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# Legal institutions and the comparison of legal cultures

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## Abstract

The institutional theory of law provides the conceptual foundations both for a sociologically sound and theoretically coherent socio-legal theory of law and for comparative research into legal cultures. By conceiving law as institutional normative order the institutional theory can accommodate for the rich historical and cultural diversity in the forms of law. This article analyses the three components of the institutional theory, i.e. norms, order and institutions, and gives a brief account of the types of norms that institutions bring together, their sociological dimension and the typologies of legal institutions. The notion of order is enhanced by the institutional theory to account both for claims to practical operation of the law and for the existence of conflicts, calling for institutional approaches to dispute resolution. This opening to "order and dispute" raises the question of justice and fairness of the norms and of the mechanisms of dispute resolution. Comparison of legal cultures needs to identify the legal fields that are being compared, with a view to producing a workable set of legal culture comparators for comparative purposes. These comparators would need further spelling out to deliver measurable indicators.

## Key words

Comparators; comparative legal cultures; institutional theory of law; legal pluralism

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## Resumen

La teoría institucional del derecho proporciona los fundamentos conceptuales tanto para una teoría del derecho sociológicamente sólida y teóricamente coherente como para la investigación comparativa de las culturas jurídicas. Al concebir el derecho como un orden normativo institucional, la teoría institucional puede adaptarse a la rica diversidad histórica y cultural de las formas del derecho. Este artículo analiza los tres componentes de la teoría institucional, es decir, las normas, el orden y las instituciones, y da una breve reseña de los tipos de normas que agrupan las instituciones, su dimensión sociológica y las tipologías de las instituciones jurídicas. La noción de orden se ve reforzada por la teoría institucional para atender la operación práctica del derecho y para explicar la existencia de conflictos, lo que exige enfoques institucionales para su resolución. Esta apertura al "orden y conflicto" plantea la cuestión de la justicia y equidad de las normas y de los mecanismos de resolución de conflictos. La comparación de culturas jurídicas necesita identificar los campos jurídicos que se están comparando, con miras a producir un conjunto viable de comparadores de cultura jurídica con fines comparativos. Estos comparadores deberán desarrollarse para ofrecer indicadores medibles.



## Palabras clave

Comparadores (indicadores); culturas jurídicas comparadas; teoría institucional del derecho; pluralismo jurídico

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## 1. Part One. A cross-cultural concept of law for legal culture

### *1.1. Introduction*

Legal culture is a fuzzy, but recurrent term. For Friedman (1975/1985, 223) legal culture comprises "ideas, values, attitudes and beliefs of a specific group of people towards law". The term is often used as an *explanation* of socially and legally relevant behaviour based on attitudes and beliefs, expectations oriented towards the law. These explanations become circular when they rely precisely on the attitudes and beliefs underlying behaviour in order to understand those very attitudes and values (Nelken 2004, 8) with the result that the legal culture that needs to be explained, the *explanandum*, is explained by reference to "legal culture", the *explanans*. Thus, if a researcher tries to explain and understand why the lack of judicial independence is a problem related to the legal and judicial culture in Spain and finds a possible explanation in the political appointments to and from the General Council of the Judiciary, themselves depending on the legal culture of the political establishment responsible for making such appointments, the researcher will have been moving in circles or, at best, from one culture, judicial, to another, political. The circular explanation can still be appealing and reveal something about Spanish judicial culture.

This heuristic circularity and this fuzziness of the concept "legal culture", its self-explanatory and intuitive meaning, its vague sense and imprecise reference, could be its methodological curse as a scientific (sub)discipline of sociology of law and of comparative law, making any rigorous research practically impossible. And yet, paradoxically, these shortcomings in scientific method have probably been the key to the academic success of the term "legal culture", considering the vast number of works that deal with legal culture whilst not really bothering to explain what is meant by the use of the vague concept, or even the many different uses of the concept (Čehulić 2021).

Attitudes and beliefs operate in a given setting or context, and important as they are, they do not explain the whole picture; they are not enough in themselves. As John Bell suggests, we also need to take a close look at the institutions and institutional practices that characterise law (Bell 2001, 6). This focus on official and institutional practice, and the normative ideas and values they reflect will be our (institutional) approach in this article, which aims at establishing a solid foundation for the comparison of legal cultures. For this purpose, Part One argues for a cross-cultural concept of law underlying any legal culture. Once such a concept has been established, largely following Hart (1961) and MacCormick (2007), Part Two draws on the institutional theory of law in order to identify some key comparators or criteria for comparison, from which, eventually, more precise and measurable indicators may be drawn that would allow for a more precise comparison of legal cultures.

Bell's institutional approach in *French Legal Culture* (2001) looks at the institutional and official culture of the legal system – institutional practices, ideas and values – rather than how the legal system is perceived by the members of society. Bell conceives French Law as having a number of distinct subcultures, at least private law on the one hand, and public (administrative and constitutional) law, on the other, with the very special position of criminal law, classified as private law. As regards the internal legal culture, Bell detects some type of *mentality* emerging from the main features of the legal system:

(i) from its sources (the primacy of *loi* and *droit écrit*, the systematic and principled nature of codified law; (ii) from the main concepts it uses (*droits subjectifs* rather than remedies); and (iii) from its major institutions (the structure of the judiciary, its professions and procedures).

Bell's analysis is illuminating not only by the comprehensive and accurate account he provides of French legal cultures, but also, and probably related to this, by the angle he adopts for comparison, his own perspective from (English) Common Law. Depending on the perspective of comparison, the main features or comparators appear to change. Thus, if we compare French and Spanish legal cultures, the conceptual primacy of *droits subjectifs* is not so striking as it would be when observed form a remedies-based legal culture. The relative importance of *la jurisprudence* and *la doctrine* as legal authorities, rather than sources of law (case-law), or the existence of a career judiciary might not become the salient features they would be when the comparison is performed as against the Common law. By contrast, when comparing internal legal culture the centrality of the *avocat,* and the barrister in English law, may strike an observer from Spain, where lawyers are aplenty, but not visible, and are eclipsed in the mass media by the instructing judges. On the other hand, the French system of courts and the brief judicial style (with the lack of separate opinions) are equally distinctive French features when seen from the angle of most other European systems. Indeed, the main features of one's legal culture become more salient when they are compared with other legal cultures, thus underlining the importance of such comparative criteria, what we can call comparators. In other words, comparison of other laws is crucial for the interpretation of one's own: "le comparatiste vise à proposer un autre regard sur son propre droit" (Ponthoreau 2005, 10).

What comparators can we then use for the comparison of legal cultures? This is a very difficult question, and research has not really focused on the identification of such comparators. Having taught the course on Comparative Legal Cultures for over fifteen years in the International Master in Sociology of Law,[1] dealing with diverse forms of law and diverse student backgrounds around the world, I have become increasingly aware of the need for a common concept of law behind any attempt to compare legal cultures. The course introduces students to the major issues involved in the cultural approach to, and understanding of law and to engage with comparative questions. The first aim, the cultural approach, leans towards specificity, idiosyncrasy, diversity and special cases, to what is particular to each case, as my regular co-teacher, Heike Jung, likes to say, what makes each particular legal culture *tick*. The second aim, the comparative focus, steers the course towards convergence trends and what is, or what is not, common to the different legal cultures compared. It is challenging to use a common lexicon that characterises law and legal phenomena – legal norms, institutions of law, dispute resolution, order and conflict, rights, control, market transactions – thus paving the way to capture the essentials of legal culture for the purposes of comparison.

The course addresses global themes, like the theoretical underpinnings of legal culture understood as description, explanation and interpretation of socially relevant *relatively*

[1] A 60 ECTS Master's degree (LL M/ M Sc) of the University of the Basque Country organised by the International Institute for the Sociology of Law, at Oñati, the two-week course on Comparative Legal Culture accounting for 3 ECTS.

*stable patterns of legally oriented attitudes and behaviour* (Nelken 2004, 1), internal and external legal culture (Friedman 2006), legal consciousness, legal pluralism and multicultural societies, diffusion, *transplants*, globalization, transnational trends, Europeanization of "national" laws. It next focuses on key institutions of law like contract, property, rights, crime, courts and dispute resolution, following the conventional approach of comparative law to focus on how the same institute, e.g. contract, is conceived in different legal systems, and grouping the similarities and resemblances into families of law.

One of the key questions to tackle in the course, moving from law to legal culture, is whether we refer to the same phenomena when we talk about law, and compare laws, and when we talk about, and compare legal cultures? One of the greatest challenges of the course, with students from different parts of the world, is to define the object, time and scale of comparison, the units of different legal cultures, from local to global: does one compare national (state, substate) legal cultures, or families of law, legal traditions, legal historical periods, or transnational phenomena? But, leaving aside the possible evaluative aspects of the term *legal culture*, as a term of art charged with value, another haunting task is to define or identify the components or variables of the different legal cultures, taking methodological care to distinguish legal culture as the *explanandum* and each of those components as the *explanans*, to circumvent Nelken's circularity conundrum (2004, 2, 8).

Assuming we could find a "universal" or transcultural concept of *law*, would it still be possible to find a transcultural concept of *legal culture*? If we assume that "legal culture" broadly and principally relates to, and relies on "law", then we need to start understanding the domain of the legal, and the concept of law, a task that has kept legal philosophers (pre)occupied for centuries. We shall therefore address the underlying domain of the *legal* in legal cultures (Part One), before we face the task of identifying possible criteria for the comparison of legal cultures (Part Two). There are extreme and moderate positions on the possibility of defining law for comparative and transcultural purposes:

**Position A** (thesis): "a comprehensive, universal, definition" is possible. We need a concept of law that works transnationally and allows for comparison. That we need it does not mean there is any such concept or such understanding of law *out there* to be discovered. We would need to (re)construct a transcendental or universal concept of law, in order to account for legal phenomena in their diversity, and to allow for translation from one law and language to another. If a particular type of "normative system" does not fit that concept, then it will not be considered law. This common ground could be found in a concept of positive (legal) norms as they operate in communicative spaces, as patterns for action that influence peoples' expectations, social actions and the settlement of disputes (conflict). Starting from this normative concept, as a premise, we can subsequently derive, almost deductively, different variables like power, authority, justice, disputes, legal norms, institutions, and others.

**Position B** (antithesis): there is "no singular definition of law" and it is futile to (re)construct any such concept. We should give up any attempt to share some conceptual, theoretical foundation of law and assume the risk of comparing phenomena that would count as "law" in one culture with phenomena that would count as

"religion" in another, or as governance, politics or economics in other cultures. Thus, Tamanaha claims that "law involves multiple social-historical phenomena that have taken on different forms and functions in different times and places and therefore cannot be captured by a singular definition of law" (Tamanaha 2017, 38). Indeed, we need to acknowledge the diversity of legal phenomena and embrace some (mild) form of legal pluralism.

**Position C**: this paper argues for a particular, moderate and hybrid synthesis that conceives law as *institutional normative order* (MacCormick 2007). This conceptual approach adopts the norm-user perspective as its premise, and while being, like Tamanaha's, "realistic", ie interested in the operation of the law in practice, still accepts the dual nature of law, its claim to correctness, as a domain of practical reason (Alexy 2010). This institutional, user-based, approach allows research to engage in comparative approaches across cultures and history. It may apply universally and, as it is open to practical reason, it may also interact with other normative domains like ethics, politics, political morality, religion, political economy. Legal culture captures this "institutional normative order" within the broader domain of practical reason and symbolic, communicative action. The criteria for comparison that we shall try to identify, the comparators, will be based on the norm users' perspective, on the institutional practices, and on the ideas and values reflecting or inspiring those practices (practical reason).

### *1.2. The law referred to in legal culture needs theoretical foundation*

Concepts of law underlie any discourse and any research project based on legal culture; some "idea" of law lies behind any discourse on *legal* culture. Where do we look for it? Is it about norms of law? Is it about institutions of law? Is it about particular forms of communication and knowledge? Is law, instead, to be found in practices and sites? Is it about functions and processes? Is it about how jurists – law professionals, internally, as participants, conceive of their practice and discourse? Or is it rather how laypersons, norm-users or actors, who inevitably deal with the law, in different ways, perceive such practices and discourses externally?

This raises the difficulty of distinguishing internal and external legal cultures (Friedman 2006), an already culturally-bound, self-reflexive, distinction that looks intuitively promising, but with very blurry boundaries, since the notion of what is, or who is, "internal" changes from one case to another, territorially, thematically or contextually. In a certain sense, as citizens and as norm-users, we are all internal to the law. No outlook is completely external, or internal, and the dichotomy repeats itself, as in a fractal structure, within each of the fields identified as internal or external. Thus, legal professions vary enormously, and whereas *laypersons* may be considered external to *lawyers*, newcomers to the legal profession, or less influential attorneys could also be considered *external* to the inner circles of elite lawyers or those acting as repeat players. Junior judges can be seen as *external*, since they will take some years and, in some systems like Spain, affiliation to a given, ideologically identifiable, judicial association, before they enter the apex elite and get a prominent judicial appointment to an appeal court, if at all. If they have a spell in government as administrators or junior ministers, working for a given political party, then they will be full-blown insiders, readily identified with a given ideology – conservative v progressive – and they will have more chances of getting further judicial appointments to the judicial apex or to the Council of

the Judiciary, but this will depend on negotiations between politicians or legislators, *external* to the judiciary.

Lawrence Friedman, a legal historian, introduced this internal/external dichotomy in order to favour an external explanation of legal change deviating from the usual internal explanation, based upon an idealistic paradigm according to which change was the result of legal *doctrinal* transformations, and thus *internal* to jurists (Friedman 2006). Rather, for Friedman, legal change is the result of external societal changes: technological and material changes bring about social change and jurists adapt, doctrinally and pragmatically, to produce new law. But one could just as well have *external*, conflict-based, explanations, materialist or idealist explanations, as we shall see below. In either case, whether triggered by technological or doctrinal factors, a functional process of differentiation does take place with legal change. Legality and legalism, i.e. procedural and technical legal knowledge, gain some formal autonomy, and law-professionals gain symbolic and material power. As a result, legal culture also changes.

Friedman, who has over the years developed a variety of definitions of legal culture (1975/1985, 1977 and 1997), understands legal culture as a set of attitudes (values) and behaviors about and towards *law*, which affect their relation with *the law* and consequently influence the position of *the legal system* in society. In *The Legal System* (Friedman 1975/1985, 193) legal culture "refers to public knowledge of and attitudes and behaviour patterns toward the legal systems". Legal culture, together with legal structure and legal substance, are part of the legal system (itself being part of the social system, *à la Parsons*). In that sense, it could make more sense to compare legal systems, as comparative lawyers do. Conversely, legal culture could encompass and be broader than the legal system, the system of legal norms (in Kelsenian [1911], even Luhmannian [1985] terms), rather than the other way round. Indeed, Friedman (1990, 213) has also defined legal culture as ideas, attitudes, expectations and opinions about law, held by some people in a given society. The legal system would then be an important component of legal culture, and the comparison would turn around the components of legal culture, as a "multi layered" concept which includes legal norms, salient features of legal institutions and the infrastructure, social behaviour in creating, using and not using law, as well as the legal consciousness in the legal professions among the public (Blankenburg and Bruinsma 1994). In our perspective, the comparison of legal cultures includes a comparison of legal systems, and other features like institutions, ideas, behaviors, expectations, …

Whatever notion of legal culture we use when engaging in comparison, we will assume an underlying minimum working concept of "law", which

(i) would need to explain significantly different phenomena, in different societies, and in different historical moments;

(ii) it would distinguish law from other normative systems of practical reason – morality, religion, politics/ideology, aesthetics, economics – and sort out legal norms from other types of norm, moral, religious, practical, economic, in situations where "everything is law and law is everything", where law has a direct religious foundation and dimension (*shariya*, *halakhah*) or where it has a strong ideological base (Communist Party foundation in Chinese law);

(iii) it would also explain how the different domains of practical reason like religion, social morality, politics, economics or law are sometimes intimately related and blended, in societies with low degrees of institutionalisation, but also in highly institutionalised settings, making it difficult to sort out the "legal" from the other domains, and sometimes neatly distinguished;

(iv) it would account for normativity, why norms bind, explaining the binding nature of norms, the authority of legal norms, and their implicit claim to correctness;

(v) but this is not all, the minimal working concept of law implicit in legal culture would factor-in the semiotic understanding of norms, i.e. what norms mean, as they operate in communicative spaces, as patterns for action that influence peoples' expectations and social action, encompassing values;

(vi) and finally, it would need to explain why those meanings are sometimes controversial, i.e. legal contestations and legal processes and disputes in different communicative spaces, and the settlement of social conflicts through special procedures and decision-making institutions, in different institutional contexts.

Accordingly, any search for *comparators* will look at norms generally, legal norms in particular, expectations, values, attitudes, processes, procedures, action (behaviour), institutions of law, courts, law-jobs, functions, legislators, sources of law, arguments, reasonings, professionals, and other like phenomena. Klare (1998, 167) gives an illustration of legal culture that focuses precisely on professional sensibilities, habits of mind, intellectual reflexes; rhetorical strategies developed by participants in legal settings, their recurring argumentative moves; persuasive legal arguments, which may include or exclude other types of arguments, possibly valid in other contexts (e.g. in political philosophy); political and ethical commitments influencing professional discourse; understandings of and assumptions about politics, social life and justice; inarticulate premises that are ingrained in the professional discourse and outlook. This approach gives some clues about possible comparators.

### *1.3. Comparative research in legal cultures*

The need to have a minimum working definition of law is even more pressing when engaging in a comparative analysis, given the enormous historical and geographical diversity in the forms of law. Special sensitivity to particulars, to detail and context, to tradition, to local institutions or to path-dependency is required, constantly checking the academically bent comparative lawyer's tendency to find convergence and global trends like diffusion, harmonisation, recognition, transplants. Different elements or forms can make up the "legal" domain behind each of the *legal* cultures. Each *legal* culture could encompass different forms or elements of *law*. In order to compare these forms we would need to identify the different legal cultures, and understand how each form of law corresponds to one or other legal culture and why. The comparative researcher of legal cultures needs to be constantly aware of diversity and suspicious of false friends. Indeed there is still the risk for the *foreign* observer to recognize normative orders as functionally equivalent to what they know from their own *law* or the risk of over-emphasizing the importance of a transplant, or to consider that institutions that look alike in different systems will have the same cultural meaning, whereas they may, in fact, be different (as false friends in translation).

Therefore, getting rid of our preconceptions and developing sensitiveness to other cultures is always a healthy intellectual and personal attitude, which may even help us reflect on our own culture, which, as Merry and Brenneis argue (2004), is also marked by hybridity and creolization. In other words, "immersion in another culture is a celebrated method for exposing our presuppositions and showing us that familiar arrangements are problematic rather than the way things have to be" (Galanter 1989, 296), "la connaissance d'un autre droit peut être la source d'interrogations sur son propre droit" (Ponthoreau 2015, 13). Nevertheless, the hermeneutic circle still applies even when we adopt an open, reflexive attitude, since we cannot rid ourselves of pre-understandings and elementary conceptual maps that help us get started in the interpretation of legal cultures.

Could we, for instance, say that there is one legal culture for each state legal system, or for each type of law like customary law in one society, or transnational forms of law, or international law? Or would we say, following John Bell (2001) that the same state legal system, French law, can hold different French legal (sub)cultures like private legal culture or public legal culture? Could we, rather, say that one legal culture can encompass different forms of law, even different state legal systems, and therefore it can correspond to what comparative law scholars used to call legal families? Do we place Latin-American legal culture, in the same scale as Mexican legal culture, and Mexican in the same scale as Chiapas legal culture? To bring the question closer to home, could we identify a Basque legal culture within Spain? Grouping different state laws into legal families because of their resemblance according to certain comparators has traditionally been an intellectual aspiration and an academic product of comparative law, and also of law professionals seeking relevant legal sources to support their cases as in the Common law in different jurisdictions. But do legal cultures also correspond to legal families? This raises the question of scale or of unit (Nelken 2004, 2) in a multilevel legal framework, from the sub-state levels to transnational law.

Whereas legal culture seems to be more removed from the figure of the state and more detached from the state model, the identification of a *legal system*, on the other hand, does seem to go hand in hand with the institution of the state, or if it does ascend beyond the state, with legal systems of International Organisations (regional or global) and with international law, where the state remains a major player. But with legal cultures the state is no longer the sole reference and perhaps not even the main indicator, and there can be more scales or varieties of legal cultures below, above and beyond (besides) state or national legal cultures. Legal culture is more open to pluralist scenarios.

Legal history and jurisprudence also enter the field and show larger connections that cut across different jurisdictions, processes of diffusion, transplants, receptions leading to a degree of convergence that allows grouping different "national laws" under the same, broader, family. Likewise, jurisprudence enquires about forms of law (pluralism/monism), legal norms and legal sources (general and universal/particular and casuistic), the role of custom (autonomous source of law/restricted function), the role of precedent and case law (binding/indicative), the role of general principles of law (as source of norms/as aids to interpretation), conceptions of legislation (codified law/statutory law), models of constitutionalism (republicanism, federalism, liberal), models of procedure (adversarial/inquisitorial), approaches to interpretation (literal,

originalist, pragmatic), degree of development of administrative law (autonomous public law, or still modelled upon private law where one party is the state), approaches to international law (monism/dualism), and identifies trends and ideas about law that show formal and material features shared across national laws.

From this larger perspective, including legal history and jurisprudence, it would make sense to identify a legal culture of the *European Union*, which is larger than the sum of the different *national* legal cultures of its Member States (Tuori 2018, Maduro 2021). It would also make sense to identify an even broader *European legal culture*, going beyond the legal culture of the EU and the national legal cultures of its Member States encompassing also the Council of Europe and its members and other European organisations, and including historical developments such as colonialism and decolonisation.

Legal cultures can be grouped the same way as legal systems or they can be grouped and compared along different legal cultural comparators brought from legal history, legal tradition, legal thought, or even from broader non-legal spheres of practical reason like religion, ideology, or even from deeper cultural "mentalities" like language, systems of thought, scientific knowledge, the economy, technologies. The research methods would very well differ in each case, legal culture tilting closer sometimes to legal dogmatics (doctrine), sometimes to social sciences, and sometimes to hermeneutics and the Humanities. Agreeing on comparators in the latter versions would be very complex. We suggest it is easier to find comparators in legal institutions, in the values and ideas they reflect and embody and in institutional practice. This, in turn, requires drawing from an institutional theory of law, and reflecting on the role of the state in that theory.

### *1.4. The Institutional Theory and Legal Culture of the State and Beyond*

We start by rethinking the relation between state and law. Under the influence of legal positivism, which postulates the dogma of unity, exclusiveness and supremacy of positive law, State law has long been, and still is, the paradigm of law, all legal norms originating from the same source, from the constitution. State law is single and one, and exhausts all the law of the land. Internal legal diversity in society, whatever its forms, will be either a challenge to the unity of the law, or a territorially and/or functionally differentiated decentralization articulated by the constitution, as in composite or in federal systems. Legal positivism or formalism has led to a monist, uniformist paradigm, according to which any challenge to the unity of the law needs to be neutralized. But since diversity of forms of law can also apply within the same society (the same social field, the same territory), official state law, which claims exclusivity, will find partial competitors regulating social and economic life.

The tendency to conceive law on the axis of the state has been dominant in Europe since the Modern Age of state formation, and the Treaty of Westphalia 1648, where the secular and spiritual powers converge: *cuius regio, eius religio*. This identification of all law with State law (the law of the polity or kingdom) reaches a climax where the validity of state law is dogma (as though it were a religious truth) and all other, external, forms of normativity are treated as fact. In Europe, the pluralist, personal status-based context of the Middle Ages was gradually overcome by the creation of territorially compact Kingdoms and the progressive formation of the Nation-State in the 19th Century, and of

the welfare state in the 20th. But in contemporary, post-national Europe, legal diversity adopts, again, diverse forms of regulation, alongside national regulation, like new *lex mercatoria*, *lex religiosa*, *lex digitalis*, *lex sportiva* and other norms and transnational laws (Tuori 2018), giving rise to a new, transnational and postnational pluralism. The nation state interacts with globalisation.

These legal forms may all govern different aspects of social life, with the result that sometimes the same areas or matters are being subject to alternative standards of conduct. When this obtains, the question of legal pluralism steps in. Even litigation and dispute resolution around such legal relations and norms can develop in pluralist frameworks, with the result that not all legally relevant disputes are brought before the aegis of state control. We thus find several forms of law, each claiming their relative and reflexive validity within the same social space, the same territory, the same population, the same overall framework institutions – the market, the body politic, the systems of communication.

Legal Pluralism raises the question which of these forms of law, sometimes cohabiting, sometimes confronting, are to be considered as the "valid" forms. This question is clumsily put, for each form will have its own criteria of validity, according to its own rule of recognition (Hart 1961), and state law will always claim to be dominant and overarching, whereas the other forms of law do not necessarily claim the force of ultimate authority, the force of law, but rather the legitimacy of their claim to correctness (Alexy 2010) or of their efficiency in finding solutions amenable to all disputants. State law tends to be the overall comprehensive legal system that covers all areas of social life – family law, criminal law, tax and policy, the economy and the market, the media, or political relations. Unless there is a situation of contested official status or of failed states, the official state law form will claim primacy and supremacy, and will very likely succeed.

In Europe, these claims to authority and supremacy, the legal side of political sovereignty, have been clashing with the claims to primacy of "community" or Union law almost from the beginning of the consolidation period of the European Court of Justice. The dogma of State law *supremacy* clashed with the dogma of EU law *primacy*, ever since the judgments in *Costa/ENEL* (1964) and, even more clearly in *Simmenthal* (1978). Like the Court's doctrine of direct effect, its primacy doctrine has met serious opposition and contestation from several Member States' judicial apexes (*Conseil d'État*, *BundesverfassungsGericht*, Czech Constitutional Court, Danish Supreme Court, and more recently Polish Supreme and Constitutional courts). The recent decision of 7 October 2021 of the Polish Constitutional Court stated that the EU doctrine of primacy would only apply in areas of recognised EU competence, implicitly suggesting that the ECJ lacks the power to decide over powers, so-called Konpetenz-Konpetenz.

The resulting scenario of competing claims to primacy has been described as (multilevel) constitutional pluralism, ranging from the soft or mild pluralism (MacCormick 1999) to the stronger versions we are now witnessing in Poland. At any rate, situations of pluralism are a challenge to the elaboration of discourses of national *legal* culture based on a reconstruction of national cultures and constitutional identities, a genuine ideological endeavour. But they are equally challenging to the discourses based on the

functional need for uniformity of the common law, like the theories elaborated by the ECJ concerning primacy, direct effect and conform interpretation.

The alternative forms of law, complementing the centrality of legislation (positive enacted law) are either custom or natural law, and the three forms – legislation (first royal decrees, then parliamentary statutes), customary law and general principles of law and justice – converge as the sources of law, all controlled by the State judiciary in the State jurisdiction. The judges, representing the crown, dictate the law, hence *iuris dictio*. State law thus comes to define the contours of law and the conditions upon which any alternatives to positive law – customs and principles of justice – may be tolerated as law. This general jurisprudence is later exported by the European colonial powers to other parts of the world. There, as in the metropolis, custom, local laws applied to the local indigenous population, is allowed, tolerated, so long as it does not contradict official law.

The development of this positivist form of State law is epitomised in Austin (1832), with his command theory of law, and also in Kelsen (1911), with his chain of validity. Law becomes a highly rationalized rule-based activity, a system of rules, norms, decisions, doctrines and principles designed to guide action, enable legal analysis and justify decisions in an "objective" and scientific, bureaucratic manner. This image of law as *scientific* pervades juristic discourses and creates the cornerstone of a legal education devoted to reading of cases, law reports and searching for, interpreting and applying legal rules (Banakar 2009, 60), modelled on the judicial application of law, a justified institutional practice legitimizing the law and constituting the core of (State) national legal culture.

From a different and alternative, pluralist and democratic, perspective, each "form of law" could develop its own discursive logic, and aim to cohabit in the same social space, and coordinate in a multilevel setting, avoiding direct clashes and confrontations, generating some form of order. When clashes between such cohabiting forms of law are inevitable one specific form of law will eventually prevail. Seen from such pluralist understandings, rather than being exclusively the official state law of the law-givers, law can also derive from the norm-users' consensus, and institutions of law can combine both, law-givers' and law-users' perspectives.

### *1.5. The Law-user Perspective of Legal Culture*

An alternative, bottom-up, view of law thus emerges where law becomes institutional normative order. External legal culture, users' folk ways, can then work its way up from such forms of normative order, as part of practical reason (values and principles), and institutional settings. The interpretation of (legal) cultures always requires attention to detail (Geertz 1973), to users' understanding of the norms, assumption of normative expectations and strategies of avoidance or adaptation, to the construction of normative meaning by norm-users going below, beyond, behind and alongside expressions of State law, interpretations by institutions and official holders of power, by the law-givers who make positive law and pretend to determine, exhaust and define the conditions of validity of law.

This reconstruction of legal culture starting from the norm-user perspective and taking legal consciousness into account is, perhaps, more amenable to private law, where the

autonomy of the parties allows for self-regulatory governance. Public law, by contrast, is bound to insist on its status as imperative, public order, and on the sovereign law-maker, the *norm-giver* perspective. But this focus is state-centred and norm-giver oriented. More democratic conceptions of public law will also require the consent and representation of the users at all levels and in all domains of law. The norm-givers are not above the law. They, themselves, become norm-users because, in order to make new law, they have to follow the secondary rules of change (Hart 1961), in accordance with the rule of law principle. And, in democratic systems, the law-givers are agents elected or appointed by the principals, the norm-users, the citizens they represent. In one important sense all citizens, including norm-givers, are norm users in democratic self-government.

These alternative, less sophisticated, understandings of law can be built upon items that are common to more institutionalised and sophisticated forms of law: norms, aspirations to justice, claims to correctness, order, institutions, orderliness, conflict and dispute resolution. The concept and idea of Legal Culture can rely on a theory of law based on such key items underscoring, but not denying, the role of the State, so as to explain forms of law that go alongside the State but also below, beyond, across, behind, and above it. Elaborations of legal culture can be based on diffusion of law, which studies processes that go below, beyond and above the national (State) legal cultures, incorporating dynamics of hegemony such as transplants, reception, harmonisation, coordination, recognition and even uniformization (unification, codification), but also dynamics of counter-hegemony such as resistance, adaptation, subsidiarity and pluralism from local normative standards to the *episteme* of the global South (Santos and Meneses 2014).

## 2. Part Two. Theoretical Foundations of/for Legal Culture: institutions, norms and conflict

We have so far established the need for a workable, cross-cultural or transcultural concept of law that allows for comparison. The comparators will be provided by such theory, in our contention by the institutional theory of law based on the work of Neil MacCormick (2007). The (cross-cultural) institutional theory of law proposed here is a middle range theory that explains law as institutional normative order, i.e. normative order of an institutional kind. This *institutional* theory is based on the idea of order, norms and institutions. Norms are understood as objects or data containing messages and can be seen as prescriptive speech acts of how reality ought to be and what ought to be done or decided (Searle 1969). Norms, both rules and principles, are the individuals' understanding of surrounding expectations on their own behaviour, so that when an individual's attitude conforms to the norm, we can postulate that the norm has been internalised by the individual, by adherence or by prudence, resulting in orderliness or social harmony. When expectations on social behaviour are broken, conflicts or disputes may arise, and there are special norms and procedures to deal with them in institutional settings. Such norms and procedures can become highly sophisticated and technical, with special personnel, technology and infrastructure. Institutionally complex law and governance thus develops, of which the bureaucratic form of state law is a paradigm in transition.

Attitude or action in conformity (or not) with the norm has cognitive, symbolic and behavioural components. Individuals' acceptance, or at least, observance of the norm, according to their attitudes and beliefs, underlines the pre-eminence of the norm-user perspective, and this applies to different sorts of norms or rules, like promises, performative speech acts, games. Law, and normativity generally, is very much like language and language games, in that the community of users determines the linguistic practice and the understanding of the rules. An authority can very well prescribe correct ways of speaking, but if the users do not follow the rules the stipulated language will become merely academic. If the users are removed from the ideas of rule following, expectations and order, normativity makes no sense. Granted, the consequences of not following rules of grammar are less drastic than those following disobedience to the commands of the sovereign. Acceptance or non-acceptance of the norms thus becomes crucial and notions of correctness, fairness, orderliness and justice thus play a key role. This part Two explores each of these cross-cultural comparators brought from MacCormick's institutional theory (2007), which adopts a norm-user approach to understanding and conceptualising law.

### *2.1. Norm users and norm givers*

Guiding human conduct is what norms do, as a form of communication, and this is a social phenomenon that works as a norm, for norm-givers and norm-users, for those engaged in the game of normativity. From the linguistic, speech-act perspective, law is a process of communication generating order in an institutional environment: a norm-giver emits or directs norms to the addressees in a given jurisdiction, or a group of users agree on the norms applying to their legal relation (contract). Users' obedience to, or acceptance of the norm-giver's commands is the axis of Austin's influential positivist definition of law: "the commands of the sovereign backed by sanctions". This top-down, hierarchical, centralised, pyramid shaped legal positivism neglects citizens, the norm-users. The sovereign is whoever receives habitual obedience from the bulk of the population. Yet, this obedience cannot be taken for granted since conformity is always the prerogative of the users. Conformity can be secured through force, interest or induced value: (i) by organising force and the constant threat of sanctions (military, police, inspection), (ii) by complicity and favour (corruption, welfare) and, preferably, (iii) by ideological or religious acculturation or domination (hegemony) leading to acceptance. These three forms of conformity governance, force, interest and heteronomous value, are often combined in authoritarian regimes or legal cultures, where compliance with superior authority is engrained in social life.

But there are alternative ways to understanding law, not as the command of a sovereign, but as the self-government of the citizens where norm-giver and norm addressee or norm-user merge as the same self-governing or autonomous agent. This takes us to a different legal culture and governance culture comparator based on the values of trust and cooperation rather than command, on equality rather than authority, on democratic self-regulation (autonomy) or self-determination, and on subsidiarity and representation. Norm-users become principals of their political representatives through direct and indirect participation in legislation and decision-making (juries, lay justice, judges and prosecutors elected by citizens, mixed tribunals, popular prosecution, class actions).

The role of norm-users is enhanced in private law, where the autonomy of the parties prevails, but the empowering or enabling framework norms of private law may very well be complemented by more stringent personal commitments under social or moral norms: in law you may reach agreements and compromises that are considered vicious in conventional morality in some cultures like e.g. attire, pornography, sex for money, or certain sexual practices, non-disclosure agreements, lying in a trial (excluding witnesses), and conversely, moral values and supporting social practices in some cultures often constrain the limits of what is lawful, like honour killings, hate speech, polygamy, arranged marriages, consensual sex in minors, homosexuality, abortion, euthanasia, some forms of incest, .... Blameworthiness of the individual conduct is the key to incrimination, but it fluctuates from one culture to another, even within the same multicultural society.

Pluralist situations may thus obtain in areas like criminal law, where the claim by some parties to respect of their culturally/ethnically diverse values clashes with the need for uniform application, equality and non-discrimination. Whether utilitarian or desert-based, justifications of punishment will need to take into account cultural explanations of deviance. Desert based punishment, ideally, has to make sense to the offender and to the community with which he or she identifies. Deterrence also has to make sense to the community if punishment is to be effective or functional. Thus, the legitimacy of the criminal justice system may sometimes depend on sentencing taking account of cultural diversity in society.

This alternative focus implies the adoption of the norm-user perspective rather than, or not just, the norm-giver. And norm-users may identify with different cultural communities or minorities in society. Unlike natural entities, social entities, such as norms and institutions, are mind-, and culture-dependent. The identification of these internal factors, of reasons for conformity and sharing the normative expectations, calls for empirical enquiries researching meaning and opinions about the law, people's reasons to follow or break the law, legal consciousness, inside and across groups within society.

### *2.2. Practical reason and the dimension of justice*

Max Weber built on the idea of coercion (the sanction of the law-giver) but also on the meaning of following a rule, upon which Hart (1961) developed the internal point of view. For Weber (1978), the norm is an instrument of communication that becomes a mental representation as a consequence of a process of socialisation. Social norms are recognised as just or fair in a social group: the expectation of due behaviour becomes the object of the social norm. People follow a norm because they consider it to be binding, and sometimes people break the law, the norm, because they hold on to alternative standards of conduct, alternative norms, they, rightly or wrongly, consider more just. The norm addressee receives the normative message, recognises the norm in the message, and decides to abide or disobey. When rules are broken, order is disrupted, conflict emerges and sanctions may follow. This opens the dimension of justice as conflict management or dispute resolution. This transpersonal recognition of the norms is linked to the development of the feeling of justice, which can be found throughout all domains of practical reason.

Law belongs in the domain of practical reason, the general human capacity for resolving, through reflection, the question of what is to be decided and/or done, how one contributes, through deliberation, to what, collectively, ought to be done, facing a set of alternatives for action (or decision). Practical reason is concerned with matters of value, of what it would be desirable to do, assessing and weighing reasons for action (Wallace 2018). And norms, rules or standards of behaviour recognised in a social group, are very powerful reasons for action and for justifying action and sanctioning non-compliance. Norms are justifying reasons: they generate legitimate expectations on action and conformity is justified by fulfilling those expectations. The nitty-gritty of lawyers' daily work is routine (based on specialised technical knowledge of norms and procedures), jurisprudentially positivistic and based on authoritative materials, but it ultimately relies upon value assumptions and ideology, which come to the fore in times of conflict and exception, in hard cases. These values and assumptions, which may be shared, or not shared, with the bulk of the population, appeal to principles and ideas of justice (practical reason).

"Justice is the first virtue of social institutions" (Rawls 1971, 3). Social norms make an implicit claim to correctness, a claim revived whenever controversies, disputes or conflict emerge concerning their adequacy, convenience or desirability, their legitimacy, or their correct meaning. This claim to correctness comes to the fore in situations of interpretation in hard cases, when the interpreters seek the best possible interpretation, or the judges aspire to discover the right answer, as per Dworkin (1986 and 1977). Law, as part of practical reason, also makes a claim to correctness, beyond formal validity or legality, even beyond the inner morality of law (Fuller 1964). Not only are the legal system and its norms valid, they are also (purported to be) morally correct because the legal system, the legal order and the institutions of law, they all aspire to reflect justice (Alexy 2010). This claim is, furthermore, cross-cultural in society: it is made for all existing sectors and groups in society, not only for one majority or an elite, but for all people. This implies an opening of the norms of law to the dimension of justice and fairness – impartiality, proportionality, non-discrimination, equal treatment – to general principles and thus to the ideological and symbolic dimension, legal culture. It engages us as users in the debate as to the best interpretation of the law.

This is not an external claim that could be checked empirically. The claim of law as integrity, the dual nature of law, is internal and conceptual: it would be self-defeating and conceptually contradictory for the law to content itself with legality and not to claim moral correctness at all, or not to be the least interested in justice. A law that discarded this claim (claim understood as *Anspruch, prétension, pretension, reivindicación*) to moral correctness or integrity would not be an institutional normative order capable of generating normative expectations in society or trust. A legal system without social trust is a cybernetic engineering of norm-making. The very concept of the norms as justificatory reasons, explained above, implies this claim to correctness. It is the very idea of "norm" (reason, value and standard) in the practical reason domain, of order and of "institution" that implies such claim to correctness and justification of action and decision. But, in an open and pluralist, multicultural and democratic society, it is essential to keep an on-going debate and to contrast different interpretations of what is correct, right or fair, and what is wrong and harmful.

### *2.3. Norms and normative orders*

Norms are not items in isolation. The expectations they raise are related to social life, orderliness in a group or community. All social norms recognised by a group thus constitute a body or *corpus* of norms, i.e. normative orders. Social norms of behaviour, conventional morality, religious norms of behaviour, political norms, economic norms, health and security norms, are all forms of normative order. And different groups in society may hold on to different norms and different interpretations. These norms can adopt any deontic mode: obligation, prohibition, permission, recommendation, or plea. When moving from these social norms to the legal norms, the body of norms becomes an institutionalised system, a legal order, and the norm's belonging to that system becomes the condition of validity. This system is structured in institutions fulfilling some social or legal functions securing orderliness or harmony, one of the explanations of the reinforced feeling of the duty to obey, which is consequential to the fact that the rule is accepted as being part of that order or that body. In other words, "the system, once accepted by participants, commits them to acceptance of facts within the system", maybe not of all the norms belonging to that system, but of the system as a whole (Searle 2010, 102–3). Practical reason then becomes more complex: not just deciding to comply with one norm, but rather weighing the pros and cons of obedience or disobedience in the light of the system as a whole.

The different norms in a social group can be ordered, organised or arranged into a normative order. The subject matter, the type of behaviour, the types of agent or addressee, the type of setting, and like criteria can gather the norms together, reading them coherently. Here, the degree of sophistication and institutionalisation become very important because complexity of the body of norms requires system criteria like unity and unicity of the legal system, system-validity, competence to adopt certain norms according to a master rule for the sharing of competences between different levels, hierarchy of norms and sources, consistency or non-contradiction between norms of the same subsystem, completeness and decidability of legally relevant disputes within each system, coherence of the norms with the principles and values proclaimed by the foundational norms of the system. Thus, special norms develop, not to establish standards of conduct as primary rules do, but to regulate the system, norms about the norms (meta-norms, what Hart called secondary rules, 1961), to identify the norms, make new ones or apply them in concrete situations. Order, system, is a set of organised primary rules or norms of conduct generating expectations and secondary, meta-norms, reflexively regulating themselves: setting out the criteria of validity or belongingness to the system – rule of recognition –, specifying the procedures to adopt new rules and bar out or modify existing ones – rules of change – and laying down the powers and procedures for individuals to bring actions and for officials to apply and interpret all rules or norms – rules of adjudication. Special functions thus develop in the social group to "arrange" or *order* the norms, apply them and change them, and socio-legal studies devote much attention to such functions (roles) and law-jobs (the legal professions). This opens another indicator for legal culture: the degree of formal systematisation of the body of norms and the degree of professionalization in the governance of the norms.

### *2.4. Order and dispute*

The section title refers directly to Roberts' classic book, *Order and Dispute* (1979). Here we move to the other meaning of *order*, orderliness or the result of social action in conformity with the norms. Orderly behaviour implies that social normative expectations are satisfied. Some norms, like Hart's minimum concept of natural law for the orderly maintenance of social life (Hart 1961, 189), are so deeply rooted and shared that it seems difficult to believe they could ever be challenged, although they may be broken, like all taboos. But even these norms and their meaning can be questioned in the social group when special circumstances obtain.

Conflict, by contrast with order, involves dispute, a direct questioning of the rules or norms. Social change often implies a change of the norms, which is a change of the meanings users, or groups of users, give to the norms. The rules may change out of common agreement by the users who give new or different meanings to the norms, with a subsequent change of the expectations in the group of users. The rules may also change when they are no longer followed, and when non-compliance no longer gives rise to criticism, or when only some members of the group criticise and call for sanctions, but the rest of the members no longer see the sanction as justified. In such situations, social change within the group can be harmonious, spontaneous and orderly.

But social change can also be the result of direct conflict or confrontation, where some norms are challenged and alternative norms, different courses of action, are proposed. Non-compliance with a norm can then be justified by reference to a different meaning, a different interpretation, or to a different, alternative norm altogether, and the normative expectations on the part of the social group are frustrated on the basis of an explicit challenge. Criticism and sanction of non-compliance can then be weakened and it might take some time until "order" is restored, or a new order emerges; a new, shared meaning, a change of norms. Conflict or dispute is the normal way to bring about change in the norms.

Law is not only about norm and regulation, it is also about dispute resolution, or conflict, which emerges where normative expectations are not met, and where behaviour does not conform to the norms, which may change with the new norms and, sometimes even a loss of trust in norms within the social group. But if this conflict and norm change is managed successfully a new form of order may emerge, and trust in institutions may be reinforced. To the extent that the users share and satisfy normative expectations or, when they do not, to the extent they rely on previously agreed procedures to address conflict and disputes, mutual trust within the social group may be reinforced. Here is another indicator for comparing legal cultures, the management of conflicts and disputes, the dyadic and triadic forms of DR. They are related to the rule of law. The institutional, economic, political and cultural settings or contexts differ greatly, but the way conflict and dispute is addressed is very telling: the scale spans from a static society that reacts to deny conflict and reaffirm the norm to a dynamic society that manages change and conflict through accepted processes becomes a democratic society.

### *2.5. From social norms to highly institutionalised legal norms*

As we have seen norms have three fundamental features related to practical reason: (i) they guide action, raising expectations, (ii) they justify action by satisfying expectations

and (iii) they justify criticism of non-compliance. In other words, norms are prospective in that they guide future behaviour when alternative courses of action remain open, and they are retrospective (explanatory and justifying reasons), in that they justify past behaviour in conformity with the norm, when the course of action adopted by the user is challenged or questioned in the norm-user's group or community. Criticism within the group follows in case of breach of the (obligation to follow the) norm, in case of non-compliance. Not following the norm frustrates the social expectations in the group and conflict is the result of the breach of the norm. The group, who shares the rules, criticises and sanctions non-compliance. Finally, this criticism and the sanction it entails are seen as justified within the group, and the norm is thus confirmed, reaffirmed; order is restored in the social group. And in multicultural societies, different communities may have different norms, in some areas or fields of social action, and share the same norms, in other areas. Norms followed by members of a social group may be criticised by members of a different social group. Some, but not all, of these norms may become legal norms, or tolerated by the majority social group. From the concept of (social) norm sketched above there is a gradual transition to the concept of legal norm, as part of a legal system of primary and secondary norms that become highly institutionalised.

From a sociological point of view, institution is any type of normative set structuring a field of social action in a lasting manner (Ferrari 2006, 139). The field of social action is the subject matter of the institution: family, property and inheritance, punishment, religious practices, games, economic value, goods, power, education, health, and so on. The lasting existence in society is the consequence of the normative set providing stability and order: "Institutions by definition are the more enduring features of social life." (Giddens 1984, 24). They are structured in a way that makes change difficult and favours path-dependency, with written and unwritten, explicit and implicit rules, ideas and mentalities ingrained in their members that are resistant to change. The structuring and the normative set go together and relate back to the concept of norms, which constitute social reality. There are formal features that the diverse human institutions have in common, enabling them to function in human life (Searle 2010, 123). Features such as status with deontic powers or relations giving rise to rights, duties, obligations, requirements, permissions, authorizations, entitlements, prohibitions... Institutions can be as varied as churches, universities, money, hospitals, schools, banks, ski-clubs, marching bands, nation-states, governments, etc. These formal features, bearing the form "*X counts as Y in context C*", rely precisely on norms (Searle 2010): they provide structure to the institutions and they involve social and collective recognition of the broader system or order where they belong as creating such deontic relations.

Institutions thus bring together categories of norms, e.g. contract, property, marriage, personality, trusts, etc., but they are themselves the creation of norms, namely constitutive rules. When they turn into legal institutions social institutions like family, authority, money, the market, acquire a higher level of complexity, an enhanced, double institutionalisation (Bohannan 1965), where the norms that constitute, regulate and change them are themselves the object of further institutions. From the point of view of practical reason too, law involves enhanced institutionalisation: "the law exists to improve people's conformity with reasons that already apply to them" (Gardner 2018, 77). Norms in highly institutionalised settings, even when, as is the case for so-called soft law, they do not acquire the full pedigree of legal norms, they are still components of

systems of governance, and are structurally (systemically) more complex and sophisticated than other norms, legal or not, originating in less institutionalised settings like custom or moral standards recognised in the law. Many of the constitutive rules of the institutions of private law are themselves enabling norms: they open up possibilities for parties to enter into consensual agreements, or they ensure parties retain a minimum of that autonomy and freedom to contract in real life situations. Here we have another indicator for comparing legal cultures, the degree of institutional sophistication or complexity in a society.

### *2.6. Types of institutions and their normative structure*

Institutions are numerous and omnipresent. The legal universe, like the social world, in modern, complex societies, is densely populated by institutions, formally conceived as bodies of norms. Some are focused on actions, on human agency, others deal with status and relations, and a third type regulates objects. For each institution, we find three different categories of norms, constitutive, consequential and terminative. We also distinguish two types of institutional existence: universals and individuals.

#### 2.6.1. Types of Institutions

Three types of institution are worth exploring for cultural comparison: agencies, institutes and things.

(i) Agencies-organisations are institutions composed of persons performing functions. They act. Some are charged with legislative functions, others with adjudicative and jurisdictional functions, others with law-enforcement functions, others with executive functions and others with administrative and management functions, others with supervisory and control functions. When all, or many of these functions are carried out in the name of a community, a nation, a polity, or *demos*, we obtain states, federations, or international organisations. In the private law domain institution-agencies act within their sphere of autonomy following the functions for which they are set up – clubs, condominiums, multinationals, associations, corporations, cooperative companies, churches, universities, museums, orchestras, and many others. These institution-agencies of private law can give rise to pluralistic situations, where state law enables their autonomy and self-regulation.

(ii) Institutes are institutions containing and systematising the norms about the three building blocks or pillars of the law: persons, actions and things (Gaius). Institutes result from the acts of persons and/or institution-agencies: contracts, trusts, property, marriage, the family, even the (juridical) person as a legal institution. They are the result of action, and they bring together sets of constitutive, consequential and terminative norms, to generate legal status of persons or legal relationships between persons, and/or things, to create normative attributes, personal and relational institutional facts.

(iii) Institution-things are institutional facts, physical objects or things, or various forms of incorporeal thing, invisible, non-tangible items that exist by virtue of norms. In law, these artefacts can be stocks and shares in companies, copyrights, futures, equity, securities, government bonds, patents, lottery tickets, electronic wrists for monitoring, passports, crypto-currencies, money, bank accounts, telephone numbers, stamps,

internet domains… Their physical reality, if there is one, is meaningless without the institutional norms relating to them.

#### 2.6.2. Types of norms regarding institutions

All institutions – organisations, institutes and things – are regulated by and are the result of three different sets of norms or rules: institutive, consecutive and terminative rules.

(i) Institutive rules, which we call *constitutive norms*, determine and define the institution, its creation and existence, its validity and the features that distinguish it from other institutions. These norms determine by what acts and procedures one can set up an agency, or an arrangement, or a thing (MacCormick 2007, 36). Take legal personality; it is a special type of institution. Constitutive norms will determine the conditions under which an entity, an organisation can be set up or count as a legal (or moral) person in a specific legal context. There will be special norms about capacity, about registration or incorporation and about name, seat or address and membership. Within this institution of legal personality there may be more specific legal institutions following different types of institutions: incorporated companies, cooperative companies, trusts, foundations, clubs, churches, limited companies, multinational companies, international organisations, public administrations, agencies, non-governmental organisations, and the like. These may, but need not have a real, social existence.

(ii) Consecutive rules determine the normative consequences of the institution once constituted: what these institutions can or cannot do – a parliament may enact laws and do other legally significant things, a contract regulates what the parties must do to keep it, and a patent grounds claims to exclusivity in the processes it specifies. The consequential rules set out the rights and obligations and other legal effects, legal status, legal capacities, legal relations, that (may) follow from the existence of the institution. They may be consequences of substance, giving rise to obligations, status, or rights and consequences of procedure, giving rise to claims and actions.

(iii) Terminative rules have to do with ending or winding up the agency, arrangement or thing. They are similar to the constitutive norms in that they lay down the conditions to declare the end of an institution and sometimes these are the result of the very defining norms or of the fact that the consequential norms have been followed, as in a contract that has been executed: the regular fulfilment of the claims and obligations following from a contract normally imply the end of such contract, but there are other possibilities for terminating contracts provided by special terminative rules.

#### 2.6.3. Institutions and their Existence

Ontologically, institutions, whether they be agencies, arrangements, or things, can be universal or individual.

(i) So far, we have referred to institutions in the abstract: contracts, persons, states, clubs, stamps. These are like universals: any institution generally fulfilling the constitutive or defining norms taken in the abstract.

(ii) Individual institutions are specific instances of abstract or universal organizations, "institutes" or things. Universal institutes of private law such as "marriage", "contract", "trust", "property transfer" or "incorporation of a company" will be instantiated in one

concrete and specific or particular contract between specific individuals in a given space and time. In public law, individual Regulations or Directives are instances of binding legislation of the European Parliament and Council as the EU legislator; individual judicial decisions, or *fatwas* in Islamic law, instantiate forms of legal judgment and remedy, or criminal conviction and sentence, or public law order; revenue officials issue individual demands for payment consequential on concrete and particular tax assessments applying the general rules of (universal) taxation institute; local government bodies grant individual instances of planning permission for particular building developments in particular places under stated conditions, and so on (MacCormick 2007, 160). The comparison of legal cultures will look at each of the ontologically universal agency, arrangement or object-institutions like crime, trust, contract, consumer, credit card, marriage, *talaq, mahr, diya*, adoption, divorce, jury, judges, prosecutors, barristers, *muftis*, web domain, patent, asylum…, and analyse their common, or their distinct, constitutive, consecutive and terminative rules.

## 3. Conclusion: provisional, open list of comparators

On the basis of all these considerations, we can identify a set of comparators for legal cultures and any search for *comparators* will look at the main criteria involving law and legal culture: practical reason and its norms generally, legal norms in particular, as identified, modified and applied according to secondary rules, normative expectations concerning such norms, their existence, interpretation and application, values, attitudes, processes, procedures, action (behaviour), courts, law-jobs, functions, sources of law…, which we can all group under the institutions of law and institutional practice, according to the institutional theory of law sketched in this article. The term "law" implied in the uses of the term *legal culture* has been deconstructed with the help of the institutional theory of law, and the different ways of understanding its key ingredients – norms, institutions, order, conflict, attitudes, beliefs, practices, behaviours – point to the cultural aspect where law is located in practical reason within a given society, often sharing these understandings with other societies, as we can observe through comparison. But we need to spell out criteria for comparison, what we have called comparators. Within each of these comparators, we could try to spell out, in more detail, specific measurable indicators. But this task is beyond the scope of this article and, for the time being, very difficult to undertake by any single researcher. Hence, this article concludes with a call to develop and devise research projects that can lead to the identification of concrete indicators for each of these comparators.

Herewith an open, provisional, list of comparators drawn from the institutional theory of law, calling for critical reactions and opening up possible alleys for comparing legal cultures:

- the weight of the state in the identification, centralisation of all law with official State law, state law as the only valid source of law, the way state law deals with other, external, forms of normativity; to what extent does the state jurisdiction monopolise the identification of valid law;
- the relevance of sources of law alternative to legislation – customary law, morality, religion, general principles of natural justice – in shaping the form

or type of law-thinking, positivism, realism, sociological jurisprudence, natural law, international human rights;

- the centrality of norm-users v norm-givers in the internal and external legal cultures;
- the values of trust and cooperation rather than command, or equality rather than authority, or democratic self-regulation (autonomy) or self-determination rather than hegemony and diktat, or subsidiarity and representation rather than centralised unification;
- the degree of formal systematisation of the body of norms and the degree of professionalization in the governance of the norms;
- the degree of pluralism in the understanding of the law;
- the openness of a legal system to international and transnational law (monism/dualism);
- the degree of sophistication, institutionalisation or complexity of the body of norms requiring system criteria like unity and unicity, system-validity, sharing of competences between different levels, hierarchy of norms and sources, consistency or non-contradiction between norms, completeness and decidability of legally relevant disputes within each system, coherence of the norms with the principles and values of the system;
- the way conflicts and disputes are managed within the system by access to courts or ADR supply-side (litigiousness);
- the extent to which users share and satisfy normative expectations or, the extent to which they rely on previously agreed procedures to address conflict and disputes;
- the relevance of dyadic v triadic forms of dispute resolution;
- the degree of social or mutual trust within the social group;
- the degree of trust in the institutions making and applying the law, by members of society, or by different groups in society;
- the way disputes, procedures and arguments are addressed: professional sensibilities, habits of mind, intellectual reflexes; rhetorical strategies developed by participants in legal settings, their recurring argumentative moves; persuasive legal arguments, which may include or exclude other types of arguments, possibly valid in other contexts (e.g. in political philosophy);
- political and ethical commitments influencing professional discourse; understandings of and assumptions about politics, social life and justice; inarticulate premises ingrained in the professional discourse and outlook (degree of professionalization of legal debates);
- degree of professionalisation of dispute settlers, degree of association and corporativism within the judicial and similar professions;
- degree of interference by political actors in the governance of the judiciary;

- degree to which a (static) society reacts to conflict denying it and reaffirm the norm as compared to a (dynamic) society that manages change and conflict through accepted processes and becomes a more democratic society;
- the degree of institutional sophistication or complexity in a society, private law enabling norms opening up possibilities for parties to enter into consensual agreements and ensuring parties a minimum of autonomy and freedom to contract in real life situations;
- the degree of institutional complexity; the degree of sophistication of institution-agencies (organisations), and how these can branch out into new agencies grouping persons or fictional, legal, persons; institutions can be as varied as churches, universities, money, hospitals, schools, banks, ski-clubs, marching bands, nation-states, governments, etc.
- the complexity of institutes like contract, futures, equity, or promisory notes,
- the richness and abstract existence of institution-things like NFTs, stamps, lotteries, algorythms, Personal Data,
- The abundance of institution-tokens per person, reflecting a rich diversity of institution types, of the same or of different laws, and thus the degree of engagement of persons with legal institutions in a society and in transnational contexts**.**

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