructing artifacts based on our will, when reconstructing and comparing legal cultures? Indeed, as

[8] As Nylund explains (2021: 12), "Nordic citizens and companies trust their courts, which is hardly surprising considering that the Nordic countries are high-trust societies. A recent report from the Nordic Council of Ministers even called trust 'the Nordic gold'. The use of lay judges has been identified as an important factor in building and maintaining trust in courts."

Jørn Øyrehagen Sunde (2021: 49) explains, "the similarities between the Nordic countries' political history are limited, with no common institutions before the late nineteenth century, large language similarities but no common legal language, and—most importantly—no common legal procedure. Still, the natural conditions in the very north of Europe came to shape the political and legal systems in similar ways, stimulating the desire to create a Nordic legal culture in the second half of the nineteenth century". The desire of the jurists meeting in the "Nordic Meeting of Lawyers" in Copenhagen, in 1872, to create a *Nordic legal culture* is a most striking lever of institutionalization[9], something that rhymes and chimes, one century later, with the European willful experiment of *Integration through Law* (ITL) bringing practical and theoretical jurists under the same federalist constellation (Cappelletti, Seccombe and Weiler, 1986). As Azoulai (2016: 450) explains of the ITL project, "this vision presented law not only as a functional tool but as a cultural or symbolic form, as a carrier of a new spirit of cooperation and solidarity".

The Nordic experiment achieves integration though the shared comparative method, legal collaboration and voluntary transplants (soft harmonization), whereas the European integration process involves the construction of a new legal order, a self-standing and self-referential institutional and legal structure, with common rules for natural and legal persons (the four basic freedoms or free movements, non-discrimination and later, citizenship and fundamental rights). Whereas the development of a European legal cultural identity has met strong resistance, a Nordic legal cultural identity or *legal mind* has materialized[10], based on a shared and mutual sense of social trust, with no special need for an institutional state-like governance, no monitoring of compliance nor executive dominance, and with no system of common courts. This Nordic legal culture is superposed on each of the local legal cultures in each Nordic country. The centrality and dominance of the legislator, and consequently of *travaux préparatoires* as sources of interpretation (Krunke, 2023)[11], with strong courts but no constitutional

[9] Nylund (2021:13) also stresses the importance of the will: "Nordic cooperation and the desire to maintain a certain degree of alignment among the Nordic countries is essential for maintaining Nordic unity and a distinctly Nordic court culture."

[10] "There is no such thing as Nordic law, yet it is easy to refer to a Nordic legal mind", in the words of Pia Letto-Vanamo (2021: 21) who draws from the *aspiration* of the Nordic jurists (the will, once again!) to explore a common way of legal thinking.

[11] Helle Krunke, "Constitutional identity and equality: the challenge of the Nordic EU member states", *Comparative Constitutional Studies*, Vol. 1 No. 1, 2023, pp. 124–139

court; the relative importance of lay participation in justice, accessible legal language in legislation and court decisions and orality in legal procedure, a still small number of legal professionals and a small and pragmatic legal science are all building blocks in an overarching characteristic of Nordic legal culture and court culture: dialogue (Sunde, 2021).

Sunde's reference to dialogue points to the key that best explains, probably, my personal connection to Nordic (legal) culture[12]. Dialogue has been a constant theme in my research and publications, and is the subject of Chapter Ten on judicial dialogues. But not only judicial dialogues. Academic interdisciplinary dialogues and philosophical dialogues are a recurrent theme and source of inspiration for my work, and are reflected in this book. Institutions engage in a permanent dialogue within, and between themselves and with their environment, but also with the citizenry, with a mutual trust relationship between institutions, including the courts[13], and citizens (Krunke 2023: 138).

Neil MacCormick, in his ground-breaking *Institutions of Law* (2007) made the crucial distinction between norm users and norm givers. Both perspectives are equally important to understand the law. N*orm-givers*, law-making and law-applying institutions like Parliaments, ministries, agencies, law-commissions, counsels, lawyers or the judiciary, they all shape our ideas, mentalities and expectations of the law, but so do the interactions of citizens and laypersons like ourselves, acting as *norm-users*. When we, as citizens, engage in dialogue using practical reason within shared institutions, we deliberate about the best course of action for the institutions to adopt, and about the handling of disputes within those institutions, or about those very institutions; we cooperate through dialogue and thus build mutual trust.

[12] We can refer to Nordic culture more generally, and not just Nordic legal culture. Geert Hofstede's model for comparing national cultures characterizes Nordic societies by features such as a mentality of equality, collectivism, cooperation, stability, strong social norms, and a balance between past and future orientations (Hofstede, 2001). I would add *dialogue*, which goes hand in hand with *social trust*, and reflects mostly in 'cooperation', 'collectivism' or 'equality'.

[13] Trust between courts and citizens is mutual. Nylund and Sunde (2019) give the following example: the courts prefer to serve documents by ordinary mail; a receipt slip is sent with the documents and the recipient is asked to note the date of service, sign the slip and return it to the court, and in the vast majority of cases, service is successful. Another example: time limits are often not set by law, and even when the written law sets a time limit, the court is often allowed to extend it.

The rational reconstruction of institutional reasoning

This dialogical practice carried within institutions delivers institutional reason and can at the same time be analyzed under the perspective of institutional reason. Legal reasoning is an instance, a special case, of practical reasoning operating within institutions of law such as courts and legislators[14]. It is shaped by the praxis or practice of norm-users and norm-givers. Institutional reasoning encapsulates the many and varied decisions these agents, users and givers, make in different institutional contexts. Practical decisions, ie decisions about what is to be done, what is the best course of action, decisions about whether to decide at all and how to decide, how and what to choose, whether and how to cooperate to achieve common aims, and the like. The type of institution, how formal or informal it is, will determine the sort of decisions to be made, but in all cases decisions need to be justified by giving 'good' reasons. What counts as good reasons will, again, depend on the type of institution, and on the social, cultural system where that institution is embedded.

Legal institutions – courts and the judiciary, parliaments, governments, executive agencies and administration, organs of international organizations - largely determine what type of reasons are valid and necessary to support decisions made within them. The actors – users and givers – are aware of those reasons and reconstruct them from their own practice, into an ideal theory of justification for each institution. Academics then place and relocate that theory in the general theoretical framework of practical reasoning and norm-users and norm-givers engaging in the practice of decision-making within such institutions reshape the theory and the practice in a discursive hermeneutic circle. This practice-based method for the development of the theory of reasoning in the justification of decisions made in, and made by institutions is often called rational reconstruction, following Habermas' theory of communicative action. To rationally reconstruct a practice is to turn the implicit "know how" of participants into an explicit "know that" (Habermas 1998: 33), a way to interpret social action and understanding actors' perspectives.

[14] Alexy (2019: 48) understands the special case in the following terms: "Legal discourse is a special case of general practical discourse because it is committed to statute, precedent, and legal dogmatics. These commitments represent the real dimension of legal discourse or argumentation. The ideal dimension comprises general practical argumentation."

John Bell echoes this reconstruction when analysing legal professions. When studying a profession like the judiciary, organized institutionally over a long historical period, "the key elements of the analysis are that there is an activity, a set of tasks and procedures that define judicial work. The reflective practitioner engages in the activity and produces outputs. He or she then reflects on what has been done. The reflection by individuals and by the profession as a whole gives rise to *norms and standards* for how the activity should be conducted in future" (Bell, 2006:11), these collective reflections between the actors normally take the form of a collective dialogue, an institutional dialogue. A rational reconstruction does not rely merely on the description of brute phenomena, but it attempts to explain legal or normative, phenomena by means of conceiving them as 'theoretical objects' and institutional facts. The legal and socio-legal scholar must be ready to adopt an internal point of view, that of legal dogmatics and of lawyers working in legal practice; to put themselves in the place of a judge, barrister or professor of penal law, or any other branch of law, but also in the place of a legislator and of a citizen (user) who puts forward claims based on some construction and reconstruction of the law. By doing so, bottom-up, the fragmented, unstructured and often conflicting data of 'raw law' or 'institutional decisions' are recognized as the elements of a potentially rational, coherent and systematic whole, from which they are constructed or interpreted, and into which they are re-constructed. A rational reconstruction of a norm, any practical norm used in decision-making, will explain how it aims to solve a given practical problem in the lifeworld according to the social expectations as to how problems are solved, and how decisions are made in institutions.

The method of rational reconstruction is not axiologically pure or neutral. Postulating the existence of a systematic and coherent whole as an object of study is already a *partie prise*, at least from a cognitive point of view. Nevertheless the method does allow for the theoretical reconstruction of any normative order, as an object of analysis, in a moderately detached and disinterested way, and this personal distancing is helpful, not only when the theorist confronts morally objectionable institutions or even unjust normative orders, but also when the theorist tackles the analysis of laws considered valuable and commendable. It is not just a rational method, but a critical reconstruction.

Legal System as Regulative Ideal

As mentioned above, the systematic nature of law, considering the law as system is already a *partie prise,* a certain reconstruction of the law, or the post-interpretive result of applying the method of rational reconstruction by legal scientists: strictly speaking, from an ontological perspective, the law is not a 'system' in a pre-interpretative sense, ex-ante, but rather, a set of norms followed and adapted by the law users and the provisions adopted by the law-makers. As a technical domain, the law is a product, a re-construction, of the legal scholar, of legal science and dogmatics (MacCormick, 1999). In other words, law as a set of provisions is not systematic; rather, it is systematized into the legal order of norms, a constant subject of systematization. The system character of law is not an immanent feature of law but the rational reconstruction made by legal science, trying to make the best possible sense of all the legal materials, classifying, interpreting and transforming them into a system. Legal science turns the set of legal provisions contained in the official sources into a system of norms, a legal system. The socio-legal scholar, on the other side, can describe the law as a set of provisions (a loose cocept of norms) and legal practices, but need not become as obsessed with the systematic or systematized character of law as the legal scholar engaging in dogmatics (the legal scientist). At best, the existence of a scholarly practice of rationally systematizing legal experience will, itself, be a sociological datum, an expression of technical knowledge, operating as a form of power, and an illustration of the idealism and formalism of law. The failures, gaps, contradictions and conflicts in the law, how and why they come about, will have more research appeal for the social scientist whereas the legal scientists will consider them imperfections.

Having said that, both socio-legal scholars and dogmatic jurists can start off from the point of view of the participants of the legal system, in particular that of lawmakers, interpreters of law and judges. The law-giver (legislator) has an idea of 'law as system' wherein it will insert the new norms it is making, but these norms will later be systematized by legal counsel, judges and scholars. This interaction of legislators and interpreters opens up the dimension of social practices and of conflict in law, the privileged domain of judges, but not their monopoly because some disputes never get to the courts. Law is multilayered and manifests itself in social practices with different degrees of institutionalization, different layers – rules, unwritten principles, doctrines - and different institutions will develop corresponding forms of reasoning.

At any rate, the systematization of law carried out by legal science or by last-instance jurisdictions is the reconstructive product of a given type of institution, of law faculties in Universities or apex courts, for example. Using a master rule (rule of recognition, doctrine of the sources of law), the jurists in these and similar institutions will identify the norms that apply in a given society. They will then analyze all this surface or base legal material (Tuori, 2021), all the positive norms adopted by law-makers in the same state or at the national, or federal level, the judgments made by other courts of the same jurisdiction, or the norms contained in directly applicable, self-executing instruments of trans-, inter- or supranational law[15]. They will strive to organize these into a coherent, rational, single system.

The legal professionals, jurists, operating in these institutions will share views and ideas about the properties of a legal system and will seek to order and sort out the surface material into such a system. It is in this sense that the idea or concept of a legal system, shared by jurists in the key legal institutions operates as a regulative ideal[16]. The law at the surface level does not present itself as a system, but the intellectual operations carried out by jurists in legal institutions, in law faculties, courts of law or Law Commissions, turn it into a system. Law needs to be understood dynamically as comprising the materials identified at the surface level (Law 1) and the ordering of such materials into a unitary, rational, complete, consistent and ideally coherent system (Law 2). These operations are also relevant to the sociology of law, to the history of law, to comparative law and to the idea of legal culture, all these disciplines engaging a dialogue with Jurisprudence.

Law 1 and Law 2

Law 1 is the compilation of all provisions contained in the written sources and considered valid at a given place and time, in a given community, according to a rule of recognition shared by the jurists, and ideally the citizens, of such community. Law 2 would be the systematized, reconstructed

[15] Tuori (2021: 39) distinguishes between different layers of law: surfave level, sub-surface and legal culture. The positive norms of the surface are the subject of legal positivism: "What primarily matters for positivist legal theory is reconstructing and explaining the unity of a single positive national legal order. Plurality is subordinated to unity".

[16] This was the title of my contribution to the 15th IVR World Conference in Göttingen, in August 1991, (Bengoetxea 1994). This dynamic conception also inspires my book *The Legal Reasoning of the European Court of Justice* (1993), which has exerted some influence in Nordic circles.

version of these and other norms of law, not necessarily written down as provisions, and not necessarily exclusive to that community. Law 1 is the accumulation of all the valid positive norms in the surface level, whereas Law 2 calls for a broader, deeper or higher understanding of law, closer to the idea of legal culture. I make no special ontological claim on the existence of these two ideas of law[17]; they both have an institutional reality and exist as institutional facts in the minds of jurists and of (some, not all) norm-users. To my knowledge, the distinction in such simple terms, 1 and 2, is new, but I trust all jurists can relate to, and tolerate it, even if they would not feel at home with such light and simplified usage, almost too unsophisticated[18]. The Law 1 / Law 2 distinction is related, but does not correspond to the dichotomy provisions/norms. Provisions and norms are different ontological dimensions: legal provisions exist as *text* contained in legal instruments flowing from the sources of law, and published in official journals or gazettes. Legal norms, on the other hand, exist as intersubjective meaning, they are mental constructs resulting from the interpretation of provisions and shared in a given community[19]. Thus both legal provisions

[17] In this respect I do not follow Alexy's theory of the dual nature of law, one real, the other ideal.

[18] The distinction between Law 1 and Law 2 will, to many, ring a bell to the well-known distinction between System 1 and System 2 made by Daniel Kahneman in his bestseller *Thinking, Fast and Slow*, (2011) which I happened to discover thanks to the discussion at a seminar I gave at Helsinki in the Spring of 2013, introducing Law 1 (sets of legal provisions) and Law 2 (system of legal norms). Although the labels System 1 and System 2 are widely used in psychology, Kahneman describes mental life by the metaphor (artefacts again) of these two agents of respectively fast and intuitive thinking versus slow and deliberative thinking. There are mutual influences between System 1 and System 2, just as there are between Law 1 and Law 2.

[19] The distinction between provisions and norms is a classic in analytical legal theory, especially under the perspective of communication (semiotics and pragmatics) and speech acts. Legislators adopt legal norms, which are written down in legal instruments as *provisions*. They become posited or positive law. These are then interpreted by jurists, who extract *legal norms* from the provisions. The interpreted norm and the enacted norm may, and tend to differ in hard cases. Another way to look at this process is through the concept of legal formants: a statute, a doctrinal handbook or a precedent case does not contain a complete statement of the rule or norm but offers normative information about it, a formant which the interpreter uses to construct the rule or norm with a view to application in the instant case, after taking into account and classifying the facts of the case (Sacco: 1991: 21-4). Rodolfo Sacco's pretense that the rule does not exist until the decision has to be made is a legal realist take on the ontology of norms. In our scheme, however, the legislator emanates norms when formally adopting the statute or the Act, and proponents of

and norms are found in Law 1 as the raw normative material that comes into operation in the elaboration and application of the law, whereas legal systems are systematizations carried out in Law 2 using all types of norms and legal formants including those identified at the Law 1 level, along with other practical norms, principles, values.

This is a plausible way to convey how Law 1 is *formed* (hence the concept of formants). Provisions are posited as written fragments – articles, sections, subsections, additional clauses, protocols, declarations …. - of legal instruments – Treaties, Conventions, Charters, Covenants, Constitutions, Acts (Statutes), Regulations, Directives, Decisions, Decrees, Orders, ... - made by recognized authorities – International bodies, Parliaments, Governments, Ministers, Delegated Authorities, … -. The meaning of such provisions is what we normally call the norms. But conceiving of norms as the interpretations of provisions does not imply that norms are only contained in written provisions nor that there was no normative proposition before the adoption of the provision in a legal instrument. Indeed, we should not downplay the relevance of the norm-giver when adopting a legal norm as legislator or executive, even when laying down the *ratio decidendi* that will become a judicial precedent (eg when dealing with a hard case, when distinguishing the *ratio*, or when overruling precedents). Authorized norm-givers do make law (legal norms), they do not simply adopt pieces of text (provisions), plain text devoid of meaning. Provisions contain the norms made by the law-maker.

Normally, the understanding of these provisions is straightforward, unproblematic, and the application of Law 1 is almost automatic, routine. An expert system could operate on the Law 1 level and automated application would be rather smooth and effective. But other times we can never be sure what exactly is the law they have made. Even the collective legislator may not know or may not agree, retrospectively, as to what legal norms they adopted. They may disagree as to their concrete form(ul)ation. The only objective clue available will be the provision that was written down when adopting the instrument, and the text of the provision may be unclear, ambiguous, imprecise, uncertain, vague, open ended, abstract. It calls for interpretation. The problem is heuristic. A more detailed consideration

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the Bill make normative propositions, intending the norm or rule to operate in a certain way in certain cases and under certain circumstances, or not to operate. Once the norms are enacted or posited the legislator, the norm-maker, fades away and the interpreter, the norm-user will extract the norms from the posited provisions. Otherwise, if the norms only come after the formants, then the legislator would not have intended to make norms, which seems self-defeating.

is called for. Automated or expert systems will be of no use. In hard cases Law 1 then becomes a barren field of provisions where the norm is contested or missing, the whole legal order is systematized, and even beyond it, beneath it, or above it practical reason and legal culture may need to be mobilized, even more so in complex or polycentric systems. Enter Law 2.

Jurists, lawyers and judges, at all instances, will propose the formulation of the rule or norm and justify it by resorting to resources from the domain of Law 2, where discourses from legal science, legal dogmatics, legal culture, legal tradition, legal system, legal consciousness, legal ideology, legal history, and philosophies of law and justice (political philosophies) will operate. Different interpretations and constructions of the norms may even reflect clashes of visions, since jurists will share a certain regulative idea of law as a system, but this idea may feed on diverging premises. Controversies and, to use the buzzword, 'culture wars' arise from many sources, some related to divergent ideologies of judicial decision-making, some related to meta-ethics like the dichotomy between cognitivists and non-cognitivists and some related to philosophical anthropology, like Sowell's dichotomy between constrained and unconstrained views of human nature[20]. Instead of these genuine dichotomies, in the European poly-centric context we can make more of the intergovernmental/supranational distinction Weiler (1982) postulated four decades ago. At any rate, the spectrum of Law 2 does not solve the hard case, it becomes the new arena unto which jurists can tap when contending for conflicting interpretations and justifying their preferred interpretation, as when legal counsel propose a norm contention and judges decide.

Law 2 further makes it possible to move away from the text of Law 1 and draw rather lofty understandings and formulations of law, even of whole areas of law[21]. This Law 1 / Law 2 artifact makes it possible to speak about

[20] This dichotomy in political philosophy, based on attitudes toward human nature, more constrained or more unconstrained, purports to explain why endemic debates perdure about the nature of practical reason, justice, equality and power (Sowell, 2002). This theory is not however related to the ideologies of judicial decision-making and legal interpretation that Wróblewski contrasted in the 1970s and 80s, the bound (formalism) and the free application (rule skepticism, fact skepticism, *Freirechtsfindung*, *uso alternativo del diritto*). Wróblewski (1992) avoided dichotomies and identified a third way, the Legal and Rational decision-making ideology.

[21] My distinction between Law-1 and Law-2 differs in this sense from Tuori's distinction between layers of law (Tuori, 2021), an archaeological theory based on sediments or layers. Mine is based on elevation, distillation, loftiness. We are both

European law and European Legal Culture, even without a clear demarcation of European law, as an identifiable set of legal instruments, in Law 1: 'European law' could refer to the complete set of provisions contained in instruments of European Union law, but also to the considerably smaller set of provisions contained in instruments of the Council of Europe, or even those of the European Convention of Human Rights. But 'European law' could also include all the Law 1 sets of provisions of all the different "national" laws of European countries (states). If we look at the surface level in the legal landscapes of Europe, we will not find any "European" law as one finds Finnish Law, Icelandic Law, Estonian Law or Scots Law, or the subsystem Basque law within the complex Spanish legal system or even the much more complex EU law. Law 1 in Europe is itself a spectrum of phenomena, from social practices considered customary law, to detailed provisions of administrative law, to the general norms on, say, non contractual liability and their development in court decisions. The fragmented character of surface law, of Law-1 is only one side of the story. Plurality, diversity, fragmentation, flexibility, multi-level, multiple-speed, variable geometries, inter-legalities are all concepts that seek to describe the complex and fluid nature of the laws in Europe. Not only at the level of state legal systems, but also at the sub-state levels with the existence of autonomous laws or subsystems giving rise to special forms of internal plurality, not to mention the supra-national and transnational European levels.

These normative, plural phenomena are not always brought under the monitoring, supervision, review of courts. Sometimes there are alternative jurisdictions, arbitration, multiple litigation, forum shopping. Courts have been the traditional actors reintroducing coherence in such fragmented pluralistic normativities, but to what extent is this really still the case in Europe? Can we bring any coherence into the spectrum of Law 1?

From the point of view of Law 2 we can always refer to European legal culture and capture principles or ideas about law in Europe, not necessarily reflected in Law 1 provisions. European law would then refer to the result of sedimentation processes for each of the identifiable systems at the surface, but bouncing and feeding back to provide foundations common to all of the European groups of Law 1. It could also be an intellectual reconstruction from the fragmented law-scapes. The idea of European law, as a rational reconstruction of those systems of law that apply across Europe

using metaphors as artefacts of legal imagination, in the sense formidably developed by (Del Mar, 2020).

like EU-law or EFTA and EEA-law or the European Convention of Human Rights or the general principles of law, or the common constitutional traditions of the Member States, or their mutual interactions, calls for a special ontology and a special hermeneutic view of the law. It is all of these at the same time. Coherence is the *leitmotiv* of Law 2. There are interesting ways to bring in coherence from a rational reconstruction of Law 1 and this book explores most of them: judicial dialogues, margin of appreciation, subsidiarity, procedural and institutional autonomy, system as a regulative ideal, reasoning and argumentation seeking pragmatism or effectiveness, horizontal effects of fundamental rights, the constitutionalization of private law, teleological arguments, institutional reason, minimalism, silence, (sometimes restraint), insufficiently theorised arguments, comity, respect for constitutional traditions, the fundamental rights culture. All these concepts and instruments are seeking normative coherence.

Likewise, any talk of Roman Law or any other historical law rely on the Law 1/Law 2 duality of spectra. It cannot be approached other than through Law 2 standpoints. Of course, the analysis will delve on instruments and sources that were once, loosely, part of Law 1 sets. The legal norms of Roman Law systematized into the *Corpus Iuris Civilis*, largely based on Gaius' Institutes, were perhaps the first example of an institutional elaboration of Law 2. The rediscovery and reception of Roman Law, with the glossators and commentators at Bologna and other European centers of knowledge, would continue the institutional tradition of Law 2 compilations. They became largely influential on written provisions (royal charters and decrees, covenants and fors), the codification of customary law and on the texts of Canon law, which made up Law 1 at different historical periods. The dialectic interplay between Law 1 and Law 2 is constant.

The same would go for Nordic law. It is a construction or reconstruction from the standpoint of Law 2 based on the different historical sequences of the sets of legal instruments, sources and materials validly operative (Law 1), and identified on the basis of a rule of recognition, which gives special supremacy to the legislator, parliament, in each of the societies that now make up the Nordic countries, some of which were, in different historical periods, part of the same kingdom (Finland in Sweden, Finland in Russia, Norway under Denmark, Iceland under Denmark, Iceland with Norway, Sweden onto Norway, and the Faroes, and Greenland, eg under the Kalmar Union). The importance of jurists and practicing lawyers in reconstructing this common Nordic legal identity through the shared comparative method, legal collaboration and voluntary transplants (soft harmonization) was one major catalyst for the Law 2 understanding of a Nordic legal culture

superposed on each of the local (Law 1) sets of valid legal norms in each Nordic country.

From a comparative analysis - and European law, including the law of the EU, is largely comparative - Law 2 becomes the normal dimension and standpoint to understand and explain legal culture, and also to undertake research of comparative law. This does not imply Law 1 is of no use in comparative law. There is a constant interaction between Law 1 and Law 2, and Law 1 provisions are particularly useful when considering technical legal transplants. Yet, the heated debate on transferability between Watson (1993), in favour of transplants and Legrand against (1997),[22] is a warning that more substantial and "cultural" transplants will require a thorough examination of the legal system from the standpoint of Law 2.

The structure and genealogy of the book

The conceptual tools analysed in this **Introduction** – rational reconstruction, regulative ideals, Law 1 and Law 2, and institutional reasoning - are a summary of the doctoral course delivered in Voss, near Bergen in the Summer of 2024. The course was directed by Ignacio Herrera Anchustegui, of the University of Bergen and dealt with methodology and project development within the fields of climate-, energy-, and environmental law; three domains that require cross-disciplinary approaches and may involve theoretical and empirical methodologies, cutting across superseding regulatory levels (international, regional, national, and local).

Chapter One, "Institutions and Norms in Practical Reason", develops the theory of institutions of law. This is the revised, modified and edited text of a lecture at the Law Faculty at Helsinki in June 2023, on the occasion of the award of the *doctor honoris causa* degree bestowed on me by that University. First published as "Socio-legal theory and research - Institutions, Reasoning and Norms in Plural Europe" by *JFT* (Tidsskrift utgiven av Juridisk Föreningen i Finland, 4–6/2023 s. 389–400), completely revisited from the standpoint of the dual spectrum of Law. The three concepts: institutions, practical reason and norms sum up my contribution to legal theory and to sociology of law (from the perspective of comparative legal cultures) in the European context, which is one of relative pluralism in a highly institutionalised context. They are the central elements of my theory of law and legal culture, and the reasoning (rational reconstruction) operates

[22] Years before, Kahn-Freund (1974) held a more nuanced position: "it depends", some transplants work, others don't.

the transition from Law 1, where we find norms (provisions) and institutions, formal expressions of practical reason, to the higher (in my conception) or more profound (in Tuori's) dimension of practical reason, Law 2, the coherence of norms, institutions, values, …

Chapter Two, "Sources and Resources of Law", also deals with Law 1 issues, and how they interact with Law 2 reconstructions of the doctrine of the sources. It is the updated and edited text of an, as yet unpublished, lecture in Reykjavik, in the National Museum of Iceland, in the Spring of 2008[23], a few weeks before the economic and financial crisis that shocked the country, and the West, and sparked a citizen movement, from the bottom up, that brought about a constitutional moment. The resources of law are the sociological side of the sources, and both elements can be located at the Law 1 level as an object of research. A theory of the sources is the key to identifying or recognizing valid law, in Hart's sense, and this process of recognition is a social and cultural fact, *pace* Kelsen. Cultural resources are essential for that recognition.

Chapter Three, on General Legal Principles and how they travel is the updated, revised and fully modified version of a Keynote lecture in Copenhagen in the Autumn of 2008, entitled *How Principles Travel*. I delivered a slightly different version of that lecture, in Stockholm, in November 2012, in the Conference organized by the Swedish Network for European Legal Studies (Bengoetxea, 2013). However this Chapter is closer to the original Copenhagen idea. Principles are tricky norms. They can jump from Law 1 to Law 2 and viceversa, like electrons leaping from one energy level to another. Principles can be written down as provisions in legal instruments, normally in foundational laws and constitutions or international treaties. They would then be located at Law 1, but their reconstruction through interpretation is carried out from Law 2 understandings. Also, principles can be distilled into Law 2 cultural norms from norms and rules contained in Law 1 provisions; they become generalizations or inductions from a set of provisions dealing with a particular subject matter. Principles are the key building blocks of legal culture, where they connect with practical reason. They are vague or general enough to operate as justifying

[23] The event was a Nordic symposium, "Beyond Nordic Legal Modernity, In Search for New Coordinates. Nordic Jurisprudence Revisited", and for me, an immersion into the concept of Nordic legal culture, which came to inspire this book. I am grateful to the journals *JFT* and *OSLS* and to Edward Elgar publishers for allowing me to use and modify some of the previously published materiales. I am most grateful to my wife, Izaskun Iriarte, for encouraging me to pursue this project.

reasons providing flexibility, and coherence, in decision-making. In that sense they can operate as gap filling norms, as jokers.

I had initially envisaged a **Chapter Four** on Soft Law as the most challenging chapter from the standpoint of the Law 1/Law 2 distinction, but instead I have decided to include a complete soft and virtual domain of law and legal institutions, i.e. the metaverse. Soft Law was the subject of my first academic contribution in a Nordic University, a seminar organised by Lars Lindhal in Lund University in the Spring of 1998, right after my first period as *référendaire* at the European Court of Justice. This lecture never got to a paper, and thus the envisaged chapter would have been specifically written down for the book along these lines: It is difficult to locate 'soft law' under Law 1, since the set of documents normally identified as 'soft law instruments' -recommendations, white papers, memoranda, notes of guidance, indicators, best practice, and many others- are not included in the generally accepted rule of recognition containing the list of official sources, and therefore do not contain enforceable norms. However, they sometimes operate as if they produced legal effects, and from a legal realist perspective, they may even be seen as exerting an influence on law and decision making. Conceiving of Law 1 as spectrum where one finds official instruments recognised in the list of sources of positive law delivered by a shared rule of recognition alongside non-official, softer and unlisted instruments allows for the approximate consideration of soft law as part of the spectrum of Law 1. Soft law is not easily amenable to Law 2 either, as it is often portrayed as falling outwith the domain of law and belonging in the realm of practical reason or general normativity, orienting policy. But 'soft law' can also operate as general principles of law, generating more specific legal instruments, listed in the official sources, that contain legal norms integrating Law 1. When compared to theories of legal pluralism, and theories of governance, soft law morphs into Law 1. But in the metaverse, we tend to find the operation of *Ersatz* legal institutions, institutes operating *as if* they were in the Law-1 domain, but completely theorised and idealized – operating as legal ideas – in Law 2.

The key to considering soft law as part of Law 1 is the production of effects in the law. The outlook is necessarily pragmatic, rather than dogmatic and positivist. Effects are taken for granted regarding norms belonging at the Law 1 level. Their very validity implies they can be invoked and enforced. But they may still produce no or little effect. **Chapter Five** on "Norms, Effects and Consequences (in European Law)" explores the production of diverse effects by different instruments of EU law recognized as sources of Law 1. The doctrine of direct effect, and the distinction between direct

applicability and direct effect is a classic topic of European law, and refers to its capacity to penetrate the Law 1 level of the Member States. Chapter Five draws from an unpublished lecture, updated and revised for this book, given at a Seminar in Bergen, in January 2009, on Consequentialist Judges, exploring the role of the judge in the European political order[24].

Chapter Six "Legal Rights and EU law" originated in a conversation in Helsinki with Niilo Jääskinen, currently judge at the Court of Justice of the EU, where we discovered a common interest in applying Hohfeld's theory of rights to the diverse effects of directives in EU law. This led to a joint paper published as "Rights and Diverse Effects in EU Law". The Chapter, revised, modified and updated for this book, is based on a lecture on "a Theory of Rights in EU Law", which was the subject of a presentation at the European Law Post-Lisbon Conference held in the University of Oslo Faculty of Law, 1 September 2010, organized by the European Law Network in cooperation with the Norwegian Association for Legal Philosophy. The Chapter has been written up anew for the book, considering the elaboration of a theory of rights, such as Hohfeld's or MacCormick's institutional theory from the perspective of Law 2. Indeed rights or subjective rights, as an institute of law, is a construction of Law 2, based on the constitutive, consequential and terminative rules contained in Law 1.

Rights tend to reflect values and **Chapter Seven** explores the value of "Solidarity in EU law", in the context of a specific test case for the EU, the refugee crisis that started off in 2015 with the outbreak of the Syrian war. Solidarity is a value proclaimed in different provisions of the TEU and TFEU. As such it inhabits the domain of Law 1; but, like principles, values are only understood from the perspective of Law 2. In fact values are even higher removed than principles. Still, values can produce effects, and lead to policies that aim at delivering the value. But values often clash with each other. Solidarity and security can be weighed and balanced, like principles. This makes it difficult for a complex, multi-value institution to live up to the expectations raised by its conflicting values, or for a community to balance the values embodied by different single-value institutions. Practical reasoning is then necessary to find the balance. At the level of Law 1, values tend to evaporate or to loose punch when precise rules of law are available for application. But values will return whenever higher justifying reasons are necessary, in hard cases. The chapter is based on the revised, modified

[24] The issue of consequentialism in the legal reasoning of the Court of Justice was also the subject of my contribution to the Festschrift in honor of the late Hjalte Rasmussen (Bengoetxea, 2010).

and edited version of a paper given at a seminar held in the University of Lund in November 2020 (Bengoetxea, 2022).

Chapter Eight, "Quality of Reasoning at the European Court of Justice: between coherence and efficiency", deals with the hermeneutic turn in legal studies, judicial discretion and the quality of legal reasoning. It is based on papers presented at a Conference on Judicial Discretion convened by Ola Wiklund, held in Stockholm in 2001, and at a seminar in the Faculty of Law of the University of Lund in April 2024, on the Normative Assessment of the ECJ Reasoning, convened by Alezini Loxa and Luigi Lonardo. Luigi and I rewrote the contribution leading to this Ch. 8 for *The Reasoning of the Court of Justice of the EU: A Normative Assessment* (Loxa and Lonardo, eds, OUP 2026). Legal reasoning, especially of the Court of Justice of the EU, is a subject that has kept me interested for decades and this book is, in a certain way, my comprehensive take on the matter, from the perspective of the institutional theory of law. The chapter discusses the conditions under which the judgments of the Court of Justice of the EU can be critically assessed or appraised. There are heuristic conditions related to knowledge of, and access to the necessary information concerning the case (the identification of the relevant points for discovery and justification), and conditions related to normative standpoints. The latter can be external (ie a normative horizon from which the Court's judgments are evaluated) or internal (ie a rational reconstruction of the Court's own criteria). The two dominant models for normative assessment of the Court's judgments are one based on the reasoning and the decision-making process, where coherence is the main rationale (rational argumentation within the law), and the other based on the outcome or result, where efficiency, implications and consequences of the decision dominate the assessment (policy-based evaluations). The choice between *text and telos* becomes a secondary question under this new distinction: coherence v efficiency.

Chapter Nine, "Multilingual and Multicultural Legal Reasoning" takes the legal reasoning analysis to a more specific context, that of multilingual courts, more particularly the Court of Justice of the EU, and explores the contribution of legal theory, and the distinction between provisions and norms, and the impact of multicultural institutions on practical reasoning. It is based on my examination as opponent of the doctoral thesis defended in Helsinki University by Elina Paunio, which she later published as *Legal Certainty in Multilingual EU Law*. The existence of provisions and norms (in Law 1) is dependent on a given language formulation, but the equivalence of the norms expressed in the provisions contained in instruments officially published in the different language versions cannot be taken for granted and